IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
APRIL SESSION, 1995

GEORGE JOHN CALLIS	(	
	:	C.C.A. No. 03C01-9411-CR-00401
Appellant,	(	
	:	Hamilton County
v.	(	
	:	Hon. Stephen Morris Bevil, Judge
STATE OF TENNESSEE	(	
	:	Second Degree Murder
Appellee	(	
	:	Post-Conviction Relief
	(	

For The Appellant:

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OPINION FILED: _____

AFFIRMED:

John A. Turnbull, Special Judge

O P I N I O N

This is a post-conviction proceeding in which petitioner (herein Callis) claims he was deprived of his constitutional right to effective assistance of counsel, and as a result, his plea of guilt to second degree murder was not voluntary and intelligent. After an evidentiary hearing, the trial court dismissed the petition. It is from that dismissal which this appeal of right is presented.

The controlling issues before this court are twofold:

1. Was counsel constitutionally deficient? And if so,

2. Is there a reasonable probability that but for counsel's errors, Callis would not have pleaded guilty?

F A C T S

Callis killed his wife, Olivia A. Callis, on November 11, 1992 and was arrested the same day. Callis was indicted for first degree murder on February 10, 1993 and the District Public Defender was appointed to represent him. Trial was scheduled for June 29, 1993. On June 28, 1993 Callis pled guilty to second degree murder and, upon his agreement, was sentenced above range to forty (40) years as a Range III persistent offender. As a Range III persistant offender, Callis will not be eligible for parole until he serves forty-five (45%) percent of his sentence. He had no prior felony convictions. As of June 28, 1993, the state had not given notice of any demand for the death penalty.

The facts key to deciding this case surround what will be called the "Callis Papers," and what was done, or not done, with them by Mary Ann Green, the assistant public defender assigned to defendant, Mr. Callis. When assigned to defend Callis on February 15, 1993, Ms. Green had thirteen years of experience as an attorney. She had spent some eleven years as a defender in juvenile court, and two years as an assistant public defender assigned to Division I of the Criminal Court of Hamilton County.

Ms. Green came into possession of the Callis Papers shortly after her assignment to the defense of Callis. By that time, it was obvious that Callis had two

possible defenses. The first possible defense was insanity at the time of the offense. The second possible defense was lack of premeditation or deliberation necessary to commit first degree murder. Callis brutally beat his wife to death. His victim suffered 14 broken ribs, a fractured clavicular joint, a ruptured spleen, multiple abdominal injuries, and multiple head and chest injuries, all of which were listed as possible causes of death in the autopsy report. Ms. Green had gone over the thirty-six gruesome photographs of the victim in her tape recorded interview with the pathologist and knew full well the impact the photos would have on the a jury. She would try to keep as many as possible out of evidence. Ms. Green was aware that Callis had called 911 to report that he had beaten his wife, she was not breathing well, and she was spitting up blood. She learned that Callis had made this report in a relatively calm voice and that, by the time EMT's arrived at the Callis home, he had apparently changed clothes and cleaned up the blood. There was ample evidence from which the inference could logically be drawn that the beating had taken place over a considerable period of time. Ms. Green was also aware of the state's possession of evidence of prior beatings Callis had administered to his wife.

The Callis Papers were acquired from Callis by Ms. Tolliver, the social worker employed by the Public Defender's office shortly after Ms. Green took over the case. Attorney Green had immediately begun investigation of the mental status of Callis. She requested and was granted a psychological evaluation at the Joe Johnson Center. She learned that Callis had some history of mental problems and alcohol abuse. She sent for and secured copies of the available psychological records which, although not extensive, showed that Callis had been seen in 1974 by Dr. Ritchie, a psychologist in Alabama. Despite repeated attempts, Ms. Green was unable to secure the Alabama records, but she learned that Dr. Ritchie had diagnosed mild paranoia when Callis was referred to him by the postal department, Callis' employer at the time. Postal department employment records secured by defense counsel also alluded to this diagnosis. Ms. Green also secured records

from the drug and alcohol treatment facilities from which Callis had begun seeking treatment shortly before the homicide. In addition, Ms. Green secured records from Moccasin Bend, where Callis was treated after his arrest because of suicidal tendencies. All these records, with the exception of the Callis Papers, were supplied to the Joe Johnson Center evaluation team by defense counsel.

The Callis Papers consist primarily of letters written by Callis to persons in authority; Vice President Bush (1982); President Bush (1990); Louisiana Governor "Buddy" Roemer (1990); and a thirty-eight page letter to U.S. District Court Judge Byron Thompson (1991). The Papers also contained calendars from 1989 with Callis' handwritten notes referring to at least one other letter sent to President Bush. In addition, the papers contain diary notes from mid October 1992, apparently in Callis' handwriting, which document some visits to drug and alcohol counselors as well as marital disputes with his wife. Also among the Callis Papers is a January 1991 letter, "To whom it may concern." The letters provide a picture at the time written of the thought processes of Callis at the time written. They reveal that in 1968 Callis observed over Hoover, Alabama what he, and apparently three persons who were with him, believed to be a U.F.O. Callis' concern about U.F.O's led him into study of the Bible which Callis believed confirmed the existence of U.F.O's, e.g., "the cloud by day and light by night that went before the children of Israel when they left Egypt; Ezekiel's vision of the wheel within a wheel; Elijah being taken up to heaven by the Chariot of Israel and Jesus Christ's visitation to the mount of transfiguration. " (letter to President Bush 12/28/90) His Bible study further led Callis to the conviction that abortion is evil and would bring tragedy on the nation which permitted it. (letter to Gov. Roemer 7/20/90) Callis relayed his premonitions of disaster; earthquakes, tidal waves, hurricanes, and war to the public officials. Reminiscent of the Old Testament prophets and some modern day evangelists, Callis foresaw calamity as the result of a nation's sin, "the wages of sin is death." The most richly detailed description of Callis' thought processes and his personal history and struggle with sin is contained in his thirty-eight page letter to Judge

Thompson.

The Callis Papers also contained a wealth of information that intelligent defense counsel would want to keep out of the hands of an able prosecutor. Armed with the papers, an able prosecutor would have been able to conduct a withering cross-examination on a defendant asserting a mental or provocation based defense. If placed in the hands of mental evaluators, these papers would have undoubtedly ended up in the hands of prosecutors. In addition, if, based on the papers, an evaluator had asserted in court a mental based defense, the jury would have been apprised of potentially damaging past conduct and thought processes of the defendant without his having taken the stand. In essence, delivery of the Callis Papers to mental evaluators would have had the effect of greatly limiting tactical options available to the defendant. Callis requested that counsel return his papers to him in a letter dated March 13, 1993.

The Callis Papers were not delivered to the evaluation team at the Joe Johnson Center. Instead, counsel and her investigator advised Dr. McGuire at Joe Johnson about the defendant's history of seeing U.F.O.'s, hearing voices, writing lengthy letters to politicians and judges, and his references to God and abortion during a lengthy conference defense held with Dr. McGuire. Dr. McGuire advised counsel he did not think any of this information would change the opinions of the Joe Johnson team and did not ask to see the papers. The findings of the evaluation team that Callis was competent to stand trial and could not sustain an insanity defense stood unaltered. When the report from the Joe Johnson Center was received by defense counsel, only five weeks remained before the scheduled trial date.

The Callis Papers were discussed by defense counsel at two full staffing held in preparation for trial. These staffings involved at least eleven people, including several attorneys, the office investigator, an experienced social worker and the

receptionist who was brought in to get the reaction of a lay person. The two possible defenses, insanity and lack of premeditation or deliberation, were analyzed at length.

Shortly before the scheduled trial date, the state conveyed an offer to allow defendant to plead guilty to second degree murder with forty years to serve, 45% of which would have to be served before Callis was eligible for probation. A first degree murder conviction would result in a life sentence, 60 years at 60%. Although the state had given no notice of demand for the death penalty, the assistant district attorney had made noises in that direction. The victim's family wanted the death penalty and consistently attended all hearings. The fact that the victim was a Sunday School teacher lent further credence to the possibility that if the trial was continued, the state might ask for the death penalty.

After lengthy discussions, none of which budged the state from its first offer, the defendant accepted the state's offer and entered his plea of guilt on June 28, 1993, the day before the scheduled trial. The defendant's decision was made after long discussions with his family and counsel. His options were laid out: seek a continuance and try to develop further proof of a mental or intent based defense; go to trial now with the possibility of a life sentence; or plead to the offer made by the state. Callis took a sentence of a minimum of 18 years to serve when faced with the possibility of receiving a minimum of 36 years to serve had he been found guilty of first degree murder.

After a full evidentiary hearing, the judge hearing the post-conviction relief petition filed a well-reasoned written opinion in which he made specific findings of fact and conclusions of law on each assertion contained in the petition. In dismissing the petition Judge Bevil found that defense counsel's investigation, advice and representation "were not below the range of competence constitutionally demanded of attorneys" and that the "petitioners plea of guilty was based on an

intelligent and informed decision after he had been fully advised by counsel."

The petition for post-conviction relief was filed pro se on October 13, 1993. Able counsel appointed for Callis amended the petition, represented him below and on this appeal. The Callis Papers were central to the evidence presented at the hearing. Dr. David McNaughten, the psychiatrist at Moccasin Bend Mental Health Hospital who examined and treated Callis following his thoughts of suicide in January, 1993, had not examined the Callis Papers when he concluded Callis did not have a severe mental illness. However, after reviewing the papers, Dr. McNaughten testified in the evidentiary hearing that these letters were "about as classical schizophrenic as you'll ever get" and were a "beautiful example, if you want a concrete example of schizophrenic thinking." Reviewing the papers caused Dr. McNaughten to change his original findings. He testified that, had he seen them, he would have diagnosed Callis as having paranoid schizophrenia. Dr. McNaughten, based on the letters, felt that petitioner should return to Moccasin Bend for a full forensic evaluation. Dr. McNaughten was not aware that Callis had received such a full evaluation at Joe Johnson. He could not say, based on his examinations and with the benefit of the Callis Papers, either that an insanity defense could be supported or that Callis lacked the mental ability to premeditate or deliberate the killing.

L A W

A Tennessee lawyer defending a citizen accused of a crime must render legal services which are not constitutionally deficient. In Baxter v. Rose, 523 S.W. 2d 930, 936 (Tenn. 1975) the Tennessee Supreme Court set the standard which requires that the advice given, or the services rendered by the attorney, must be within the range of competence demanded of attorneys in criminal cases. The rule more specifically devised by the United States Supreme Court in Strictland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984) provides:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless the defendant makes both showings, it cannot be said that the conviction or ... sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Where, as here, the petitioner has pled guilty, the petitioner must show not only the legal services fell below the range of competence but also there must be a reasonable probability that, but for counsel's errors, the defendant would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985)

In a post-conviction relief proceeding, the burden is on petitioner to prove by the preponderance of the evidence the allegations in his petition. On appeal, the findings of fact of the trial judge are conclusive unless the evidence preponderates against the judgment. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

When viewing the performance of defense counsel appellate courts are reluctant to second guess the tactical decisions made by defense counsel. As observed by this court in State v. Kerley, 820 S.W. 2d 753, 758 (Tenn. Cr. App. 1991); perm. to appeal denied August 5, 1991:

> Hindsight can always be utilized by those not in the fray so as to cast doubt on trial tactics a lawyer has used. Trial counsel's strategy will vary even among the most skilled lawyers. When that judgment exercised turns out to be wrong or even poorly advised, this fact alone cannot support a belated claim of ineffective counsel. Robinson v. United States, 448 F.2d 1255 at 1256 (8th Cir. 1971); Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

> This court does not sit to second guess strategic and tactical choices made by trial counsel. However, when counsel's choices are uninformed because of inadequate preparation, a defendant is denied the effective assistance of counsel. United States v. De-

Coster, 487 F.2d 1197 at 1201 (D.C. Cir. 1973); Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982)

Petitioner here asserts that counsel was deficient in not supplying the Callis Papers to the evaluators at Joe Johnson. He claims that, had these papers been furnished to the evaluators, he would likely have received a more favorable report and that, without this information, his plea was not knowing, voluntary, and intelligent because he did not know the strength of his defense. This argument requires several leaps of faith to be persuasive. First the proof does not demonstrate that, had the papers been supplied to the evaluators, Callis would have received a report which would have supported either an insanity defense or a report which would have indicated he did not have the capacity to premeditate or deliberate the killing. Dr. McGuire informed Ms. Green that he did not believe any of this information would change the opinions the evaluation team had reached. Although hearsay if offered to prove the truth of the matter asserted in that statement, this evidence was not hearsay and admissible if, as here, offered to show the information possessed by counsel. Even though Dr. McNaughten classified the Callis Papers as "essential" to a complete psychological evaluation, he conducted no such evaluation and was unable to testify that the resulting opinion would support either defense. Dr. McNaughten was not aware that a court ordered forensic mental evaluation had been given Callis.

In addition, petitioner's argument completely ignores the fact that the tactical options available in his defense would have been severely limited had the Callis Papers fallen into the hands of prosecutors, a near certainty if delivered to the evaluation team.

In an act which protected defendant, counsel instead advised the lead evaluator, Dr. McGuire, of the more bizarre contents of the papers. When she learned that this information would not likely change the opinions expressed by evaluators, she went no further. We will not second-guess this conduct.

A review of the record in this case does not convince us that the proof

preponderates against the finding of the trial court that counsel's advice, investigation, and representation was not below the range of competence demanded of attorneys.

The conclusion of the trial judge that counsel properly advised petitioner as to the potential punishment to which he was exposed is also supported by the evidence.

Petitioner also claims counsel was deficient in failing to adequately prepare for trial, actively pursue plea negotiations or assist petitioner in his decision whether to accept the plea offer. The record supports the conclusions of the trial judge that Ms. Green consulted with Callis on twenty (20) different occasions and held two full staffings with other attorneys, investigators, social workers, and a lay person to go over the strong and weak points of the case and plan trial strategy. Counsel plainly and correctly advised Callis what his options were. This advice was given after she made competent investigation of the facts and the law. The fact that the state would not budge from its first offer is no proof that counsel did not competently handle plea negotiations.

Since we have found that counsel was not constitutionally deficient in her representation of petitioner, we need not address the question whether, but for ineffective assistance of counsel, Callis would have pled guilty. It is sufficient to say that under all the facts and circumstances of this case, a fair result was reached.

C O N C L U S I O N

The judgment of the trial court in dismissing the petition for post-conviction relief is in all things affirmed.

_____

JOHN A. TURNBULL, SPECIAL JUDGE

CONCUR:

_____
DAVID WELLES, JUDGE

_____
DAVID HAYES, JUDGE

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GEORGE JOHN CALLIS	(	
	:	C.C.A. No. 03C01-9411-CR-00401
Appellant,	(	
	:	Hamilton County
v.	(	
	:	Hon. Stephen Morris Bevil, Judge
STATE OF TENNESSEE	(	
	:	Post-Conviction Relief
Appellee	(	Second Degree Murder
	:	
	(	AFFIRMED

JUDGMENT

Came the Appellant, George John Callis, by counsel, and also come the Attorney General on behalf of the State, and this case was heard on the record on appeal from the Criminal Court of Hamilton County; and upon consideration thereof, this Court is of the opinion that there is no reversible error on the record and that the judgment of the trial court should be affirmed. In accordance with the Opinion filed herein, it is, therefore, ordered and adjudged by this Court that the judgment of the trial court is affirmed, and the case is remanded to the Criminal Court of Hamilton County for the execution of the judgment of that Court and for the collection of the costs accrued below. Costs of appeal will be paid into this Court by the Appellant, George John Callis, for which let execution issue.

DAVID WELLES, JUDGE

DAVID HAYES, JUDGE

JOHN A. TURNBULL, SPECIAL JUDGE

Certification

Office of Clerk of Court of Criminal Appeals
for the Eastern Division of the State of Tennessee:

I, _____, Clerk of said Court, do hereby certify that the foregoing is a trust, perfect and complete coy of the Judgement of said Court, pronounced _____, 1995 in the case of State of Tennessee against George John Callis as appears of records now on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the Court at office in Knoxville, Tennessee on this the _____ day of _____, 1995.

_____, Clerk