

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1996 SESSION

FILED

August 22, 1996

**Cecil W. Crowson
Appellate Court Clerk**

PATRICK COLLIER, * #01C01-9509-CR-00314

APPELLANT, * DAVIDSON COUNTY

VS. * Hon. Ann Lacy Johns

STATE OF TENNESSEE, * (Post-Conviction)

APPELLEE. *

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Patrick Collier, appeals from the Davidson County Criminal Court's judgment denying his petition for post-conviction relief. He alleges that he was denied his right to the effective assistance of counsel at trial. The trial court denied relief after conducting two evidentiary hearings. We find no error and affirm the judgment.

In September of 1992, the appellant was convicted of first degree murder and attempted first degree murder for shooting two of his cousins with a .38 caliber pistol. One of the victims, Joseph L. Collier, was shot in the head from close range and killed. The second victim, Kenneth D. Collier, was shot in the back as he fled from the scene. The appellant was sentenced to life imprisonment and a term of twenty-five years, to be served consecutively. His convictions and sentences were affirmed on direct appeal. State v. Patrick N. Collier, No. 01-C-01-9303-CR-00093 (Tenn. Crim. App., Aug. 19, 1993, Nashville), perm. to appeal denied, (Tenn. 1993).

The appellant's post-conviction petition alleged that trial counsel was ineffective for failing to present several family members who could have testified at trial. These witnesses testified at the post-conviction hearing. Thomas Collier Sr., the appellant's father, testified that he had been visiting his family at his mother's house in Nashville on the day of the shooting. He saw his son, Melvin Collier, and his brother, Rolland Collier, walk around the side of the house where a shot was fired. Rolland Collier returned and said that Melvin had been "trying to set the house on fire." Melvin Collier went to the hospital to be treated for minor gunshot wounds. The appellant and Thomas Collier Jr. later arrived at the scene, found out what had happened, and went to the hospital to check on Melvin. Collier Sr. was not at the scene when the appellant shot the victims.

Thomas Collier Jr. also testified at the post-conviction hearing. He said that after visiting Melvin Collier in the hospital, he returned to the scene and saw one of the victims, Joseph Collier, “mumbling and crying” and appearing “to be mad about something.” Collier Jr. did not see the appellant shoot the victims. Likewise, Melvin Collier testified at the post-conviction hearing that he was not at the scene when the appellant shot the victims. He was still at the hospital being treated for his minor injuries.

Rolland Collier, the appellant’s uncle, testified at the post-conviction hearing that “everything [was] in an uproar” on the day of the offenses because Melvin Collier had been threatening to burn the house. When the problem escalated, Rolland Collier shot Melvin. The appellant later showed up at the house and wanted to know who shot Melvin. The appellant then shot Joseph Collier, who had been unarmed. According to Rolland Collier, there had been no altercation between the appellant and Joseph prior to the shooting.

John Wiethe testified that he was retained to represent the appellant following the preliminary hearing. He reviewed the assistant public defender’s file and tapes of the preliminary hearing. He interviewed witnesses and visited the scene of the offenses. He met with the appellant five or six times; he described the appellant as “helpful” and “cooperative.” They discussed witnesses and defenses; they decided to raise a claim of self defense.

Counsel learned about the incident between Rolland Collier and Melvin Collier that preceded the appellant’s offenses. Counsel believed that Rolland Collier’s testimony would be damaging to the appellant. Counsel was unable to interview Melvin Collier, who lived in Kansas City. He asked Thomas Collier Sr., who also resided in Kansas City, to contact Melvin Collier on his behalf, but the attempts were unsuccessful. Counsel believed that Thomas Collier Sr. could have helped “set the background” for the

defense. However, according to counsel, Collier Sr. became evasive and said he was too busy to travel to Nashville for the trial. Similarly, counsel was unable to find Thomas Collier Jr., who could have testified about the appellant's "frame of mind."

Counsel testified that he learned through pre-trial discovery motions that a weapon had been found in bushes near the scene of the crimes. He tried to find out whether the weapon had been handled by Rolland, Kenneth, or Joseph Collier. It was the defense theory that one of the victims had the weapon when the appellant arrived at the scene. However, the prosecution told counsel that no fingerprints had been found on the weapon. Counsel conceded that the appellant was the sole defense witness at trial.

In post-conviction cases, the burden is on the petitioner to prove allegations by a preponderance of the evidence. Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1988); Vermilye v. State, 754 S.W.2d 82, 84 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1987). On appeal, we are bound by the trial court's findings of fact unless the evidence in the record preponderates against those findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1990). The appellant has the burden of illustrating how the evidence in the record preponderates against the judgment entered. Id.

To establish a claim of ineffective assistance of counsel under the Sixth Amendment to the United States Constitution, a petitioner must show (a) that counsel's performance was deficient and (b) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687 (1984). Appellate review of such an issue does not have to begin with the attorney's conduct; if prejudice is not shown, we need not determine the validity of the allegations about deficient performance. Id. at 697. The Strickland standard has been applied as well to the right to

counsel under Article 1, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn.), cert. denied, 493 U.S. 874 (1989).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether services rendered were within the range of competence demanded of attorneys in criminal cases. In reviewing counsel's conduct, a "fair assessment ... requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. at 689; see also Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. Hellard v. State, 629 S.W.2d at 9.

The appellant claims that trial counsel was ineffective, primarily for failing to substantiate the claim of self defense. First, he argues that counsel failed to interview and subpoena the appellant's family members who could have testified about the "background" incident between Rolland and Melvin Collier. Second, he argues that counsel failed to subpoena Rolland Collier, who could have testified that the appellant had first asked who shot Melvin Collier before he shot Joseph Collier. Finally, he contends that counsel failed to investigate the matter of who was in possession of a weapon when the appellant arrived at the scene.

We conclude that the evidence in the record does not preponderate against the trial court's findings. As the trial court noted, the evidence showed that counsel met with the appellant on numerous occasions to discuss witnesses and possible defenses. He visited the scene and tried to talk to all of the witnesses. Although he had difficulty communicating with out of state witnesses, he made efforts to contact them through other

family members. Moreover, counsel reviewed statements taken by the appellant's original counsel, and he also reviewed the tapes of the preliminary hearing.

With regard to specific witnesses, it is clear, as the trial court found, that Thomas Collier Sr., Thomas Collier Jr., and Melvin Collier were not at the scene when the crimes occurred. While they may have been able to testify about the incident between Rolland and Melvin Collier, it is not clear from the record that such evidence would have bolstered the appellant's self defense claim for events that occurred hours later. Moreover, the trial transcript reflects that evidence regarding the incident between Rolland and Melvin Collier was before the jury. Thus, the appellant has failed to show that counsel was ineffective and he has failed to show a reasonable probability of a different outcome.

Similarly, the evidence supports the trial court's finding that the testimony of Rolland Collier may have been damaging to the appellant's defense. In sum, Rolland Collier testified that the victim, Joseph Collier, was unarmed when he was shot by the appellant. Moreover, Rolland Collier said nothing to contradict the State's evidence regarding the appellant's shooting of Kenneth Collier. Similarly, there is nothing in the record to show what else counsel could have learned with regard to the weapon that was found at the scene. The trial transcript reveals that evidence concerning the weapon and its location was elicited at trial in full detail. Accordingly, the appellant has not shown that counsel was ineffective. The judgment of the trial court is affirmed.

William M. Barker, Judge

John H. Peay, Judge

David G. Hayes, Judge