IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JUNE SESSION, 1996

TAURUS L. GAINES,	)	**C.C.A. NO. 02C01-9507-CR-00197**
	)	
Appellant,	)	
	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. JOSEPH B. BROWN**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post Conviction, First Degree Murder)

ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF SHELBY COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant Taurus L. Gaines appeals from the denial of his petition for post-conviction relief. In October 1990, a jury found Appellant guilty of first degree murder and assault with intent to commit second degree murder. Because Appellant was a juvenile when he committed murder, he was not eligible to receive the death penalty. See Tenn. Code Ann. § 37-1-134(a)(1) (1996). Instead, Appellant received a life sentence for murder to run concurrently with a one year sentence for assault. On January 15, 1992, this Court affirmed Appellant's conviction for first degree murder. State v. Taurus Ladell Gaines, No. 02C01-9105-CR-00113, 1992 WL 4784 (Tenn. Crim. App. Jan. 15, 1992), perm. to app. den., (Tenn. 1992). On July 31, 1992, Appellant filed a pro se petition for post-conviction relief, alleging ineffective assistance of counsel. Counsel was appointed on September 9, 1992 and after several continuances, a hearing was conducted on October 21, 1994. The post-conviction court denied Appellant's petition, finding that Appellant's claims were meritless. For the reasons discussed below, we reject Appellant's claims and affirm the decision of the post-conviction court.

Factual Background

In order to address Appellant's claims, a short review of the factual background leading to Appellant's convictions is necessary. On August 14, 1989, the victim and his brother, Andre Jerome Claiborne, were seated on a bench at the end of an alley near the intersection of Bond and Latham Streets in Memphis. While there, Appellant and two other individuals approached the victim. Appellant accused the victim of "messing" with his girlfriend and struck the victim

in the head with a stick. Then, a short scuffle occurred after which the defendant and his friends left the area. At a later time in the evening, Appellant returned with at least four friends. When they got within approximately twenty feet of the victim and his brother, shots were fired, and the victim was mortally wounded. Andre Claiborne was also shot. At trial, and to this day, Appellant claims that he did not have a gun nor did he shoot the victim or his brother. Appellant alleges that a man named Anthony Johnson, who Appellant claims was part of the second group of people to confront the victim and his brother, was the triggerman.

Appellant challenges trial counsel's representation in five respects. He alleges that counsel was ineffective in that counsel failed : (a) to procure and present crucial defense witnesses, (b) to properly cross-examine Andre Claiborne, (c) to interview Anthony Johnson before he put Johnson on the stand, (d) to properly investigate the case, and (e) to sufficiently involve Appellant in the defense of the case.

When an appeal challenges the Sixth Amendment right to effective assistance of counsel, Appellant has the burden of establishing that the advice given or services rendered by the attorney fell below the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). Under Strickland v. Washington, 466 U.S. 668, 694 (1984), there is a two-prong test which places the burden on the appellant to show that (1) the representation was deficient, requiring a showing that counsel made errors so serious that he or she was not functioning as "counsel" as guaranteed a defendant by the Sixth Amendment, and (2) the deficient representation

prejudiced the defense to the point of depriving the appellant of a fair trial with a reliable result. Prejudice is shown by demonstrating a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 694. Under the Strickland test, a reviewing court's scrutiny "must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence. . . ." Id. at 689. In fact, a petitioner challenging his counsel's representation faces a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." Id. at 689.

Before addressing the substance of Appellant's claim of ineffective assistance of counsel, we recognize that our scope of review is limited. In a petition for post-conviction relief, the petitioner must establish his or her allegations by a preponderance of the evidence. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983) (citing Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978)). Furthermore, the findings of fact made by trial judge in post-conviction hearings are conclusive on appeal unless the appellate court finds that the evidence preponderates against the judgment. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

Appellant first alleges that counsel was ineffective in failing to present crucial defense witnesses. Appellant claims that he gave counsel the names and addresses of those persons who accompanied him the second time he confronted the victim. He further claims that these witnesses would have testified that Anthony Johnson was the triggerman. Counsel testified at the post-conviction hearing that he subpoenaed all of the persons Appellant asked him to

find. All of these subpoenas were returned "not to be found." Counsel even attempted to find these people on his own. Counsel went to the housing community where the witnesses supposedly lived and knocked on doors asking about their whereabouts. The only person he could find was Anthony Johnson, who he personally served. Surely, counsel cannot be faulted for failing to procure these witnesses since he pursued every avenue possible to obtain their testimony. This Court has addressed a similar situation in State v. Overbay, 806 S.W.2d 212 (Tenn. Crim. App. 1990), where counsel attempted to procure the testimony of a defense witness but was unable to do so because the person could not be found. In that case, we found that counsel's failure to obtain the desired testimony did not constitute ineffective assistance of counsel. Id.

Appellant also claims that counsel was ineffective in failing to present Stephanie Ruffin, Johnson's girlfriend. At trial, Johnson claimed that he did not accompany Appellant to confront the victim because he was with his girlfriend Ruffin who was giving birth to their daughter at the hospital. Appellant faults counsel for not calling this witness because he says that Ruffin would have testified that Johnson was not at the hospital with her when the crime took place. When a petitioner claims that counsel failed to procure a necessary witness, such a witness should be produced at the post-conviction hearing. Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Otherwise, this Court can only speculate as to how such a witness would testify. Appellant failed to produce any of the witnesses at his post-conviction hearing he complains were not called. In addition, we add that counsel heard of Johnson's alibi for the first time in the middle of trial when Johnson testified that he had been at the hospital at the time of the crime. Before that point, Johnson had refused to talk to counsel.

Moreover, counsel testified that he was able through other witnesses to present the defense theory, that Johnson and not Appellant committed the crimes, to the jury. Counsel called Velma Givens, Toni Gaines, Appellant's sister and the mother of two of Johnson's children, Ronald Humphrey, Appellant's cousin, and Ruby Humphrey, Appellant's grandmother to testify on behalf of Appellant. Velma Givens testified that Johnson told her that he had shot the victim, and threw the gun which he used to shoot the victim in the Mississippi River. Toni Gaines testified that Johnson told her that he was the triggerman, and that Taurus Gaines did not shoot the victim. Appellant himself also testified at trial that Johnson was the triggerman. Apparently, the jury accredited Andre Claiborne's and Johnson's testimony and not Appellant's. We find that under the circumstances the failure to procure the above-mentioned witnesses did not fall below the range of competence demanded of attorneys in criminal cases.

Next Appellant maintains that counsel erred in his cross-examination of Andre Claiborne, the State's chief witness, because counsel did not ask him enough questions and failed to investigate his background prior to cross-examination. Counsel discredited Claiborne's testimony in several ways. Through cross-examination, counsel pointed out that it was very dark in the alley at the time of the crime. He also exposed the fact that Claiborne had been heavily drinking immediately before the incident and that Claiborne had been mistaken about what Appellant was wearing the night of the incident. All of these points cast doubt on the ability of Claiborne to identify Appellant as the gunman. Again, we find that counsel's actions did not fall below the range of competence of attorneys in criminal cases.

Next Appellant maintains that counsel erred in failing to interview Johnson before he put him on the stand. Counsel testified that he did not expect Johnson to take the stand and testify to committing the crime. He expected Johnson to offer some form of alibi after which, counsel planned to offer the testimony of Velma Givens and Toni Gaines to refute that testimony. Obviously, the testimony of Velma Givens and Toni Gaines was hearsay, normally prohibited from being admitted into evidence. However, with Johnson testifying that he did not tell Givens and Gaines that he shot the victim, Givens' and Gaines' testimony became admissible to impeach Johnson's testimony. See Tenn. R. Evid. 613(b). While we do not think it is advisable to call witnesses without first speaking to them, we find that counsel's actions in putting Johnson on the stand without first interviewing him, under these circumstances did not fall below the range of competence demanded of attorneys in criminal cases. Indeed, without Johnson's having testified the testimony of Givens and Toni Gaines may very well have been inadmissible.

Appellant also argues that counsel was ineffective in failing to properly investigate the case. Appellant claims that counsel did not visit the scene of the crime, and only visited him twice in jail. Counsel testified that he visited the scene of the crime several times and even took pictures of the scene which were admitted at trial. He also testified that he visited Appellant far more times than the two times claimed by Appellant. Counsel took discovery, interviewed witnesses, and obtained evidence the State expected to produce. We find that counsel's actions in investigating the case did not fall below the range of competence demanded of criminal attorneys.

Finally, Appellant claims that counsel erred in failing to involve Appellant in the defense of the case. Appellant alleges that counsel failed to discuss the possibility of a plea bargain and did not provide him with copies of his statement. Counsel testified that he thought he remembered discussing a plea with the State and Appellant but that neither party would seriously consider a plea. Appellant, from the time charges were brought against him, until this day, maintains his innocence. Counsel testified that Appellant wanted to go to trial. Counsel also testified that he did provide Appellant with a copy of his statement. The record reveals that counsel informed Appellant about the State's case against him, about the fruitless subpoenas for witnesses, and that counsel looked for the witnesses himself. Counsel also discussed Appellant's defense with Appellant. Therefore, we find that counsel's actions in keeping Appellant informed of his case did not fall below the range of competency demanded of attorneys in criminal cases.

We conclude that based on the record presented Appellant was not deprived of effective assistance of counsel, and that the evidence produced by Appellant does not preponderate against the findings of the post-conviction court. Accordingly, the judgment of the post-conviction court is affirmed.

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JERRY L. SMITH, JUDGE

CONCUR:

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JOSEPH M. TIPTON, JUDGE

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DAVID H. WELLES, JUDGE