IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1999 SESSION

STATE OF TENNESSEE,	*	C.C.A. # 03C01-9902-CR-00072
Appellee,	*	GREENE COUNTY
VS.	*	Hon. James E. Beckner, Judge
JAMES ALAN MORGAN,	*	(Post-Conviction)
Appellant.	*	

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OPINION FILED:_____

AFFIRMED

GARY R. WADE, PRESIDING JUDGE

OPINION

The petitioner, James Alan Morgan, appeals the trial court's denial of post-conviction relief. The issues presented for our review are whether the petitioner's voluntary manslaughter conviction was proper and whether he was denied the effective assistance of counsel, particularly during the sentencing hearing.

We affirm the judgment of the trial court.

Originally charged with the second degree murder of the victim, Randy Hurd, the petitioner was convicted of voluntary manslaughter, a Class C felony. The trial court imposed a Range I sentence of four years. The petitioner was fined $10,000.00. This court affirmed the conviction and sentence on direct appeal. State v. James Alan Morgan, No. 03C01-9408-CR-00305 (Tenn. Crim. App., at Knoxville, Mar. 13, 1997).

On November 2, 1998, the petitioner filed a petition for post-conviction relief, alleging that he was not properly convicted of voluntary manslaughter and that he had been denied the effective assistance of counsel. The petitioner specifically alleged that the trial court should not have instructed the jury on the lesser offense of voluntary manslaughter. Because the grand jury had returned indictments for both second degree murder and voluntary manslaughter, the district attorney general voluntarily dismissed the voluntary manslaughter charge before trial. The petitioner contends that the voluntary manslaughter conviction "cannot stand" because "a dismissal means what it says." The motion and order, signed by the district attorney general and entered by the trial judge on May 4, 1993, provides as follows:

> Comes the State of Tennessee, and moves this Honorable Court to allow the State to dismiss, with prejudice, the alternative indictment for voluntary manslaughter returned against the above styled defendant.

The petitioner's claims of ineffective assistance of counsel relate to trial counsel's performance at the sentencing hearing and on appeal. He contends that his trial counsel failed to present witnesses, failed to file mitigating factors, failed to object to enhancement factors, and failed to ask for judicial diversion, probation, or any form of alternative sentencing. The petitioner also insists that his counsel inexplicably failed to raise the sentencing issue on direct appeal.

The trial court denied relief on both grounds. It ruled that the state may present charges to the grand jury in the alternative, that involuntary manslaughter was a lesser included offense of the second degree murder charge, and that there was no double jeopardy issue. It concluded "whether it's a no true bill by the grand jury or a dismissal by the court of one of the alternatives chosen by the grand jury ... [it] is a procedural matter, not a substantive issue." As to the sentencing issue, the trial court observed that the four-year sentence imposed was in the lower half of the range and the evidence would have actually supported a conviction for second degree murder which, of course, would have resulted in a much higher sentence. It ruled that there was no deficiency in the performance of counsel because neither additional proof nor consideration of other sentencing alternatives would have changed the sentence:

> The file shows exhaustive work on behalf of the [petitioner].... Truly in the preparation of this case no stone was left unturned. The work is absolutely exhaustive. The petitioner has received the benefit of superior representation, certainly meeting the standards required by law for effective assistance of counsel.

I

Initially, the petitioner contends that his conviction for voluntary manslaughter was improper. Although there were two indictments, there was obviously only one crime. Constitutional guaranties against double jeopardy would have precluded convictions for both second degree murder and involuntary manslaughter, if based upon the same evidence. See State v. Denton, 938 S.W.2d 373 (Tenn. 1996); See also State v. Black, 524 S.W.2d 913, 915 (Tenn. 1975) (stating that "one convicted of [a] higher charge could not also be convicted of a less serious but included offense"). Our supreme court has stated the following:

> [D]ouble jeopardy violations arise *only* when an individual is twice placed in jeopardy for the same offense. Customarily, in jury proceedings, jeopardy attaches when the jury is sworn, and in nonjury proceedings, jeopardy attaches when the first witness testifies. A defendant must be put in jeopardy at least once, "for only if that point has once been reached does any subsequent prosecution of the defendant bring the guarantee against double jeopardy even potentially into play."

State v. Pennington, 952 S.W.2d 420, 422 (Tenn. 1997) (quoting Crist v. Bretz, 437 U.S. 28 (1978)) (emphasis in original) (citations omitted).

Here, the state voluntarily dismissed the charge of voluntary manslaughter well before jeopardy attached. Because the jury had not been sworn, jeopardy had not yet attached and there was no bar to the second degree murder charge or to the subsequent conviction for the lesser included offense of voluntary manslaughter. Pennington, 952 S.W.2d at 422.

Moreover, an indictment charging the crime of second degree murder necessarily includes charges on all lesser included offenses. Tenn. R. Crim. P. 31(c); Strader v. State, 362 S.W.2d 224 (Tenn. 1962); State v. Alcoin, 741 S.W.2d 135 (Tenn. Crim. App. 1987). An indictment has three purposes: (1) it must inform

the defendant of the precise charges; (2) it must enable the trial court upon conviction to enter an appropriate judgment and sentence; and (3) it must protect the defendant against double jeopardy. James v. State, 385 S.W.2d 86 (Tenn. 1964). There is no constitutional right to have all lesser included offenses set forth in any indictment. Id.

Tenn. Code Ann. § 40-18-110 requires instructions to the jury as to all the law of each offense included in the indictment when there are two or more grades or classes of the offense. There is a duty to charge the jury on lesser included offenses whether requested to do so or not. Tenn. Code Ann. § 40-18-110(a). The guiding principle is that if there is evidence in the record from which the jury could have concluded that the lesser included offense was committed, there must be an instruction for the lesser offense. State v. Wright, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981).

Here, the petitioner was charged with second degree murder, which is defined as "a knowing killing of another...." Tenn. Code Ann. § 39-13-210(a). Voluntary manslaughter, a lesser included offense, is defined as the "intentional or knowing killing of another in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner." Tenn. Code Ann. § 39-13-211(a); See Howard v. State, 506 S.W.2d 951 (Tenn. Crim. App. 1973). The trial judge had a duty to instruct the jury as to voluntary manslaughter, as a lesser included offense of second degree murder. To do otherwise, under the facts presented at trial, would have been erroneous. The petitioner is not entitled to relief on these grounds.

II

Next, the petitioner argues that he was denied the effective assistance of counsel. He claims specifically that the trial counsel was deficient in the following respects:

> (1) by failing to object to enhancement factors used to determine his sentence;
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> (2) by failing to present mitigating factors;
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> (3) by failing to call witnesses at the sentencing hearing;
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> (4) by failing to request alternative sentencing; and
>
> (5) by failing to appeal the sentence.

In a post-conviction proceeding filed after May 10, 1995, the appellant has the burden of establishing his claims by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f). Moreover, the findings of fact of a trial court have the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against its judgment. Davis v. State, 912 S.W.2d 689, 697 (Tenn. 1995). When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must first establish that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Second, he must show that the deficiencies "actually had an adverse effect on the defense." Strickland v. Washington, 466 U.S. 668, 693 (1984). Should the petitioner fail to establish either factor, he is not entitled to relief. In reviewing a claim of ineffective assistance of counsel, 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). Moreover, the burden is on the petitioner to show that the evidence preponderates against the findings of fact made by the trial court. Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978), cert. denied 441 U.S. 947 (1979).

The petitioner received a Range I sentence of four years in the Department of Correction. The applicable range was three to six years. The trial court found the existence of three enhancement factors: the petitioner used a deadly weapon during the commission of the offense, the petitioner had no hesitation about committing a crime when the risk to human life was high, and the crime was committed under circumstances under which the potential for bodily injury to a victim was great, Tenn. Code Ann. § 40-35-114(9), (10), and (16). In mitigation, the trial court found that the petitioner had acted under strong provocation, Tenn. Code Ann. § 40-35-113(2), and that the petitioner had no prior history of criminal activity. The state recommended a four-year sentence.

The petitioner complains that his attorneys were ineffective for failing to object to the enhancement factors applied to his sentence. The record does not reflect any basis for an objection to Tenn. Code Ann. § 40-35-114(9) because the petitioner used a firearm in the murder of the victim. Furthermore, the evidence established that the petitioner shot the victim while the victim's fiancee was standing in close proximity. Tenn. Code Ann. § 40-35-114(10), relating to a high risk to human life, may be supported by risk to persons other than a victim of the convicted offense. State v. Sims, 909 S.W.2d 46 (Tenn. Crim. App. 1995). Therefore, the application of this factor was proper.

In 1993, this court ruled that Tenn. Code Ann. § 40-35-114(16), which

relates to a high risk of bodily injury, is inherent in any homicide. State v. David Keith Daughtery, No. 03C01-9203-CR-00082 (Tenn. Crim. App., at Knoxville, August 27, 1993). More recently, a panel from this court specifically ruled that it is not proper to apply this factor based on risk to others. State v. Charles Justin Osborne, No. 01C01-9806-CC-00246 (Tenn. Crim. App., at Nashville, May 12, 1999). Only months after the trial of this case, another panel of this court approved the application of Tenn. Code Ann. § 40-35-112(16) "where individuals other than the victim are in the area and are subject to injury." State v. Sims, 909 S.W.2d 46 (Tenn. Crim. App. 1995) (citing State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App. 1994)). Because a challenge to the application of this enhancement factor might have been successful, despite the conflict in authority, trial counsel may have been deficient for having failed to present the issue.

At the sentencing hearing, however, the trial judge placed a great amount of emphasis on Tenn. Code Ann. § 40-35-112(9), dealing with the use of a deadly weapon:

> [I]t is a significant enhancement factor that a handgun was used. It seems that more and more people are being killed in this country and this county by handguns .... [H]andguns are abused widely, and the violence that results from the death of those that are victims of the use of handguns is alarming ... so I think that is a significant enhancement factor.

It is apparent that the trial court afforded great weight to the presence of enhancement factor nine. In applying factors 10 and 16, the trial judge observed that the two factors "overlap a great deal in this case," thereby limiting the effect of factor 16 on the sentence imposed. The trial judge also concluded that the only "significant" mitigating factor was the petitioner's lack of a prior record. While the trial judge did believe that the petitioner committed the crime while under strong provocation, Tenn. Code Ann. § 40-35-113(2), he concluded that "the jury has

mitigated that factor to where it's no longer a viable consideration for me" by convicting the petitioner of voluntary manslaughter rather than second degree murder. The weight to be given to enhancement and mitigating factors is left to the discretion of the trial judge. State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). Based on the apparent weight given to the properly applied enhancement factors and the finding of only one significant mitigating factor, the sentence of four years was not erroneous, notwithstanding any possible misapplication of Tenn. Code Ann. § 40-35112(16).

At the evidentiary hearing, the petitioner testified that his attorneys did not present any proof of mitigation at the sentencing hearing. He claimed that he "got up and made a small statement of remorse and that's all that I did." The petitioner insisted that he could have presented the testimony of family, friends, and employers who would have testified that he had a good employment record and no prior criminal record. At the evidentiary hearing, he submitted affidavits from his ex-wife, father, and mother which indicated they would have testified about the petitioner's character, employment record, potential for rehabilitation, and "other positive aspects of his life" had they been asked to do so.

Jerry Laughlin, one of the petitioner's trial attorneys, testified that in his view the only potential mitigation evidence was the degree of provocation prior to the petitioner's commission of the offense. He recalled that the evidence of provocation was fully developed in the presentation of the defense and that the trial court properly considered the evidence in sentencing. Trial counsel further stated that the petitioner's favorable employment history and lack of prior criminal record were not disputed and that the trial court was well aware of those factors prior to sentencing. Regarding mitigation witnesses, the petitioner's trial counsel explained

that it was not his custom to call close relatives to testify at a sentencing hearing.

> The trial court ruled as follows:
>
> > This court considered many of the things that are complained of. This Court noted that the defendant had no record. It is correctly stated that mothers, fathers, brothers, sisters, uncles, and aunts usually make little difference in any court's decision about a case, and that's not because the Court discredits them. It's because we all love our children, our brothers, our sisters, and it's going to be very difficult for anybody to testify negatively about the people that are closest to us. Work record does make a difference in confinement issues, but normally is not one of those mitigating factors that would reduce the sentence.... [H]ad all the evidence been presented today and it's good the family has stood behind the defendant and friends have stood with him and none of these things can be considered by the Court for the purpose of now changing its mind about the sentence. The only reason that can be considered is whether or not it should have been presented by defense counsel and [if] failure to present it is a deficiency. <u>It can be argued that it should have been, but I do not find that it was a deficiency not to do so because, without any question, it would have made no difference in the result of sentencing in this court....</u>

(emphasis added).

In our view, the petitioner has failed to establish prejudice. The transcript of the sentencing hearing reflects that the trial court considered as mitigating factors the degree of provocation and the absence of a prior criminal record. While the petitioner may have been able to present testimony regarding his character from friends, family members, and employers, it is most important that the trial judge who imposed the original sentence ruled that any such testimony would not have changed the result. In our view, the circumstances warranted a sentence of one year above the minimum, even in consideration of the misapplication of one of the enhancement factors.

The petitioner also contends that trial counsel was deficient for failing to request probation or another form of alternative sentencing. The record, however, demonstrates that the trial court did consider the issue. Thus, any failure on the part of trial counsel to make a formal request for alternative sentencing would not have been prejudicial. At the sentencing hearing, the trial court observed as follows:

> You do not qualify for alternative sentencing and it's my judgment no probation would be granted because where the death of a person results from the criminal acts of a defendant, the defendant has a great burden ... to show that probation is an appropriate alternative to sentencing and I do not believe that's shown by any of the facts or circumstances in this case. There is also a great need ... to deter people recklessly using handguns to kill people. I realize the jury found there was provocation, and certainly the evidence supports that, but because there is such an alarming incidence of people being killed with handguns I think deterrence is an important factor in the denial of probation.

At the conclusion of the evidentiary hearing, the trial judge acknowledged that he had considered alternative sentencing and probation at the sentencing hearing and that even if witnesses had been called to testify regarding the petitioner's character, the results would not have been different. The serious nature of the circumstances of a crime often warrant the denial of probation. State v. Kyte, 874 S.W.2d 631 (Tenn. Crim. App. 1993). In this instance, it is evident that the trial court had a sound basis to deny probation or other alternative sentence regardless of any more persuasive argument trial counsel might have made. State v. Kyte, 874 S.W.2d 631 (Tenn. Crim. App. 1993).

Finally, the petitioner argues that counsel was ineffective for failing to challenge the sentence on appeal. The petitioner's attorneys presented two issues for appellate review: the sufficiency of the evidence and the admissibility of portions

of a taped interview between the petitioner and the police. At the evidentiary hearing, the petitioner testified that he "felt like it was [his] attorney's obligation to appeal the sentence regardless of what it was since he appealed other matters anyway." When asked at the hearing why he had not challenged the sentence on appeal, attorney Laughlin answered that the enhancement factors could not be disputed and the trial court was "justified in imposing a sentence of four years." It was his opinion that there was no misapplication of the sentencing law.

The trial judge concluded that the sentence imposed was in the lower half of the applicable range. He further ruled that had the petitioner been convicted of second degree murder, rather than the lesser included offense of voluntary manslaughter, the evidence would have been sufficient to sustain that conviction on appeal. The trial judge commented as follows:

> [He has] raised an appeal. It does become tactical considerations rather than issues of deficiency and, again, no different result would have occurred, if anything different had been done tactically or otherwise.

In our view, the petitioner has failed to establish that he was prejudiced by the failure of his trial counsel to challenge the sentence on direct appeal. Nothing in the record suggests that this court would or should have changed the four-year term even in view of the additional testimony provided in the post-conviction proceeding.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Presiding Judge

CONCUR:

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Jerry L. Smith, Judge

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James Curwood Witt, Jr., Judge