IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
JULY SESSION, 1996

FILED

November 27, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

AMOS COPENY,	)	
	)	No. 03C01-9601-CR-00001
Appellant	)	
	)	HAMILTON COUNTY
vs.	)	
	)	Hon. Stephen M. Bevil, Judge
STATE OF TENNESSEE,	)	
	)	(Post-Conviction)
Appellee	)	

For the Appellant:

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Amos Copeny, appeals the Hamilton County Criminal Court's order denying his petition for post-conviction relief. In this appeal, the appellant contends that his trial counsel was ineffective for:

> (A) failing to meet with the appellant sufficiently to present an effective defense;
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> (B) failing to interview the witnesses for either the defense or the State;
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> (C) failing to carry out a "test drive" of the appellant's alleged route to determine whether the State's theory of the case was possible;
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> (D) failing to properly prepare for the trial of the case; and
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> (E) failing to adopt a strategy in defending the appellant.

After a review of the record and the brief of both parties, we affirm the order of the trial court denying post-conviction relief.

I. Background

On June 28, 1991, a jury returned a verdict finding the appellant guilty of the second degree murder of Bobby Wilson.[1] Subsequently, the Hamilton County Criminal Court sentenced the appellant to sixty years in the Department

[1]On September 4, 1990, the victim in this case, Bobby Wilson, was shot to death near the corner of Sixteenth Street and Market Street in Hamilton County. The facts developed at trial reveal that the victim and the appellant were involved with the same woman. On the morning of the murder, the victim and this woman were walking through an alley to the victim's vehicle when another car suddenly approached. The female was unable to view the driver of the vehicle but heard two gunshots, one which penetrated the back window of the victim's car. Other shots followed. Soon after the gunfire ended, the victim ran into a nearby business and dropped a .44 caliber pistol on the floor. Clutching his chest, the victim shouted, "Call the ambulance. I've been shot." The owner of the business looked out onto the street. He stated that he saw two cars on Sixteenth Street, one in the middle of the street with its driver-side door open and the other car driving backward away from the parked car. At the hospital, the victim named the appellant as the perpetrator. The victim later died. At trial, several witnesses testified that the appellant had previously made threats against the victim's life. Witnesses for the appellant testified, however, that the victim had been the aggressor in his relationship with the appellant. Nonetheless, the proof clearly and overwhelmingly established that the appellant fired the shot which resulted in the victim's death. Although the indictment charged the appellant with first degree murder, based on the evidence at trial, the jury found the appellant guilty of second degree murder.

of Correction as a career offender. This court affirmed the appellant's conviction and sentence on June 25, 1993, and, on October 4, 1993, the supreme court denied permission to appeal. See State v. Copenny, 888 S.W.2d 450 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1993).[2] The appellant filed a *pro se* petition for post-conviction relief on January 15, 1992. With the assistance of appointed counsel, the appellant filed an amended petition on July 11, 1995. On August 30, 1995, the trial court conducted the post-conviction hearing.

At the hearing, the appellant testified that, at trial, he was represented by Karla Gothard, of the public defender's office, and William Heck.[3] The appellant stated that Heck and Gothard only met with him "five or six times" prior to trial. He explained that "I just feel, you know, they didn't recommended [sic] me right, they didn't investigate my case, nor nothing, right." He suggested that trial counsel should have discussed with him "showing them pictures [of the victim's car] ["all shot up"] to the jury," because "that wasn't no part of the trial." However, the appellant admitted that he could not have "told [his] lawyers [anything] that would have helped them keep those pictures out of evidence." Additionally, the appellant testified that trial counsel should have investigated "the bullet hole supposed to been in [the victim's] car."

Next, the appellant alleged that counsel failed to interview witnesses for either the defense or the state. Specifically, the appellant stated that counsel failed to interview Janie Jones, his brother-in-law, Lovell Johnson, Sabryna Clemons, and "Lisa -- I done forgot her last name." The appellant also complained that trial counsel failed to carry out a "test drive" of his alleged route. He explained that his attorneys should have traveled from "Main to over there by

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[2]In the direct appeal, the appellant's surname is spelled "Copenny." The appellant testified that the correct spelling of his name is "Copeny."

[3]The appellant was appointed co-counsel because this proceeding was originally a capital case.

the Westside cab stand where the accident happened at. . . . [J]ust like making the -- way I went and the way I got blocked off." The appellant believes that by driving this test route, he can prove that he was not at the scene of the accident.

The appellant asserted that his counsel "should have gathered up enough evidence to defend the trial." Specifically, the appellant believes that they should have come up with evidence "about the gun fire, check the gun, who shot the guns, and . . . about the gun. . . . Then the gun had been shot in his -- supposed to been in the back of his car -- had never -- nobody never checked that out or nothing, and whether he on drugs or whatever. . . ." He also testified that trial counsel should have investigated information regarding the victim's reputation for violence, the victim's prior physical threats to him, and the victim's reputation for being in the "drug business." The appellant stated that his defense theory was that of self-defense, because "[the victim] had a .44 Magnum and [the appellant] had a .38." Finally, he conceded that he did not testify at trial because of his prior record.

William Heck testified that he has been practicing law for twenty-four years, that 85 percent of his practice is criminal, and that he has tried death penalty cases in the past. Regarding his representation of the appellant, Heck stated that the appellant never complained that his case was not receiving enough attention by trial counsel nor did he indicate that he was not happy with their representation of him. Heck also explained that he "had complete access to the District Attorney's file. [I]n fact, I was given the file outright when . . . the case first developed. I was allowed to read but not copy the statements of witnesses for the [S]tate that I was not entitled to receive legally until after that witness had actually testified at trial." Additionally, he asserted that "[he] talked to all of the [S]tate's witnesses." Heck stated that he "drove [the route that the appellant allegedly traveled the day of the shooting] from the point where [the

appellant] left his parole officer's office on McCallie Avenue and tried to follow what he's told me. And then I went down . . . to the scene. I was at the scene on a couple of occasions, and in fact had even done some measuring down there and taken some Polaroid photographs to see if it was consistent with what I was being told." He also confirmed that the defense strategy for the case was self-defense.

The final witness was Karla Gothard. She stated that she was employed by the Public Defender's Office and was assigned to the appellant's case. She admitted that this was her first death penalty case and that Mr. Heck was appointed lead counsel, although she was appointed first. Gothard conceded that she was "somewhat frustrated at times because [she and Heck] couldn't get together . . . as frequently as we wanted to." However, she testified that she "met with the defendant as many times as I could." She added that members of her staff investigated the offense thoroughly, and that she, Heck, and the defendant agreed that it would be in his best interest not to testify, given his extensive criminal record. Additionally, Gothard stated that she was aware of the appellant's limited abilities to read and write, accordingly, Gothard confirmed that she translated from legalese to something "more easily understandable." Regarding the "test drive," she stated that she never understood the purpose of the drive since the appellant's strategy was self-defense. Hence, there was no purpose in trying to show that the appellant could not have been at the scene of the shooting at that particular time.

In denying the appellant's petition, the trial court remarked that both Mr. Heck and Ms. Gothard were very thorough and very competent attorneys. In rejecting the appellant's argument of deficient performance, the trial court found that the appellant's counsel interviewed the appellant on numerous occasions, visited the crime scene on numerous occasions, and conducted a thorough pre-

trial investigation. The court further acknowledged that the only defense available to the appellant was that of self-defense and that trial counsel did everything they could in getting that defense before the jury. The trial court concluded that "the defendant has failed to carry the burden of showing that counsel rendered ineffective assistance of counsel."

II. Analysis

In determining whether the appellant received effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution and Art. I, Sec. IX of the Tennessee Constitution, this court must look to whether the performance of trial counsel was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To reverse a conviction on these grounds, the appellant must show, by a preponderance of the evidence, Taylor v. State, 875 S.W.2d 684, 686 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994), that counsel's representation was deficient and that there was prejudice resulting from that deficiency.[4] Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052. 2064 (1984). Unless the appellate court finds that the evidence preponderates against the factual findings of the trial court, the findings of the trial court are conclusive on appeal. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

Counsel's representation is deficient if the errors were so serious as to deprive the appellant of representation guaranteed by the Sixth Amendment. Cox v. State, 880 S.W.2d 713, 717 (Tenn. Crim. App. 1994). The deficient

[4]The Strickland standard has been applied to the right of counsel under Article I, Section IX of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn.), cert. denied, 493 U.S. 874, 110 S.Ct. 211 (1989).

representation becomes prejudicial when the appellant is deprived of a fair trial with a reliable result. Id. However, this court's review may first look at the prejudice prong of Strickland. If the court finds that the defendant suffered no prejudice, a deficiency, if any, is considered harmless. Strickland, 466 U.S. at 693, 104 S.Ct. at 2067. Therefore, even if there are attorney errors, the appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" in order to succeed on an ineffectiveness claim. Strickland, 466 U.S. at 693, 104 S.Ct. at 2068.

A. Counsel's Failure to Meet Sufficiently with Appellant

The appellant alleges that trial counsel were prevented from presenting an effective defense due to their failure to consult with him prior to trial. The appellant testified that trial counsel met with him five or six times prior to trial. Mr. Heck testified that he believed there was a good relationship between counsel and appellant. Ms. Gothard stated that the appellant had many opportunities to convey any dissatisfication with their representation of his case. Moreover, the appellant conceded that he did not know how often trial counsel should have met with him in order to present an effective defense. This issue is without merit.

B. Counsel's Failure to Interview Witnesses

Next, the appellant avers that his attorneys could have investigated his case "a little better." Specifically, he asserted that trial counsel failed to interview Janie Jones and Lovell Johnson. Mr. Heck testified that he or his investigator interviewed all State witnesses. Additionally, Ms. Gothard testified that her investigator interviewed numerous witnesses who heard the shots, but never saw the shooting, and that all of the witnesses identified by the appellant were

interviewed.

The appellant also complains that trial counsel should have shown him pictures of the victim's car which were presented to the jury. However, he admitted that he had nothing to tell counsel about the pictures that would have kept them out of evidence. This issue is without merit.

C. Counsel's Failure to Complete "TEST DRIVE" of Appellant's Route

The appellant's contention that trial counsel was ineffective for failure to "test drive" the appellant's alleged route to determine whether the State's theory of the case was possible. This contention was directly contradicted by Mr. Heck's testimony that he did, in fact, drive the route. This issue is without merit.

D. Counsel's Failure to Properly Prepare

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E. Counsel's Failure to Adopt a Defense Strategy

The appellant next argues that trial counsel failed to collect enough evidence to defend him at trial. Specifically, he refers to information regarding the gun, the gun fire, and the victim's drug use. Ms. Gothard testified that the appellant's defense was self-defense. She added that evidence was introduced at trial to establish this defense. Counsel attempted to introduce evidence about the victim's reputation and prior criminal record, but was so precluded by the trial court. The appellant conceded that he decided not to testify due to his own lengthy criminal record. He also acknowledged that his defense was self-defense. These issues are without merit.

The post-conviction court found that the appellant failed to carry his burden of proof. Furthermore, the trial court stated that "the proof has shown just the opposite" of the appellant's allegations. We conclude that there is no

evidence in the record that preponderates against the findings of the trial court. Not only has the appellant failed to establish any scintilla of deficient performance, but he has also failed to show how his attorneys' performance prejudiced his case. Accordingly, we affirm the trial court's order denying the appellant post-conviction relief.

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DAVID G. HAYES, Judge

CONCUR:

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JOE B. JONES, Presiding Judge

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WILLIAM M. DENDER, Special Judge