IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1999 SESSION

WALTER BLAIR,	)	
	)	**C.C.A. NO. W1999-01847-CCA-R3-PC**
Appellant,	)	
	)	**HAYWOOD COUNTY**
VS.	)	
	)	**HON. DICK JERMAN, JR., JUDGE**
STATE OF TENNESSEE,	)	
	)	
Appellee.	)	(Post-conviction)

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The petitioner, Walter Blair, pled guilty to second-degree murder. As part of the plea agreement, he was sentenced as a Range III persistent offender to forty-five years; absent the plea agreement, petitioner would have been classified as a Range I offender. Petitioner filed for post-conviction relief, which was denied after a hearing. He now appeals, raising three issues:

> 1. His trial counsel induced him to plead guilty by misadvising him that he would face the death penalty if he proceeded to trial;
>
> 2. His trial counsel was ineffective in failing to file a motion for change of venue; and
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> 3. The trial court abused its discretion when it denied his motion for recusal.

Upon our review of the record, we affirm the judgment of the trial court.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

In reviewing the petitioner's Sixth Amendment claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To prevail on a claim of ineffective counsel, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. There must be a reasonable probability that but for counsel's error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985).

To satisfy the requirement of prejudice, the petitioner must demonstrate a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. See Hill v. Lockart, 474 U.S. 52, 59 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991).

Petitioner was originally indicted for first-degree murder, and the State filed

its notice of intent to seek the death penalty. According to petitioner's trial counsel, the State initially refused to consider a plea bargain. Petitioner's lawyer was convinced that petitioner was likely to receive the death penalty if he proceeded to trial. Accordingly, he concentrated his efforts on trying to obtain a plea bargain for his client. Eventually, trial counsel convinced the prosecutor to extend the offer which petitioner finally accepted. Trial counsel was successful in this effort because he had unearthed a grade school record which designated petitioner's I.Q. as 68: low enough to meet one of the criteria necessary to classify petitioner as mentally retarded and thereby disqualify him from eligibility for the death penalty. See T.C.A. § 39-13-203(a). However, petitioner's lawyer was also aware of a later school I.Q. test showing a score of 73: too high to satisfy the statutory definition of mentally retarded. Id. And while the psychological evaluation performed on petitioner after his arrest indicated an I.Q. score of 54, the psychologist suspected that this score was the result of malingering. Accordingly, petitioner's lawyer remained very concerned that petitioner would not be able to prove his ineligibility for the death penalty. He continued to advise his client, therefore, of the risk of proceeding to trial and facing a sentence of death.

Petitioner testified that he pled guilty according to the plea agreement in order to escape the death penalty. He now contends that the State had withdrawn the death penalty prior to his plea, and that his lawyer misadvised him in order to avoid going to trial. The record contains no withdrawal of the State's notice of intent to seek the death penalty. Petitioner's lawyer testified that the State had "[a]bsolutely not" withdrawn the notice prior to the plea. The only evidence in support of petitioner's allegation is contained in a letter by Clayburn Peeples to the Board of Professional Responsibility written long after petitioner's plea, in response to a complaint petitioner filed against his lawyer and Mr. Peeples. The letter contains the following paragraph:

> The proof against both Blair and Williamson in this case was extremely strong. So strong in fact that the State initially sought the death penalty. It was later determined, however, that due to the diminished mental capacity of the defendants, some other resolution of the case might be appropriate and in the interest of justice.

Contrary to petitioner's contention, this paragraph does not prove that the State had decided not to seek the death penalty if petitioner proceeded to trial. Rather, it explains why the State entertained the possibility of a plea bargain after initially refusing to

consider one. The petitioner reaped the benefit of his lawyer's efforts to challenge the State's case, and of the State's resulting change of heart. The petitioner's allegation that his lawyer deliberately misadvised him about the perils of going to trial is totally unsupported by the proof, and the trial court did not err in refusing to grant relief on this ground. This issue is without merit.[1]

Petitioner also complains about his lawyer's failure to file a motion for change of venue. Petitioner's trial counsel testified that, after conducting some informal research in the neighboring counties, he determined that a change of venue would not have served petitioner's best interest. He also testified that petitioner's family was well known in Haywood County, and he thought petitioner might benefit from this if the trial were held there. Trial counsel thereby made an informed tactical decision not to seek a change of venue. This Court should not second-guess trial counsel's tactical and strategic choices unless those choices were uninformed because of inadequate preparation, Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 280 (Tenn. Crim. App. 1980). This issue is without merit.

II. MOTION TO RECUSE

Petitioner's claim for relief was initially dismissed by the court below without a hearing. Upon appeal, this Court entered an order reversing the trial court's decision and remanding the case for an evidentiary hearing.[2] Petitioner filed a motion for recusal based on certain language contained in the trial court's original order of dismissal. The judge denied the motion, holding that he had "no prejudice or bias toward petitioner's case," that he "harbor[ed] [no] animosity toward the petitioner," and that he did not "wish to burden another judge with a case which should be heard by" him.[3] This Court will not

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[1]Petitioner also contends that, because he pled guilty on the basis of misinformation, his guilty plea is invalid as not knowingly, intelligently or voluntarily made. Since petitioner has not proven that he pled guilty based on misinformation, this corollary argument also fails.

[2]See Order entered in Walter Blair v. State, No. 02C01-9610-CC-00355, Haywood County (Tenn. Crim. App. filed April 16, 1997, at Jackson).

[3]Following the trial court's ruling, the petitioner filed a motion for interlocutory appeal. The disposition of this motion does not appear in the record.

reverse the trial court's ruling absent a clear abuse of discretion. Caruthers v. State, 814 S.W.2d 64, 67 (Tenn. Crim. App. 1991).

Petitioner claims that, in summarily dismissing his original pleading, the trial court ruled that his allegations were "made with either conscious or reckless disregard for the truth of such allegations;" that some of them were "patently untrue;" and that, even if they were true, he had failed to allege how he had been prejudiced thereby. The court further ruled, according to petitioner, that his

> allegations concerning the entry of his guilty plea and sentencing concern matters and events occurring in the presence of the Court and which are recalled by the Court; that the Court determined at the time that his guilty plea was made knowingly and voluntarily; that in all respects his plea and sentencing proceedings were lawfully and properly effected; and, that there is no merit whatsoever to his complaints in such regard.[4]

He now appears to claim that these rulings demonstrate that the trial court had prejudged the factual issues presented to it at the hearing.[5]

We disagree. The trial court's initial ruling was in response to the original post-conviction petition, which, we note, is not included in the record. The ruling dealt solely with the petitioner's allegations: not with the proof in support of the allegations. The judge recalled the guilty plea hearing as having been properly conducted and, indeed, petitioner has pointed to nothing intrinsically wrong with the plea hearing as presented to the court. Rather, he complains that his lawyer withheld important information from him: an action, if true, which the trial court would not have been able to discern during the plea hearing. Thus, the trial court's initial ruling did not foreclose a later favorable ruling based on adequate proof of matters previously outside the trial court's knowledge.

A judge should recuse himself from a proceeding in which his impartiality might reasonably be questioned, as when he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

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[4]The trial court's original ruling in this matter is not included in the record before us. The quotations attributed to the trial court are contained in petitioner's motion to recuse.

[5]Petitioner's brief is less than clear on this point.

Tenn. Sup. Ct. Rule 10, Cannon 3(E); Harris v. State, 947 S.W.2d 156, 172 (Tenn. Crim. App. 1996). However, adverse rulings are not generally sufficient grounds to establish bias. Harris v. State, 947 S.W.2d at 173. Additionally, a judge "is in no way disqualified merely because he has participated in other legal proceedings against the same person." Harris, 947 S.W.2d at 172. Finally, the determining issue is not the propriety of the judge's conduct, but "whether he committed an error which resulted in an unjust disposition." State v. Hawk, 688 S.W.2d 467, 472 (Tenn. Crim. App. 1985). No unjust disposition occurred in this case, and the trial judge did not abuse his discretion in denying petitioner's motion to recuse. This issue is without merit.

The judgment of the trial court is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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NORMA McGEE OGLE, Judge

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ALAN E. GLENN, Judge