



# OPINION

This is an appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant filed a petition for post-conviction relief alleging ineffective assistance of counsel. After conducting an evidentiary hearing, the trial court found that the Defendant had failed to establish that he was entitled to relief due to the ineffective assistance of counsel; therefore, the trial court denied the Defendant post-conviction relief. We affirm the judgment of the trial court.

The Defendant was convicted on a jury verdict of selling a controlled substance. On appeal to this court, he raised three issues: (1) Whether his conviction and sentence violated the Interstate Compact on Detainers; (2) whether the trial court erred by instructing the jury on flight; and (3) whether the evidence supported the jury verdict. This court resolved those issues against the Defendant and affirmed his conviction and sentence.<sup>1</sup> The Tennessee Supreme Court denied his application for permission to appeal on March 7, 1994.

In the petition for post-conviction relief filed herein, the Defendant first argues the identical issues which he argued on direct appeal. In addition, he argues that his constitutional right to counsel was violated by ineffective assistance of counsel. The trial judge correctly determined that those issues raised on the Defendant's direct appeal had been previously determined and could not be again considered. Tenn. Code Ann. § 40-30-105 (repealed 1995).<sup>2</sup> Concerning the Defendant's allegations of ineffective assistance of counsel, the trial court found no merit in those allegations. The court found that defense counsel properly investigated the case, communicated

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<sup>1</sup>State v. L. H. Hill, No. 02C01-9206-CR-00131, Shelby County (Tenn. Crim. App., Jackson, filed Sept. 29, 1993).

<sup>2</sup>Current law is codified at Tenn. Code Ann. § 40-30-206.

extensively with the Defendant, and gave advice and rendered services within the range of competency demanded by an attorney in a criminal case.

To secure post-conviction relief in Tennessee, the defendant must prove an abridgment of a Federal or State constitutional right. Tenn. Code Ann. § 40-30-105 (repealed 1995).<sup>3</sup> To prevail on an ineffective assistance of counsel claim, the defendant must show that the adversarial process failed to produce a reliable result. Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993) (citing Strickland v. Washington, 466 U.S. 668 (1984)); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990) (citing Strickland v. Washington, 466 U.S. 668 (1984)).

Proving failure of the adversarial process because of ineffective assistance of counsel requires the defendant to satisfy, by a preponderance of the evidence, both prongs of a two-pronged test. See Butler, 789 S.W.2d at 899. First, the defendant must prove that counsel's performance failed to meet the threshold of competence demanded of attorneys in criminal cases. Butler, 789 S.W.2d at 899. Second, the defendant must prove actual prejudice resulting from the deficient performance. Cooper, 849 S.W.2d at 747 (citing Strickland, 466 U.S. at 687).

Scrutiny of counsel's performance should be highly deferential. Strickland, 466 U.S. at 689. The court should judge counsel at the time of the alleged error in light of all facts and circumstances. Strickland, 466 U.S. at 690; see Cooper, 849 S.W.2d at 746. To satisfy this prong, the defendant must show that counsel's performance does not meet the Sixth Amendment standard of objective reasonableness. Strickland, 466 U.S. at 687; Cooper, 849 S.W.2d at 747. Objective reasonableness demands that counsel's performance fall within the wide range of professional competency.

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<sup>3</sup>Current law is codified at Tenn. Code Ann. § 40-30-203.

Strickland, 466 U.S. at 688, 690; see Cooper, 849 S.W.2d at 746. Informed tactical decisions made by trial counsel, such as a decision not to call the defendant to testify, are not to be second guessed. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

The defendant must prove prejudice that results in an unfair or unreliable proceeding. Lockhart v. Fretwell, 113 S.Ct. 838, 843-44 (1993); Strickland, 466 U.S. at 687. To satisfy this prong, the defendant must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding defendant's guilt. Strickland, 466 U.S. at 695. This reasonable probability must be "sufficient to undermine confidence in the outcome." Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

The resolution of the factual issues raised by the Defendant was determined by the trial court after a hearing in which both the Defendant and the Defendant's trial counsel testified. The trial judge weighed the testimony of these witnesses and found that the Defendant had failed to carry the burden of proof to support his claims, which the Defendant must do to prevail. State v. Kerley, 820 S.W.2d 753, 755 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1991). This court is bound by the findings of the trial judge on the factual determinations unless the evidence preponderates against the findings. Rhoden v. State, 816 S.W.2d 56, 59 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1991). We conclude that the evidence supports the findings of the trial judge. We find no error of law requiring reversal.

The judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JOHN H. PEAY, JUDGE