IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1995 SESSION

FILED

September 18, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

RICHARD LYNN NORTON,	)
	) C.C.A. No. 03C01-9409-CR-00324
Appellant,	)
	) Greene County
V.	)
	) Hon. Ben K. Wexler, Judge
	)
STATE OF TENNESSEE,	) (Post-Conviction)
	)
Appellee.	)

FOR THE APPELLANT:

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District Public Defender

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

Richard Lynn Norton appeals as of right from a judgment of the Greene County Criminal Court dismissing his petition for post-conviction relief. On appeal he raises issues related to due process, double jeopardy, the sufficiency of the indictment, and ineffective assistance of counsel.

We affirm the judgment of the trial court.

In June of 1988 defendant was convicted by a jury of aggravated assault and simple assault. His conviction was reversed on appeal due to prosecutorial misconduct. State v. Norton, C.C.A. No. 295 (Tenn. Crim. App. filed Mar. 30, 1989). In May of 1989 the defendant was retried and re-convicted of the same charges. This Court affirmed on appeal. State v. Norton, C.C.A. No. 319 (Tenn. Crim. App. filed July 12, 1990). On October 15, 1992, the defendant filed a petition for post-conviction relief. After a hearing, the court dismissed the petition.

STANDARD OF REVIEW

In post-conviction suits, this Court is bound by the determinations of the trial court unless the evidence preponderates against the court's findings or the judgment entered. Rhoden v. State, 816 S.W.2d 56, 59 (Tenn. Crim. App. 1991). The defendant has the burden of establishing why the evidence contained in the record preponderates against the trial court's judgment. Id. at 60. We do not reweigh or reevaluate the evidence, nor do we substitute our inferences for those drawn by the trial court. Id. Further, questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are resolved by the trial court. Id.

DUE PROCESS

Citing 22 Corpus Juris Secundum Criminal Law Sections 55-57 (1989), the defendant argues that repeated instances of deliberate and flagrant misconduct by the government violate his due process rights to substantial justice and fundamental fairness, justifying a reversal and dismissal of the charges against him. He points to the following misconduct to support his claim:

> (1) a pretrial transfer to prison to presumably avoid medical treatment;
>
> (2) detainment in state prison without benefit of opportunity to consult counsel;
>
> (3) petitioner was forced to proceed at a preliminary hearing prior to his first trial without counsel and was never afforded a preliminary hearing;
>
> (4) petitioner was required to defend the assault and battery charge at a time when the state knew no evidence of the charge existed;
>
> (5) a conviction which was reversed due to prosecutorial misconduct;
>
> (6) a deliberate attempt by the state to include evidence of an assault and battery for which he had been acquitted.

The principle to which the defendant refers is the outrageous government conduct, government misconduct or due process defense. It is available to bar prosecution only where the government is so involved in the criminal endeavor that it violates fundamental fairness, shocking the universal sense of justice mandated by the due process clause. Id. § 57 at 70. The defense is similar to, but distinguishable from, the defense of entrapment. Id. at 72. The outrageous government conduct defense focuses on the government's actions and is premised on the notion that the due process clause imposes limits upon how far the government may go in detecting a crime. Id. To invoke the defense, one must generally present proof of government over-involvement in the charged crime and proof of the accused's mere passive connection to the government-orchestrated and implemented criminal activity. Id. at 71. The defendant cannot avail himself of the defense if he has been an active participant in the criminal activity which gave rise to his arrest. United States v. Nations, 764 F.2d 1073,

1077 (5th Cir. 1985). "The criminal conduct by government agents which provides accused with the defense of outrageous conduct is some activity which aids in the commission of the crime." 22 C.J.S. Criminal Law § 57 at 71. We were unable to locate an opinion in which a Tennessee court has applied this defense.

The outrageous government conduct defense is not available to the defendant because the government's activity in the present case is not of the nature contemplated by this defense and because the defendant was certainly an active participant in the criminal activity which gave rise to his arrest. The facts as found by this Court in State v. Norton, C.C.A. No. 319 (Tenn. Crim. App. filed Jul. 12, 1990), reveal that two police officers responded to a domestic violence complaint arising out of a dispute between the defendant and his wife. The defendant told the officers that he would kill them if they did not leave. One of the officers testified that the defendant pointed a gun at him. The officer responded by firing his weapon at the defendant. The other officer also fired at the defendant. The defendant claimed at trial that he did not have a gun on the night in question. The jury convicted the defendant of aggravated assault and assault.

As part of his first issue, the defendant also argues that the six events articulated violate the "double jeopardy prohibition." The state correctly points out that the defendant waived this issue because he failed to present any argument on the issue in his brief. See T.R.A.P. 27(a)(7). Furthermore, a double jeopardy violation is not generally obtained where a retrial on the same charges follows a reversal based on prosecutorial misconduct. State v. Tucker, 728 S.W.2d 27 (Tenn. Crim. App. 1986).

THE INDICTMENT

Citing Tennessee Code Annotated Section 39-2-101, the defendant argues that the indictment fails to allege action which could convey to the victims a "well-grounded apprehension of personal violence." This Court cannot review the issue because the defendant failed to present it in his post-conviction petition and thus there is no record for this Court to review. Accordingly, this issue is without merit.

INEFFECTIVE ASSISTANCE OF COUNSEL

The defendant bases his claim of ineffective assistance of counsel on his attorney John Anderson's (a) failure to fully discuss the factual and legal issues with him; (b) failure to interview witnesses; (c) failure to include a motion waiving his right to appeal the judge's disallowance of the defendant to accompany Anderson to the crime scene; (d) failure to file a motion for individual voir dire; and (e) failure to request a mistrial after the state made thirty or more references to domestic violence prior to objection by counsel.

In finding no merit to the defendant's ineffective assistance of counsel claim, the trial court found as follows:

> The evidence of Attorney John Anderson was that he graduated from Chamberland (sic) law school in Alabama, that he had been practicing law in Rogersville, Tennessee, since 1987, that he had handled both civil and criminal cases. After being appointed to represent the petitioner, he acquired the transcript of the preliminary hearing and the transcript of the original jury trial, that he did not talk or discuss the case with Billy Norton, one of the petitioner's witness (sic), as he felt that Billy Norton was going to give false or perjured testimony, that he did question Gary Norton; but Gary Norton only knew that the petitioner did not have a gun on the night this incident occurred at the Norton home, that he was unable to find witness Dallas Bowman, one of the petitioner's witness (sic) and he filed a Motion for Continuance, because he could not locate Mr. Bowman, the court denied this motion. He did interview the wife and daughter, but did not call the wife as a witness because on the day of trial, she was a nervous wreck. Also, she did not want the State to question her about the domestic violence that occurred on the occasion at the Norton home. That he did visit the home and scene and determined that pictures would be of little or no value, did file a pre-trial motion to allow him

> and the petitioner to go to the scene, but this motion was denied, interviewed the clerk that wrote Mrs. Norton's warrant the night of the incident. (sic) Also, interviewed the two police officers that were involved. He did not ask for individual voir dire, but did ask the petitioner about each jury selection and the petitioner agreed with the jury chosen. That he did file a motion for another preliminary hearing, but felt that he could not go behind the appellate reversal of the first trial, this motion was denied. Also, he filed a motion for change of venue, which was denied. Also, Attorney Anderson obtained all the police files in this case and used this information as best he could. That he, Anderson felt there was no merit in the double jeopardy issue. This Court holds that Attorney Anderson obtained all the information, both written and oral that was possible at that time, that he interviewed the petitioner several times, interviewed the witnesses that he thought would help the case and was (sic) available to him at that time. He followed the instructions of the petitioner when he thought his suggestions would help the petitioner in his case, but did not follow all his instructions where he thought they would hinder his defense.

We reviewed the record in this case with the presumption that these findings of the trial court are correct. Rhoden v. State, 816 S.W.2d 56, 59 (Tenn. Crim. App. 1991). 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 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.

We agree with the trial court. The defendant has failed to demonstrate that the evidence preponderates against the trial court's finding that Anderson's representation met the objective standard of reasonableness. Moreover, we find that the defendant failed to present evidence sufficient to establish that any of the alleged errors prejudiced him. Furthermore, he completely failed to present any argument on the prejudice issue in his appellate brief, including how the alleged errors prejudiced him and what evidence supports such a finding.

AFFIRMED

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PAUL G. SUMMERS, JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

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WILLIAM M. BARKER, JUDGE