IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1996 SESSION

STATE OF TENNESSEE,	*	C.C.A. #03C01-9505-CR-00132
APPELLEE,	*	HAMILTON COUNTY
VS.	*	Hon. Stephen M. Bevil, Judge
TERRY LEE SHROPSHIRE,	*	(Post-Conviction)
APPELLANT.	*	

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Terry Lee Shropshire, appeals from the denial of post-conviction relief. He maintains that he was denied his constitutional right to the effective assistance of counsel at trial. The issue was litigated before the Hamilton County Criminal Court. We find no error and affirm the judgment.

In 1992, the appellant was convicted of conspiracy to possess with the intent to sell or deliver three hundred grams of cocaine, a class A felony, and sentenced to twenty-five years in the Department of Correction. This court affirmed the conviction and sentence on direct appeal, and the Tennessee Supreme Court denied the appellant's application for permission to appeal. State v. Shropshire, 874 S.W.2d 634 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994).

The evidence at trial revealed that two informants, James McMillian and George Shadwick, discussed a cocaine transaction with the appellant. The appellant met with McMillian and Gary Lomenick, an undercover detective with the Chattanooga Police Department, to discuss the quality and price of cocaine. The appellant was shown one kilo of cocaine and he tested a portion of it. Thereafter the appellant called McMillian and said that he had $22,000 with which to purchase cocaine. A second meeting was arranged, which was video taped. The appellant and a codefendant met with Lomenick and the informants. The codefendant produced money and handed it to the appellant. The appellant threw the money in Lomenick's van and said to give the "stuff" to the codefendant.

The petition for post-conviction relief was filed on April 4, 1994. It alleged that the appellant was denied the effective assistance of counsel at trial because counsel (a) failed to establish the defense of entrapment, (b) failed to give adequate advice regarding possible plea bargains, and (c) failed to adequately prepare for trial. The petition also

alleged that counsel was ineffective during sentencing and on appeal. The petition was later amended with the assistance of appointed counsel.[1]

During the post-conviction hearing, the appellant testified that he had originally been represented by retained counsel. The State offered to allow the appellant and his codefendant to plead guilty to class C felonies. The offer was terminated by the State when the codefendant refused to accept the plea. The appellant was thereafter indicted for a more serious offense, a class A felony. He could no longer afford retained counsel, and he received court-appointed counsel. Counsel visited the appellant in jail before the appellant made bond, and meetings were also held in counsel's office. According to the appellant, counsel said that the State had a video tape of the drug transaction but never played it for the appellant.

According to the appellant, a meeting was held in counsel's office two days prior to trial. A plea bargain was discussed. The video tape was also discussed. The appellant testified that counsel told him, "They got you on tape, so there [isn't] much you can do." Counsel also asked about possible defense witnesses for the first time. The appellant mentioned "the guy who brought [the informants] to his house."[2] The appellant also told counsel that his wife could testify about the number of phone calls the informants had made to his home to initiate the drug deal.

The appellant testified that an entrapment defense was not discussed until the day of trial when counsel discovered that the State's informants had been paid with a

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[1] The amended petition reiterated the broad claim of ineffective assistance, and it added several particulars: that counsel should have moved to suppress the testimony of the paid informant, that counsel should have filed a pretrial notice to use an entrapment defense, that counsel failed to show the appellant the video of the transaction, and that counsel failed to appeal to the Tennessee Supreme Court.

[2] This was an apparent reference to Samuel Eugene Willie Bartley, who, along with the appellant's wife, testified on behalf of the defense at trial.

percentage of the confiscated drug money. According to the appellant, counsel said that the information "could blow [the informants] out of the water." Counsel then talked to the appellant's two witnesses. The appellant said that he wanted to testify, but counsel advised against it because of the appellant's prior drug related conviction. The appellant said that he could have testified that his contacts with the informants initially did not involve drugs. The appellant conceded, however, that he thought the drug transaction was a way to make "a little extra money" because he planned to deliver the cocaine to someone in Atlanta for $27,000. The appellant said: "I got [paid] for it, but yet...I did it on some of my own free will, but yet...they was involved too."

The appellant maintained that counsel should have played the video tape of the transaction for him to fully evaluate the State's case. He conceded that the tape "hurt" the defense at trial. He also said that he had hoped to plead guilty in return for a lower sentence and that he would have accepted a six year sentence. He admitted that he did not know whether the State had extended such an offer to the indictment that charged the class A felony.

Counsel testified that he graduated from law school in 1987 and that, at the time of the appellant's trial, some ninety-five per cent of his practice was devoted to criminal law and trial practice. Counsel prepared for the appellant's case for two months or more. He originally believed that the appellant "had no defense" due to the video tape of the transaction. He reviewed the video tape on the day he was appointed and he discussed it "blow by blow" with the appellant. Counsel described the tape as evidence that "drove the nails in [the appellant's] coffin."

Counsel testified that he met with the appellant several times before the trial. They discussed the defense of entrapment. Counsel also asked the appellant for any witnesses who could help the defense. On the night before the trial, the appellant told him

about a witness who could "miraculously" testify that the State's agents initiated the transaction. Counsel may have talked to the witness by phone, but he did not interview him in person until the morning of the trial. Counsel testified that he also discovered "at the last minute" that the State's informants had been paid for their role in the transaction. Counsel believed that he requested a continuance but it was denied. He was, however, given an opportunity to interview the informants prior to trial. He advised the appellant not to testify because the appellant had two prior drug related convictions that the State could use to rebut an entrapment defense by showing the appellant's predisposition to commit the crime. Moreover, he believed that keeping the appellant off the stand assisted counsel's strategy to portray the State's informants in a negative light.

Counsel testified that he never told the appellant that the defense would "blow them out of the water." To the contrary, the appellant used those words to advance his "theory" that the State's informants were not permitted to cross state lines. The appellant was "infatuated" with this theory, which was one counsel did not pursue at trial. Counsel said that he called the appellant's last minute witness, Bartley, and the appellant's wife to testify at trial. Finally, counsel said that the prosecution never made a plea offer other than to allow the appellant to plead to the charged offense. Counsel said that he never expected the State to reduce the charge given the weight of the evidence against the appellant.

In post-conviction cases, the burden is on the petitioner to prove allegations by a preponderance of the evidence. Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1988); Vermilye v. State, 754 S.W.2d 82, 84 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1987). On appeal, we are bound by the trial court's findings of fact unless the evidence in the record preponderates against those findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App.), perm. to appeal denied,

(Tenn. 1990). The appellant has the burden of illustrating how the evidence preponderates against the judgment entered. Id.

To establish a claim of ineffective assistance of counsel under the Sixth Amendment to the United States Constitution, a petitioner must show (a) that counsel's performance was deficient and (b) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687 (1984). Appellate review of such an issue does not have to begin with the attorney's conduct; if prejudice is not shown, we need not determine the validity of the allegations about deficient performance. Id. at 697. The Strickland standard has been applied as well to the right to counsel under Article 1, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419, n.2 (Tenn.), cert. denied, 493 U.S. 874 (1989).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether services rendered were within the range of competence demanded of attorneys in criminal cases. In reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. at 689; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. Hellard v. State, 629 S.W.2d at 9.

On appeal, the appellant asserts three reasons in support of his claim that trial counsel was ineffective: counsel had been involved in the case for only two months; counsel was not prepared to take the case to trial; and counsel elected to proceed with trial

instead of pursuing a plea bargain to a lesser offense. The appellant also asserts that the State withheld the identity of its informants until the morning of trial, which further undermined counsel's ability to try the case.[3] We note that the appellant has failed to cite any authority on appeal to advance the first three of these contentions; they are, therefore, waived. See Tenn. R. App. P. 27(a)(7). We have reviewed the issues, notwithstanding the waiver, and we have concluded that they are without merit.

We are assisted in our review by the detailed factual findings made by the trial court. With respect to counsel's preparation, the court found:

> [Counsel], on the day he was appointed, went to the District Attorney's office and viewed the video tape. [Counsel] discussed this video tape at length with the [appellant] when they met on several different occasions to discuss the trial. The Court does not find that [counsel] was ineffective in not producing the video tape for [the appellant] to see. [Counsel] discussed at length with [the appellant] the contents of the video tape.
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> [The appellant] also alleges that [counsel] was not adequately prepared for trial. [Counsel] testified at the hearing that the only defense that he had in this case was an entrapment defense. [Counsel] had asked [the appellant] numerous times about any witnesses and the night before trial was informed by [the appellant] of a witness, Bartley, who would testify to the fact that the law enforcement officers pursued [the appellant]. [Counsel] testified that he was prepared to go to trial as much as he possibly could be with the limited defense that he had and the facts that he had before him. The Court does not find that [counsel] was ill prepared to go to trial.

The appellant has not shown that the evidence in the record preponderates against these findings. See Black v. State, 794 S.W.2d at 755. The trial court also addressed counsel's preparation with regard to whether the appellant should have testified in support of the entrapment defense:

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[3] The remaining contentions made by the appellant in the petition or during the hearing have not been raised on appeal. The trial court addressed each and every contention in its findings of fact and conclusion. Our review reveals that the findings are well supported by the record, notwithstanding the appellant's failure to specifically raise the contentions on appeal.

> [The appellant] further alleges that he did not get to testify at the trial to help establish his entrapment defense. [Counsel] was on the horns of a dilemma. To help substantiate the defense that [the appellant] was entrapped by the law enforcement authorities into selling or buying the cocaine, it would have helped for [the appellant] to have testified. [H]owever, [the appellant] had prior convictions in the state of Georgia for cocaine offenses, and [the appellant], according to his testimony of the hearing, would have testified before the jury that he was purchasing the cocaine to make a profit in Atlanta. These two (2) revelations to the jury would have been extremely detrimental to the defense case, and would not have bolstered his entrapment defense....This was a strategic decision on [counsel's] part which was substantiated by the proof.

Again, the evidence in the record supports the trial court's findings. We note in this regard that counsel testified that he explained the implications of testifying to the appellant before trial. This court will not second guess a tactical decision. See Hellard v. State, 629 S.W.2d at 9.

With regard to the appellant's assertion that counsel should have pursued a plea negotiation, the trial court found:

> The only offer made by the state on the subsequent charge was that [the appellant] plead guilty to the charge and rely upon the Court to set the sentence. There was no recommendation of sentence made to [the appellant]. Faced with the option of pleading blind and relying upon the Court to set the sentence, or going to trial and taking a chance that the jury might find petitioner not guilty, [counsel] advised [the appellant] to go to trial. [The appellant] indicated that he did not want to plead, and that he did want to go to trial. The Court finds that there was no ineffective assistance of counsel for not obtaining a lesser plea, since none existed.

We note that counsel also testified that the appellant was convinced that the State's case could be "blown out of the water" during a trial because the informants had been paid and had crossed state lines. It is clear once again that the appellant has not shown that the evidence in the record preponderates against the trial court's findings.

Finally, the appellant argues that the State's failure to disclose the identity of its informants until the morning of trial deprived counsel of an opportunity to prepare for the

trial. Counsel testified, however, that he was given the opportunity to interview the witnesses prior to trial and to review their criminal records. A review of the trial transcript reveals that counsel fully cross examined the informant McMillian, and that informant Shadwick did not testify. Counsel elicited information about McMillian's criminal record and the fact that he was paid a percentage of the drug money by the State. Accordingly, the evidence in the record does not preponderate against the trial court's findings that counsel was adequately prepared to try the case.

The judgment is affirmed.

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William M. Barker, Judge

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John H. Peay, Judge

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David G. Hayes, Judge