IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1995 SESSION

LUTHER E. FOWLER,	)	
	)	**C.C.A. NO. 03C01-9501-CR-00027**
Appellant,	)	
	)	**HAMILTON COUNTY**
VS.	)	
	)	**HON. DOUGLAS A. MEYER ,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-conviction)

FOR THE APPELLANT:

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OPINION FILED:_____

REVERSED AND REMANDED

JOHN H. PEAY,
Judge

O P I N I O N

The petitioner was indicted and convicted by a jury of felonious assault with a firearm with the intent to commit first-degree murder. His conviction was affirmed on direct appeal. He then petitioned for post-conviction relief, alleging ineffective assistance of counsel at trial and on appeal, and no effective waiver of his constitutional right to counsel at trial.

The lower court held an evidentiary hearing and heard testimony from the petitioner and William R. Heck, his appointed counsel at trial and on direct appeal. At the conclusion of the hearing, the lower court dismissed the petition. The petitioner now appeals.

While at a bar, the petitioner shot and seriously injured the victim. He claims that he shot the victim in self-defense after the victim pulled a knife on him. The petitioner's first trial, with Mr. Heck as his appointed counsel, resulted in a hung jury. Mr. Heck also represented the petitioner in preparation for the retrial, but the petitioner fired Mr. Heck on the morning of his second trial. The trial proceeded with the petitioner pro se. After lunch, however, Mr. Heck was reappointed at the petitioner's request and represented him for the remainder of the trial. The second jury convicted the petitioner.

The petitioner's claim that Mr. Heck ineffectively represented him at trial rests on Mr. Heck's "failure" to subpoena certain witnesses. The petitioner testified during his post-conviction hearing that he had given Mr. Heck the names of numerous witnesses who would testify that he had shot the victim in self-defense. Mr. Heck testified that "[i]n efforts to contact those people I found telephones disconnected or the people

themselves were simply nonexistent and there was no way to locate them."[1] Of the names supplied by the petitioner, Mr. Heck was able to find three: two of these related accounts that were not favorable to the petitioner. The third person was the petitioner's nephew and Mr. Heck did put him on to testify. Mr. Heck also found other potential witnesses during his investigation of the case but none that were helpful to the petitioner.

The petitioner also testified that the witnesses whose names he had given to Mr. Heck had spoken with Mr. Jerry Summers, another lawyer, and that these witnesses had given favorable accounts of the petitioner's conduct to Mr. Summers. Mr. Heck testified that he had spoken with Mr. Summers about these witnesses, and that Mr. Summers had denied ever speaking with any of them.

"In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his [or her] petition by a preponderance of the evidence." McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the factual findings of the trial court in hearings "are conclusive on appeal unless the evidence preponderates against the judgment." State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983).

In reviewing the petitioner's Sixth Amendment claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To prevail on a claim of ineffective counsel, a petitioner "must show that counsel's representation fell

[1]Mr. Heck testified that one of the reasons it was difficult to find the witnesses was because the petitioner had "skipped a number of bonds," causing a lengthy delay between his arrest and his trial.

below an objective standard of reasonableness" and that this performance prejudiced the defense. There must be a reasonable probability that but for counsel's error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985).

The lower court found that "Mr. Heck did the best he could in locating the witnesses . . . . I don't see how he could have found any witness that would have testified differently than the way that the witnesses . . . did testify to in court." The court further found that "Mr. Heck did far more than required under the standard of effectiveness of counsel." The petitioner has not carried his burden of proving his allegations of ineffective assistance of counsel by a preponderance of the evidence, and the evidence adduced at the post-conviction hearing does not preponderate against the lower court's ruling. This issue has no merit.

The petitioner also claims that Mr. Heck was ineffective in his representation of him on his direct appeal. There is no evidence in the record to support this contention; indeed, the petitioner was granted a new sentencing hearing on appeal, and his conviction for attempted aggravated assault was dismissed. This issue is without merit.[2]

The petitioner also alleges that the trial court erred by not advising him of the dangers of proceeding pro se upon his request to discharge Mr. Heck, and that his waiver of his right to counsel was not effective.

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[2]The only allegations made by the petitioner about the appeal were, "I would like to know why he didn't bring up no issues in my appeal when he appealed my case about anything in my transcript of my trial, the only thing he brought up was on that presentencing hearing for a new trial about illegal sentence on my -- on illegal sentencing."

The Sixth Amendment to the United States Constitution grants criminal defendants the right to represent themselves. Faretta v. California, 422 U.S. 806 (1975). There are three preconditions which must be satisfied before a defendant's right to self-representation becomes absolute. "First, the accused must assert the right to self-representation timely. Second, the accused's request must be clear and unequivocal. Third, the accused must knowingly and intelligently waive the right to the assistance of counsel." State v. Herrod, 754 S.W.2d 627, 629-30 (Tenn. Crim. App. 1988) (citations omitted). In State v. Northington, our Supreme Court reiterated the guidelines set out by the United States Supreme Court to be used by trial judges before determining that a defendant has waived his constitutional right to counsel:

> [A] judge must investigate as long and as thoroughly as the circumstances of the case before him [or her] demand. The fact that an accused may tell him [or her] that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

667 S.W.2d 57, 60 (Tenn. 1984) (quoting Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948)) (alterations added). Additionally, our state code has provided since 1989 that:

> (a) No person in this state shall be allowed to enter a plea in any criminal prosecution . . . when not represented by counsel, unless such person has in writing waived the right to the assistance of counsel.
>
> (b) Before a court shall accept a written waiver of the right to counsel, the court shall first advise the person in open court concerning the right to the aid of counsel in every stage of the proceedings. The court shall at the same time determine

> whether or not there has been a competent and intelligent waiver of such right, by inquiring into the background, experience and conduct of the person and such other matters as the court may deem appropriate. If a waiver is accepted, the court shall approve and authenticate it and file it with the papers of the cause, and if the court is one of record, the waiver shall also be entered upon its official minutes.

T.C.A. § 8-14-206 (emphasis added). See also Tenn. R. Crim. P. 44(a) ("Every indigent defendant shall be entitled to have assigned counsel in all matters necessary to the defense and at every stage of the proceedings, unless the defendant executes a written waiver. Before accepting such waiver the court shall first advise the accused in open court of the right to the aid of counsel in every stage of the proceedings. The court shall, at the same time, determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience and conduct of the accused and such other matters as the court may deem appropriate. Any waiver accepted shall be spread upon the minutes of the court and made a part of the record of the cause.")

In order to adequately cover the issues raised by a potential waiver of the right to counsel, this Court has recommended that the trial judge use the questions contained in 1 Bench Book for United States District Judges 1.02-2 to -5 (3d ed. 1986). See, e.g., Herrod, 754 S.W.2d at 630. These questions can also be found in the appendix to United States v. McDowell, 814 F.2d 245, 251-252 (6th Cir. 1987).

In this case, the following exchange was had between the trial judge and the petitioner relative to the petitioner's waiver of his right to counsel on the morning of his trial:

> Judge: Are you telling me you don't want [your appointed counsel] to try it?
>
> Defendant: I don't want him --- no, I don't want him, period.

Judge: Do you want to try the case yourself?

Defendant: If I have to, yeah.

Judge: Well, the case is for trial today.

Defendant: Okay, whatever.

Judge: Of course, you understand if you represent yourself, I have to hold you to the same standards I would a lawyer as far as procedure is concerned. You understand that?

Defendant: Yes, sir, whatever. I don't know what ---

Judge: You've got two choices.

. . .

Judge: Mr. Fowler, based on the proof I heard and the jury's position last time, I think your chances really are slim to none, and less than that if you represent yourself. You do have a constitutional right to represent yourself though if you fully understand that you're waiving your right to be represented by an attorney.

Defendant: Yeah, if you don't appoint me one I guess I'll have to.

Judge: I cannot appoint you another lawyer.

Defendant: All right then, I'll ---

Judge: This case is set for trial today.

Defendant: Okay.

Judge: It's going to be tried today. And Mr. Heck is a very able, very competent lawyer. He's tried this case ---

Defendant: Not to me he's not.

Judge: Well, whether you think so or not, he's a very competent lawyer, and I don't think you're ---

Defendant: He hasn't done one thing to try to help me since I been in this courtroom.

Judge: Well, he doesn't have a magic wand. He can't change the facts. The facts are pretty clear.

. . .

> Defendant: He's not gonna represent me. If I have to represent myself then that's what I'll do.
>
> Judge: You are freely waiving your right to be represented by an attorney then. That's your decision?
>
> Defendant: Yes, sir.
>
> Judge: Okay. . . .

After the jury had been selected, impaneled and accepted, the following additional colloquy occurred out of the jury's presence:

> Judge: I don't want to embarrass you when I ask you this questions [sic], but I must put it on the record. The officer tells me that you cannot read or write, is that correct?
>
> Defendant: Yes, sir.
>
> Judge: So you are at a handicap that way.
>
> Defendant: On reading, yeah.
>
> Judge: Do you wish to reconsider and have Mr. Heck sit at the table so he can look at the papers?
>
> Defendant: No, sir, I don't want him.
>
> Judge: You do not wish to have Mr. Heck sit with you?
>
> Defendant: No, sir.
>
> Judge: You can still represent yourself and he can be of counsel, just sit there to advise with you and to look at any exhibit and explain it to you.
>
> Defendant: I don't want him around me.
>
> Judge: All right. So you're waiving that right.

At that point, Mr. Heck was excused and left the courtroom, and the trial proceeded. The petitioner represented himself during the reading of the indictments; entered a plea of not guilty; made opening argument; and cross-examined several witnesses. After the lunch break, the petitioner requested assistance of counsel for the remainder of his case. The

court called Mr. Heck back, and Mr. Heck proceeded to represent the petitioner through the remainder of the trial.

Thus, the petitioner clearly and unequivocally asserted his right to proceed pro se, satisfying one of the three preconditions to self-representation. However, this Court is concerned that the petitioner did not assert his right timely.

Because Mr. Heck had represented him at his first trial, the petitioner knew full well the quality of the representation he would be receiving at his second trial. Yet, the petitioner waited until the last possible moment to try and discharge his attorney. This smacks of the same sort of disruptive tactics attempted to be used by the defendant in State v. Chadwick, 450 S.W.2d 568 (Tenn. 1970). There, the defendant discharged his lawyer after jury selection, stating that he wanted another attorney. The court denied the lawyer's motion to withdraw and required him to remain at the trial and be available to the defendant. After his conviction, the defendant appealed, complaining that the trial court had denied him effective assistance of counsel. Our Supreme Court affirmed the trial court's action stating, " 'The court may deny [the] accused's application to discharge his counsel where it appears that such application is not made in good faith but is made for [the] purpose of delay.' " State v. Chadwick, 450 S.W.2d at 570 (citation omitted). In the case sub judice, the trial court would have been correct in denying the petitioner's request to represent himself on the basis that his request was not made timely.

We are further concerned in this matter that the trial judge did not examine the petitioner as thoroughly as our Supreme Court and the State Legislature intend. For instance, the trial court did not explore the petitioner's comprehension of the nature of the charges against him; the statutory offenses included within the charged crimes; the range

of allowable punishments; and possible defenses and mitigating circumstances. Nor did the trial court obtain anything in writing from the petitioner concerning his waiver.[3]

Although we previously recognized in our opinion on the direct appeal of this matter that "[t]he trial judge carefully and patiently dealt with" the petitioner's desire to represent himself, State v. Fowler, No. 03C01-9207-CR-00249 at pp. 2-3, Hamilton County (Tenn. Crim. App. filed July 27, 1993, at Knoxville), the issue of the effectiveness of the petitioner's waiver of his right to counsel was not raised on that appeal. Accordingly, the court below erred in concluding that this issue had been previously determined and was therefore not cognizable in this post-conviction proceeding.

It is clear from the records of both the post-conviction hearing and the petitioner's second trial that the petitioner is a difficult individual to deal with and that he has some aptitude for manipulating the legal system to his benefit. As wasteful as it may appear to try the petitioner a third time, however, the Sixth Amendment requires it. If the petitioner again requests to represent himself, the trial court shall determine whether his waiver of his right to counsel is effective pursuant to the guidelines set forth in this opinion.

The judgment of the lower court is reversed, the petitioner's conviction for felonious assault with a firearm with the intent to commit first-degree murder is vacated, and this matter is remanded for a new trial.

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[3]This Court recognizes that the petitioner claimed he was illiterate. A written waiver bearing the petitioner's mark should still have been obtained, however, after a reading of the waiver to the petitioner on the record.

JOHN H. PEAY, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

_____
DAVID G. HAYES, Judge