IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH SESSION, 1996

LARRY VAN DAVIS,	)	C.C.A. NO. 01-C-01-9509-CC-00312
	)	
Appellant,	)	CANNON COUNTY
	)	
v.	)	HON. J.S. DANIEL, JUDGE
	)	
	)	(Post Conviction Relief)
STATE OF TENNESSEE,	)	
	)	
Appellee.	)	

FOR THE APPELLANT:

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OPINION FILED _____.

AFFIRMED

WILLIAM S. RUSSELL, SPECIAL JUDGE

OPINION

_____The appellant, Larry Van Davis, appeals the trial court's denial of his motion to compel discovery in conjunction with his Petition for Post Conviction Relief, and the subsequent denial of the relief requested in the Post Conviction Petition. We affirm the action of the trial court in both respects.

Davis was convicted in the Circuit Court of Cannon County on May 17, 1991, by jury verdict, and the judgments of conviction were duly entered. Those convictions were for burglary of a non-habitation; theft of property valued at over one thousand dollars but less than ten thousand dollars; driving under the influence, third offense; driving on a revoked license; reckless driving; and evading arrest. There was an additional charge of aggravated assault, but judgment of acquittal was granted as to it.

The convictions derive from the November 29, 1990, nighttime burglary of a service station in which a window was broken out and the cash register and its contents were taken. The burglary and theft were followed almost immediately by a high speed police chase ending in apprehension of the appellant. Cash register receipts from the service station were found inside the car. Parts of the cash register, along with additional receipts, were found along the roadway where they had been seen being thrown from the vehicle during the police pursuit.

Davis was sentenced on July 19, 1991, receiving eight years for the burglary; four years for the theft; eleven months and twenty-nine days and a two thousand dollar fine for both DUI and evading arrest; and six months and a fifty dollar fine for driving on a revoked license and for the reckless driving. The felony sentences were ordered served consecutively to each other, with the misdemeanor sentences concurrent, for a total effective sentence of twelve years to serve in the Tennessee Department of

Correction as a Range II, persistent offender.

In this appeal, which stems from Davis's collateral attack upon these convictions, he contends that a post conviction proceeding is a civil matter governed by the Tennessee Rules of Civil Procedure and that the trial judge erred in declining to grant his motion to compel discovery. We affirm the ruling of the trial court.

The appellant originally filed his post conviction petition pro se and with it he filed a request for discovery. Subsequently, counsel was appointed and filed a second request for discovery, requesting that the matters contained in the initial request be answered and also requesting additional information. The requested items included: the trial attorney's time and/or billing records; press releases; forensic laboratory reports; police reports; any exculpatory information obtained post-trial; all other physical evidence; and, a witness list for the post conviction hearing.

A motion to compel a response to the discovery request was filed and heard. The State noted that post conviction counsel had a copy of the trial transcript; that the trial exhibits were available in the local clerk's office; and that the office of the district attorney did not have possession of the defense attorney's time or billing records. Additionally, the State's attorney identified its only potential witness. Following argument, the trial judge denied the motion to compel and advised appellant's counsel that items such as the billing records could be obtained by subpoena.

We find no error in the trial court's denial of the motion to compel discovery. The appellant was not entitled to discovery in

conjunction with his post conviction petition. Troletti v. State, 483 S.W. 2d 755 (Tenn. Crim. App. 1972). Furthermore, the items he requested were available to him prior to the hearing, with the possible exception of the billing records. Those were received at the hearing on the petition and appellant's counsel gave no indication then that he needed additional time or otherwise lacked a sufficient opportunity to review those documents. Additionally, the record demonstrates that he was able to conduct a thorough examination of trial counsel regarding their contents. Thus, there is no indication of any prejudice to the appellant. This issue is without merit.

Davis' second issue on appeal is his contention that the trial judge erred in denying his Petition for Post Conviction Relief.

In his petition, appellant attacks his convictions on the ground that he received ineffective assistance of counsel. Following an evidentiary hearing, the trial court found that the Appellant failed to carry his burden of proving that his attorney's performance was deficient. We affirm the ruling of the court below.

It is well-settled that the burden is on the petitioner to prove by a preponderance of the evidence the allegations in a Petition for Post Conviction Relief. On appeal, the reviewing court is bound by any factual determination made by the trial judge unless the evidence preponderates against the lower court's findings of fact. See, e.g., State v. Kerley, 820 S.W. 2d 753, 755 (Tenn. Crim. App. 1991); Tenn. R. App. P. 13 (d).

It is further well-settled that for the appellant to successfully attack the effectiveness of his trial attorney's

representation, he must establish a Sixth Amendment violation, proving that the services of his lawyer were below the range of competency demanded of attorneys in criminal cases, and also proving that there is a reasonable probability that, but for his counsel's deficient performance, the result of the trial would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In Tennessee, it is required that "the advice given, or the services rendered, [be] within the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W. 2d 930, 936 (Tenn. 1975).

At the trial level, appellant sought to rely on four allegations of ineffective assistance. On appeal, three of those have been abandoned and the appellant raises only one of his originally pleaded allegations, plus another that was added without objection at the evidentiary hearing below.

First, Davis claims that his trial attorney was ineffective for not exhausting his peremptory challenges on jurors with a potential bias against appellant and then, if necessary, challenging the entire panel on the ground of bias.

Appellant testified that he conveyed concerns about several potential jurors to his attorney. Those concerns purportedly included a long ago social relationship with one female prospective juror, and the knowledge that another panel member was a distant kinsman of a law enforcement officer in no way involved in appellant's case.

Trial counsel testified that it was both his standard trial procedure and his practice in Davis' case to maintain a chart of the jurors on which he noted their responses to questions. Using that diagram, he consulted with Davis and all clients throughout

jury selection, discussing whether the client had concerns about each particular juror and whether the client concurred in counsel's recommendation as to keeping or challenging each juror. No concerns were articulated by Davis and he expressed agreement with his attorney's recommendations.

Finally, when the point was reached where it appeared that those people seated in the jury box were about to be accepted by both sides, trial counsel's procedure with Davis and all clients was to give them a final opportunity to direct that someone be removed, for whatever reason. Counsel testified that both he and the appellant were satisfied with the jury as seated. Therefore, there was no need for any further challenges or for an issue regarding the jury panel to have been pursued in the motion for new trial or on appeal.

The trial judge accredited the testimony of the trial attorney regarding his communications with Davis during jury selection. The record certainly supports the trial judge's conclusion.

Additionally, the trial court noted that in a county where the population is less than eleven thousand, it is a rarity to conduct voir dire and not find prospective jurors who are acquainted with or related to one another and who have had previous contact with the person on trial. He noted, and the record substantiates, that in those instances in which jurors in the Davis trial indicated that they had knowledge of the accused, had been the previous victim of a burglary, or were distantly related to a law enforcement officer not involved in the case, trial counsel asked the appropriate questions and ascertained to the court's satisfaction that the jurors could be fair and impartial.

The record amply supports the trial court's conclusion that the performance of Davis' trial attorney in the jury selection process was in no respect substandard.

Appellant's second contention of ineffective representations is that trial counsel was deficient for failing to make an offer of proof to preserve the appellant's testimony in conjunction with the Rule 609 hearing at which the trial court determined the admissibility of Davis' prior convictions for impeachment in the event he took the stand and testified.

At the evidentiary hearing on the post conviction petition, appellant explained that, if he had testified, he would have "testified to a whole lot that they didn't know about, that didn't come out." Nowhere in appellant's proof or even in his argument does he enlighten us as to what those unknown facts were or how they might have impacted the outcome of his trial.

What is established in the record is that appellant told his trial attorney that he had no alibi and that his only potential witness was his charge partner. Trial counsel testified that based on what his client had told him his [Davis'] testimony would have been, counsel did not feel that the reviewing court needed the testimony to evaluate the balancing test conducted by the trial court pursuant to Rule 609.

Even if trial counsel could be faulted for not seeking to make an offer of proof of his client's testimony, appellant has failed to establish that such a request would have been granted or that it would have had any effect whatsoever on the outcome of the trial. This contention is meritless.

In light of the foregoing, it is the opinion of this Court

that the judgment of the trial court should be and hereby is, **AFFIRMED**.

WILLIAM S. RUSSELL, SPECIAL JUDGE

CONCUR:

DAVID G. HAYES, PANEL PRESIDING JUDGE

JERRY L. SMITH, JUDGE

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	)	

JUDGMENT

This cause came on to be heard on upon the briefs and written arguments of the parties and the entire record, whereupon a decision was taken under advisement.

For the reasons stated in an opinion filed contemporaneously herewith, it is the judgment of this Court that the judgments of the trial Court are in all respects **AFFIRMED**.

Costs are adjudged against the appellant, for which execution may, if necessary, be issued.

Entered this _____ day of _____, 1996.

PER CURIAM

HAYES, J.
SMITH, J.
RUSSELL, Sp. J.