IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1995 SESSION

RAYMOND LEWIS COVINGTON,	*	C.C.A. # 01C01-9408-CC-00286
APPELLANT,	*	MAURY COUNTY
VS.	*	Hon. Jim T. Hamilton, Judge
STATE OF TENNESSEE,	*	(Post-Conviction)
APPELLEE.	*	

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OPINION FILED: _____

AFFIRMED

Gary R. Wade, Judge

OPINION

The petitioner, Raymond Lewis Covington, appeals from the trial court's order dismissing his petition for post-conviction relief. The single issue presented for review is whether the petitioner had been denied the effective assistance of counsel at trial.

A brief procedural history is necessary to put the claim in context. On February 27, 1991, the petitioner was convicted of first degree murder and armed robbery. This court affirmed the convictions on direct appeal. See State v. Raymond L. Covington, No. 01C01-9109-CC-00267 (Tenn. Crim. App., at Nashville, May 13, 1992). Our opinion contained a factual summary:

> This case concerns the killing of Ernie Anglin on April 14, 1979. Bonnie Parker, the mother of Mr. Anglin's daughter, was living with Mr. Anglin on the date of his death. According to her testimony, two masked men entered their house at approximately 9:30 p.m. Brandishing weapons, they took a substantial amount of cash from Anglin's pants pocket and then led him out of the house while pointing a gun at his back. The victim's four-year-old daughter was a witness to this robbery and abduction. The little girl was crying hysterically while her mother, Ms. Parker, desperately sought help. She called a friend; but before anyone arrived, Ms. Parker heard two gunshots from across the street. Shortly thereafter, Ernie Anglin was found dead on the ground with two gunshots to his body.
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> Sheriff's investigations led to Greg Hill as a possible suspect. Hill made a statement to law enforcement officers implicating himself, the appellant, and a man named Ronnie Brown. Hill agreed to allow himself to be wired and to engage in a conversation with the appellant. The conversation was videotaped and recorded. During the taped conversation, the

> appellant admitted robbing and shooting Anglin. The court reporter had difficulty hearing every word of the tape and would
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> certify the transcript of the recording as a "best effort" only.

On September 3, 1992, the petitioner filed a pro se petition for post-conviction relief alleging that his trial counsel had been ineffective in several ways. Later, the petitioner was appointed post-conviction counsel and an amended petition was filed. A hearing ensued and the trial court denied relief.

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 petitioner testified that his counsel was ineffective as follows: (1) by rarely contacting the petitioner and by meeting with him only twice, for a total of

approximately forty-five minutes; (2) by failing to have the tape-recorded conversation between the petitioner and state witness Greg Hill professionally enhanced, because portions of the tape were unclear; (3) by failing to conduct a follow-up investigation of a letter written by Pete Bondurant to his brother, Pat, concerning Hill; and (4) by failing to call three witnesses who would have testified favorably for the petitioner.

The petitioner's trial counsel, appearing as a state witness, testified at the evidentiary hearing that he had expended a great deal of time preparing the petitioner's case. He remembered filing a motion to suppress the statement of codefendant Hill, consulting with a gun expert, viewing the crime scene, and interviewing most of the state's witnesses. He acquired helpful information from counsel representing Hill. Trial counsel recalled that he had been readily accessible to the petitioner and denied that he had met with him for only forty-five minutes before the trial. He estimated that he had counseled with the petitioner for at least four hours, a contention supported by office time records. At the conclusion of the evidentiary hearing, the trial court took the matter under advisement and ultimately ruled that the petitioner had been effectively represented. These findings of fact must be considered as conclusive for purposes of appeal unless the evidence preponderates against them. See Graves v. State, 512 S.W.2d at 604. In our view, the record fully supports the determinations of the trial court.

Trial counsel explained that he chose not to hire an expert to enhance the quality of the taped conversation between Hill and the petitioner as a matter of strategy. He believed that a more accurate transcript might have further incriminated the petitioner. The poor quality of the tape offered the petitioner an opportunity to impeach Hill about the tape.

Trial counsel also explained his decision not to call Pete Bondurant as a witness. Bondurant had written a letter to his brother, Pat, in which he claimed that Hill had said that "he wasn't going to take no fall so long as the D.A. was a sucker." While this statement would have cast doubt upon the truthfulness of Hill's testimony, trial counsel was concerned about the credibility of the Bondurants; both were in jail on second degree murder charges at the time of the communication. Pete Bondurant would have been fair game for impeachment by his prior criminal record. Trial counsel believed that any possible success in the trial hinged upon the credibility of the defense and that the Bondurant participation presented a risk to that strategy.

An informed decision by counsel may not be the basis for relief, even if the strategy does not work. Rhoden v. State, 816 S.W.2d 56, 60 (Tenn. Crim App. 1991). In each of these instances, trial counsel made a sound tactical choice. Thus, we may not second-guess that strategy.

Trial counsel could not remember why he chose not to

call Fred Alexander, a witness subpoenaed by the defense. Thus, counsel may have been deficient in performance. Alexander, however, was not called as a witness at the post-conviction hearing. Thus, petitioner failed to establish who Alexander was or what his testimony would have been; no prejudice has been shown.

Counsel also testified that, as best he could remember, Officer Hall would have been unable to provide helpful information. Moreover, the petitioner also failed to call Officer Hall as a witness at the post-conviction hearing. Thus, we are unable to determine how the omission affected the results of the trial.

The petitioner's girlfriend, Amena Comings, was not called because trial counsel concluded that much of her testimony would have been inadmissible. Because he believed the petitioner had made a very good witness, counsel chose, again as a matter of strategy, not to call Ms. Comings. While Ms. Comings attended the evidentiary hearing on the petition for post-conviction relief, she did not testify. Thus, the petitioner has again failed to establish how he might have been prejudiced. As a practical matter, the failure to call witnesses may be a basis for post-conviction relief only when those witnesses testify at the post-conviction hearing and establish that the results of the trial may have been different had they participated. See Black v. State, 794 S.W.2d 752 (Tenn. Crim. App. 1990). Since none of the witnesses in question testified, no prejudice has been shown.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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John H. Peay, Judge

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Rex H. Ogle, Special Judge