IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1994 SESSION

LARRY CLARKE,	*	C.C.A.# 03C01-9404-CR-00138
APPELLANT,	*	WASHINGTON COUNTY
VS.	*	Hon. R. Jerry Beck, Judge
STATE OF TENNESSEE,	*	(Post-Conviction)
APPELLEE.	*	

For the Appellant:

Randall E. Reagan
602 Gay Street
Suite 905
Knoxville, TN 37902

Deborah B. Huskins
Asst. Public Defender
P.O. Box 996
Johnson City, TN 37601

For the Appellee:

Charles W. Burson
Attorney General and Reporter
450 James Robertson Parkway
Nashville, TN 37243-0493

Sharon S. Selby
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

William R. Mooney
Asst. District Attorney General
P.O. Box 38
Jonesborough, TN 37659

OPINION FILED: _____

AFFIRMED

Gary R. Wade, Judge

OPINION

The petitioner, Larry Clarke, appeals from the denial of his petition for post-conviction relief. Two issues have been presented for our review:

> (1) whether the petitioner was denied the effective assistance of counsel at trial and on appeal; and
>
> (2) whether the petitioner was denied due process of law when the trial court directed the jury to reread a portion of the instructions.

Initially, the petitioner asserts that his trial counsel was ineffective in two ways: first, by failing to establish a proper foundation for the introduction of prior inconsistent statements by witness Brian Kirby, and second, by presenting no evidence at the sentencing hearing. He alleges that counsel was ineffective on direct appeal by not presenting these two issues for review.

I

In order for the petitioner to be granted relief on grounds of ineffective counsel, he must establish that the advice given or the services rendered were not within the range of competence demanded of attorneys in criminal cases and that, but for his counsel's deficient performance, the results of his trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975).

The burden is on the petitioner to show that the evidence preponderated against the findings of the trial

judge. Clenny v. State, 576 S.W.2d 12 (Tenn. Crim. App. 1978). Otherwise, the findings of facts by the trial court are conclusive. Graves v. State, 512 S.W.2d 603 (Tenn. Crim. App. 1973).

The first issue was previously determined on direct appeal. See State v. Larry Clarke, No. 241 (Tenn. Crim App. at Knoxville, February 1, 1989), perm. to app. denied (Tenn. 1989); Tenn. Code Ann. §§ 40-30-111 and -112(a). The petitioner correctly points out that his counsel failed to provide a proper foundation for the statements' admission and failed to adequately brief the issue on direct appeal. Nonetheless, our court ruled that the record was sufficient to address the merits of a claim that the trial court should have admitted the evidence; a panel of this court held that the testimony would have been cumulative and its exclusion had not affected the results of the trial:

> Kirby admitted on cross-examination that he had failed to tell police about the $500 pay-off, and thus introduction of the extrinsic evidence in question became unnecessary. State v. Grady, 619 S.W.2d 141, 143 (Tenn.Crim.App. 1980). We find no error in connection with the trial court's ruling on this point.

We now turn to the claim of ineffective counsel at the sentencing stage. The petitioner faced a sentence range of ten to thirty-five years for second degree murder. See Tenn. Code Ann. § 40-35-109 (1982). The trial court imposed a thirty-year sentence, but made no specific findings of fact. The petitioner was sentenced under the 1982 Sentencing Reform Act. Thus, our review on direct appeal would have been de

novo without a presumption of correctness. See Tenn. Code Ann. § 40-35-402(d)(1987 Supp.).

Defense counsel did not present any evidence. Yet, a comprehensive presentence report appears in the record. The contents established that at least two enhancement factors applied: (1) that the petitioner had a prior history of criminal convictions; and (2) that he employed a firearm in the commission of the offense. Tenn. Code Ann. § 40-35-111(1) and (9)(1982). The report also reflects that the petitioner had a poor social history, had a sporadic work history, and had used illegal drugs, marijuana and cocaine. While the report contained some positive statements about his work ethic from two prior employers and indicated that his prior criminal record was not extensive, no specific mitigating factors were applicable. Tenn. Code Ann. § 40-35-110 (1982). Moreover, the petitioner has failed to provide affidavits or any other evidence demonstrating what helpful information potential witnesses may have provided had trial counsel insisted upon presenting proof at the sentencing hearing.

The petitioner was convicted of second degree murder, a crime he committed in order to obtain illegal drugs. On the night of the murder, the petitioner "partied the night away" with the drugs he had received as compensation. After the murder, he helped place the body in the trunk of a vehicle and helped set it on fire. These gruesome facts, when coupled with the defendant's relatively poor social history, two applicable enhancement factors, and the absence of any

mitigating factors, carry substantial weight. A thirty-year sentence appears to be fully warranted under the guidelines set forth in the 1982 Act. Under these circumstances, we cannot find that the petitioner suffered any prejudice by his trial counsel's failure to present witnesses or otherwise seek specific findings of fact on the sentencing issue.

II

As his last issue, the petitioner claims that he was denied the due process of law when the trial court, upon receiving a question from the jury, made reference to a specific portion of the written instructions without any caution not to place undue emphasis on that particular section. We disagree.

We must begin with the proposition that the trial court provided the jury with proper instructions as to the state's burden of proof. There was no complaint that the charge, as originally given, placed emphasis on any particular portion thereof. After some deliberation, the jurors submitted a written inquiry to the trial judge. The note was read in the presence of the petitioner and his counsel and the question was answered without objection from counsel or a request for cautionary instructions. Frankly, a cautionary instruction might have been appropriate in these circumstances. Yet the failure to give such a charge does not necessarily mean that constitutional error was committed. Here, the jury asked for guidance. The trial court did not recall them upon its own initiative. There was no supplemental charge. The trial court merely pointed out the

portion of the overall charge that supplied the answer to their inquiry.

Moreover, the petitioner was represented by two attorneys. Each testified that they made a tactical choice not to object to the answer given to the jury's question or to seek cautionary instructions because they believed the question to be an encouraging sign that a verdict of something less than first degree murder might result. As it turned out, they were right. Any error on the part of the trial court in failing to give a cautionary instruction must be viewed in context of the entire record. Burton v. State, 217 Tenn. 62, 394 S.W.2d 873 (1965). Here, the failure to have provided cautionary instructions appears to have been inconsequential.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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Joseph M. Tipton, Judge

_____
Robert E. Burch, Special Judge