

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE 1995 SESSION

<p><b>FILED</b></p> <p>September 13, 1995</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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<p><b>FREDDIE L. KING,</b> Appellant, V. <b>STATE OF TENNESSEE,</b> Appellee.</p>	<p>) ) C.C.A. No. 02C01-9501-CR-00011 ) ) Shelby County ) ) Hon. Joseph B. McCartie, Judge ) ) (Post-Conviction) ) )</p>
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OPINION FILED: \_\_\_\_\_

**AFFIRMED**

**PAUL G. SUMMERS,**  
Judge

**OPINION**

The petitioner Freddie L. King filed a post-conviction relief petition in the Criminal Court at Shelby County alleging ineffective assistance of counsel. After a hearing, the trial court dismissed the petition, finding no merit to the claims. On appeal, the petitioner argues that he received ineffective assistance of counsel because his attorney failed to advise him to testify at trial and failed to interview certain witnesses.

We affirm the judgment of the trial court.

A brief review of the facts is helpful to the resolution of the issues on appeal. The petitioner was convicted by a jury of theft of property. A police officer observed the defendant recklessly driving a vehicle in a mall parking lot. When another police officer attempted to stop the petitioner, he fled in an attempt to evade arrest. Shortly thereafter the petitioner wrecked the vehicle. He was removed from the wreckage, taken to the hospital and later arrested. The vehicle was determined to be stolen. William Moore represented the petitioner at trial. The petitioner did not testify. He was convicted. On appeal, the petitioner argued that the evidence was insufficient to prove that he intended to deprive the victim of the vehicle. This Court affirmed the conviction. See State v. King, No. 02C01-9206-CR-00128 (Tenn. Crim. App. filed Jul. 21, 1993).

On appeal, the petitioner essentially argues that the evidence preponderates against the findings of the trial court with regard to his allegations of ineffective assistance of counsel. The appropriate test for determining whether counsel provided effective assistance at trial is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1974). In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show, first, that counsel's

performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Id. at 687. In order to prove a deficient performance by counsel, a defendant must prove that counsel's representation fell below an objective standard of reasonableness. Id. at 688. A reviewing court must indulge in a strong presumption that counsel's conduct falls within the wide range of professional assistance. Id. at 689. In order to prove prejudice, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. The approach to the issue of ineffective assistance of counsel does not have to start with an analysis of an attorney's conduct. If prejudice is not shown, we need not seek to determine the validity of the allegations about deficient performance. Id. at 697.

At the hearing on his post-conviction petition, the petitioner testified that he received ineffective assistance of counsel because his attorney failed to advise him that he should testify. The petitioner explained that he would have testified that he did not intend to deprive the victim of the vehicle, but was only "joyriding." He contends that if the jury had heard this testimony, then he would not have been convicted of theft, but of a lesser offense. The petitioner admits that he chose not to testify based on his attorney's advice that the state could use his prior criminal convictions to impeach his testimony. Moore, on the other hand, testified that he explained the good and bad points of testifying to the petitioner so that he could make an intelligent decision about whether or not to testify. Moore further testified that he put the petitioner on the stand at trial and the judge explained the right to testify to the petitioner.

At the close of the proof, the trial court found no merit to the petitioner's allegation, stating that "[t]he petitioner's decision not to testify was made with full knowledge of his rights and his 'hindsight argument' is therefore baseless." We

must affirm the judgment of the trial court unless the evidence preponderates otherwise. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). The petitioner has the burden of establishing why the evidence preponderates against the judgment of the trial court. Id. The petitioner has failed to do so in this case. The petitioner testified that Mr. Moore did not inform him that his testimony would have been helpful in refuting that he had an intent to deprive the victim of the vehicle. Moore testified that he did inform the petitioner of the good and bad points of testifying. Questions concerning the credibility of witnesses and the weight and value to be given to their testimony are resolved by the trial court, not this Court. Id. In addition to the overwhelming evidence that the petitioner was informed of his right to testify, the trial court obviously accredited the testimony of Moore. This issue is without merit.

The petitioner also contends that his attorney provided ineffective assistance of counsel because he failed to interview possible witnesses who could have provided an alibi for him or testify on his behalf. At the post-conviction hearing, the petitioner identified five individuals who he contends would have provided an alibi for him at the time the vehicle was stolen. He contends that this testimony would have shown that he did not intend to deprive the victim of the vehicle. The petitioner alleges that Moore only interviewed one of the potential witnesses. Moore, on the other hand, testified that he interviewed the witnesses whose testimony was relevant to the theft charge. He further testified that the so called "alibi testimony" was unhelpful to the petitioner's case because the time when the vehicle was stolen could not be established. The trial court found no merit to the petitioner's claim. Again, the petitioner has failed to show why the evidence preponderates against the findings of the trial court. Mr. Moore's testimony is a sufficient basis on which to rest a finding that his representation was not deficient. The petitioner, however, has also failed to show why the evidence establishes that he was prejudiced by these allegations of deficient representation. The petitioner failed to produce any

of the witnesses or their testimony at the hearing on his petition. When a petitioner contends that counsel failed to interview a witness, this witness ordinarily should be presented at the post-conviction petition hearing. Id. at 757. As a general rule, this is the only way that a petitioner can establish that counsel's failure to interview a witness inured to his prejudice. Id. "It is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of whether further investigation would have revealed a material witness or what a witness's testimony might have been if introduced by defense counsel." Id. Accordingly, this issue is without merit.

**AFFIRMED**

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PAUL G. SUMMERS, JUDGE

CONCUR:

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WILLIAM M. BARKER, JUDGE

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MARY BETH LEIBOWITZ, SPECIAL JUDGE