IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

OCTOBER 1996 SESSION

FILED
December 13, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

TIMOTHY EARL WATERS,	)	
	)	**C.C.A. NO. 02C01-9604-CR-00113**
Appellant,	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. W. FRED AXLEY, JUDGE**
STATE OF TENNESSEE,	)	
	)	
Appellee.	)	(Post-conviction)

FOR THE APPELLANT:

RICHARD F. VAUGHN
1928 -- 100 N. Main
Memphis, TN 38103

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

ELLEN H. POLLACK
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

JOHN W. PIEROTTI
District Attorney General

ALANDA HORNE
Asst. District Attorney General
201 Poplar Ave., Third Fl.
Memphis, TN 38103

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The petitioner was convicted after a jury trial of first-degree murder and assault with intent to commit first-degree murder. His convictions were affirmed on direct appeal. He petitioned for post-conviction relief, alleging ineffective assistance of counsel at trial and on appeal and due process violations arising from the jury instructions; improper closing argument by the State; and the State's failure to provide exculpatory evidence. After an evidentiary hearing, the court below denied relief. The petitioner now appeals, adding as an issue that the court below erred by refusing to allow him to be present during his trial attorney's testimony. After a review of the record, we affirm the court 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).

The petitioner made numerous allegations against his former lawyer, Mr. William Johnson, who represented him at both the trial and on direct appeal. The court below found that the petitioner had "not offer[ed] sufficient proof" on four of these allegations[1] and therefore held these issues waived. Because the transcript of the trial was entered into evidence at the hearing, we disagree with the court below that the petitioner waived these issues. However, we find this error to have been harmless because the proof does not demonstrate that Mr. Johnson's performance fell below the requisite standard with respect to these issues. Moreover, even if it did, the petitioner has not shown that the outcome of the trial probably would have been different had Mr. Johnson handled these matters differently. Accordingly, these allegations are without merit.

Another of the petitioner's allegations against Mr. Johnson is that he was ineffective because he failed to raise pre-trial a defect in the indictment charging the petitioner with first-degree murder. Specifically, the indictment was not signed by the grand jury foreman. Mr. Johnson raised this issue at trial and a hearing was had, including testimony from the grand jury foreman. After the hearing, the trial court ruled the error to be ministerial in nature and permitted the foreman to sign the indictment.

While we agree with the petitioner that, in a perfect world, this issue should have been addressed pre-trial, we do not see that he suffered any prejudice as a result of the manner in which it was eventually handled. As recognized by our Supreme Court in Applewhite v. State, "the foreman's signature has come to be viewed as 'a procedural safeguard rather than a substantive requisite of an indictment,' such that 'its presence or absence does not materially affect any substantial right of the defendant; and . . . neither assures to him nor prevents him from having a fair trial.' " 597 S.W.2d 328, 329 (Tenn.

[1]These four allegations were that Mr. Johnson had failed to object to improper closing argument by the State; failed to object to certain hearsay testimony; failed to object to the challenged jury instructions; and did not raise the State's failure to prove premeditation and deliberation.

Crim. App. 1979) (citations omitted). The Court further cited with approval other jurisdictions' holdings that proof of an indictment's proper return in open court serves the same function as the endorsement, that is, to identify and authenticate it and, therefore, an omission in the endorsement or signature may be cured. 597 S.W.2d at 330 (citations omitted). In this case, the trial court permitted the indictment to be signed and therefore the petitioner suffered no harm from his counsel's failure to raise the objection earlier.[2]

With respect to the remaining allegations, after considering both the petitioner's testimony and that of Mr. Johnson, the court below found that, "[t]he conduct of William Johnson has not been proven to be anything other than an attorney's sound judgment of proper trial strategy and tactics." The evidence does not preponderate against this finding by the court below. Accordingly, we find this issue to be without merit.

The petitioner next contends that the trial court's jury instructions on his alibi defense and reasonable doubt were unconstitutional. We have reviewed the jury charge given[3] on alibi defense, and it is in accord with the Tennessee Pattern Jury Instruction -- Crim. 42.13. This instruction was approved by our Supreme Court in Christian v. State, 555 S.W.2d 863, 866 (Tenn. 1977). We decline the petitioner's invitation to find it unconstitutional. Similarly, the trial court's instruction on reasonable doubt was in substantial accord with the Tennessee Pattern Jury Instruction -- Crim. 2.03. The petitioner complains about the use of the term "moral certainty" in this instruction. However, our Supreme Court has upheld the use of this instruction in the face of a similar attack. State v. Nichols, 877 S.W.2d 722, 734 (Tenn. 1994). Accordingly, this issue is

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[2] See also this Court's earlier opinion in the direct appeal of this case, in which this Court held that "Where the issue raises the right of an accused to be proceeded against only by presentment or indictment, we think the proceeding of the trial court was a proper method to insure the right of the accused in this context and to supply an omission of a largely ministerial duty." State v. Timothy Earl Waters, C.C.A. No. 107, Shelby County (Tenn. Crim. App. filed July 18, 1990, at Jackson) (citation omitted).

[3] The trial transcript does not contain the jury instructions. Rather, the record contains a copy of the typed charge from which, presumably, the trial court read.

without merit.

The petitioner also complains that the State failed to make available certain exculpatory evidence. However, the evidence adduced at the hearing below demonstrated that Mr. Johnson was provided the information at issue prior to trial. This issue is therefore without merit.

The petitioner next argues that he was denied due process and equal protection when the State made improper remarks during closing argument. Specifically, the petitioner complains in his brief that the State

> defined a witness's interest to tell the truth in comparison with the term 'lawsuit.' The jurors were not trained in the law, and the term 'lawsuit' was never defined or explained to them in reference to its use. . . . [T]he jury could easily have gained the clear understanding that they would be sued for money damages by the [petitioner] and his family if they were to not follow the prosecution's recommendation to find him guilty as the prosecution advised them to do during the closing arguments.

We have reviewed the cited portion of the State's closing argument and find no merit to the petitioner's contention.

The petitioner also contends that he was denied due process at his trial due to the cumulative effect of the alleged errors. However, he has failed to prove by a preponderance of the evidence his allegation that his "trial was tainted by several constitutional errors." Indeed, he has failed to prove by a preponderance of the evidence that his trial was tainted by a single constitutional error. This issue is without merit.

Finally, the petitioner complains that he was not allowed to be present during that portion of the hearing below at which Mr. Johnson testified. Mr. Johnson's testimony was had approximately two months after the petitioner testified, and the court

below denied the petitioner's motion to be present. This Court has previously held that a post-conviction hearing judge "has the discretion to take proof by various means, as long as the petitioner's right to test the evidence is preserved." Turner v. State, 580 S.W.2d 797, 799 (Tenn. Crim. App. 1979). In that case, the petitioner was not present during the testimony of a witness. This Court found that the petitioner's interests were protected during his absence and that his presence would not have made any difference in the outcome of the hearing. Id. The same analysis holds here. The petitioner's post-conviction lawyer was present during Mr. Johnson's testimony and cross-examined him. The petitioner's rights were thus protected and he has not shown how his presence would have made any difference in the outcome. This issue is without merit.

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

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JOHN H. PEAY, Judge

CONCUR:

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PAUL G. SUMMERS, Judge

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DAVID G. HAYES, Judge