IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1996 SESSION

FILED

October 8, 1996

Cecil W. Crowson
Appellate Court Clerk

BILLY RAY ALBERT,	)	
	)	**C.C.A. NO. 01C01-9510-CR-00332**
Appellant,	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. J. RANDALL WYATT, JR.,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-conviction)

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The petitioner was convicted by a jury of second-degree murder and armed robbery. He was sentenced to forty years for the murder and twenty-five years for the robbery, consecutive, for an effective sentence of sixty-five years. On direct appeal, his convictions were affirmed and his sentence on the robbery conviction reduced to twenty years.

In his petition for post-conviction relief, the petitioner alleged that he had received ineffective assistance of counsel at the trial and appeal levels. Mr. John Oliva represented the petitioner at his first trial, which resulted in a hung jury, at his second trial, and on the direct appeal. After a hearing at which the petitioner, Mr. Oliva, and the prosecuting attorney testified, the court below took the matter under advisement and later issued a comprehensive order denying relief. After reviewing the record, we affirm the judgment below.

"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). Furthermore, the factual findings of the trial court in hearings "are conclusive on appeal unless the evidence preponderates against the judgment." State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983).

In reviewing the petitioner's Sixth Amendment claim of ineffective 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 counsel, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. There must be a reasonable probability that but for counsel's error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985).

This Court should not second-guess trial counsel's tactical and strategic choices unless those choices were uninformed because of inadequate preparation, Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 280 (Tenn. Crim. App. 1980).

In his brief, the petitioner avers that “trial counsel made numerous mistakes and errors throughout the trial.” However, the only “mistake” about which the petitioner offers any legal argument is that Mr. Oliva did not call Mary Jo Eaton, “a material defense witness,” to testify in the second trial, after having called her in the first. Issues not supported by argument are deemed waived on appeal. Ct.Crim.App.R. 10(b). Accordingly, we find the remainder of the “mistakes” which the petitioner raised in his post-conviction petition to be waived for the purposes of this appeal.

With respect to Mr. Oliva’s decision not to call Eaton in the second trial, the court below made the following findings:

> The Court has heard the testimony of Mr. Oliva at the hearing on this petition relating to his reasons for not calling Ms. Eaton as a witness at the second trial. Among the reasons cited by Mr. Oliva as a basis

> for his strategic decision not to call her as a witness [were] that her testimony placed the defendant in the vicinity of the incident, her description of the defendant's clothing was consistent with the description given by the State's witnesses, and that the State could call rebuttal witnesses to attack her credibility and make the defendant's position seem untenable. Mr. Oliva also testified that he explained these reasons to the petitioner. After considering Mr. Oliva's testimony, in conjunction with a review of Ms. Eaton's testimony from the first trial, the Court is of the opinion that petitioner has not overcome the presumption that counsel's decision 'might be considered sound trial strategy.' Strickland v. Washington, 466 U.S. 668, at 694, 80 L.Ed. 2nd 674, 104 S.Ct. 2052 (1984).

Accordingly, the court below denied post-conviction relief on this ground.

The evidence does not preponderate against the court's finding that the petitioner failed to overcome the presumption that Mr. Oliva's decision to not call Ms. Eaton may have been sound strategy. Thus, this finding is conclusive. However, we note that Ms. Eaton's first trial testimony describing the petitioner's clothing was not in fact consistent with the description given by the State's witnesses. The State's witnesses at the first trial testified that the man in question had been wearing "a brown leather jacket," "a trench coat, long, come up to the knees," and "a long leather type coat." These witnesses also all testified that the man had been black. Ms. Eaton testified at the first trial that the petitioner had been in her bar that evening, wearing a "blue jean jacket." However, she also testified that another man known as "Big Mike," who had been in the bar at the same time as the petitioner, had been wearing a "brown leather coat, below his waist." Nevertheless, because the petitioner is a black male and Big Mike a white male, Mr. Oliva affirmed that the two men "would have been easily distinguishable on the basis of race." Thus, in addition to our agreement with the court below that Mr. Oliva's decision was not proved inappropriate, we cannot find that there exists a reasonable probability that the result of the trial would have been different even if Ms. Eaton's testimony had been offered at the second trial. Accordingly, no prejudice has been demonstrated on

this point.

This issue being without merit, the judgment below is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

_____
DAVID H. WELLES, Judge