IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1996

TRAVIS DYER,	)	**C.C.A. NO. 03C01-9601-CR-00021**
	)	
Appellant,	)	
	)	
	)	**KNOX COUNTY**
VS.	)	
	)	**HON. MARY BETH LEIBOWITZ**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-Conviction)

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

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Petitioner appeals the trial court's denial of his petition for post-conviction relief. He was convicted by a jury verdict of first-degree murder and was sentenced to life imprisonment. In this appeal, he argues (1) That the jury instruction inferring malice from the use of a deadly weapon denied him due process under the United States and Tennessee constitutions; (2) that the jury instruction on premeditation and deliberation denied him due process; and (3) that counsel provided ineffective assistance because of counsel's failure to raise voluntary intoxication as a defense at trial. We conclude that the trial court properly denied the petition for post-conviction relief and affirm the judgment of the trial court.

The Petitioner was convicted of first-degree murder on April 26, 1990. He appealed his conviction and a panel of this Court affirmed the judgment of the trial court in an opinion filed on April 3, 1991. The Tennessee Supreme Court denied permission to appeal on August 5, 1991. State v. Travis Dyer, No. 1329, Knox County (Tenn. Crim. App., Knoxville, April 3, 1991), perm. to appeal denied, id. (Tenn. 1991).

The Petitioner filed a pro-se petition for post-conviction relief on December 10, 1992. Counsel was appointed and later dismissed. The Petitioner then retained counsel, who filed an amendment to the petition and a motion to file additional amendments on April 4, 1994. Counsel filed a petition on August 23, 1994, encompassing the issues that had been presented in the previous petition.

It is unclear from the record whether this was an amended petition or a second petition. The trial court conducted a hearing and denied the Petitioner relief on the claims alleged in the petition which was filed on August 23, 1994. On appeal, the Petitioner asserts that the trial court erred by denying his petition.

First, we will briefly discuss the facts. While on a trip to Myrtle Beach , South Carolina, the Petitioner had spent several days drinking beer, taking Valium, and smoking marijuana. After the Petitioner's return to Knoxville, he, his sister and his girlfriend went to a city housing development to buy marijuana. The victim in this case agreed to obtain the drugs for the Petitioner after he had given the victim money with which to make the purchase. The victim failed to return the money or any marijuana. As a result, the Petitioner and the girls drove their car and parked near the victim, who was on foot. The Petitioner ordered one girl to open the car door and scoot over. He aimed a .38 pistol at the victim, who pled "Don't shoot me." The victim ran and the Petitioner shot him four times. The victim later died from his wounds.

In his first issue, the Petitioner contends that the jury instructions regarding malice were unconstitutional because of the language that suggests malice may be inferred from the use of a deadly weapon.[1] He claims that the language in the jury instruction functions as a presumption that unconstitutionally shifts the burden of proof to the accused. See Yates v. Aiken, 484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546 (1988); Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct.

[1] The Petitioner questions the following portion of the jury instructions: "If a deadly weapon is handled in a manner so as to make the killing a natural and probable result of such conduct, then you may infer malice sufficient to support a conviction of murder in the first degree."

2450, 61 L.Ed.2d 39 (1979); Swanson v. State, 749 S.W.2d 731 (Tenn. 1988); State v. Bolin, 678 S.W.2d 40 (Tenn. 1984).

The State argues that the Petitioner's claim is waived as provided by Tennessee Code Annotated section 40-30-112(b)(1)(repealed 1995). This provides that "[a] ground for relief is 'waived' if the petitioner knowingly and understandingly failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." § 40-30-112(b)(1). The State contends that the Petitioner's Sandstrom claim was available at trial and on direct appeal and because he did not previously raise the issue, it is waived. We agree.

The United States Supreme Court decided Sandstrom in 1979, and the Tennessee Supreme Court formally adopted Sandstrom in 1984 in State v. Bolin, 678 S.W.2d at 44-45. Furthermore, Sandstrom was given retroactive application in Yates v. Aiken in 1988, with the Tennessee courts also recognizing Yates in 1988. Swanson, 749 S.W.2d at 733.

Here, the Petitioner was convicted in 1990 and the opinion on direct appeal was filed in 1991. The supreme court denied review on August 5, 1991, which concluded his remedies on direct appeal. Clearly, this was several years after Sandstrom type objections to instructions became available as constitutional issues. There is no evidence that the Petitioner raised the issue at trial or on direct appeal. If an available issue is not raised in a prior proceeding, there is a presumption that the Petitioner waived asserting the claim. Tenn. Code. Ann. § 40-30-112(b)(2). A ground is deemed waived when the petitioner fails to raise

the ground as part of the direct appeal following conviction. Workman v. State, 868 S.W.2d 705, 709 (Tenn. Crim. App.), perm. to appeal denied, id. (Tenn. 1993); Rhoden v. State, 816 S.W.2d 56, 65 (Tenn. Crim. App. 1991). However, the presumption may be rebutted if the Petitioner did not "knowingly and understandingly" fail to raise the issue. § 40-30-112(b)(1). The rebuttable presumption of waiver is not overcome by an allegation that the petitioner did not personally, knowingly, and understandingly fail to raise a ground for relief. Waiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney. House v. State, 911 S.W.2d 705, 713 (Tenn. 1995), reh'g denied (1995), cert. denied, 116 S.Ct. 1685, 134 L.Ed2d 787 (1996).

The Petitioner has offered nothing to rebut the presumption of waiver because of his failure to raise this issue in the prior proceedings. Therefore, this issue has been waived.

As his second issue, the Petitioner contends that the jury instruction regarding premeditation and deliberation violated his due process rights because the prosecution was not required to prove every element of the offense of which he was accused. He challenges the instruction that premeditation "may be conceived and deliberately formed in an instant" which was disapproved of by our supreme court in State v. Brown, 836 S.W.2d 530 (Tenn. 1992). Brown and a later case, State v. West, 844 S.W.2d 144 (Tenn.1992), ruled that the concepts of deliberation and premeditation had, in many prior instances, been wrongly commingled. Those decisions separated deliberation, an act done with cool purpose and undertaken after the exercise of reflection and judgment, and

premeditation, which was defined as the process of thinking about the murder before committing it. The precise holding in Brown involves a confusing jury instruction which stated that premeditation could be formed in an instant and also suggested that deliberation could be formed in an instant. Brown, 836 S.W.2d at 543. The court held that the reflection required to prove deliberation involved more than just an instant of time. Id.; see also West, 844 S.W.2d at 147.

This court has previously ruled in a number of cases that Brown is not to be applied retroactively. State v. Ray, 880 S.W.2d 700 (Tenn. Crim. App.) perm. to appeal denied, id. (Tenn.1993); State v. David Lee Richards, Hamilton County, No. 03C01-9207-CR-230 (Tenn. Crim. App., Knoxville, filed Mar. 23, 1993), perm. to appeal denied, id. (Tenn.1993); State v. Willie Bacon, Jr., Hamilton County, No. 1164 (Tenn. Crim. App., Knoxville, filed Aug. 4, 1992), perm. to appeal denied, id. (Tenn. 1992).

Furthermore, the fact that such a jury instruction has been abandoned because it is confusing does not mean that its use was error of a constitutional magnitude. Lofton v. State, 898 S.W.2d 246 (Tenn. Crim. App. 1994), perm. to appeal denied, id. (Tenn.1995); State v. John Wayne Slate, No. 03C01-9201-CR-00014, slip. op. at 8 (Tenn. Crim. App ., Knoxville, filed Apr. 27), perm. to appeal denied, id. (Tenn.1994).

As previously stated, the Petitioner was tried in 1990 and his direct appeal was concluded in 1991. Brown was not decided until 1992. Because Brown is not to be applied retroactively, the Petitioner has not been denied due process of law by the content of the instructions for the jury.

However, the Petitioner asserts that the jury instruction that provides that premeditation may be formed in an instant and the allowance that deliberation may also be formed in that period of time relieved the State's burden to prove both of those elements of first-degree murder, akin to a Sandstrom error. The jury was instructed that the State was required to prove "(4) that the killing was deliberate, that is, with cool purpose; and (5) that the killing was premeditated." The Petitioner contends that if the State was able to prove "premeditation in an instant," that deliberation would also be proved. He bases this argument on Brown's disapproval of the jury instruction used at the Petitioner's trial. Although Brown held that such a jury instruction may be confusing, premeditation and deliberation remained two distinct elements of the offense. West clarified that some time is required to form the cool purpose that satisfies the element of deliberation.

> The element of premeditation requires a previously formed design or intent to kill. Deliberation, on the other hand, requires that the killing be done with a cool purpose-in other words, that the killer be free from the passions of the moment. . . . While it remains true that no specific length of time is required for the formation of a cool, dispassionate intent to kill, Brown requires more than a "split second" of reflection in order to satisfy the elements of premeditation and deliberation.

West, 844 S.W.2d at 147 (citations omitted).

We reiterate that Brown and West did not establish that any constitutional due process right was threatened by the prior jury instructions nor that they require retroactive application. The Slate court found that the jury instructions given in that case had correctly defined the elements of first-degree murder and had sufficiently separated the elements of premeditation and deliberation so as

to ensure that the jury appropriately considered the actions and intent in relation to each element. Slate, slip op. at 8-9. Similarly, the instructions given in this case afforded due process. The first-degree murder jury instruction quoted the statute and addressed each element separately. The burden of proving every element was emphasized. Although the instruction included the rejected "in an instant" language, it also emphasized the importance of the accused's mental state and required the jury to consider carefully whether the accused was sufficiently free from excitement and passion to be capable of acting with deliberation. See id., slip op. at 8-9.

In the case sub judice, the facts do not suggest that the impermissible language in the jury instruction, when considered in context, relieved the State's burden to prove deliberation. In addition, this Court reviewed the sufficiency of the evidence and determined that the element of deliberation was proven beyond a reasonable doubt. State v. Travis Dyer, No. 1329, Knox County, slip op. at 5 (Tenn. Crim. App., Knoxville, April 3, 1991), perm. to appeal denied, id. (Tenn. 1991). "[T]he jury could and did find that, at the time of the killing, defendant with cool purpose and deliberation ordered the driver of the vehicle to move over from the driver's seat and to open the car door as the defenseless victim begged for his life, and that the defendant then fired four shots at the body of the fleeing victim with the intent to kill him." Id. Certainly, the evidence was sufficient to support both premeditation and deliberation in light of Brown and West. This issue has no merit.

In his final issue, the Petitioner claims that counsel was ineffective in his assistance at trial because counsel did not assert the defense of voluntary intoxication. In determining whether counsel provided effective assistance at trial, the court must decide whether counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To succeed on a claim that his counsel was ineffective at trial, a petitioner bears the burden of showing that his counsel made errors so serious that he was not functioning as counsel as guaranteed under the Sixth Amendment and that the deficient representation prejudiced the petitioner resulting in a failure to produce a reliable result. Strickland v. Washington, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984); Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). To satisfy the second prong the petitioner must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding petitioner's guilt. Strickland, 466 U.S. at 695. This reasonable probability must be "sufficient to undermine confidence in the outcome." Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

When reviewing trial counsel's actions, this court should not use the benefit of hindsight to second-guess trial strategy and criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel's alleged errors should be judged at the time they were made in light of all facts and circumstances. Strickland, 466 U.S. at 690; see Cooper 849 S.W.2d at 746.

The Petitioner claims that counsel was ineffective because he failed to adequately investigate and assert the defense of voluntary intoxication. The

Petitioner states that there was evidence that prior to the killing, he had spent several days consuming a variety of intoxicants and drugs. He asserts that counsel was aware of his drug use, yet counsel failed to further investigate this as a defense. At the post-conviction hearing, the Petitioner testified that on the day of the killing, he had consumed two or three beers throughout the day and taken two yellow, possibly five-milligram, Valium tablets two to four hours before the incident. He contends that he discussed his drug use with his attorney. On cross-examination, the Petitioner admitted that when the police arrested and interrogated him, he denied having anything to drink or any drugs because he was scared. At trial, the Petitioner admitted to drinking the beer and taking the Valium, but stated that he did not feel he was under the influence of intoxicants at the time he killed the victim. At the post-conviction hearing, he described his condition as "stressed out" and that "everything was real quick." The Petitioner's sister testified that he was drinking and using Valium on the days before the shooting. She could not say with certainty how many intoxicants the Petitioner ingested before the incident, but just that they were "messed up" for several days.

The Petitioner's counsel testified that he had several discussions with the Petitioner regarding his drug use and that, although he admitted ingesting drugs and alcohol, he denied being under the influence of intoxicants when the shooting occurred. Counsel inspected his notes, which reported that the Petitioner stated he had several drinks and two Valiums the night of the murder, but that his sister stated he had nothing to drink that evening. Another portion of counsel's notes stated that the Petitioner had two Percocets, but it is not clear whether these were in addition to the other drugs. The Petitioner testified at the post-conviction hearing that he took Percocets a couple of days prior to the murder. Counsel

also testified that he did not request a jury instruction on voluntary intoxication because he felt that the proof at trial did not reflect that defense.

In post-conviction relief proceedings, the petitioner has the burden of proving the allegations in his or her petition by a preponderance of the evidence. Clenny v. State, 576 S.W.2d 12, 14 (Tenn.Crim.App.1978). The factual findings of the trial court 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). The trial court found that on the facts presented, counsel diligently investigated the Petitioner's drug use, obtained detailed information and determined that there was not significant evidence to assert the intoxication defense. The trial court found that counsel did not fall below the expected level of competence and that his representation was adequate. We cannot conclude that the evidence preponderates against the findings of the trial court. Because we find that counsel did not perform below the requisite level of competence, we do not need to reach the issue of prejudice.

Accordingly, the judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JERRY L. SMITH, JUDGE