IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1995 SESSION

HARLEY BENSON CALHOUN,	)	C.C.A. NO. 03C01-9411-CR-00421
	)	
Appellant	)	HAMILTON COUNTY
	)	
v.	)	HON. STEPHEN M. BEVIL
	)	JUDGE
STATE OF TENNESSEE,	)	
	)	Post-conviction
Appellee	)	Underlying offense--arson

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OPINION FILED _____

AFFIRMED

JOHN K. BYERS
SENIOR JUDGE

O P I N I O N

The petitioner was convicted of arson in a jury trial on May 18, 1989; he was sentenced to serve six years. This Court affirmed the conviction, and the Supreme Court denied review.

There were two prior petitions for post-conviction relief filed in this case, which were dismissed. These have no bearing on the case before us, which is a third petition for post-conviction relief filed by petitioner which seeks to have the conviction set aside.

An evidentiary hearing was held on this petition, and the trial judge dismissed the petition.

The petitioner raised the following grounds upon which he sought to have the conviction set aside:

> A. The evidence clearly preponderates against the trial court's finding that the Petitioner was afforded effective assistance of counsel.
>
> > 1. The instant record shows that trial counsel's decision not to present evidence known to defense counsel well in advance of trial and highly exculpatory of the Petitioner evinces grossly prejudicial, ineffective assistance of counsel.
> >
> > 2. The record shows that the Petitioner's desire to testify in his own defense was overborne by trial counsel.
> >
> > 3. Counsel on direct appeal failed to raise potentially meritorious issues as to the excessive length of the sentence imposed and as to the trial court's basing the sentence in part on extraneous matters which had not been moved into evidence by the State but instead was [sic] received *sua sponte* as an exhibit to the sentencing hearing.
> >
> > 4. The record shows that trial counsel inappropriately failed to move for recusal of the trial judge.
>
> B. The record shows the Petitioner was denied his substantive constitutional right to testify in his own defense.

We find the evidence does not preponderate against the findings of the trial judge, and we affirm the judgment.

The burden is upon the petitioner to prove by a preponderance of the

evidence the allegations raised in a petition for post-conviction relief, *State v. Kerley*, 820 S.W.2d 753, 755 (Tenn. Crim. App. 1991), and on appeal the findings of the trial judge on the evidence are conclusive unless the evidence preponderates against the verdict. *Cooper v. State*, 849 S.W.2d 744, 746 (Tenn. 1993). If a petitioner surmounts these hurdles at trial and on appeal, the petitioner must then show that the conduct of counsel was so serious as to deprive the petitioner of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). The *Strickland* rule was adopted as the rule to apply in these cases in Tennessee by the holding of our Supreme Court in *State v. Melson*, 772 S.W.2d 417, 419 f.n. 2 (1989) (citing *State v. Ash*, 729 S.W.2d 275 (Tenn. Crim. App. 1986)).

We review the record in this case within the parameters of the above rules.

The only issue raised by the petitioner which has a modicum of possible prejudice is issue A.1, the refusal of trial counsel to put on evidence which would have been exculpatory.

The indictment charged the defendant with burning property owned by Sam Ailey. Prior to trial, Sam Ailey made an affidavit, in defense counsel's office, in which he swore he had given the property to Calhoun. At trial, defense counsel elected not to call Ailey as a witness. On the face of this, it appears counsel was deficient in making this decision.[1] However, in light of the evidence introduced on this issue, we find the trial judge properly denied relief.

It is true that Sam Ailey gave an affidavit in which he said he had given the property to the defendant. This record shows that, at the time of the original trial, and now, Sam Ailey was an older man whose memory was seriously deficient.

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[1]Counsel for the petitioner relies heavily upon the statement of this Court in *Harlen [sic] Benson Calhoun v. State of Tennessee*, C.C.A. No. 03C01-9112-CR-0377 (filed at Knoxville, August 8, 1992) to assert counsel was incompetent. That statement by the author of that opinion, concurred in by the other judges, was made in a vacuum. In other words, they did not have the advantage of a full-blown airing of the claim by the petitioner as we now have.

When the fire occurred, Sam Ailey made remarks to the police which indicated he was the owner of the property in question.

Based upon this, defendant's counsel feared that Sam Ailey would not withstand the rigor of cross-examination on trial concerning whether he had given the property to Calhoun. This affidavit was made by Ailey after the fire and before the trial. Counsel did not put much faith in the accuracy of the affidavit, which was given in the presence of Calhoun.

Obviously, counsel may have questions about the veracity of a witness which would cause reluctance to offer the evidence. Nevertheless, whether a witness is to be believed or not is a matter to be determined by the trier of fact and when, as here, the evidence, if believed by the trier of fact, would have possibly led to a dismissal of the indicted charge against the defendant, the failure to offer it requires close scrutiny. If we had viewed this case in that position on direct appeal, we likely would have reversed the conviction. The issue of ownership of the burned property was raised on appeal. However, as we pointed out in the original opinion, the only evidence on the issue of ownership showed Sam Ailey to be the owner. *State of Tennessee v. H.B. Calhoun*, C.C.A. No. 278 {filed at Knoxville, August 21, 1990).

We now have the benefit of hindsight on the decision of trial counsel not to call Ailey. This record shows that Ailey had in fact transferred the property to a Mr. Stafford on September 24, 1986, well before the fire. The deed was not of record, and there was no reason for counsel to discover it. The evidence further shows Mr. Stafford conveyed the property back to Mr. Ailey on April 9, 1990, well after the trial of the defendant. We have the further hind-sight of the ruling by the trial judge that the petitioner is not credible. We, of course, are not in as good a position to make an assessment of the petitioner's credibility, but if we were asked to pass on the credibility of the petitioner from reading the testimony, we would certainly concur with the trial judge--in short, the record convinces us the testimony of the petitioner was not credible.

What original trial counsel was faced with at trial was a client whose credibility would have been seriously eroded if not destroyed at trial, and an affiant to call as a witness whose credibility, because of age, was questionable. The entire theme of the defense was to convince the jury that the building which was burned was useless. The evidence does show the building was falling down prior to the burning. Defense counsel characterized the defense as a so-what defense.

If counsel had called Mr. Ailey, who wept and lamented the loss of property in the burned building, and the defendant whose credibility was very questionable, he would have lost the substance of the defense raised.

We have examined this in the context of the rules set out in the above cases and find the petitioner has failed to show counsel was incompetent.

We have examined issue number A.2 raised by the petitioner and find the ruling by the trial judge that counsel did not unconstitutionally deny him the right to testify is supported by the record.

We find that issue A.3 raised by the defendant is without merit because this record does not show a reduction in the sentence imposed by the trial judge would have resulted had counsel raised the issue of the length of the sentence on appeal.

We find there is nothing in this record to show counsel should have asked the original trial judge to recuse himself from the trial.

The petitioner asserts this should have been done because he had sworn some very vulgar words at the trial judge prior to his becoming a judge. This was said by the petitioner to have occurred on the occasion of the taking of his pre-trial discovery deposition by Mr. Mayo L. Mashburn (now Judge Mashburn) on July 27, 1977 in a civil case filed by the instant petitioner. Conrad Finnell, counsel for the petitioner in the 1977 discovery deposition, testified at the post-conviction hearing that he had no recollection of the occurrence (cursing of Mr. Mashburn) related by the petitioner.

Judge Mashburn testified in the post-conviction hearing that he had never had any conversation with the petitioner to his recollection and further testified he was absolutely certain he had not had any conversation with him prior to the trial on the arson.

After the post-conviction case had been ruled on, petitioner filed a copy of a pre-trial discovery deposition which showed Mr. Mashburn was counsel for the defendant in the taking of the discovery deposition in 1977.[2]

The petitioner, through his current counsel, makes a very strident attack upon the integrity of the trial judge based upon his testimony concerning the deposition, a condemnation which we find far less certain than counsel's attack warrants.[3]

At any rate, we can find no reason to grant relief to the petitioner on this issue because there is no showing that failure of counsel to have the trial judge recused denied the petitioner a fair and impartial trial.

The judgment of the trial court is affirmed. Costs are assessed to the appellant, Harley Benson Calhoun.

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John K. Byers, Senior Judge

CONCUR:

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[2]We might note the deposition does not contain any language the plaintiff said he used towards Mr. Mashburn, nor does it show any interruptions in the deposition.

[3]We note this attack is occasioned by an exhibit with which the judge was not confronted when he was a witness. Perhaps counsel may practice long enough to understand that memories can be deceptive and many attorneys cannot recall all the depositions they have taken over the years. At any rate, counsel can pursue his allegation against the judge in another forum where the witness whose integrity is questioned can be confronted by the evidence and be given an opportunity to respond to counsel's charges.

Joseph M. Tipton, Judge

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F. Lee Russell, Special Judge