IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JANUARY SESSION, 1996

FRANKLIN WAYNE BARNETT	)	**C.C.A. NO. 02C01-9507-CR-00202**
	)	
Appellant,	)	
	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. W. FRED AXLEY**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	**(Post-Conviction Relief)**

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

In December of 1990, a jury convicted Appellant Franklin Wayne Barnett of armed robbery, resulting in a sentence of ten years imprisonment. Contemporaneously, Appellant pleaded guilty on a separate indictment for the possession of a controlled substance and received a three year sentence to be served concurrently to the robbery sentence. After his conviction was affirmed on direct appeal, State v. Barnett, No. 02C01-9103-CR-00035, 1992 WL 44921 (Tenn. Crim. App. March 11, 1992), perm. to appeal denied, (Tenn. 1992), Appellant petitioned for post-conviction relief in the Shelby County Criminal Court, alleging that he failed to receive effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution.

In this action, Appellant appeals the denial of this, his first petition for post-conviction relief. Finding no error in this record with regard to the denial of the post-conviction petition, we affirm the decision of the criminal court.

Initially, we are guided by certain well-established principles of law. When an appellant's post-conviction claim involves the Sixth Amendment right to effective 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 assistance of counsel, a petitioner must show that his or her counsel's representation fell below the objective standard of Baxter and, additionally, that this sub-standard representation actually prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 692 (1984).

Our Supreme Court has held that “[t]o establish actual prejudice, the defendant must demonstrate that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. . . . A probability is ‘reasonable’ if it is ‘sufficient to undermine confidence in the outcome’ of the proceeding.” Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994) (quoting Strickland, 466 U.S. at 694).

"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). Unless the appellate court finds that the evidence preponderates against the factual findings of the trial court, these findings are conclusive on appeal. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). In reviewing the trial judge’s decision, we are bound by the following rules of appellate review:

“(1) this court cannot reweigh or reevaluate the evidence or substitute its inferences for those drawn by the trial judge [and] (2) questions concerning the credibility of witnesses, weight and value to be given their testimony, and factual issues raised by evidence are resolved by the trial judge . . . .”

Taylor v. State, 875 S.W.2d 684, 686 (Tenn. Crim. App. 1993) (citing Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990)).

Appellant has raised numerous incidents as proof of the allegedly ineffective trial representation . We will address each of these in turn. The trial judge found that Appellant's petition centered upon (1) trial counsel’s failure to adequately prepare for trial including the filing of various discovery motions; (2) trial counsel’s failure to call character witnesses and alibi witnesses; and (3) trial counsel’s failure to adequately cross-examine the State’s main witness, the victim.

I.

We turn first to Appellant's claim that the trial attorney failed to prepare adequately for Appellant's defense. Appellant relies heavily upon the undisputed fact that the trial attorney met with Appellant only once in jail, while all other meetings were scheduled at the courthouse to coincide with days that Appellant had court appearances. Appellant testified that there were five or six of these courthouse meetings-- all of which were very brief, averaging four or five minutes. Furthermore, Appellant claims that there were numerous times that he attempted to contact the trial attorney and was unable to do so.

At the post-conviction hearing, the trial attorney testified that he had spent around twenty-two in-court hours and twenty-six out-of-court hours on Appellant's case and that he felt adequately prepared. The trial attorney said that he first met with Appellant in May of 1990 after being assigned the case the preceding April. Referring to his notes, he chronicled the subsequent meetings, testifying as to the matters discussed at each meeting. Though he conceded that some of the meetings may have been as short as five minutes, others were much longer. The trial attorney readily admitted to scheduling courthouse meetings with all of his clients as he found this the most efficient way to meet with incarcerated clients in light of the public defender's tremendous caseload.

The trial judge found the preparation and discovery in this case to be "nothing short of complete." We agree. A quiet conference room in a courthouse serves the same purpose as a similar room at the jailhouse. The trial attorney met with Appellant approximately once a month for the seven months preceding the trial. While Appellant complains about the brevity of these meetings, the trial attorney's testimony reveals thorough discussion regarding the progress of Appellant's case. Furthermore,

Appellant does not suggest other matters which he would have discussed or about which he would have inquired had these meetings been longer or more numerous.

In his attack on the trial attorney's preparation, Appellant also insists that the trial attorney should have filed a motion for discovery. However, the proof showed that the trial attorney enjoyed an open-file policy with the District Attorney's office, eliminating the need for such a motion. Moreover, Appellant does not refer to any specific beneficial evidence in the State's files of which his attorney was unaware.

II.

Appellant next complains about the trial attorney's decision not to call certain witnesses on Appellant's behalf. Where ineffective assistance of counsel is based upon the trial attorney's failure to present potential defense witnesses, the witnesses should testify at the post-conviction hearing. Generally, this is the only way Appellant can establish that (a) a material witness existed and could have been discovered but for counsel's neglect, (b) a known witness was not interviewed by counsel, (c) the failure to discover or interview a witness prejudiced the petitioner, or (d) the failure to call certain witnesses denied critical evidence to the prejudice of the petitioner. See Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990).

The only potential trial witnesses called by Appellant at the post-conviction hearing were his brother, Mr. Charles Barnett, and Mr. Larry Darbison. Mr. Darbison testified that he was the bartender at a bar owned by Appellant and Mr. Charles Barnett at the time of the robbery, which occurred at 5:55 a.m. on February 18, 1987. Mr. Darbison started work at 11:00 p.m. on February 17 and worked until 6:00 a.m. the next morning. He testified that Appellant was present all night long and that he saw him periodically throughout the night.

On cross-examination, Mr. Darbison disagreed that he had told the trial attorney that Appellant could have left for twenty or thirty minutes without him knowing about it--he would have known as the only door into the bar was visible to him. He stated that it would take "every bit of twenty-five, thirty-- maybe forty minutes" to walk to the Burger King from the bar. He admitted telling the attorney that he was not really sure what Appellant was doing at 5:55 a.m. However, he was fairly certain of Appellant's presence because he saw Appellant at the bar five minutes later when they got off work.

Appellant's brother, Mr. Charles Barnett, was also a witness at the post-conviction hearing. Corroborating the testimony of Appellant and Mr. Darbison, Mr. Barnett testified that the three of them had gone together to meet with an attorney around 8:00 or 8:30 the morning following the robbery. Mr. Barnett remembered the morning because of the pre-scheduled meeting with the attorney and later verified the exact date with the attorney's office. After conveying this information to the trial attorney, Mr. Barnett anticipated being able to communicate it to a jury. He also planned to verify Appellant's employment and to tell the jury that Appellant had no need to rob the Burger King as his own business was profitable and he had access to money at all times.

Both men testified that they communicated this information to the trial attorney. Though they were present at the courthouse during Appellant's trial, they were told they were not needed to testify.

The trial attorney determined that Appellant's brother could not provide an alibi. With regard to Mr. Darbison, the trial attorney remembered a very different conversation. At the post-conviction hearing, he testified that Mr. Darbison was not only unable to recall where Appellant was at 5:55 am. but even told him that Appellant

left for twenty or thirty minutes. In addition, Mr. Darbison said that the Burger King was only a ten minute walk from the bar. Concluding that such testimony, by placing Appellant near the crime scene, actually served to implicate Appellant, the attorney consulted Appellant who agreed that his brother and Mr. Darbison should not testify. At the post-conviction hearing, the trial attorney testified that, had Appellant insisted that they testify, he would have put them on the stand.

The trial judge found that Appellant failed to show that the alibi witnesses would have been helpful to the defense. He stated that "[b]y not calling the so-called 'alibi' witnesses, defense counsel prevented potentially damaging testimony [from] being presented on [Appellant's] behalf." Obviously, the trial judge found the attorney's version of the pre-trial discussion of the case to be more credible than that of the two witnesses. In light of the trial attorney's testimony, the strategy not to call these two witnesses was a sound tactical choice. See Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

The Appellant also complains that the attorney exerted no effort to obtain character witnesses at the trial. While Appellant testified that his attorney never discussed character proof with him, the trial attorney testified to the contrary. Though the attorney recommended that there not be character witnesses, Appellant was determined to talk with possible witnesses and make his own decision. However, Appellant never followed through and no character witnesses were called.

The trial judge accredited the trial attorney's account of facts with regard to character proof and concluded that this decision of trial strategy was for the attorney to determine. From the trial attorney's testimony, it is apparent that his decision not to pursue a character line of defense was the product of informed choice. See State v. Kerley, 820 S.W.2d 753, 756 (Tenn. Crim. App. 1991) (counsel's conscious decision

not to call character witnesses was no basis for an ineffective assistance claim). We refuse to second guess the trial court's decisions with regard to these witnesses. Furthermore, as no character witnesses were presented at the post-conviction hearing, we cannot speculate as to the substance of their testimony. See Black v. State, 794 S.W.2d at 757.

III.

Appellant's next issue involved the cross-examination of the victim, Ms. Jaqueline Smith. Appellant's position is that the State's entire case rested upon the victim's testimony and, as such, the trial attorney should have used every available method of discrediting this testimony.

In support of his contention, Appellant pointed to certain uncontroverted facts. Ms. Smith gave a description of the robbers in both the police report and a subsequent statement made to the police which, when compared to her trial testimony, revealed several discrepancies. For example, in her statement, the victim remarked that, in the lineup, Appellant merely "looked like he was the [robber] with the mustache." However, she was much more certain of Appellant's identity at trial. In addition, there were other minor inconsistencies, including one with regard to the hair color of the other man who assisted in the robbery.

When asked at the post-conviction hearing, the trial attorney said that he was aware of these discrepancies. However, Ms. Smith stated that she had become more certain of Appellant's identity upon seeing his face in a vision that she had when she looked into a mirror. Additionally, the victim identified a ski mask, a jacket, a pair of gloves, and a pistol which were taken from Appellant when he was arrested a couple of weeks after the robbery. As Ms. Smith testified that she was able to identify these

items after having seen them in a dream, the trial attorney made the decision that he would focus his cross-examination on the victim's concession that her testimony was based on a vision and a dream.

Once the trial attorney successfully elicited this testimony from Ms.Smith, he felt that he "had hit everything that [he] needed and hit it well, and there's a time to quit. That . . . [by] going further [he] ran the risk of allowing her to rehabilitate herself." In making this determination, he considered that the victim "was the kind of person . . . who if you just let her go on, she's going to start thinking of facts and building things and that kind of thing."

As we have noted above, a reviewing court must defer to an attorney's trial strategy or tactical choices so long as they are informed and based upon adequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982); Vermilye v. State, 754 S.W.2d 82, 85 (Tenn. Crim. App. 1987). From the trial attorney's testimony, it is apparent that he considered the potential methods of impeaching the credibility of this particular witness and made a competent decision about which avenue was most appropriate.

IV.

Finally, there were several matters mentioned at the post-conviction hearing to which Appellant summarily alludes in his brief. The trial court did not address these matters in its Findings of Fact and Conclusions of Law. Included were allegations involving the constitutional validity of the lineup from which the victim first identified Appellant, the trial attorney's alleged last-minute effort to have Appellant dressed in

street clothes, and the trial attorney's failure to object to allegedly improper prosecutorial argument.

Appellant has presented neither authority nor any substantial argument to support these claims. Therefore, in accordance with the rules governing this Court, these issues are waived. Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b); see State v. Hill, 875 S.W.2d 278, 284 (Tenn. Crim. App. 1993).

Finding that Appellant has failed to present any evidence that preponderates against the trial court's conclusion that Appellant received effective and competent trial representation, we affirm the decision of the trial court.

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JERRY L. SMITH, JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

_____
LYNN BROWN, SPECIAL JUDGE