IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

APRIL 1996 SESSION

GEORGE GARY PICKLE,	)
	) C.C.A. No. 02C01-9412-CR-00271
Appellant,	)
	) Shelby County
V.	)
	) Hon. Joseph B. Dailey, Judge
	)
STATE OF TENNESSEE,	) (Post-Conviction)
	)
Appellee.	)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

The petitioner, George Gary Pickle, was convicted following a jury trial of robbery with a deadly weapon and two counts of grand larceny. He filed a pro se petition for post-conviction relief which, following the appointment of counsel and a hearing, was denied. In this appeal, the petitioner raises three issues for review. First, he claims that he was denied the effective assistance of counsel. Secondly, the appellant argues that the actions of the trial judge violated his rights of due process and to a fair trial. Finally, he asserts that the post-conviction court failed to follow the mandates of Tenn. Code Ann. § 40-30-118(b). We affirm the dismissal of the petition.

Because the petitioner's third issue challenges the adequacy of the record, we will address it first. Specifically, he claims that the post-conviction court failed to comply with the mandates of Tenn. Code Ann. § 40-30-118(b). This section provides that:

> Upon the final disposition of every petition, the court shall enter a final order, and ... shall set forth in the order or a written memorandum of the case all grounds presented and shall state the findings of fact and conclusions of law with regard to each such ground.

Tenn. Code Ann. § 40-30-118(b) (1990) (repealed). The petitioner claims that the court's failure has denied him his due process rights to further appellate review. We disagree.

In State v. Swanson, 680 S.W.2d 487, 489 (Tenn. Crim. App. 1984), this Court held that failure to abide by this requirement does not always mandate reversal of the trial court's judgment. The underlying intent of the requirement is to facilitate appellate review. Id. As in Swanson, we are able to glean from the post-conviction court's order, the technical record and the transcript of the

hearing, the information necessary to effectuate meaningful appellate review. Thus, this issue is without merit.

The petitioner's first issue is that he received ineffective assistance of counsel at trial. In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court established a two-prong test to determine whether counsel's assistance was so defective as to require reversal of a conviction. The defendant must show (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced him or her so as to deprive the defendant of a fair trial. Id.

In Tennessee, the appropriate test is whether counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1974).

In his brief, the petitioner alleges that counsel was ineffective because he was inexperienced in criminal law. He points to the record where trial counsel said that although he had practiced law for several years, this was his first or second criminal case. Further, he claims that counsel did no discovery on his own and relied completely on the previous counsel's work. Additionally, he argues that counsel spent a limited time with him prior to trial, making it extremely difficult to render effective representation.

At the post-conviction hearing, the petitioner testified that he had met with trial counsel on only two or three occasions prior to trial. He said that, in his opinion, counsel failed to adequately cross-examine the two detectives who arrested him in Nashville and recovered the stolen automobile. The petitioner also opined that trial counsel was intimidated by the court and was not aggressive enough in his representation.

The petitioner further testified that counsel failed to meet with petitioner's ex-wife. It appears from the testimony that petitioner's alibi witnesses were impeached through the testimony of his ex-wife. He argues that counsel should have called the alibi witnesses back to rebut the wife's statement that they had sold dope to her. On cross-examination, the petitioner admitted that he had given counsel a witness list which did not include his ex-wife's name. Further, he did not ask counsel to interview her.

The petitioner also claimed that during closing argument, the assistant district attorney general continually referred to the crime as done by professionals. This, he argues, alluded to his prior record rather than the manner in which the crime was committed. Thus, counsel should have objected.

Trial counsel testified at the post-conviction hearing. He indicated that he came into the case after the previous attorney had withdrawn. Counsel used the extensive file assembled by former counsel which contained interviews with potential witnesses and their statements. In addition, counsel traveled to Nashville to interview other potential witnesses. Further, he was able to persuade the trial judge to grant a continuance so that a previously unavailable witness could be interviewed; he attempted to get the state to reoffer its earlier plea agreement; he was granted a psychiatric evaluation of the appellant; and he sat through the entire trial of the codefendant so as to apprise the appellant of the testimony given.

Counsel denied that he had met with the appellant only two or three times. He stated that he had five separate meetings with the appellant to discuss possible defenses and trial strategy. Counsel also had a telephone conference for these same purposes. He said he spent 95.2 hours during the trial phase of the petitioner's trial.

Glenn Wright, the assistant district attorney general assigned to the petitioner's case, testified that:

> I remember thinking at the time that [trial counsel] tried as well a case -- I think I put him in the top two with that George Pickle case as I had seen since I have been in the District Attorney's Office. I was that impressed with his trial performance, quite frankly, and his ability to put on proof ... So I thought ... he did a very fine job in representing Mr. Pickle.

The petitioner told the post-conviction court that trial counsel did the best he could in trying the case before an antagonistic court. He summed up counsel's performance by saying that counsel was timid and that he cringed when the trial judge jumped on him about anything.

In his order denying the relief, the trial judge found specifically that petitioner received the effective assistance of counsel. We agree. Nothing in the record establishes that counsel's performance was deficient in any way. Further, no alleged deficiency resulted in prejudice against the petitioner. This issue is without merit.

Finally, in his second issue, the petitioner claims that the trial judge's actions and comments constituted judicial misconduct. He makes a number of bald assertions none of which contain references to the record. Further, he cites no authority to support his claim that the actions of the trial judge constituted misconduct. These failures result in waiver of this issue. T.R.A.P. 27(a)(7); Tenn. R. Ct. Crim. App. 10(b). Moreover, although we did not have appropriate references to the record, our review failed to uncover support for a judicial misconduct claim. Instead, we agree with the post-conviction court that the trial judge's remarks were more demonstrative of personality and style rather than misconduct.

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. Butler v. State, 789 S.W.2d 898, 899-900 (Tenn. 1990). The burden is on the petitioner to establish that the evidence so preponderates. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). Here, the petitioner has failed to meet his burden.

The judgment of the post-conviction court is affirmed.

PAUL G. SUMMERS, Judge

CONCUR:

JOSEPH M. TIPTON, Judge

JERRY L. SMITH, Judge