

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1999 SESSION

FILED

February 2, 2000
Cecil Crowson, Jr.
Appellate Court Clerk

EDWARD THOMPSON,	*	C.C.A. # 03C01-9811-CC-00414
Appellant,	*	COCKE COUNTY
VS.	*	Hon. Rex Henry Ogle, Judge
STATE OF TENNESSEE,	*	(Post-conviction)
Appellee.	*	

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, PRESIDING JUDGE

OPINION

The petitioner, Edward Thompson, appeals the trial court's denial of post-conviction relief. The single issue presented for our review is whether the petitioner's trial counsel was ineffective.

We find no error and affirm the judgment of the trial court.

The facts upon which the petitioner was convicted of attempted second degree murder, aggravated kidnaping, and theft of over \$1,000 are as follows:

On October 20, 1993, [the petitioner] and the victim, Kevin Hall, went to the Woodzo Drive-In in Newport, Tennessee to see a showing of the Beverly Hillbillies. [The petitioner] and Hall were friends and traveled to the movie in Hall's car. Hall testified that both he and [the petitioner] were sniffing toluene that evening. Toluene is a paint thinning substance commonly called "tuleo...." En route to the movie, the friends stopped at a liquor store and purchased vodka and orange juice, which they both drank during the movie. Testimony also reflects that [the petitioner] was taking pills of an unknown nature prior to the drive-in visit.

During the movie, [the petitioner] spilled his container of tuleo in Hall's car and asked Hall to take him home to get more tuleo. Hall refused to leave the movie and a brief argument ensued. [The petitioner] left the vehicle, but shortly returned and sat down in the passenger's seat of the car. Hall continued to watch the movie. Moments later, he heard a gunshot and realized that blood was running down the side of his face. Hall had been shot in the head by [the petitioner]. [The petitioner] quickly exited the car, entered the driver's side and shoved Hall into the passenger's side floorboard. He drove the car from the drive-in, at which time Hall said that he "begged him to take me to the hospital."

[The petitioner] sped through town running red lights and began traveling on the Asheville Highway. He opened the passenger side door and tried to shove Hall out of the door while the car was still moving. Hall's foot got caught under the dashboard and his body was partially hanging out of the car. His buttocks were dragging the pavement when [the petitioner] stated that he was going to kill him and fired another shot. The second shot missed Hall. [The petitioner] finally stopped the car near the French Broad Tavern, where Mr. Bill Loveday came to Hall's aid.

Mr. Loveday testified that while sitting at the door of the French Broad Tavern, he saw a car go by that was dragging a person out the passenger's side door. The

car stopped and he rushed to help the person. Mr. Loveday stated that he immediately recognized [the petitioner] and asked him what was wrong. [The petitioner] stated that he had shot this man and was going to shoot him again. Mr. Loveday told [the petitioner] not to shoot again and dragged Hall from the car. [The petitioner] drove off from the tavern and Loveday sought medical assistance for Hall.

State v. Edward Thompson, Cocke County, No. 03C01-9503-CR-00060, slip op. at 2-3 (Tenn. Crim. App., at Knoxville, Dec. 12, 1996), app. denied, (Tenn., June 30, 1997).

In 1994, the petitioner was found guilty of one count of attempted second degree murder, one count of aggravated kidnaping, and one count of theft of property over \$1,000. His sentences were twenty years, twelve years, and four years, respectively. The theft and kidnaping sentences were to be served concurrently but consecutive to the attempted second degree murder sentence, for an effective term of thirty-two years. The convictions were upheld on direct appeal. State v. Edward Thompson, Cocke County, No. 03C01-9503-CR-00060 (Tenn. Crim. App., at Knoxville, Dec. 12, 1996). Our supreme court denied application for permission to appeal on June 30, 1997.

On September 7, 1995, the petitioner filed this petition for post-conviction relief alleging several instances of ineffective assistance of counsel. He also contended that the state withheld exculpatory information and was guilty of other misconduct. The petitioner filed an amended petition on August 11, 1997, alleging ineffective assistance of counsel, a violation of his due process and equal protection rights, an illegal indictment, and violation of his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution. The trial court appointed counsel in June of 1998. A second amended petition included claims of ineffective assistance of counsel for a variety of specific reasons.

At the evidentiary hearing, the petitioner testified that his trial counsel, Susanna Thomas, met with him at the jail to discuss a possible plea bargain, but that she never met with him at the Northeast Correctional Facility. He stated that he

received only one letter from Ms. Thomas while he was at the correctional facility. The petitioner testified that he informed trial counsel that he and the victim struggled during an argument, causing the gun to accidentally discharge. He claimed that she never advised him of his right to testify.

Ms. Joy Parton, an eyewitness to the offense, testified that she gave a statement to the police, but that the petitioner's trial counsel never contacted her.

John Gunter testified that several days prior to the shooting the victim pointed a gun and threatened to shoot him. Gunter stated that the petitioner might have been present during the incident but specifically recalled that he was the only individual the victim threatened. He also testified that he had not been contacted by anyone about being a witness at the trial of the petitioner.

Susanna Thomas testified that she met with the petitioner on at least five occasions to prepare for trial and that the petitioner claimed that the shooting was accidental, not the result of self-defense. She further testified that she spoke with the petitioner about his right to testify in his own defense but informed him that it would "not improve our position" because it would enable the jury to hear about his prior convictions. She stated that the petitioner made the ultimate choice not to testify. She believed that his best option was to accept a plea agreement of twenty-five years with a thirty percent release eligibility because she felt it was a preferable option to the likely jury verdict and resultant sentence. It was trial counsel's opinion that there was a high probability of a conviction for attempted first degree murder. The petitioner rejected the plea agreement.

Ms. Thomas recalled that there was no proof in the record which would have substantiated a theory of self-defense. Rather, it was her belief that the "verdict reflected the accident theory because [the jury] reduced the charge from premeditated to second degree attempted murder." She testified that she presented no witnesses on the petitioner's behalf because "there weren't any." She explained

that her theory of defense was to "try to mitigate and give some reasonable explanation for why he shot Mr. Hall." She observed that the "factual problem that I had with the attempted first degree murder was not limited to the original shooting but to the conduct that came afterwards at the French Broad Tavern."

Ms. Thomas testified that she spoke with eyewitness Joy Parton by telephone before the trial, but that she did not meet Ms. Parton in person. She claimed that Ms. Parton told her that she heard an argument and a gunshot coming from the car parked next to her at the drive-in and that the driver then hurriedly drove away. Trial counsel conceded that she did not interview Kathy Derrick, who was also present when the shooting occurred. She explained that according to the statement she had provided police, Ms. Derrick was unable to identify anyone. At trial, Ms. Derrick testified that she heard a gunshot, saw that the victim had been injured, and then observed the petitioner push the victim out of the driver's seat and drive away. Trial counsel admitted that she could not recall whether she had interviewed either Hope or Gary Watts, who were also witnesses to the shooting, but she claimed that she had talked to everyone else listed on the indictment.

Ms. Thomas acknowledged that she knew of the incident involving Gunter and the victim. Gunter, however, was not called to testify at trial because trial counsel did not believe his testimony would be admissible. She stated that she did not believe that the petitioner was present when the incident occurred and that it was not relevant.

At the conclusion of the proceeding, the trial court ruled as follows:

And so I find that [trial counsel] did go up there. And [she] is a very experienced and in fact is one the best trial lawyers in this Circuit and I have watched her and she's not afraid to represent her clients. And she has advised him and did advise him that if he took the witness stand that he faced these problems and she advised him not to do it and he didn't do it. And he rolled the dice and he lost. And I find that there is no ineffective assistance of counsel at all in this record and I dismiss the Petition.

In this appeal, the petitioner alleges only the issue of ineffective assistance of counsel. He contends that his trial counsel was ineffective for having failed to properly advise him as to his right to testify in his own behalf. He submits that his trial counsel failed to discuss possible defenses that could have been presented to the jury. He also argues that his trial counsel was deficient for failing to interview all of the witnesses listed on the indictment.

In order for the petitioner to be granted relief on grounds of ineffective assistance of counsel, he must establish that the advice given or the services rendered were 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 likely have been different. Strickland v. Washington, 466 U.S. 688 (1984); Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975).

This court may not second-guess the tactical and strategic choices made by trial counsel unless those choices are uninformed because of inadequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Trial counsel may not be deemed ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276 (Tenn. Crim. App. 1980). The reviewing courts must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance. Strickland, 466 U.S. at 690.

The findings of fact made by the trial court are conclusive and will not be disturbed on appeal unless the evidence contained in the record preponderates against them. Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988); Graves v. State, 512 S.W.2d 603 (Tenn. Crim. App. 1973). The burden is on the petitioner to prove his allegations by a preponderance of the evidence. McGee v. State, 739 S.W.2d 789 (Tenn. Crim. App. 1987); Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978).

In our view, the petitioner has failed to establish that trial counsel's performance was deficient. Ms. Thomas maintained a reasonable level of communication with the petitioner. She explained to the petitioner his options based on the evidence presented at trial and adequately informed him of his right to testify. The petitioner was aware that if he chose to testify the state could introduce his prior criminal record into evidence, a circumstance that might cause a more harsh result. Trial counsel communicated to the petitioner her belief that his testimony would not substantially benefit his defense and the introduction of his prior record would be particularly damaging. Ultimately, the decision not to testify was made by the petitioner. Because he did not claim self-defense, it is difficult to imagine how his version of the events would have helped his cause. In our view, the record supports the trial court's conclusion that the guilty verdicts were not the result of any deficiency in preparation by trial counsel. Moreover, trial counsel claimed that she had interviewed Ms. Parton by telephone. Ms. Parton's testimony at trial and at the evidentiary hearing was similar to that reported by trial counsel. While Ms. Parton maintained that she had not been contacted by trial counsel, it is not apparent how her testimony, even if it was not known to the defense, might have assisted the petitioner.

The failure to interview Ms. Derrick, who was listed on the indictment, is a matter of concern. The evidence at the evidentiary hearing established that trial counsel relied on the statement Ms. Derrick had given to the police. Yet, Ms. Derrick had informed officers that she was unable to identify anyone. Because her trial testimony was similar to the statement that she had given to the police, it cannot be said that a pretrial interview of the witness might have caused a different result.

Trial counsel admitted that she was unable to recall if she had interviewed Hope or Gary Watts. Neither witness was called at petitioner's trial or at the evidentiary hearing. The record does not reveal that their testimony might have been helpful to the petitioner.

Finally, trial counsel explained that she did not call John Gunter to testify at trial because she did not believe his testimony would be admissible. She did not believe that the incident involving the victim and Gunter was relevant to the case. The petitioner contends that Gunter's testimony would have allowed him to set up a theory of self-defense.

The use of specific acts to prove first aggression is character proof of the victim's propensity for violence. Specific violent acts of the victim may be admissible to corroborate the defendant's theory that the victim was the first aggressor. However, evidence of a victim's prior violent acts is not admissible to prove that the victim acted in accordance with a specific character trait. State v. Ruane, 912 S.W.2d 766, 779 (Tenn. Crim. App. 1995) (citing State v. Furlough, 797 S.W.2d 631, 649 (Tenn. Crim. App. 1990)). This kind of evidence is not authorized on direct testimony under the Tennessee Rules of Evidence. N. Cohen, D. Paine, and S. Sheppard, Tennessee Law of Evidence, § 404.4 (3rd ed. 1995). Rules 404 and 405 of the Tennessee Rules of Evidence would have limited the use of the incident involving Gunter to cross-examination of the victim. Thus, the evidence would not have been admissible under a theory of first aggression if offered for anything more than mere corroboration and would have been admissible only on cross-examination. See State v. Curtis Anthony Miller, No. 01C01-9309-CR-00329 (Tenn. Crim. App., at Nashville, June 2, 1994); Ruane, 912 S.W.2d at 779-80.

There is a distinction, however, between evidence of prior acts of violence by the victim used to corroborate the defense theory that the victim was the first aggressor and that used to establish the defendant's fear of the victim. If the defendant is aware of the victim's prior violent acts, he may so testify. State v. Hill, 885 S.W.2d 357, 361 (Tenn. Crim. App. 1994), perm. to app. denied, (Tenn. 1994). If the defendant was unaware of the prior acts of violence by the victim, as is the more likely case here, the evidence is admissible for corroborative purposes only.

Moreover, a prerequisite to the admission of such evidence has been

that the issue of first aggressor be raised by the evidence. Hill, 885 S.W.2d at 361; see also State v. Curtis Anthony Miller, No. 01C01-9309-CR-00329 (Tenn. Crim. App., at Nashville, June 2, 1994), perm. to appeal denied, (Tenn. 1994). "Self-defense must be at issue by the evidence in the record, not by the words and statements of counsel." State v. Laterral Jolly, No. 02C01-9207-CR-00169 (Tenn. Crim. App., at Jackson, Dec. 15 1993), perm. to appeal denied, (Tenn. 1994). By the use of the Hill standard, the incident involving the victim and Gunter would have been admissible only for corroborative purposes, that is, for the limited purpose of supporting any claim by the petitioner of self-defense. Because the petitioner did not indicate to his trial counsel that the shooting occurred in self-defense and claimed that the shooting was accidental, the testimony was irrelevant. Nothing in the evidentiary hearing suggests a viable claim of self-defense, despite the petitioner's general claim that Gunter's testimony might have given rise to a claim of self-defense. In the absence of a basis for a self-defense theory, trial counsel correctly concluded that Gunter's testimony would not have been admissible. In our view, there was no deficiency of performance.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Presiding Judge

CONCUR:

David H. Welles, Judge

David G. Hayes, Judge