FILED

February 13, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER SESSION, 1995

MORRIS ALLEN RAY,	)	**C.C.A. NO. 01C01-9501-CC-00021**
	)	
Appellant,	)	
	)	
	)	**BEDFORD COUNTY**
VS.	)	
	)	**HON. CHARLES LEE**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-Conviction)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE CIRCUIT COURT OF BEDFORD COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Petitioner appeals from the denial of his petition for post-conviction relief after a hearing was conducted by the trial court. He was convicted of first degree murder. After exhausting his direct appeals, he brought this petition for post-conviction relief. The trial court denied the Petitioner's post-conviction petition because the Petitioner did not meet the burden of proof necessary to grant the Petitioner a new trial. We agree with the trial court.

We will briefly address the underlying facts. The Petitioner became angry when the victim swore out a warrant on him for assault. He went over to the victim's house and, in the presence of the victim's two brothers, shot the victim and killed him. The Petitioner was convicted of first degree murder and sentenced to life in prison. There was a two and a half year time span between his conviction for first degree murder and the hearing on his motion for new trial. The Petitioner's motion for new trial was unsuccessful, as was his direct appeal. The trial court denied his petition for post-conviction relief, and he appeals this denial.

The Petitioner argues six issues in his appeal: (1) Whether his due process rights were violated by the denial of his motion for employment of a psychiatrist to assist him in the development of his defense; (2) whether his due process rights were violated by the State's failure to disclose a witness statement which would have been germane to his defense of diminished capacity and which would have supported the theory of a mental disorder precluding formation of predicated intent; (3) whether the post-conviction relief court denied the Petitioner's due process rights to a full and fair hearing by denying his request for a continuance for purposes of locating a critical witness on his Brady issue; (4) whether the Petitioner was denied his Sixth Amendment rights by his attorney's unauthorized exclusion of a potential juror, desired by the

Petitioner, solely on the grounds of race; (5) whether the Petitioner was denied his right to effective assistance of counsel based upon the cumulative effect of his attorney's errors and omissions; (6) whether the Petitioner was denied his right to due process of law by the two and one-half year delay between the time of his conviction and the hearing on his new trial motion.

I.

The Petitioner's first issue is whether the trial court erred in failing to hold that the Petitioner's due process rights were violated by the denial of authorization for the employment of a psychiatrist to assist with his "explosive personality defense."

The Petitioner argued this same issue in his direct appeal. This court first stated that the record was incomplete to address this issue. Apparently there was no transcript of the hearing after which the trial court denied the Petitioner's motion for the appointment of a psychiatrist to assist with the Petitioner's defense. Then we discussed Ake v. Oklahoma, 470 U.S. 68 (1985), which held that an indigent defendant in a capital case is entitled to the appointment of a psychiatrist if his sanity is at issue. We also discussed State v. West, 767 S.W.2d 387 (Tenn. 1989), cert. denied, 497 U.S. 1010 (1990), which held that the appointment of a psychologist was not required to assist with the defense of duress. Relying on Ake and West, we stated that "the defendant is not likely entitled to relief here. Moreover, the statutory right has not been extended to non-capital cases." State v. Morris Ray, No. 01C01-9201-CC-00025, Bedford County, slip. op. at 11 (Tenn. Crim. App., Nashville, filed Mar. 1, 1993), perm. to appeal denied, (Tenn. 1993).

However, relying on Ake, our supreme court has recently held that an indigent defendant is entitled to a state appointed psychiatrist in a non-capital case if the defendant's sanity is at issue. State v. Barnett, 909 S.W.2d 423 (Tenn. 1995). In Ake,

the United States Supreme Court stated that "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist." Ake, 470 U.S. at 83.

In the case sub judice, there was a separate hearing before the trial began to determine whether a psychiatrist should be appointed. The trial judge denied the motion after the hearing. There is no transcript of the hearing included in the record. The record is inadequate for this court to decide whether the trial judge's denial of the appointment of a psychiatrist violated the Petitioner's due process rights.

It is the Petitioner's duty to have prepared an adequate record in order to allow a meaningful review on appeal. T.R.A.P. 24(b); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983); see State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). When no evidence is preserved in the record for review we are precluded from considering the issue. Roberts, 755 S.W.2d at 836.

Therefore, this issue is without merit.

II.

The Petitioner's second issue is whether the Petitioner's due process rights were violated by the State's failure to disclose a witness statement which would have been relevant to his defense of diminished capacity and would have supported the theory of a mental disorder precluding formation of predicated intent.

The statement in question reads:

> Prior to the murder of [the victim], [the Petitioner] came to my home late at night. He knocked on the door real loud. I let him in. He said,

> I need some bullets, I need some bullets. Then he said, I need a gun. He was very excited. His eyes looked glazed. He didn't look like the same person I knew. I tried to get him to settle down by asking him what was wrong. At that time, he walked out the door, got in his truck, squalled the tires when he left. The truck was a black Chevrolet 4 X 4. I have known [the Petitioner] for a couple of years. Later on that same night, I heard [the victim] had been killed. My wife's oldest sister, . . ., came back and told us about it.

The Petitioner contends that the statements about the Petitioner's eyes being glazed and that he did not look like the same person would have been exculpatory. He argues that these statements would establish that he was in an impaired state at the time of the murder. This statement was given to the police February 9, 1989, and transcribed May 22, 1989. The Petitioner's trial occurred February 13, 14, 16, and 17 1989.

Under Brady v. Maryland, 373 U.S. 83 (1963), the prosecution is required to voluntarily furnish the defense with any exculpatory evidence upon the request of the defense. Id. at 87. The exculpatory evidence must pertain to the guilt or innocence of the defendant or to the punishment which may be imposed. Id. This court has stated three prerequisites before the prosecution is required to turn over exculpatory evidence:

> First, the evidence must be material. Second, the evidence must be favorable to the accused, his defense, or the sentence that will be imposed if found guilty. Third, the accused must make a proper request for the production of the evidence unless the evidence, when viewed by the prosecution, is obviously exculpatory in nature and will be helpful to the accused.

State v. Marshall, 845 S.W.2d 228, 232 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1992) (citations omitted).

We believe that the statement in question qualifies as exculpatory evidence and should have been disclosed to the Defendant by the prosecution. This error is subject to a harmless error analysis. United States v. Bagley, 473 U.S. 667 (1985); State v. Hartman, 703 S.W.2d 106, 114-115 (Tenn. 1985), cert. denied, 478 U.S. 1010 (1986).

> [I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Agurs, 427 U.S. 97, 112-13 (1976).

We conclude that the statement in question, when considered as part of the entire record, does not create a reasonable doubt as to the Petitioner's guilt. We do not find that the statement demonstrates a diminished capacity to form the necessary intent. The Petitioner's due process rights were not violated by the omission of this evidence from trial.

Therefore, this issue has no merit.

III.

The Petitioner's third issue is whether the trial court denied the Petitioner's due process rights to a full and fair hearing by denying his request for a continuance for purposes of locating a critical witness on his Brady issue.

The critical witness referred to is the witness who made the statement concerning the Petitioner's glazed eyes before the murder. The Petitioner moved for a continuance at the post-conviction hearing so that he could locate the witness who made the statement. The Petitioner made this motion after he closed his proof and before final arguments were to be made. The trial court chose to consider the motion on the merits without considering the timeliness of the motion.

The trial court asked the Petitioner if the witness's testimony would be any different from what was in the sworn statement. The Petitioner told the trial court that because the trial counsel did not investigate this witness, no one knew what the witness's full statement would be. Petitioner's counsel stated that he did subpoena the witness a few weeks before the hearing. When the trial court asked Petitioner's counsel if the subpoena was served or if the witness was not found, Petitioner's counsel said that he did not know and that he was going to have to say that the witness was not found.

The trial judge made this statement when he denied the Petitioner's motion:

> The Court is going to deny the defendant's motion to continue for a number of reasons. One is that it is not-- at the conclusion of all of the evidence is not the time to make a motion to continue for the purpose of reopening the evidence. Two is that, assuming that this motion had been made at the beginning of this hearing, the Court does not find based upon what I have heard today that the continuance would have been granted even at the beginning of the hearing because, one, there is no showing that this is a material witness to the issues which the Court has before it. Two is that apparently there was a request-- I mean, a subpoena was issued not

> to be found or not served in the county. And consequently, there is no assurance that even if the Court had granted a continuance that the witness would have been found.

The granting or denial of a continuance is a matter left to the sole discretion of the trial judge, whose decision will not be disturbed absent "a clear showing of gross abuse of his discretion to the prejudice of the defendant." Baxter v. State, 503 S.W.2d 226, 230 (Tenn. Crim. App.), cert. denied, id. (Tenn. 1973). This court has previously stated that "[t]he only test is whether the defendant has been deprived of his [or her] rights and an injustice done." State v. Goodman, 643 S.W.2d 375, 378 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1982). In order to reverse the judgment of the trial judge, we must be convinced that the defendant "did not have a fair trial and that a different result would or might reasonably have been reached had there been a different disposition of the application for a continuance." Baxter, 503 S.W.2d at 230.

We do not find that the trial judge abused his discretion in denying the motion to continue. There is no reason to believe that the testimony of the witness would add any more than what was included in his sworn statement. In addition, the location of the witness is unknown. We find that the Petitioner had a fair hearing on the issues presented, and the unavailability of this witness would not have changed the outcome of the hearing.

Therefore, this issue has no merit.

IV.

The Petitioner's fourth argument is whether he was denied his Sixth Amendment rights by his attorney's unauthorized exclusion of a potential juror solely on the grounds of race, when the Petitioner desired for the juror to remain on the jury. The Petitioner argues that his counsel challenged a juror on the jury panel because she was African-American. He bases this argument on the fact that his counsel wrote the word "black" next to the juror's name on a jury diagram that counsel prepared.

At jury selection, the juror stated that she believed that the Petitioner had shot the victim from what she had heard. She did say that this would have to be proven to her in a court of law for her to vote for his conviction. The juror also stated that the victim's funeral was at her church, even though the victim did not belong to her church.

Petitioner's trial counsel testified at the post-conviction hearing. He denied that any jurors were peremptorily challenged because of race. He testified that he did not remember why he had written the word "black" next to the juror's name, or why he had written the other notations that were on the jury diagram. He stated that several other names on the diagram were people who are black. Trial counsel testified that the victim and the Petitioner were black and that his research revealed that the victim was very popular in the black community. He also discovered that the Petitioner had some problems in the community. The Petitioner's trial counsel stated that he thought that he remembered that the juror had some connection with the victim's family. He stated that he would have liked to have had her on the jury because he had represented her son.

In Georgia v. McCollum, 112 S.Ct. 2348 (1992), the United States Supreme Court held that the Constitution prohibits a criminal defendant from peremptorily challenging a potential juror because of race. This court has stated:

> The Constitution prohibits purposeful racial discrimination through the exercise of peremptory challenges. Georgia v. McCollum, 112 S.Ct. at 2351; Batson v. Kentucky, 476 U.S. 79 (1986). Racially neutral explanations which meet the Batson criteria must support the exercise of peremptory challenges. At the post-conviction hearing, defense counsel testified that he removed two blacks from the jury because of appellant's reputation for violence in the local black community and because he believed that whites were less likely to know appellant's reputation. Further counsel testified that he discussed the issue with appellant. Batson nor McCollum provide any basis for a criminal defendant to challenge the racially neutral, strategic exercise of peremptory challenges by his counsel under these circumstances.

Bobby Roberson v. State, No. 02C01-9203-CC-00069, Obion County, slip. op. at 12 (Tenn. Crim. App., Jackson, filed Dec. 1, 1993), perm. to appeal denied, (Tenn. 1994). Batson requires that when a prosecutor has been accused of using peremptory challenges in a racially discriminatory manner the prosecutor must supply a racially neutral reason that is "related to the particular case to be tried." Batson, 476 U.S. at 98. The prosecutor's explanation does not need to rise to the level that would justify an exercise of a challenge for cause. Id. at 97.

We conclude that Petitioner's trial counsel supplied sufficient racially neutral reasons to support the peremptory challenge of the potential juror in his testimony at the post-conviction hearing. The Petitioner's due process rights were not violated by the exercise of this peremptory challenge.

This issue is without merit.

V.

The Petitioner's fifth issue is whether he was denied his right to effective assistance of counsel based upon the cumulative effect of his attorney's errors and omissions.

The test to determine whether or not counsel provided effective assistance at trial is whether or not his performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). Under Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984), there is a two-prong test which places the burden on the appellant to show that (1) the representation was deficient, requiring a showing that counsel made errors so serious that he was not functioning as "counsel" as guaranteed a defendant by the Sixth Amendment, and (2) the deficient representation prejudiced the defense to the point of depriving the defendant of a fair trial with a reliable result. 466 U.S. at 687. To succeed on his claim, the appellant must show that there is a "reasonable probability," which is a probability sufficient to undermine confidence in the outcome that, but for the counsel's unprofessional errors, the results of the proceeding would have been different. Id. at 694. The burden rests on the appellant to prove his allegations by a preponderance of the evidence. Long v. State, 510 S.W.2d 83, 86 (Tenn. Crim. App. 1974). We also do not use the benefit of hindsight to second-guess trial strategy by counsel and criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

The Petitioner argues that there are several instances where his trial counsel was ineffective. He first generally argues that his counsel was ineffective during his opening statement. We have reviewed counsel's opening statement under the Strickland standards and do not find that his representation of the Petitioner was deficient.

The Petitioner also argues that his trial counsel was ineffective because he did not put on any proof for the Petitioner, and he recommended that the Petitioner not testify at the trial. We conclude that these issues fall under the category of trial strategy and, therefore, cannot be second-guessed. Trial counsel cross-examined the witnesses for the State and stated at the post-conviction hearing that he would have called these witnesses if the State had not. At the post-conviction hearing Petitioner's counsel testified that he did not put on any character witnesses because the Petitioner had several misdemeanor convictions such as assault that involved acts of violence. This decision was clearly a tactical move on the part of counsel. Trial counsel also stated at the post-conviction hearing that he did not recommend that the Petitioner testify at trial because immediately before trial, counsel and his investigator discovered that the Petitioner had not been alone when he went to the victim's house. Counsel believed that this information would lead to the conclusion that the Petitioner had time to think about what he was doing. We do not find any reason to doubt trial counsel's decisions or the adequacy of his representation of the Petitioner.

The Petitioner also argues that his counsel was ineffective because he did not object to the State's closing argument when the prosecutor referred to the Petitioner as a "cold-blooded killer." We conclude that this also falls under the heading of trial strategy. The evidence at the trial clearly showed that the Petitioner killed the victim. At the post-conviction hearing trial counsel stated that he probably did not object to that characterization because his strategy was to admit that the Petitioner had indeed killed that victim but show that the Petitioner was intoxicated and could not form the necessary intent. Again, we cannot second guess trial counsel's trial strategy, and we do not have any reason to doubt his trial strategy.

The Petitioner also argues that trial counsel was ineffective because he did not adequately investigate the Petitioner's mental health. We disagree. Petitioner's counsel did everything he could to investigate the Petitioner's mental health. He filed

a motion for authorization for the employment of a psychiatrist to assist with his "explosive personality defense." This motion was denied. We do not know what else counsel could have done to investigate the Petitioner's mental health.

The Petitioner argues that even if these instances alone do not constitute ineffective assistance of counsel, then the accumulation of these errors constitute ineffective assistance of counsel. We disagree. The Petitioner received effective assistance of counsel at trial. Therefore, this issue has no merit.

VI.

The Petitioner's sixth issue is whether he was denied his right to due process of law by the two and one-half year delay between the time of his conviction and the hearing on his new trial motion. Apparently, this delay occurred because there was some difficulty in obtaining the transcript of the trial. During this time period, the Petitioner filed a disciplinary complaint against his counsel, and new counsel had to be appointed.

The trial court ruled on this issue after the post-conviction hearing. The trial judge stated in his findings that the Petitioner "failed to present proof of how he had been prejudiced by this delay." The trial court decided that this issue had no merit. We agree with the trial court.

> Under the Post-Conviction Procedure Act, grounds for relief are limited to situations where "the conviction is void or voidable because of the abridgement in any way of any right guaranteed by the constitution of this state or the Constitution of the United States." Tenn. Code Ann. § 40-30-105 (1990). See also Sloan v. State, 477 S.W.2d 219 (Tenn. Crim. App. 1971).

Gable v. State, 836 S.W.2d 558, 559 (Tenn. 1992). The two and a half year delay between the conviction and the hearing of the motion for new trial did not violate a right

guaranteed under the Constitution. The delay itself did not render the Petitioner's conviction void or voidable. Furthermore, the Petitioner has demonstrated no prejudice.

Therefore, this issue has no merit.

We affirm the judgment of the trial court.

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DAVID H. WELLES, JUDGE

CONCUR:

_____
JOHN H. PEAY, JUDGE

_____
PAUL G. SUMMERS, JUDGE