

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1995 SESSION

FILED
October 31, 1995
Cecil Crowson, Jr.
Appellate Court Clerk

CHARLES LARRY TUNE,

Appellant,

V.

STATE OF TENNESSEE,

Appellee.

)
) C.C.A. No. 01C01-9412-CC-00423
)
) Marshall County
)
) Hon. Charles Lee, Judge
)
) (Post-Conviction)
)
)

FOR THE APPELLANT:

John Harwell Dickey
District Public Defender

Robert Marlow
Asst. Dist. Public Defender
P. O. Box 1119
Fayetteville, TN 37334

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

Ellen H. Pollack
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0485

William Michael McCown
District Attorney General

Weakley E. Barnard
Asst. Dist. Attorney General
Marshall County Courthouse
Lewisburg, TN 37091

OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

OPINION

The petitioner, Charles Larry Tune, was convicted following a jury trial of first degree murder and malicious shooting. He was sentenced to life imprisonment on the murder conviction and to a consecutive six year sentence for the malicious shooting conviction. The petitioner filed a post-conviction relief petition alleging that he was denied the effective assistance of counsel at trial and on appeal. Following an evidentiary hearing, the trial judge dismissed the petition.

The petitioner brings four issues in this appeal. In his first and second issues, he claims he was denied a “fundamentally fair trial” due to the trial judge’s failure to treat deliberation and premeditation as separate and distinct elements of premeditated murder as held in State v. Brown, 836 S.W.2d 530 (Tenn. 1992) and due to comments made by the prosecutor during closing arguments. In his third and fourth issues, the petitioner claims that he was denied the effective assistance of counsel at trial and on appeal. Following our review, we affirm the trial court’s dismissal of the petition.

As to the petitioner’s first issue, he contends that he was denied a “fundamentally fair trial” in violation of Article I, Section 8 of the Tennessee Constitution and the Sixth and Fourteenth Amendments to the United States Constitution because the trial judge failed to treat premeditation and deliberation as distinct and separate elements of first degree murder. The petitioner bases his claim on the holding in State v. Brown, in which our Supreme Court stated that “it is prudent to abandon an instruction that tells the jury that ‘premeditation may be formed in an instant.’ Such an instruction can only result in confusion, given the fact that the jury must also be charged on the law of deliberation.” Id. at 543. However, the Court did not find that the instruction violated a constitutional right. Subsequently, this Court held that because the instruction is

error but not of a constitutional scope, such a claim may not be used as a basis for relief under the Post-Conviction Procedure Act. State v. Hayes, No. 03C01-9310-CR-00347, (Tenn. Crim. App. Aug. 17, 1994). Furthermore, the Supreme Court did not intend that Brown should be applied retroactively to invalidate every first degree murder case wherein the jury had been instructed that premeditation may be formed in an instant. State v. Bacon, No. 1164, (Tenn. Crim. App. Aug. 4, 1992).

Additionally, the Tennessee Post-Conviction Procedure Act does not permit the petitioner to relitigate claims of error raised and previously determined. State v. McClintock, 732 S.W.2d 268, 272 (Tenn. 1987). In the instant case, the petitioner raised an issue on direct appeal challenging the sufficiency of the evidence as to the elements of deliberation and premeditation. State v. Tune, 872 S.W.2d 922, (Tenn. Crim. App. 1993). In that appeal this Court, per Judge Peay, considered these elements in light of Brown and upheld the conviction. Slip op. at 7-8. The petitioner argues that because the Court did not specifically mention the effect of the prior jury instructions on these elements, this issue has not been “previously determined.” We disagree. We find that this Court considered the direct appeal in light of Brown and resolved the issue. Additionally, as stated above, Brown does not apply retroactively. Therefore, under either argument, the petitioner’s first issue is without merit.

In his second issue, the petitioner claims that he was denied a “fundamentally fair trial” in violation of Article I, Sections 8 and 9 of the Tennessee Constitution and the Fifth and Fourteenth Amendments to the United States Constitution due to the prosecutor’s continual reference to “uncontroverted evidence” during closing arguments. He contends that these statements were a comment on his failure to testify. The state, citing State v. Coury, 697 S.W.2d 373, 378 (Tenn. Crim. App. 1985), responds that “[m]ere argument by the State that proof on a certain point, is unrefuted or

uncontradicted is not an improper comment upon a defendant's failure to testify." We agree with the state. Although the prosecution used the term a number of times, we do not find in our review that those instances were a comment on the petitioner's right not to testify. This issue is without merit.

In his third and fourth issues, the petitioner insists that he was denied the effective assistance of counsel, Barry B. White, at trial and on appeal. As to his trial representation he contends that counsel was deficient for failing to object to: (1) the prosecution's continual use of the word "uncontroverted," (2) the "unconstitutional charge" given to the jury regarding the essential elements of first degree murder, and (3) the trial court's communication with the jury via the court officer during deliberations which took place off the record. The petitioner's complaint against his appellate representation is that counsel failed to raise the "unconstitutional" jury instruction issue on direct appeal.

The appropriate test for determining whether counsel provided effective assistance at trial is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1974). In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that a convicted defendant's claim that counsel's assistance was so defective as to require a reversal of a conviction requires that the defendant show, first, that counsel's performance was deficient and, secondly, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Id. at 687. In order to prove a deficient performance by counsel, a defendant must prove that counsel's representation fell below an objective standard of reasonableness. Id. at 688. A reviewing court must indulge in a strong presumption that counsel's conduct falls within the wide range of professional assistance. Id. at 689. In order to prove prejudice, the defendant must show that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. The approach to the issue of ineffective assistance of counsel does not have to start with an analysis of an attorney's conduct. If prejudice is not shown we need not seek to determine the validity of the allegations about deficient performance. Id. at 697.

Trial counsel testified at the evidentiary hearing that he had not objected to the continual use of the word, "uncontroverted," because he did not feel that any of the instances infringed upon the petitioner's right to remain silent. Further, counsel stated that it was his conscious tactical decision to refrain from making unnecessary objections in order to retain credibility with the jury. Similarly, counsel added that he did not feel the mere use of the word "uncontroverted" was directed at the defendant's decision not to testify. Instead, he interpreted those statements made by the prosecutor to point to the testimony of witnesses during direct and cross-examination. The trial judge found, after reviewing the record, that counsel's tactical decision not to object under these circumstances was reasonable. The judge concluded that by allowing the prosecutor to use the term "uncontroverted" counsel then had the opportunity to find holes in the state's "uncontroverted" case. Further, the trial judge opined that the objections would likely have been overruled. Finally, he concluded that counsel's concern with credibility as compared to the state was a valid trial tactic.

The petitioner's second assertion is that trial counsel erred by failing to object to the jury instruction regarding deliberation and premeditation. The proof at the evidentiary hearing indicated that the trial judge charged the standard instructions in effect at the time of the trial. Because the trial in this cause was held on January 22-25, 1990, and Brown was not decided until June 1, 1992, we agree with the trial judge that counsel had no reason to object at the time of trial and could not have foreseen such a change.

The final complaint against his trial representation is that counsel failed to object to communication during deliberation between the judge and jury via the court officer. The record established that in two instances the jury asked questions of the judge which were not taken before open court and placed on the record. First, the jury asked whether they had to be unanimous as to each and every element and secondly, whether they had to be unanimous on first degree murder. The trial judge simply responded in the affirmative to both questions. Trial counsel testified at the hearing that he had not objected because he felt the judge would simply have brought the jury in and given them the same answer. Because the evidence of defendant's guilt was overwhelming, trial counsel felt any error would have been harmless. Further, counsel stated that he also knew he could raise the issue at a later time. The trial judge found that these were valid trial tactics.

In his attack against appellate counsel, the petitioner claims that counsel erred by failing to raise the issue of "unconstitutional" jury instructions given at trial. The Brown decision was rendered after counsel filed the direct appeal in this cause but before the appeal had been resolved. Counsel testified that he had become aware of Brown and had considered the jury instructions given by the trial judge as to premeditation and deliberation. In his review, he interpreted Brown to stand for the proposition that the trial judge must delineate between these two elements. Counsel stated that he had reviewed the trial judge's instructions and felt that, with minor exceptions, the judge had apparently instinctively charged what the Brown court advised some months later. Trial counsel added that in his opinion, the slight deviation from the eventual Brown holding was not reversible error. Arguably, counsel could have filed the Brown opinion as supplemental authority; however, his failure to do so does not constitute ineffective assistance of counsel. Further, because this Court considered the appeal in light of Brown, any error would have been harmless.

The trial judge concluded that counsel provided effective representation to the petitioner at trial and on appeal far above the level established in Baxter v. Rose. The trial court's findings of fact in post-conviction hearings are binding on appeal unless the evidence preponderates otherwise. Long v. State, 510 S.W.2d 83, 86 (Tenn. Crim. App. 1974). The burden is on the petitioner to prove that the evidence preponderates against the judgment. Id. We find no merit in the issues raised by the petitioner; therefore, he has failed to carry his burden.

We affirm the dismissal of the petition in all respects.

AFFIRMED

PAUL G. SUMMERS, JUDGE

CONCUR:

JOHN H. PEAY, JUDGE

DAVID H. WELLES, JUDGE