IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH SESSION, 1995

RANDALL HARRELL,	)	**C.C.A. NO. 03C01-9410-CR-00392**
	)	
Appellant,	)	
	)	
	)	**WASHINGTON COUNTY**
VS.	)	
	)	**HON. THOMAS J. SEELEY**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-Conviction)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE CRIMINAL COURT OF WASHINGTON COUNTY

FOR THE APPELLANT:

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and
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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Petitioner appeals as of right from the trial court's denial of his petition for post-conviction relief. He seeks relief from his conviction by a jury of being a habitual offender. He was sentenced to life imprisonment for his habitual offender conviction. His sole issue is that he received ineffective assistance of counsel at trial. The trial court denied the Petitioner's petition. We affirm the trial court's judgment.

The Petitioner was convicted on January 30, 1986. After he was convicted of second degree burglary and of being a habitual offender, he appealed his conviction to this court. State v. Randall Harrell, No. 219, Washington County (Tenn. Crim. App., Knoxville, filed Jul. 9), cert. denied, (Tenn. 1987). This court affirmed his conviction and modified his sentence to reflect a single sentence of life as a habitual offender. Id. at 11. The Tennessee Supreme Court denied the Petitioner the opportunity to appeal this decision on October 5, 1987. The Petitioner filed a post-conviction petition on September 27, 1988 on the grounds that he was not advised that his guilty pleas for three convictions could be used to enhance his sentence to a habitual offender, as they were in his case. The trial court denied this petition and the Petitioner did not appeal its decision. The Petitioner then brought a second post-conviction petition on August 16, 1990. After conducting an evidentiary hearing, the trial court dismissed the petition. It is from the order of the trial court dismissing this petition that the Petitioner appeals.

In his second petition for post-conviction relief, the Petitioner argues that he did not receive the effective assistance of counsel because his attorney did not object to a variance between the indictment and the proof at trial. Three guilty plea convictions were used at trial to convict the Petitioner of being a habitual offender. In the indictment, the date for these convictions was listed as October 1, 1982. The correct

date for these convictions is May 26, 1982. The Deputy Circuit Court Clerk testified at trial to the correct date. The Petitioner argues that the failure of trial counsel to object to these "oral amendments" to the indictment constitutes ineffective assistance of counsel.

We first point out that the Petitioner did not raise this issue in his direct appeal or in his first post-conviction petition. "A ground for relief is 'waived' if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." Tenn. Code Ann. § 40-30-112(b)(1). "There is a rebuttable presumption that a ground for relief not raised in any such proceeding which was held was waived." Tenn. Code Ann. § 40-30-112(b)(2).

This issue was available to the Petitioner during his direct appeal. His trial counsel did not represent him during his direct appeal. In fact, the Petitioner appealed on the grounds that the three convictions, the dates of which were incorrect on the indictment, were not three separate offenses to support a habitual offender conviction. Harrell, slip. op. at 6-7. This court commented that the Petitioner did not make an argument concerning the correctness or incorrectness of the indictment. Id. at 7. The Petitioner also argued during his direct appeal that he did not intentionally waive his constitutional rights when pleading guilty for the three convictions in question, and that they should not have been admitted into evidence. Id. at 8. This court denied relief on both of these grounds.

This issue was also available to the Petitioner in his first post-conviction petition. According to the transcript of the first post-conviction hearing, the Petitioner argued one issue. That issue is that the Petitioner was not advised that the three guilty pleas in question in the case sub judice could be used to enhance a subsequent sentence to

a habitual offender. The trial court denied his petition, and he did not appeal this decision.

In these two previous cases, the Petitioner argued an issue that concerned the validity of the three guilty pleas, but did not argue the fact that the indictment incorrectly listed the date for the guilty pleas. There is a rebuttable presumption that this issue is waived under the statute quoted above. The Petitioner did not argue any reason why this issue was not argued in his direct appeal or his first post-conviction petition. Even though this issue is presumably waived, we choose to address it on the merits.

The test to determine whether or not counsel provided effective assistance at trial is whether or not his performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). Under Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984), there is a two-prong test which places the burden on the appellant to show that (1) the representation was deficient, requiring a showing that counsel made errors so serious that he was not functioning as "counsel" as guaranteed a defendant by the Sixth Amendment, and (2) the deficient representation prejudiced the defense to the point of depriving the defendant of a fair trial with a reliable result. 466 U.S. at 687. To succeed on his claim, the appellant must show that there is a "reasonable probability," which is a probability sufficient to undermine confidence in the outcome that, but for the counsel's unprofessional errors, the results of the proceeding would have been different. Id. at 694. The burden rests on the appellant to prove his allegations by a preponderance of the evidence. Long v. State, 510 S.W.2d 83, 86 (Tenn. Crim. App. 1974). We also do not use the benefit of hindsight to second-guess trial strategy by counsel and criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

Petitioner's counsel failed to object to the fact that the indictment incorrectly stated the dates of the three convictions that were used to support the Petitioner's conviction of being a habitual criminal. We do not find in the case sub judice that counsel's actions made his representation so deficient that he was not acting as counsel as guaranteed by the Sixth Amendment. Variance in an indictment can be fatal to a prosecution. However, the citing of an incorrect date would not necessarily have been fatal in this case.

> [B]efore a variance will be held to be fatal it must be deemed to be material and prejudicial. A variance between an indictment and the proof in a criminal case is not material where the allegations and proof substantially correspond, the variance is not of a character which could have misled the defendant at trial and is not such as to deprive the accused of his right to be protected against another prosecution for the same offense.

State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984). Although the wrong dates for the convictions were listed in the indictment, the correct case identification numbers were listed. We conclude that the allegations and proof substantially correspond because the case identification numbers that were included in the indictment were testified to at trial. We also conclude that the identification numbers would be sufficient to prevent the Petitioner from being misled concerning which convictions were being used and would also prevent the possibility that the Petitioner would be prosecuted for the same offense concerning these convictions.

The failure of Petitioner's counsel to object did not render his assistance ineffective in this particular case. The first prong of the Strickland test is not met. Therefore, this issue is without merit.

The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

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JOE B. JONES, JUDGE

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WILLIAM M. BARKER, JUDGE