

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
APRIL SESSION, 1996

FILED

September 13, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,)
)
 Appellee)
)
 vs.)
)
 SANDY EUGENE WOMACK,)
)
 Appellant)

No. 01C01-9507-CC-00235

MONTGOMERY COUNTY

Hon. Robert W. Wedemeyer, Judge

(Armed Robbery; Robbery)

For the Appellant:

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Sandy Eugene Womack, appeals from the Montgomery County Criminal Court's denial of his petition seeking post-conviction relief. The appellant was convicted in 1989 of one count of armed robbery and one count of robbery. The appellant is currently serving a 50 year sentence and a concurrent 15 year sentence for these convictions. The convictions and sentences were affirmed on direct appeal. State v. Womack, No. 01C01-9003-CC-00077 (Tenn. Crim. App. at Nashville), perm to appeal denied, (Tenn. 1990). In this appeal, the appellant contends that he received ineffective assistance of counsel at trial.

BACKGROUND

The appellant's convictions stem from the armed robbery of an Arby's and the robbery of a Pizza Hut in Clarksville. The offenses were charged in a single indictment and were tried jointly. Although the indictment initially charged two counts of armed robbery, the trial court granted the appellant's motion for a judgment of acquittal as to the offense of armed robbery of the Pizza Hut and submitted to the jury the lesser included charge of robbery of that establishment.¹ At trial, the appellant testified that he only employed a toy or BB gun during both robberies, a position consistent with the appellant's statements to the police prior to trial.² The appellant's statements were admitted into evidence at trial. However, a witness to the Arby's robbery, Lisa Beals, testified that the appellant used either a .45 caliber or a .9 mm blue steel automatic pistol. She further testified that the gun was neither a toy nor a BB gun.

The appellant filed his petition for post-conviction relief on September 21,

¹The record suggests that the State's witnesses in the Pizza Hut robbery were unable to establish that the alleged weapon employed by the appellant was, in fact, a deadly weapon.

²At the post-conviction hearing, the appellant claimed that, during the Arby's robbery, he employed a BB gun, and, during the Pizza Hut robbery, he employed a "blank pistol."

1993. In his petition, the appellant only challenged his conviction for armed robbery of the Arby's, requesting the following relief: "1. That the conviction ... be overturned; [and] 2. The case be remanded for new trial." As the basis for relief, the appellant alleged that counsel was ineffective in numerous respects.³ The appellant also alleged prosecutorial misconduct.

The post-conviction court appointed counsel on July 12, 1994. The court then conducted a post-conviction hearing on February 14, 1995. The appellant and his trial attorney were the only witnesses called to testify at the hearing. For the first time, the appellant contended that counsel was also ineffective for failing to submit to the trial court a motion to sever the two charges set forth in the indictment. At the conclusion of the hearing, the post-conviction court dismissed the appellant's petition, finding that counsel's representation was not "ineffective in any respect."⁴ On appeal, the appellant only challenges trial counsel's failure to file a motion to sever the two robbery charges.

ANALYSIS

Initially, we note that the appellant has waived the issue of trial counsel's failure to submit a motion for severance. Nowhere in the appellant's brief is there a reference to the record of the post-conviction hearing. Tenn. R. App. P.

³The appellant alleged the following ineffective conduct: (1) counsel did not pursue discovery; (2) counsel did not attempt to interview state witnesses; (3) counsel failed to investigate the weapons "expertise" of witness, Lisa Beals; (4) counsel did not investigate the crime scene; (5) counsel failed to sufficiently consult with the appellant concerning trial strategy; (6) counsel failed to object to the introduction at trial of the appellant's statements to the police; (7) counsel failed to file motions in limine with respect to improper statements by the prosecutor and failed to object to the improper statements at trial; (8) counsel compelled the appellant to testify at trial; (9) counsel delivered an improper opening statement; (10) counsel failed to request appropriate jury instructions; and (11) counsel did not ensure that a complete and accurate transcript of the trial proceedings was made, as the trial transcript did not include bench conferences, *voir dire*, closing arguments, and jury instructions.

⁴Although the appellant and his trial attorney testified concerning the trial attorney's representation, the appellant failed to present any proof relating to the issue of prosecutorial misconduct.

27(a)(6) and (7), (g); Ct. Crim. App. R. 10(b).⁵ Moreover, the appellant fails to cite any authority in support of his argument. Tenn. R. App. P. 27(a) (7); Ct. Crim. App. R. 10(b).⁶ Notwithstanding waiver, we elect to address the merits of the issue presented.⁷

When a claim of ineffective assistance of counsel is raised, the appellant bears the burden of showing that his counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment of the federal constitution, and the appellant must demonstrate that the deficient representation deprived the appellant of a fair trial with a reliable result. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). With respect to deficient performance, the court must decide whether or not counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To satisfy the prejudice prong of the Strickland test, the petitioner must show a reasonable probability that, but for counsel's ineffective performance, the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. This reasonable probability must be "sufficient to undermine confidence in the outcome." Id. See also Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

⁵In his brief, the appellant does refer to the record of the trial proceedings. However, the appellant has failed to include any portion of the trial transcript in the record before this court. It is the appellant's duty to ensure that the record on appeal contains all of the evidence relevant to those issues that are the bases of appeal. Tenn. R. App. P. 24(b). See also Smith v. State, No. 02C01-9302-CR-00022 (Tenn. Crim. App. at Jackson), perm. to appeal denied, (Tenn. 1994).

⁶The appellant does cite "[t]he classic statement ... that if it's and and's were pots and pans there would be no work for tinkers." Intending no disparagement of those wise maxims that have surfaced from the body of our national folklore, we would suggest that Tenn. R. App. P. 27(a) (7) contemplates something more.

⁷As already mentioned, although the appellant did not raise this issue in his petition for post-conviction relief, he did raise the issue at the post-conviction hearing. Moreover, in its findings of fact, the post-conviction court addressed trial counsel's failure to file a motion for severance. Accordingly, we are not jurisdictionally barred from considering this issue. Goad v. State, No. 01C01-9404-CR-00133 (Tenn. Crim. App. at Nashville), perm. to appeal granted, (Tenn. 1995); Tenn. Code Ann. § 16-5-108 (a) (1994).

First, there is no proof in the record that trial counsel did not file a motion to sever the offenses.⁸ Second, the post-conviction court concluded “that a motion to sever would not have been granted and, therefore, trial defense counsel’s failure to make one was irrelevant.”

The factual findings of the post-conviction court are conclusive on appeal unless the evidence preponderates against those findings. Butler, 789 SW.2d at 899. This court cannot reweigh or reevaluate the evidence or substitute its inference for those drawn by the post-conviction court. Taylor v. State, 875 S.W.2d 684, 686 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994)(citing Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990)). On appeal, the petitioner has the burden of demonstrating why the evidence contained in the record preponderates against the judgment entered by the post-conviction court. Id. The record is devoid of any evidence that would contradict the findings of the court. The indictments are not included in the record, and, therefore, we are unable to determine the date or dates on which these offenses were committed. See Tenn. R. App. P. 24(b). Moreover, the record is silent concerning the issues of whether the offenses were part of a common scheme or plan and whether the evidence of one offense would have been admissible at the trial of the other. See Tenn. R. Crim. P. 14(b)(1). The appellant has failed to meet his burden.

Accordingly, the judgment of the post-conviction court is affirmed.

⁸At the post-conviction hearing, trial counsel testified, “I have no independent recollection of whether I did or didn’t [file a motion to sever].” Subsequently, he stated, “[I]f there is not one in the file, there was not.” No further proof was developed on this issue.

DAVID G. HAYES, Judge

CONCUR:

JOE B. JONES, Presiding Judge

(not participating)

JOHN H. PEAY, Judge