

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

**FILED**

December 11, 1995

**Cecil Crowson, Jr.**  
Appellate Court Clerk

**DAVID PAUL DUNBAR,** )  
 )  
Appellant )  
 )  
vs. )  
 )  
**STATE OF TENNESSEE,** )  
 )  
Appellee )

No. 03C01-9410-CR-00381

**WASHINGTON COUNTY**

Hon. **Jerry Beck**, Judge

(Post Conviction)

**For the Appellant:**

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**For the Appellee:**

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OPINION FILED: \_\_\_\_\_

**AFFIRMED**

**David G. Hayes**  
Judge

# OPINION

The appellant, David Paul Dunbar, appeals from an order entered by the Criminal Court of Washington County dismissing his petition for post-conviction relief. The appellant raises one issue for our review. The appellant contends that his conviction for second degree murder should be reversed because he received the ineffective assistance of counsel at trial.

After reviewing the record, we affirm the post-conviction court's judgment.

## I. FACTUAL BACKGROUND

On July 10, 1990, the appellant filed a petition for post-conviction relief. The petition sought the reversal of the appellant's conviction for second degree murder. The appellant alleged ineffective assistance of counsel, contending that trial counsel performed deficiently in two ways: first, trial counsel failed to properly object to a "material variance" in the indictment; second, trial counsel failed to call two witnesses to present mitigating evidence at the sentencing hearing.

The proof introduced at trial revealed that, on April 18, 1986, the appellant and a friend engaged in a lengthy and heated argument with the victim and three of the victim's associates. At a point in the argument, the appellant fired one shot from a .22 caliber rifle at the rear of the victim's vehicle, believing it to be unoccupied. The bullet apparently ricocheted off the vehicle, fatally striking the victim who was standing at the rear of the car. The appellant was nineteen years old when this offense occurred.

The grand jury subsequently indicted the appellant for second degree murder. In relevant part, the indictment charged that the appellant did "maliciously assault Michael J. Hance with a deadly weapon, to wit: a .22 caliber rifle, and did then and there kill and murder the said Michael J. Hance in the second degree... ." Central to the appellant's defense was the issue of malice.

In instructing the jury at the appellant's trial, the trial court defined both express and implied malice. In defining implied malice, the trial court instructed the jury:

Implied malice is malice not against the party slain, but malice in general, or that condition of mind which indicates a wicked, depraved and malignant spirit and heart regardless of social duty and bent on mischief. Implied malice may be found to exist where the wrongdoer did not intend to slay the person killed, but death resulted from a consciously unlawful act done intentionally, and with knowledge on the wrongdoer's part that the act was directly perilous to human life. In such event, there is implied such a high degree of conscious and willful recklessness as to amount to malignity of heart constituting malice. Shooting into an occupied vehicle is an unlawful act. (emphasis added).

This jury instruction, with the exception of the last sentence, is virtually identical to T.P.I. Crim. No. 20.04(B), which provides for the instruction of malice in a second degree murder charge. The record indicates that the last sentence of the above quoted instruction was inserted by the trial court at the request of the State. On the date this offense was committed, "shooting into an occupied vehicle" was a statutory offense. However, the State did not seek prosecution for this crime. The record also indicates that the appellant's trial counsel made no objection to the instruction, and that he failed to file any special requests for a different or supplemental jury charge.

During the course of their deliberations, the jury submitted the following question to the court: "[D]oes shooting into the car represent malice as it is defined in second-degree murder?" In response, the trial court instructed the jury to refer to three specific sections of the jury charge for guidance, including

the above instruction for implied malice. Again, trial counsel did not object to the court's instruction. After further deliberation, the jury found the appellant guilty of second degree murder as charged.

In the appellant's motion for a new trial, and on direct appeal, the appellant argued that the trial court erroneously instructed the jury "that they could find implied malice sufficient to convict for second degree murder from the act of the defendant in shooting into an occupied vehicle." This court held on direct appeal that trial counsel's failure to submit a special request for an additional instruction waived the erroneous instruction claim. See State v. Dunbar, No. 232 (Tenn. Crim. App. at Knoxville, June 6, 1988), perm. to appeal denied, (Tenn. 1988). This court further concluded that "the instruction was not erroneous." Id. Two years later, the appellant filed the instant petition collaterally attacking his murder conviction.

After hearing all the evidence, the post-conviction court dismissed the appellant's petition. In doing so, the court ruled that trial counsel represented the appellant competently. The appellant now seeks our review of the post-conviction court's ruling.

## **II. ANALYSIS**

In order to establish ineffective assistance of counsel, the appellant has the burden of proving (1) deficient representation and (2) prejudice resulting from that deficiency. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984); Cooper v. State, 847 S.W.2d 521, 527 (Tenn. Crim. App. 1992). "Deficient representation" occurs when the services rendered fall below the range of competence demanded of criminal counsel. Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991). "Prejudice," on the other hand, is

defined as a reasonable likelihood that the outcome would have been different but for the deficient representation. Cooper, 847 S.W.2d at 547.

The appellant first argues that trial counsel failed to object to an alleged "material variance" between the indictment and the proof presented at trial. This argument is predicated upon the fact that the indictment alleged that the appellant did "maliciously assault ... with a deadly weapon," whereas, the trial court's instruction permitted the jury to find malice based upon an unlawful act, that is shooting into an occupied vehicle. This "shift," the appellant argues, amounted to a material variance between the elements of the offense charged in the indictment and the proof used at trial to convict him. We disagree.

A variance arises when the evidence introduced at trial establishes facts different from those alleged in the indictment. Once it is determined that a variance exists, the issue then is whether the variance is material or prejudicial to the accused's rights.

The general rule regarding variations between the indictment and the proof is set forth in the case of State v. Moss, 662 S.W.2d 590, 592 (Tenn. 1984):

Unless substantial rights of the defendant are affected by a variance, he has suffered no harm, and a variance does not prejudice the defendant's substantial rights (1) if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial, and (2) if the variance is not such that it will present a danger that the defendant may be prosecuted a second time of the same offense; all other variances must be considered to be harmless error.

In the case before us, there is no variance between the proof at trial and the crime charged. The indictment properly informed the appellant of the crime of second degree murder by use of a deadly weapon. The proof at trial established that the appellant, by the use of a .22 caliber rifle, fatally shot and killed the

victim. Thus, no variance is presented.

While the appellant labels the issue as one of "fatal variance," his underlying challenge actually addresses his trial counsel's failure to object to the trial court's instruction on implied malice. The thrust of the appellant's argument focuses upon the joinder of the trial court's instruction that "shooting into an occupied vehicle is an unlawful act" with the immediately preceding instruction that "implied malice may be found to exist where death resulted from a consciously unlawful act ... ." While arguably the instruction that "shooting into an occupied vehicle is an unlawful act" raises a Sandstrom issue,<sup>1</sup> we are precluded from further inquiry as to the propriety of this instruction. See Dunbar, No. 232. This issue is *res judicata*. On direct appeal, this court held that the instruction given by the trial court was not erroneous. Id. Thus, if the instruction was not erroneous, the failure of trial counsel to object did not constitute deficient performance. Obviously, neither prejudice nor deficient representation can be based upon failure to make a meritless objection.

Similarly, the appellant has failed to demonstrate ineffective representation at the sentencing hearing. As the post-conviction court averred, the testimony of Kyle Moore and Reverend Moore would have been "redundant."<sup>2</sup> In light of the other evidence presented at the sentencing hearing, we have no basis to conclude that counsel's representation was either deficient

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<sup>1</sup>A jury instruction that creates a mandatory presumption whereby the jury must infer the presumed fact if the State proves certain predicate facts violates the Due Process Clause if it relieves the State of the burden of persuasion on an element of the offense. Sandstrom v. Montana, 442 U.S. 510, 520-524, 99 S.Ct. 2450, 2457-59 (1979). Thus, the issue is whether the trial court's instruction "shooting into an occupied vehicle is an unlawful act," as a matter of law created a mandatory presumption that the appellant acted with malice.

<sup>2</sup>At the sentencing hearing, a "number of witnesses" were called by the appellant to attest to his "good character" and "non-violent nature." At the post-conviction hearing, Kyle Moore and Reverend Moore testified that, if called at the sentencing hearing, they would have testified as to the appellant's reputation as a "good" and "non-violent" person.

or prejudiced the appellant.

For these reasons, we affirm the post-conviction court's decision.

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**DAVID G. HAYES, Judge**

CONCUR:

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**PAUL G. SUMMERS, Judge**

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**WILLIAM M. BARKER, Judge**