IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MAY 1996 SESSION

FILED

June 28, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

TOMMIE L. STANTON,	)
	) C.C.A. No. 02C01-9505-CR-00134
Appellant,	)
	) Shelby County
V.	)
	) Honorable Joseph B. Brown, Jr., Judge
	)
STATE OF TENNESSEE,	) (Post-Conviction: Second-Degree Murder)
	)
Appellee.	)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

PAUL R. SUMMERS,
Special Judge

O P I N I O N

A jury convicted the appellant, Tommie L. Stanton, of second-degree murder. He was sentenced as a Range II multiple offender to thirty years incarceration. This Court affirmed on appeal. He filed for post-conviction relief alleging ineffective assistance of counsel. The trial court conducted a full evidentiary hearing and denied relief. Appellant appeals and we affirm.

FACTS

On appeal, the appellant avers that his trial counsel rendered ineffective assistance by: (1) failing to subpoena two witnesses, "June Bug" and "Rabbit"; (2) failing to dissuade the appellant from testifying on his own behalf; (3) failing to assert a claim of ineffective assistance on direct appeal; and (4) failing to introduce certain photographic evidence.

The appellant testified at his post-conviction hearing. He stated that his relationship with trial counsel had deteriorated and that he had only met with counsel on "about four or five" occasions. During one of those meetings, he apparently requested counsel to locate two witnesses, "June Bug" and "Rabbit." At the post-conviction hearing, he claimed that both witnesses possessed information that could have exonerated him. He further asserted that counsel was remiss in failing to introduce photographs depicting the lighting conditions inside the club.

The appellant's trial counsel testified. He stated that he attempted to find a "Rabbit" and a "June Bug." He, however, was unable to locate any individuals referred to by those names.[1] He stated that upon reviewing photographs of the crime scene, he concluded the photographs would not support the appellant's defense. As to the appellant's decision to testify, trial counsel stated:

> I put it on the record it was against my advice that he testify and then the Court sent us back -- The Judge gave us an opportunity to

[1]Counsel noted that "[y]ou can't subpoena 'June Bug.'"

> talk to him further since he said he did want to testify, even though it was against my advice to do so.

The hearing judge found that "Rabbit" and "June Bug" were non-locatable witnesses. He remembered the appellant's trial and he incessantly referred to counsel's performance as "outstanding" and "artful."[2] He further recalled that counsel:

> set up a self defense theory, or in the alternative, to show that the homicide was no more than voluntary manslaughter. [Trial counsel] did one of the best jobs the Court has seen to set that up.

He recalled that the appellant's problems arose, however, when the appellant insisted on testifying against his attorney's advice.[3]

> When he got up and testified that he had absolutely nothing to do with this, had no part in the killing, he destroyed his self-defense theory and the voluntary manslaughter possibility . . . that [counsel] had engineered for him during the course of the trial.

ANALYSIS

The test for determining whether counsel provided effective assistance at trial is whether counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). Appellant must establish by a preponderance of the evidence that: (1) counsel's services or advice fell below "the range of competence demanded of attorneys in criminal cases," and (2) counsel's deficient performance prejudiced his defense. Strickland v. Washington, 466 S.W.2d 668 (1984).

In post-conviction proceedings, the petitioner bears the burden of proving his allegations by a preponderance of the evidence. McBee v. State, 655

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[2]The judge found that:

> [Trial counsel] put on an excellent demonstration of the attorney's craft and his performance was quite artful and instructive. . . . Cross examination was vigorous and excellent.

[3]The hearing judge recalled that trial counsel "advised [the appellant] in the Court's presence, that he should not, in his opinion, exercise the option of giving testimony."

S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the trial court's findings in post-conviction hearings are conclusive on appeal unless the evidence preponderates against those findings. State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983); Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978).

FAILURE TO SUBPOENA WITNESSES

The appellant alleges that trial counsel rendered ineffective assistance by failing to subpoena "June Bug" and "Rabbit." To succeed on his claim, the appellant must establish that he was prejudiced by counsel's failure to subpoena the witnesses. Strickland v. Washington, 466 U.S. 668 (1984). To establish prejudice, he must: (1) produce the witness at his post-conviction hearing; (2) show that through reasonable investigation, trial counsel could have located the witness; and (3) elicit both favorable and material testimony from the witness. State v. Black, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990).

The appellant failed to produce either "June Bug" or "Rabbit" at his post-conviction hearing. He is, therefore, unable to establish that he suffered prejudice by counsel's failure to subpoena those witnesses.[4] This issue is devoid of merit.

RELATIONSHIP WITH ATTORNEY

The appellant next avers that trial counsel was ineffective by permitting him to testify. The appellant argues that his relationship with his attorney had deteriorated such that "he was unable to benefit from the expertise of [trial counsel]." As a result of the deteriorated relationship, trial counsel was unable to dissuade him from testifying.

[4]Because the appellant cannot establish prejudice, we need not address whether counsel's performance, in failing to subpoena "June Bug" or "Rabbit," was deficient. Jones v. State, 915 S.W.2d 1, 3 (Tenn. Crim. App. 1995).

The hearing judge recalled that counsel vehemently and on the record advised the appellant not to testify. However, as a Range II multiple offender, the appellant was no neophyte to the judicial process. He had a right to testify and he chose to exercise that right over the sound advice of his attorney. He should not now be permitted to complain simply because, looking back, he now realizes that he exercised poor judgment in refusing to follow the advice of his attorney. This issue is without merit.

APPELLATE COUNSEL

The appellant argues that his appellate counsel was ineffective for failing to raise trial counsel's alleged ineffectiveness on direct appeal. The appellant, however, has waived this issue by failing to support his argument with citation to any authority. See Tenn. R. Ct. Crim. App., Rule 10(b).

PHOTOGRAPHS

The appellant's contention that counsel was ineffective for failing to introduce photographic evidence of the shooting scene is without merit. The decision to introduce photographic evidence was a tactical decision. The record indicates that counsel made an informed decision to refrain from introducing photographic evidence of the crime scene. We will not "second guess" informed tactical and strategic decisions. Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993). Moreover, the appellant failed to introduce this photographic evidence at his hearing. Appellant cannot establish prejudice through mere bald assertion that introduction of the evidence would have dictated a different outcome.

AFFIRMED

PAUL R. SUMMERS, Special Judge

CONCUR:

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PAUL G. SUMMERS, Judge

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DAVID G. HAYES, Judge