IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1996 SESSION

FILED

November 27, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

KENNETH TEAGUE,	)	
	)	**C.C.A. NO. 03C01-9604-CC-00153**
Appellant,	)	
	)	**BLOUNT COUNTY**
VS.	)	
	)	**HON. W. DALE YOUNG,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-conviction)

FOR THE APPELLANT:

THOMAS G. MCCROSKEY
100 N. Court St.
Maryville, TN 37804-5722

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

ELIZABETH T. RYAN
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

MIKE FLYNN
District Attorney General

EDWARD P. BAILEY, JR.
Asst. District Attorney General
363 Court St.
Maryville, TN 37804

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

After a jury trial, the petitioner was convicted of aggravated assault, second-degree burglary while possessing a firearm, and two counts of aggravated kidnapping. His convictions were affirmed on direct appeal. He petitioned for post-conviction relief alleging that his indictment was multiplicitous and therefore in violation of his constitutional rights against double jeopardy, and that he had received ineffective assistance of counsel. After a hearing, the court below denied relief. We affirm.

The petitioner contends that his constitutional rights against double jeopardy were violated because the indictment against him charged multiple counts for his commission of the aggravated kidnapping and aggravated assault offenses. Specifically, the petitioner was charged with aggravated kidnapping against each of two victims and aggravated assault against one of these victims. Each of the crimes was alleged to have occurred in two ways. Count one of the indictment charged that the petitioner kidnapped Scott Butler while he (the petitioner) was armed with a deadly weapon. Count two alleged that Butler's kidnapping was done for the purpose of obtaining ransom. Both of these counts were alternative methods of charging aggravated kidnapping pursuant to T.C.A. § 39-2-301 (1988 Supp).[1] Count three alleged that the petitioner assaulted Butler while displaying a deadly weapon; count four alleged that he assaulted Butler causing serious bodily injury. These two counts were alternative methods of charging aggravated assault pursuant to T.C.A. § 39-2-101 (1988 Supp). Counts six and seven alleged the same alternative offenses of aggravated kidnapping against Michael Keeble.

---

[1]The crimes were committed in 1986.

This method of charging the petitioner did not subject him to double jeopardy. Our state and federal constitutions protect a person from being prosecuted a second time for the same offense after acquittal or conviction, and from being punished multiple times for the same offense. State v. Mounce, 859 S.W.2d 319, 321 (Tenn. 1993). Here, the petitioner was convicted of one charge of aggravated kidnapping against Butler, one charge of aggravated assault against Butler, and one charge of aggravated kidnapping against Keeble[2]. He has not been prosecuted twice for any of these offenses, nor is he suffering multiple punishments for them. This issue is without merit.

In the context of raising his double jeopardy claim, the petitioner also complains that the indictment was improperly multiplicitous. However, he did not raise this issue on his direct appeal. Accordingly, it is waived. T.C.A. § 40-30-112(b) (1990). Nor, according to the petitioner's amended petition for post-conviction relief, was it raised before his trial. Objections based on defects in the indictment must be raised prior to trial or they are waived. Tenn. R. Crim. P. 12(b)(2).

In his next issue, the petitioner contends that his trial counsel was ineffective for failing to call a particular witness for the defense.[3] He first raised this contention in his direct appeal and this Court determined that the record did not establish

---

[2]The petitioner states in his brief that he "was convicted by the jury on seven of [the] eight charges, not just four. The trial court entered Judgments of Conviction on only four of the jury convictions." The record does not contain the jury's verdict forms. Nor does the record contain other evidence of what the jury actually did. It is the defendant's duty to have prepared an adequate record in order to allow a meaningful review on appeal. T.R.A.P. 24(b). When no evidence is preserved in the record for review, we are precluded from considering the issue. State v. Roberts, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988). In any event, it appears that only four convictions were entered by the trial court, and the defendant was only sentenced on these four convictions.

[3]In his amended petition, the petitioner raised numerous grounds in support of his claim of ineffective assistance. However, he appeals on only this single item.

that his attorney's representation fell below the required standard. Thus, it found this issue to be without merit. State v. Kenneth Teague, No. 03C01-9102-CR-00053, Blount County (Tenn. Crim. App. filed August 27, 1991, at Knoxville). It has therefore been previously determined. T.C.A. § 40-30-112 (1990). Moreover, the petitioner's trial counsel testified at the hearing below that there were strategic reasons for his decision not to call the witness. 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).

The court below found that the evidence did not support the petitioner's claim of ineffective assistance of counsel. "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). The evidence does not preponderate against the lower court's holding. Accordingly, this issue is without merit.

For the reasons set forth above, the judgment below is affirmed.

_____
JOHN H. PEAY, Judge

CONCUR:

_____
DAVID G. HAYES, Judge

_____
WILLIAM M. BARKER, Judge