

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1996 SESSION

<p>FILED</p> <p>December 16, 1996</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>
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BARRY L. CHILDRESS,)	C.C.A. NO. 03C01-9512-CR-00384
)	
Petitioner/Appellant)	HAMILTON COUNTY
)	
v.)	HON. STEVEN M. BEVIL, JUDGE
)	
STATE OF TENNESSEE,)	Post-conviction
)	aggravated burglary
Respondent/Appellee)	

For the Appellant:

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For the Appellee:

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OPINION FILED _____

AFFIRMED.

JOHN K. BYERS
SENIOR JUDGE

OPINION

The defendant was convicted of aggravated burglary on June 26, 1991 and sentenced to serve 15 years at 45% service. On February 9, 1994, he filed a petition for post-conviction relief, claiming that his counsel at the trial and on the original appeal were incompetent.

Petitioner alleged that trial counsel failed: 1) to communicate with petitioner; 2) to investigate the facts of the case properly; 3) to provide petitioner with pleadings and other documentation; 4) to file certain motions sufficiently in advance of trial to allow defendant time to determine how the outcome of the motions would affect his case; 5) to object to particular questions of the district attorney; 6) to ask for cautionary instructions to the jury upon the presentation of a mug shot of the defendant 7) to support arguments in the motion for new trial and on the appellate level with case law.

The trial judge denied the petition, and we affirm the trial court's denial.

Petitioner had three charges arising out of three distinct events. Paul Bergman, an assistant public defender, represented petitioner on all three charges. On the first charge, petitioner did not testify, on the advice of Mr. Bergman, and he was acquitted. Petitioner was convicted on the second charge, which conviction he is now challenging. On Mr. Bergman's advice, petitioner pled guilty to the third charge and received a sentence equal and concurrent to the one he received upon his conviction.

In a post-conviction relief proceeding, the burden is on the petitioner to prove the allegations in his petition by a preponderance of the evidence. *State v. Kerley*, 820 S.W.2d 753, 755 (Tenn. Crim. App. 1991); *Bratton v. State*, 477 S.W.2d 754 (Tenn. Crim. App. 1971). On review of post-conviction proceedings, the trial court's findings of fact are conclusive on appeal unless the evidence preponderates against the judgment. *Cooper v. State*, 849 S.W.2d 744, 746 (Tenn. 1993).

Where ineffective assistance of counsel is claimed, the petitioner must show both that his counsel's performance was deficient and that the deficient performance resulted in prejudice to him. *Strickland v. Washington*, 466 U.S. 668,

697 (1984); *State v. Melson*, 772 S.W.2d 419 (Tenn. 1989). It is ineffective counsel if a petitioner proves that there is a reasonable probability the deficiencies made the result of the trial unreliable or the proceedings were fundamentally unfair.

Strickland, 466 U.S. at 697. It is unnecessary to determine whether trial counsel's performance was deficient if prejudice is not shown. *Id.*

The trial court found that Mr. Bergman communicated with petitioner sufficiently and that he was familiar with the facts and issues in the case. The court further found that Mr. Bergman's failure to provide petitioner with all of the pleadings did not result in prejudice to the petitioner's case.

The trial court found that it was not unusual and, in fact, was the general practice to hear a motion in limine on the day of trial. It further found that petitioner was familiar with the issues surrounding the possibility of his testimony opening the door to impeachment by his prior convictions for similar crimes and was not prejudiced by a ruling on the day of trial. The trial judge commented that Mr. Bergman's advice to petitioner that he not testify was "sage" considering the potential devastating effect that the revelation of petitioner's prior criminal record could have on the jury, especially since some of these convictions were also for burglaries. The trial judge noted that petitioner had followed Mr. Bergman's advice not to testify in the previous theft charge and had been found not guilty.

The trial court found that the issue of whether counsel should have asked for a cautionary instruction to the jury upon presentation of the mug shots was a strategic decision on the part of trial counsel in order not to draw the jury's attention to the fact that it is a mug shot taken at a jail. The trial court further found trial counsel's failure to object to various leading questions to be strategic and within the realm of competent representation and that petitioner had not shown any prejudice by trial counsel's failure to object to these specific questions.

As to the issue of the failure of Mr. Bergman to cite case law in his motion for new trial and of public defender, Ms. Ardena Garth, to cite case law in her appellate argument on the issue of the admission of the mug shots, the trial court found these

omissions to be deficient performance by counsel but not prejudicial since the Tennessee Court of Criminal Appeals had ruled on the merits of the issue anyway.

We find the evidence does not preponderate against the findings of the trial court in this case. We would further point out that at the original trial, when the jury left the courtroom to deliberate, the trial judge asked the defendant if it was his decision not to testify, to which the defendant responded affirmatively. Upon further questioning, the defendant reiterated that it was his decision not to testify and that he understood that it was his right to do so and that his attorney could not prevent him from doing so. Also, upon the trial judge's questioning, he stated that Mr. Bergman had been "a good lawyer to me" and that he had no complaints about his representation.

The trial court's judgment is affirmed.

John K. Byers, Senior Judge

CONCUR:

Joseph B. Jones, Presiding Judge

Paul G. Summers, Judge