

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

AUGUST SESSION, 1999

FILED
December 22, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

CHARLES JOINER,)
)
Appellant,)
)
VS.)
)
STATE OF TENNESSEE,)
)
Appellee.)

C.C.A. NO. W1999-01622-GA-R2-1999
SHELBY COUNTY
HON. JOSEPH B. BROWN, JR.
JUDGE
(Post-Conviction - Aggravated Assault)

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

The petitioner, Charles Joiner, appeals the Shelby County Criminal Court's order denying his petition for post-conviction relief. He was convicted in 1992 of one (1) count of aggravated assault and sentenced to five (5) years in prison.¹ In 1993, the petitioner filed this post-conviction petition alleging ineffective assistance of counsel. After counsel was appointed, a hearing was held on the petition, and the trial court denied relief. On appeal, the petitioner claims that the trial court erred in finding that he received effective assistance of counsel at trial. After a thorough review of the record before this Court, we affirm the judgment of the trial court.

I.

A.

The petitioner was convicted of one (1) count of aggravated assault and received a sentence of five (5) years. His conviction was affirmed by this Court on direct appeal. State v. Charles E. Joiner, C.C.A. No. 02C01-9204-CR-00093, Shelby County (Tenn. Crim. App. filed October 20, 1993, at Jackson). To place the petitioner's issues in the proper perspective, we will recite the facts as presented by this Court on direct appeal:

The facts of this case were simple but greatly disputed in this hotly contested trial. The state presented evidence that the defendant fired gun shots at the victim as they each drove down a public street of Memphis. The victim positively identified the defendant as the person who fired the shots. Another witness obtained a tag number of the truck from which the shots were fired. The tag number belonged to the defendant's truck.

The defendant presented proof that the victim had a motive to seek revenge against him in that the defendant had previously successfully prosecuted the victim for an earlier assault. He further

¹ The petitioner was released from prison sometime after filing this petition. However, after being fully advised by his post-conviction attorney and the trial court at the post-conviction hearing, the petitioner stated that he understood the consequences of requesting post-conviction relief at this juncture and wished to proceed with the petition.

presented numerous alibi witnesses who placed the defendant at his place of business at the time of the shooting and also evidence that his truck was disabled and in a repair shop at the time of the shooting.

State v. Charles E. Joiner, C.C.A. No. 02C01-9204-CR-00093, slip op. at 3.

B.

At the post-conviction hearing, the petitioner testified that trial counsel was unprepared for trial and failed to conduct an appropriate investigation of his case. He claimed that trial counsel did not file any pretrial motions and did not receive discovery from the state. The petitioner stated that, on the day of trial, counsel had not spoken with any defense witnesses. He further testified that his attorney failed to appropriately question state witnesses regarding their prior convictions or any possible biases they might have.

The petitioner stated that trial counsel would not allow a material witness, Shorty Chambliss, to testify at trial. He maintained that Chambliss would have testified that, on the day of the aggravated assault, the petitioner's truck was dismantled and inoperable. This testimony would have been directly contrary to the testimony of state witnesses that the petitioner was operating his truck during the incident.

The petitioner acknowledged that trial counsel requested a continuance on the day the case was set for trial, but the trial court denied such motion. The petitioner then testified that counsel "tried his best" after the trial court ordered him to present his case on the scheduled trial date.

Irvin Salky represented the petitioner at trial. He testified at the post-conviction hearing that he had been practicing law for approximately 31 years, and a considerable amount of his practice was in the field of criminal law. Salky stated that he investigated the petitioner's case and, that although he filed an unsuccessful motion for a continuance on the scheduled trial date, was prepared for trial. He filed the appropriate pretrial motions and received discovery from the state. Further, he subpoenaed approximately seven (7) alibi witnesses to testify on the petitioner's behalf at trial.

With regard to Shorty Chambliss, Salky testified that he interviewed him in preparation for trial. However, Salky was concerned about Chambliss' credibility due to inconsistencies in his story; thus, he determined that it would be in his client's best interest not to call Chambliss to testify. Instead of presenting Chambliss' testimony, Salky was able to convince the assistant district attorney to stipulate to the admission of a receipt which indicated that Chambliss performed mechanical work on the petitioner's truck on the day of the incident.

The trial court found that Salky sufficiently investigated the petitioner's case and prepared for trial. The court found that Salky had filed appropriate pretrial motions and subpoenaed multiple alibi witnesses for the defense. The court further determined that "counsel exercised sound judgment and discretion in the election of trial strategy and tactics." The court concluded that Salky's performance at trial was effective and denied the petition for post-conviction relief.

From the trial court's ruling, the petitioner now brings this appeal.

II.

A.

In post-conviction proceedings, the petitioner bears the burden of proving the allegations raised in the petition by a preponderance of the evidence.² Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996); Wade v. State, 914 S.W.2d 97, 101 (Tenn. Crim. App. 1995). Moreover, the trial court's findings of fact are conclusive on appeal unless the evidence preponderates against the judgment. Tidwell v. State, 922

² Under the 1995 Post-Conviction Procedure Act, the petitioner has the burden of proving his claims by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f). However, since the present petition was filed in 1993, the petitioner's claims need only be proven by a preponderance of the evidence.

S.W.2d at 500; Campbell v. State, 904 S.W.2d 594, 595-96 (Tenn. 1995); Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993).

B.

The Sixth Amendment to the United States Constitution provides, in part, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.” Similarly, Article I, § 9 of the Tennessee Constitution guarantees an accused “the right to be heard by himself and his counsel . . .” Additionally, Tenn. Code Ann. § 40-14-102 provides, “[e]very person accused of any crime or misdemeanor whatsoever is entitled to counsel in all matters necessary for such person's defense, as well to facts as to law.”

The United States Supreme Court articulated a two-prong test for courts to employ in evaluating claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court began its analysis by noting that “[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686, 104 S.Ct. at 2064. When challenging the effective assistance of counsel in a post-conviction proceeding, the petitioner bears the burden of establishing (1) the attorney's representation was deficient; and (2) the deficient performance resulted in prejudice so as to deprive the defendant of a fair trial. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; Powers v. State, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). This Court is not required to consider the two prongs of Strickland in any particular order. Harris v. State, 947 S.W.2d 156, 163 (Tenn. Crim. App. 1996). “Moreover, if the Appellant fails to establish one prong, a reviewing court need not consider the other.” Id.

The test in Tennessee in 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, 936 (Tenn. 1975); see also Harris v. State, 947 S.W.2d at 163. In order to demonstrate that counsel was deficient, the petitioner must show that counsel's

representation fell below an objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688, 104 S.Ct. at 2064; Harris v. State, 947 S.W.2d at 163.

Under the prejudice prong of Strickland, the petitioner must establish that “there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

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, 466 U.S. at 689, 104 S.Ct. at 2065. The mere failure of a particular tactic or strategy does not *per se* establish unreasonable representation. Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996). However, this Court will defer to counsel's tactical and strategic choices only where those choices are informed ones predicated upon adequate preparation. Id.; Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

C.

The petitioner contends that he was denied the effective assistance of counsel at trial in numerous different respects. However, many of these allegations were not included in the petition for post-conviction relief. This Court will not consider post-conviction issues which were not raised in the petition. Brown v. State, 928 S.W.2d 453, 457 (Tenn. Crim. App. 1996). As a result, the petitioner's allegations on appeal that trial counsel was ineffective for failing to sufficiently confer with his client, for preventing the petitioner from testifying, for failing to raise all available defenses, for failing to request a special instruction on eyewitness identification, and for failing to challenge the indictment are waived.

Secondly, this Court notes that the petitioner failed to make appropriate citations to the record in support of his argument on appeal. As a result, the issues on appeal are waived. Tenn. R. Crim. P. 10(b); State v. Killebrew, 760 S.W.2d 228,

231 (Tenn. Crim. App. 1988). Nevertheless, in the interest of justice, we will briefly address the petitioner's issues.

D.

Although not raised by the parties, this Court notes that the trial court orally stated its findings of fact at the conclusion of the post-conviction hearing. In a subsequent written order, the trial court denied post-conviction relief. Tenn. Code Ann. § 40-30-211(b) provides:

Upon the final disposition of every petition, the court shall enter a final order, and . . . shall set forth in the order or a written memorandum of the case all grounds presented, and shall state the findings of fact and conclusions of law with regard to each such ground. (Emphasis added).

In this case, the trial court made oral findings of fact but did not state its finding of fact and conclusions of law in its written order denying post-conviction relief. Generally, the failure of the trial court to follow the mandate of Tenn. Code Ann. § 40-30-211(b) would preclude review by this Court. See Claude Francis Garrett v. State, C.C.A. No. 01C01-9807-CR-00294, Davidson County (Tenn. Crim. App. filed June 30, 1999, at Nashville).

However, the failure of the trial court to follow Tenn. Code Ann. § 40-30-211(b) does not always necessitate reversal of the trial court's judgment. "Noncompliance by the postconviction court does not warrant a reversal if the record is sufficient to effectuate a meaningful appellate review." See Rickman v. State, 972 S.W.2d 687, 692 (Tenn. Crim. App. 1997) (construing Tenn. Code Ann. § 40-30-118(b) (1990)). The trial court made oral findings of fact at the post-conviction hearing; thus, the record is adequate for this Court to review the petitioner's issues on the merits.

E.

The petitioner contends that trial counsel was ineffective in failing to properly investigate his case, in failing to interview witnesses, in failing to file appropriate pretrial motions, and in failing to present the testimony of a material witness in the case. The trial court found that trial counsel conducted a sufficient investigation of the petitioner's case and adequately prepared for trial. The court further found that

Salky filed appropriate pretrial motions and subpoenaed multiple alibi witness to testify for the defense. The evidence in the record preponderates in favor of the trial court's findings; therefore, trial counsel provided constitutionally adequate representation with regard to the investigation and pretrial preparation of petitioner's case. Furthermore, the petitioner has not demonstrated how he was prejudiced by any of the deficiencies he attributes to this attorney.

The trial court did not make any specific findings with regard to the petitioner's allegation that trial counsel prevented Shorty Chambliss from testifying at trial. However, the trial court found that counsel "exercised sound judgment and discretion in the election of trial strategy and tactics." Salky testified at the post-conviction hearing that he did not call Chambliss to testify because, after interviewing Chambliss, he believed that Chambliss' credibility was questionable. He believed that it would not be in his client's best interest for Chambliss to testify at trial. At the post-conviction hearing the petitioner acknowledged that Chambliss' credibility would have been significant at trial. Clearly, the decision not to call Chambliss to testify at trial was a sound tactic which this Court may not second-guess.

In any event, the petitioner has failed to establish prejudice from his attorney's failure to call Chambliss to testify. Although the petitioner alleges that Chambliss' testimony would have been material, Chambliss did not testify at the post-conviction hearing. In order for a petitioner to establish prejudice from his attorney's failure to present a witness' testimony at trial, the petitioner must have this witness testify at the post-conviction hearing. Black v. State, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). "It is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of whether further investigation would have revealed a witness or what that witness' testimony might have been if introduced by defense counsel." Id. at 757. Thus, the petitioner has failed to prove how he was prejudiced by his attorney's failure to present Chambliss' testimony at trial.

The trial court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. Tidwell v. State, 922 S.W.2d at 500. This Court is, therefore, bound to affirm the trial court's judgment unless the evidence in the record

preponderates against the findings of the trial court. Id. The petitioner has not established that the evidence preponderates against the trial court's findings.

III.

The evidence in the record fully supports the trial court's determination that the petitioner received effective assistance of counsel at trial. Accordingly, the judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

DAVID H. WELLES, JUDGE

JAMES CURWOOD WITT, JR., JUDGE