IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JULY SESSION, 1996

STEVE MOSLEY,	)	**C.C.A. NO. 01C01-9509-CC-00299**
	)	
Appellant,	)	
	)	
	)	**DICKSON COUNTY**
VS.	)	
	)	**HON. LEONARD W. MARTIN**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	**(Post-Conviction Relief)**

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant Steve Mosley appeals from the denial of his petition for post-conviction relief. Appellant was convicted by a jury of two counts of selling cocaine, one count of conspiracy to distribute cocaine, and one count of misdemeanor possession of cocaine. He was sentenced as a Range II offender to a total of twenty-four years incarceration. On September 9, 1993, this Court affirmed Appellant's conviction. State v. Mosley, No. 01C01-9211-CC-00345, 1993 WL 345542, at *8 (Tenn. Crim. App. Sept. 9, 1993), perm. to app. den., (Tenn. 1994). On February 28, 1995, Appellant filed a pro se petition for post-conviction relief alleging ineffective assistance of counsel and other issues not raised in this appeal. Counsel was appointed and an evidentiary hearing held. The post-conviction court dismissed the petition on May 23, 1995. For the reasons discussed below, we reject Appellant's claims and affirm the decision of the post-conviction court.

Appellant challenges trial counsel's representation in three respects. He asserts that counsel was ineffective because (1) of an undisclosed conflict of interest in representing Appellant that resulted in the admission of prejudicial testimony; (2) counsel advised Appellant against taking the stand; and (3) counsel failed to call defense witnesses.

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).

First, Appellant claims that counsel was ineffective because of an undisclosed conflict of interest. The basis of Appellant's claim is the following exchange between the prosecution and one of its witnesses, Ted Tarpley, the Director of the Twenty-Third Judicial District Drug Task Force:

> Q: Who recommended them (the undercover agents)[1] to you?
> A: Steve Lee, who is an undercover investigator with the District Attorney's office in Huntingdon, Gus Radford's. Gus Radford is the District Attorney. (Counsel) used to work for him.

According to Appellant, counsel's previous employment with the District Attorney's office which was prosecuting Appellant constituted a conflict of interest. Appellant also believes that the above response allowed the jury to infer that counsel had worked with the agents and approved of them. Further, Appellant argues that because of the conflict of interest, counsel could not effectively present Appellant's defense of entrapment. In other words, Appellant maintains that counsel could not persuasively argue entrapment, attacking the credibility of the State's undercover agents, when the jury believed he had used them in his work as a prosecutor.

Where a petitioner establishes an actual conflict of interest, the Strickland test is altered and no showing of prejudice is required. Cuyler v. Sullivan, 100 S.Ct. 1708, 1719 (1980). Instead, prejudice is presumed. Cuyler, 100 S.Ct. at 1719. However, an actual conflict of interest must be demonstrated before deviation from the Strickland test is warranted. A mere possibility of a conflict of interest will not suffice.

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[1] At trial, the State presented the testimony of undercover agents Kathleen and Joseph Dearmitt who testified that they made undercover buys of cocaine from Appellant.

Counsel testified at the evidentiary hearing that he believed he informed Appellant before trial of his former employment by the District Attorney's office and that he was familiar with the undercover agents. He stated that it was his policy to tell all his clients about his former employment with the District Attorney's office in order to demonstrate his experience in the criminal law field. He also remembers telling Appellant that he thought that one of the agents would not make a good witness at trial. Therefore, Appellant has not carried his burden of establishing that any possible conflict of interest was undisclosed.

Neither are we persuaded by Appellant's argument that counsel's previous employment by the District Attorney's office which prosecuted Appellant by itself constituted a conflict of interest. Appellant has not alleged that counsel worked on the case against Appellant. There is no evidence at all that trial counsel in any way felt some form of continued allegiance to his former employer that would hinder his representation of Appellant. In fact, the experience counsel gained from working with the District Attorney in all likelihood helped rather than hindered counsel's representation.

In addition, we find that Appellant's argument that the comment by Ted Tarpley prevented counsel from effectively arguing entrapment is meritless. Appellant has failed to demonstrate an actual conflict of interest. At most, Appellant speculates at a possible conflict of interest which did not prejudice him. Appellant admitted at the evidentiary hearing that Mr. Tarpley never stated on the stand that counsel knew the undercover agents. This Court has previously found that Tarpley's comments had no effect on the verdict. Mosley, 1993 WL 345542, at *7.

Appellant also argues that counsel erred in advising him against testifying on his own behalf to present the defense of entrapment. Appellant testified that he wanted to testify at trial that the undercover agents used drugs with him and lured him into purchasing cocaine by appealing to his addiction to drugs. Appellant further testified at the evidentiary hearing that counsel advised him not to testify because it would be unwise of him to admit to being a drug abuser. Counsel testified that he advised Appellant not to take the stand because he was concerned that Appellant's testifying would allow the prosecution to introduce Appellant's prior record of drug convictions. Counsel further testified that Appellant emphatically did not want to testify. Appellant claims that counsel never advised him of this possibility and argues that his prior convictions would have been inadmissible under Tennessee Rule of Evidence 609 because they were entered more than ten years ago. First of all, Appellant's failure to submit any proof regarding his prior convictions prevents us from addressing his claim that his prior convictions were inadmissible. Secondly, counsel's advice to Appellant to decline taking the stand was a tactical decision, and it is well-established that this Court will not second-guess the reasonable strategic and tactical decisions of counsel. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982) (citing United States v. DeCoster, 487 F.2d 1197, 1202 (D.C.Cir. 1973)).

Finally, Appellant maintains that counsel was ineffective because he failed to present any defense witnesses. Appellant claims that he gave counsel the names of witnesses who would discredit the State's witnesses by testifying that the undercover agents were taking drugs at the time of Appellant's alleged criminal activity and that the audio tape submitted at trial by the prosecution had been unfairly edited. Specifically, Appellant wanted Debra Tidwell, Tim Brown,

Lisa Brandt, Kathleen Dearmitt, Fred Nichols, and a Ms. Dickinson to testify on his behalf. At the time of trial, Tidwell, Dearmitt and Nichols all had charges pending against them for drug related crimes. Counsel did not think that it was advisable to call persons indicted for drug charges to testify for Appellant. Tidwell, a co-defendant, had not been to trial nor had she presented a plea by the time Appellant went to trial. In fact, counsel spoke with the Public Defender representing Tidwell who told counsel that he would not allow Tidwell to testify. Counsel interviewed Brandt, but he felt that she would be a poor witness. Counsel decided not to call Appellant's parole officer, Ms. Dickinson, since she would probably be forced to reveal to the jury that Appellant had prior drug convictions. Counsel's decision to call or not to call certain witnesses was a strategic decision, which, as mentioned previously, will not be second-guessed by this Court. See Hellard, 629 S.W.2d at 9. The record reveals that the State's witness Tim Brown testified that he saw the undercover agents using drugs. Therefore, even if counsel erred in failing to call any of the above witnesses, Appellant has not shown that this fact prejudiced him. Moreover, 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). At the evidentiary hearing, Appellant failed to present any of the witnesses who he claims were necessary to his defense.

We conclude that 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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DAVID H. WELLES, JUDGE

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WILLIAM M. BARKER, JUDGE