

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1999 SESSION

FILED

January 27, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

JIMMY ALEXANDER,	*	C.C.A. # 03C01-9903-CC-00097
Appellant,	*	SEVIER COUNTY
VS.	*	Hon. Richard R. Vance, Judge
STATE OF TENNESSEE,	*	(Post-Conviction)
Appellee.	*	

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, PRESIDING JUDGE

OPINION

The petitioner, Jimmy Alexander, appeals the trial court's denial of post-conviction relief. In this appeal of right, two issues are presented for our review:

- (1) whether the petitioner was denied the effective assistance of counsel due to a conflict of interest; and
- (2) whether the petitioner was denied due process of law when the trial court declined to order a competency hearing the day prior to trial.

We affirm the judgment of the trial court.

On October 20, 1993, the petitioner was convicted of the premeditated murder of Dan Smith, also known as Dan Witt, and was sentenced to life in prison. The apparent motive was that the victim had failed to pay a prior debt to the petitioner. The petitioner admitted to a witness, Gary Perkey, who he asked to help dispose of the body, that he had killed the victim during an argument over money and gold he believed to be in the possession of the victim. An autopsy established that there were four bullet wounds to the head of the victim, who was eventually found in the trunk of the petitioner's vehicle. Two weeks before the murder, the petitioner told Dennis Strickland that he intended to "pop a cap on someone...." This court affirmed the conviction on direct appeal. State v. Jimmy Alexander, No. 03C01-9404-CR-00159 (Tenn. Crim. App., at Knoxville, Aug. 4, 1995). Application for permission to appeal to the Tennessee Supreme Court was denied on January 2, 1996.

On October 25, 1996, the petitioner filed this petition for post-conviction relief alleging, among other things, the denial of effective assistance of counsel. Counsel was appointed. In an amended petition, the petitioner alleged that his trial counsel should have been disqualified by a conflict of interest and that the trial court had erroneously denied a request for a mental evaluation.

The post-conviction court reviewed the medical records and determined that some five weeks prior to trial, the petitioner had a serious reaction to medication and thereafter was placed upon a dosage of Prednisone for a skin rash. It found that Dr. Charles Roach, who had seen the petitioner the day before the trial began, had conducted an examination and determined that "his thought content appears normal, responds appropriately." The post-conviction court also concluded that when the issue was first raised just prior to trial, the trial judge, after having a dialogue with the petitioner and hearing the argument of his counsel, "made a judgment that there was no basis at all to order a mental evaluation...." The post-conviction court also concluded that the failure of trial counsel to raise that issue on direct appeal was not a basis for a post-conviction claim because there "was no basis for raising that on appeal."

There was proof that petitioner's trial counsel, Edward C. Miller, the public defender in the district, had been initially appointed to the case but, because the petitioner became a witness for the state in a separate prosecution in which trial counsel undertook to represent the accused, withdrew due to a perceived conflict of interest. Attorney G. Kenneth Gilleland was then appointed to represent the petitioner. Ultimately, the petitioner was not called as a witness in the trial of the other case. At that point, Attorney Gilleland suggested that Attorney Miller resume his representation of the petitioner. When he expressed a reluctance to do so, Gilleland, an attorney with a private practice, filed a motion for a continuance of the trial in which he pointed out the public defender's reluctance to resume representation for the petitioner. Some five months before the actual trial took place, the trial judge ruled that the conflict of interest no longer existed and directed that the public defender represent the petitioner. One week before trial, the petitioner refused to communicate with the public defender, who filed a motion to withdraw on the day before trial. When advised by the trial judge that his only alternative might be to represent himself, the petitioner agreed to proceed with the public defender as counsel. At the conclusion of the evidentiary hearing, the post-conviction court found that there was no evidence of the conflict of interest and

further commented as follows:

Once the potential for a conflict had gone away, since we can't find there was a conflict, Mr. Miller was reappointed. But it's interesting in this case because Mr. Gilleland, who had been appointed as counsel, remained on the case, participated in the trial, made statements to the court, at least during the motion hearing. He was present during the entire trial sitting at counsel table. So, in effect, Mr. Alexander had two attorneys to aid him in this very serious case.... That was explored in dialogue with Judge Holt and with Mr. Gilleland, who pointed out that the principal problem that Mr. Alexander had was concerning some testimony of his daughter. But that upon being assured that Mr. Gilleland would be present during the trial, Mr. Alexander chose to proceed.

(Emphasis added).

The post-conviction court concluded that there was no conflict of interest as to the public defender and that the public defender was not ineffective for having failed to appeal the trial court's decision to deny his motion to withdraw. The post-conviction court also determined that relief was not warranted because the petitioner had additional counsel who was clearly free of any conflict of interest.

I

Initially, the petitioner claims that there was an actual conflict of interest. He argues that the Code of Professional Responsibility prohibits a lawyer from "multiple employment if the exercise of professional judgment in behalf of a client will be or is likely to be adversely affected by the lawyer's representation of another client, or if it would be likely to involve the lawyer in representing different interests...." Tenn. Sup. Ct. Rule 8, DR 5-105(B).

There is a constitutional right to the effective assistance of counsel at all critical stages of criminal prosecution. Tenn. Const. art. I, § 9; Powell v. Alabama, 287 U.S. 45 (1932). In order for the petitioner to be granted relief on grounds of ineffective counsel, he must establish that the advice given or the services rendered was not within the range of competence demanded of attorneys in criminal cases and that, but for his counsel's deficient performance, the result of his trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984);

Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975).

The petitioner must prove factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f). On appeal, the burden is on the petitioner to show that the evidence preponderates against the findings of the trial judge. Clenny v. State, 576 S.W.2d 12 (Tenn. Crim. App. 1978). The findings in the trial court on questions of fact may not be reversed on appeal unless the evidence preponderates otherwise. Graves v. State, 512 S.W.2d 603 (Tenn. Crim. App. 1973).

Generally, the general conduct of attorneys is governed by the Code of Professional Responsibility. While the disciplinary rules "do not fully equate with the body of law governing courts, trials and the administration of the justice system," the Code often provides guidance in our determinations. State v. Willie Claybrook, No. 3 (Tenn. Crim. App., at Jackson, Feb. 5, 1992), perm. to appeal denied, (Tenn. 1992); see State v. Jones, 726 S.W.2d 515, 519 (Tenn. 1987); State v. Mosher, 755 S.W.2d 464 (Tenn. Crim. App. 1988).

An actual conflict of interest is usually defined in the context of one attorney representing two or more parties with divergent interests. A test for determining a disqualifying conflict in that situation is whether the attorney "made a choice between possible alternative courses of action [that were] helpful to one client but harmful to the other." Thomas v. Foltz, 818 F.2d 476, 481 (6th Cir.), cert. denied, 484 U.S. 870 (1987)(citing United States v. Mers, 701 F.2d 1321 (11th Cir. 1983)). The term has been described as "a situation in which regard for one duty tends to lead to [the] disregard of another." State v. Reddick, 230 Neb. 218, 222, 430 N.W.2d 542, 545 (1988); see Gardner v. Nashville Housing Authority, 514 F.2d 38 (6th Cir.), cert. denied, 423 U.S. 928 (1975). In Ford v. Ford, 749 F.2d 681, 682 (11th Cir.), cert. denied, 474 U.S. 909 (1985), the court declared a conflict of interest when an "attorney was placed in a position of divided loyalties." Once an actual conflict of interest is shown, disqualification is the appropriate remedy. See Moran

v. State, 4 Tenn. Crim. App. 399, 472 S.W.2d 238 (1971).

The right to counsel requires complete devotion to the interest of the defendant. State v. Knight, 770 S.W.2d 771 (Tenn. Crim. App. 1988). When counsel was unable to provide a "zealous representation ... unfettered by conflicting interests," there has been a breach of the right to the effective assistance of counsel. State v. Thompson, 768 S.W.2d 239 (Tenn. 1989). In Cuyler v. Sullivan, 446 U.S. 335 (1980), the United States Supreme Court developed a separate standard for cases involving a conflict of interest. Because there is a breach of loyalty, prejudice is presumed.

Multiple representation is not necessarily prejudicial. The prejudice is presumed only if the defendant establishes that his counsel "actively represented [a] conflicting interest" and that "an actual conflict of interest adversely affected his ... performance." Cuyler v. Sullivan, 446 U. S. at 350. The burden is on the petitioner to prove inconsistent interests which resulted in "a choice between possible alternatives of action helpful to one client but harmful to the other." Thomas v. Foltz, 818 F.2d 476, 481 (6th Cir. 1987).

In this instance, the petitioner did not testify at the trial in the other case. That trial was concluded months before the trial in this case. There is no suggestion in this record how the cases were related or what choice the public defender might have made that was harmful to the petitioner. Absent proof of divided loyalties, it is impossible for this court to conclude that there was an actual conflict of interest. Moreover, the petitioner had the active representation of another attorney from January of 1993 throughout the trial of the case in October of that year. The petitioner makes no allegation that Attorney Gilleland had any conflict of interest. From all of this, it is our conclusion that there is no merit to the argument.

II

Secondly, the petitioner argues that the trial court erred by failing to

order a competency hearing the day before the trial began. In support of his claim, the petitioner cites Berndt v. State, 733 S.W.2d 119 (Tenn. Crim. App. 1987), wherein this court held that "[w]hen it is believed an accused is incompetent to stand trial, it is the duty of the court to conduct a hearing for the purpose of inquiring into the competence of the accused...." In support of his claim that the trial court should have questioned his competency to stand trial, the petitioner asserts that he had been treated with Prednisone and received emergency room treatment for confusion only five weeks prior to trial. He suggested that Prednisone may have side effects such as mood changes, personality changes, severe depression, insomnia, or psychotic behavior. The petitioner asserts that his refusal to communicate with the public defender during the week prior to trial substantiates his claim.

In Dusky v. United States, 362 U.S. 402 (1960), the Supreme Court ruled that the defendant is competent if he has sufficient ability to consult with his lawyer with a reasonable degree of rational understanding and a reasonable and factual understanding of the proceedings. In Mackey v. State, 537 S.W.2d 704 (Tenn. Crim. App. 1975), this court determined that the defendant must be able to understand the nature and objects of the proceedings against him, must be able to consult with counsel, and must be able to assist in the preparation of his defense.

The burden is on the defendant to establish his incompetency to stand trial by a preponderance of the evidence. State v. Oody, 823 S.W.2d 554 (Tenn. Crim. App. 1991). The determination of competency is within the sound discretion of the trial court. State v. Howard, 926 S.W.2d 579 (Tenn. Crim. App. 1996). On appeal, the question is whether the trial judge, who failed to conduct an evidentiary inquiry, should have experienced doubt with respect to the defendant's competency to stand trial. Berndt v. State, 733 S.W.2d at 122.

The record establishes that the petitioner was arrested on July 29, 1992. Despite continuous representation of counsel, the petitioner did not raise the question until October 19, 1993, the day before the trial began. Attorney Gilleland

conceded that he made no attempt to raise the issue until the day before trial. The unavoidable inference is that he had no reason to do so. The public defender testified that the petitioner understood the legal proceedings, was aware of the penalties associated with the offense, and did not exhibit any indication of incompetence. He did not notice any side effects as a result of the petitioner's medication, did not detect any difference in the petitioner's behavior throughout the interrupted course of his representation, and was not advised by the petitioner's family of any potential mental issues. The public defender explained his rationale for seeking a competency evaluation as based upon the petitioner's failure to communicate during the week before trial. He believed that the communication breakdown was actually the result of a difference of opinion over certain of the evidence the state intended to present at trial. The public defender testified that the petitioner communicated throughout the course of the trial with both of his counsel. At the hearing on the motion for competency evaluation, the trial judge saw and heard the petitioner firsthand and concluded that the real problem was the petitioner's perception that the public defender had replaced Attorney Gilleland as counsel. The petitioner testified in his own defense at trial, thereby providing the trial judge with the clear opportunity to reconsider his prior ruling.

In summary, it is our view that the trial court did not abuse its discretion by denying the motion to seek a competency evaluation. Thus, the petitioner was not denied due process of law and his counsel was not ineffective for having failed to present the issue on appeal.

Accordingly, the judgment is affirmed.

Gary R. Wade, Presiding Judge

CONCUR:

David H. Welles, Judge

David G. Hayes, Judge