

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1995 SESSION

FILED

April 12, 1996

RICKY ALLAN JOHNSON,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

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C.C.A. # 01C01-9503-CC-00072

SEQUATCHIE COUNTY

Hon. Buddy D. Perry, Judge

(Post-Conviction)

Cecil W. Crowson

Appellate Court Clerk

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OPINION FILED _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The pro se petitioner, Ricky Allan Johnson, appeals the trial court's denial of his petition for post-conviction relief. He claims that he did not receive the effective assistance of counsel at trial or on direct appeal, asserting among other things, that his counsel failed to present proof at the evidentiary hearing and otherwise have an immunity agreement enforced. He also argues that the trial court should have granted a judgment of acquittal.

We affirm the judgment of the trial court.

On June 8, 1988, the petitioner was convicted of felony murder, aggravated kidnapping, and armed robbery. The trial court imposed an effective sentence of seventy years. This court affirmed the convictions and sentences on direct appeal. See State v. Johnson, 781 S.W.2d 873 (Tenn. Crim. App. 1989). The supreme court denied the petitioner's application for permission to appeal on November 27, 1989.

On October 26, 1992, the petitioner filed this petition alleging several instances of ineffective assistance of counsel and challenging both the sufficiency of the evidence and the excessiveness of the sentences. The trial court appointed counsel and the petition was amended. No witnesses were presented at the evidentiary hearing. Instead, the petitioner relied upon portions of the trial record in making his case. The trial court denied relief, finding that the defendant had breached the agreement and was not,

therefore, entitled to enforcement.

I

The petitioner has listed numerous instances of ineffective assistance. He claims that he has not received a full and fair hearing, as required by statute, because his post-conviction counsel "abandoned the issue" by failing to present proof at the evidentiary hearing.

In order for the petitioner to be granted relief on grounds of ineffective assistance of counsel, he must establish that the advice given or the services rendered were not within the range of competence demanded of attorneys in criminal cases and that, but for his counsel's deficient performance, the result of his trial would have been different. Strickland v. Washington, 466 U.S. 668 (1984); Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). The same standard applies to counsel on appeal. Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993); see Evitts v. Lucey, 469 U.S. 387 (1985).

The burden is on the petitioner to show that the evidence preponderated against the findings of the trial judge. Clenny v. State, 576 S.W.2d 12 (Tenn. Crim. App. 1978). Otherwise, the findings of fact by the trial court are conclusive. Graves v. State, 512 S.W.2d 603 (Tenn. Crim. App. 1973).

Recently, our supreme court addressed the issues of previous determination and waiver under the post-conviction act. A full and fair hearing was defined as follows:

[A] "full and fair hearing" sufficient to support a finding of previous determination occurs if a petitioner is given the opportunity to present proof and argument on the petition for post-conviction relief. We further conclude that the rebuttable presumption of waiver is not overcome by an allegation that the petitioner did not personally and therefore, "knowingly and understandingly," waive the ground for relief. Waiver is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney.

House v. State, 911 S.W.2d 705, 706 (Tenn. 1995) (emphasis added).

The court ruled that the following circumstances were sufficient to constitute a full and fair hearing for previous determination purposes:

An evidentiary hearing was held, and the petitioner was afforded every opportunity to present evidence and argument. The original trial record was introduced into evidence, and the trial judge determined from that record, and the argument of counsel, that the allegations were without merit.

Id. at 711. This petitioner had the opportunity at the evidentiary hearing to support his claims of ineffective assistance of his counsel. That his counsel relied upon the record of the trial to prove his claims does not mean that he was denied a hearing; that is not an unusual tactic. Moreover, there is no constitutional right to the effective assistance of counsel in a post-conviction hearing. E.g., Id. at 706. Even if counsel was ineffective for having failed to

present proof, the petitioner is bound by that action.

II

Until recently, the rule in Tennessee had been that informal immunity agreements were generally unenforceable. See Bruno v. State, 192 Tenn. 244, 240 S.W.2d 28 (1951). In the direct appeal by the petitioner, this court relied on Bruno, at least in part, in determining that the state was not bound by the immunity agreement. State v. Johnson 781 S.W.2d at 879-80. In State v. Howington, 907 S.W.2d 403, 407-09 (Tenn. 1995), however, our supreme court overruled Bruno and its progeny, holding "that an agreement between a prosecutor and a defendant is enforceable under the law of contracts" unless there had been a material breach by the defendant. The court made specific reference to this case: "in Johnson, the trial court determined, after a hearing, that Johnson had breached the agreement by being untruthful." Id. at 407, n.7.

In the opinion rendered on direct appeal, this court ruled that there had been "a substantial and material misstatement by the defendant [concerning his own involvement in the kidnapping and murder.]" State v. Johnson, 781 S.W.2d at 879. An issue is previously determined and thus unavailable as a ground for post-conviction relief "if a court of competent jurisdiction has ruled on the merits after a full and fair hearing." Tenn. Code Ann. § 40-30-112(a). The issue of whether the immunity agreement was enforceable had not only been addressed by this court on direct appeal, it was determined in a way consistent with the holding in Howington.

As a result, the petitioner is not entitled to relief on this ground. The focus of the argument made at the evidentiary hearing was on trial counsel's failure to help draft the immunity agreement in an enforceable form. As part of the agreement, however, the petitioner had to pass a polygraph examination. He did not do so. Counsel could hardly be faulted for that. That clearly distinguishes this case from the holding in Howington. In Howington, the defendant had faithfully performed his obligations under the agreement and had provided accurate information to the state. Johnson, on the other hand, had failed to meet a basic condition of the agreement and, in consequence, was not contractually entitled to any relief.

The remaining allegations of ineffective assistance are not supported by the proof. The petitioner has also failed to establish how the results of his trial might have been different absent the claimed deficiencies. Certainly, the evidence does not preponderate against the trial court's finding that the petitioner received the effective assistance of counsel at trial. Our own conclusion is that the petitioner was effectively represented by counsel on appeal.

III

Finally, on direct appeal the petitioner raised the issue of whether the trial court had erred in denying his motion for judgment of acquittal on the armed robbery and aggravated kidnapping charges. Otherwise, he did not challenge the sufficiency of the evidence or the trial court's

denial of his motion for judgment of acquittal on the murder charge.

While this issue has most likely been waived by the standards in House, the petitioner would not be entitled to relief anyway. This court reviewed the sufficiency of the evidence on all of the charges on direct appeal and determined that the evidence was "overwhelming to show beyond a reasonable doubt that the defendant was a participant in the aggravated kidnapping ..., the robbery ..., and the cold blooded murder of [the victim] during the course of the commission of these other felonies." This court further concluded that the jury was "unquestionably warranted in finding the defendant guilty beyond a reasonable doubt of all of these crimes." Under these circumstances, we must also hold that the issue was previously determined, as defined by statute, and is otherwise without merit.

Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

David H. Welles, Judge

Robert E. Corlew, III, Special Judge