IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

AUGUST 1996 SESSION

FILED

October 10, 1996

Cecil W. Crowson
Appellate Court Clerk

DONALD W. BURLISON,	)	
	)	**C.C.A. NO. 01C01-9511-CC-00359**
Appellant,	)	
	)	**HICKMAN COUNTY**
VS.	)	
	)	**HON. CORNELIA A. CLARK,**
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 first-degree murder and aggravated assault. His convictions were affirmed on direct appeal. He subsequently filed a petition for post-conviction relief alleging ineffective assistance of counsel at both the trial and appeal levels, and an improper jury instruction. After an evidentiary hearing, the court below dismissed the petition. Upon our review of the record, we affirm the judgment below.

"In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his 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).

On this appeal, the petitioner contends that his trial counsel was ineffective because he failed to properly advise the petitioner about the State's plea bargain offer; failed to properly advise him about his right to testify; and failed to properly object to the trial court's jury instruction on premeditation and deliberation in the context of first-degree murder. With respect to the first of these contentions, the court below considered the hearing testimony of both the petitioner and his trial counsel, Thomas Woodall, and made a specific "credibility finding in [Woodall's] favor." The court further found "that petitioner fully understood the terms of the [plea bargain] offer and the relative strengths and weaknesses of going forward. Since petitioner refused the offer, and it was later withdrawn, there is little else counsel could have done except continue the trial." The evidence does not preponderate against these findings. This issue is without merit.

As to the petitioner's claim that his lawyer did not adequately advise him with respect to his right to testify on his own behalf, the court below found as follows:

> [Petitioner] contends that he told counsel 'it might be best' for him to take the stand and dispute what had been said [by a State's witness]. He alleges that his counsel advised him not to take the stand because he would not be a good witness. However, he had no prior felonies and no serious misdemeanors. He contends that he relied solely on the advice of counsel in making this decision.
>
> However, petitioner also stated that he 'doubted' that he would have taken the stand anyway because he was 'not good at remembering things.' If he had taken the stand, he would have testified that he did not see the victim again after the initial fight occurred. He could have testified about where he was subsequently, to show he was not near the vicinity when the death occurred.
>
> It is this statement that the court finds most amazing, and that makes it difficult to accept any other testimony given by petitioner. This is because, on cross examination, he admitted [to contradictory facts]. Thus, not only did he lie during this hearing, but he essentially conceded that the testimony he would have given had he taken the stand in his own defense at trial would have been perjured testimony.
>
> [Mr. Woodall] testified that petitioner made certain admissions to him that would have been damaging at trial.

The evidence does not preponderate against the court's findings. This issue is without merit.

With respect to the jury instruction issue, the petitioner contends that his counsel was ineffective for failing to object to the instruction at trial, and for failing to raise it as an issue in the petitioner's direct appeal. The petitioner also argues that the jury instruction was so incorrect as to rise to the level of a constitutional violation cognizable in this post-conviction proceeding. Because we disagree that the jury instruction was incorrect, we also find that the petitioner's trial counsel was not ineffective because he did not object to the instruction.

The relevant instruction dealt with the definition of premeditation and deliberation as required for first-degree murder and was as follows:

> A premeditated act is one done after the exercise of reflection and judgment. Premeditation means that the intent to kill must have been formed prior to the act itself. Such intent or design to kill may be conceived and deliberately formed in a very brief period of time. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval, as long as it was the result of reflection and judgment.

The petitioner relies on State v. Brown, 836 S.W.2d 530 (Tenn. 1992), as requiring this instruction to be found improper because of our Supreme Court's holding in that case that a jury instruction stating that premeditation and deliberation can be formed in an instant is improper. However, as noted by the court below, our Supreme Court did not hold in that case that such an instruction violated a constitutional right. Accordingly, post-conviction relief is not available on this basis. T.C.A. § 40-30-105 (1990 Repl.) (repealed May 10, 1995). Moreover, this Court has repeatedly held that Brown should not be

applied retroactively. See, e.g., Lofton v. State, 898 S.W.2d 246, 250 (Tenn. Crim. App. 1994), and cases cited therein. The petitioner's trial was held prior to the Brown case. This issue is therefore without merit.

No reversible error having been committed, the judgment below is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

_____
JOSEPH M. TIPTON, Judge

_____
DAVID H. WELLES, Judge