IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER SESSION, 1996

ANTHONY SCALES,	)	**C.C.A. NO. 01C01-9601-CR-00027**
	)	
Appellant,	)	
	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. J. RANDALL WYATT, JR.**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-Conviction)

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

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal as of right from the judgment of the trial court denying the Petitioner post-conviction relief. The Petitioner presents only one issue for review: That his trial counsel rendered ineffective assistance by failing to present a witness for his defense at a pretrial hearing to suppress evidence. We affirm the judgment of the trial court.

The Petitioner was convicted of felony murder and especially aggravated robbery. He was sentenced consecutively to life imprisonment for the felony murder conviction and to twenty years for the robbery conviction. On appeal, a panel of this court affirmed his convictions and sentences. See State v. Anthony Angelo Scales, C.C.A. No. 01C01-9310-CR-00353, Davidson County (Tenn. Crim. App., Nashville, July 28, 1994), perm. to appeal denied (Tenn. 1994).

On February 22, 1995, the Petitioner filed a pro se petition for post-conviction relief. Counsel was appointed and filed an amended petition for post-conviction relief on April 5, 1995, and a second-amended petition on June 22, 1995. After conducting an evidentiary hearing, the trial court denied relief. The Petitioner appeals from the judgment of the trial court.

In his one issue presented for review on this appeal, the Petitioner alleges that he was denied his constitutional right to effective assistance of counsel. In particular, he contends that counsel failed to call his girlfriend to testify, who he

claims would have assisted in his attempt to suppress evidence seized in her apartment.

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 contends that the attorney who represented him at a hearing to suppress certain evidence rendered ineffective assistance because she failed to call his girlfriend to testify. Members of the Nashville police department were conducting an investigation into the stabbing death of Sherrill Denise Smith. Scales, C.C.A. No. 01C01-9310-CR-00353, slip op. at 3. They went to the apartment of Delilah Shebareth, the Petitioner's girlfriend, to talk with the Petitioner after they were advised that he frequented the victim's home and sometimes sold her stolen merchandise. Id. The officers knocked on the door, identified themselves, and the Petitioner and his girlfriend opened the door. Id. The Petitioner admitted seeing the victim just prior to the murder, and after he had answered several questions, the officers noticed he was wearing bloodstained tennis shoes. Id. at 3-4. At this point, the officers asked whether they could search the apartment and both the Petitioner and Ms. Shabareth signed consents to search. Id. at 4.

The Petitioner claims that both he and his girlfriend were threatened by the police officers and thus signed the consent forms. He asserts that they threatened to take his children away from his girlfriend, and this forced her to agree. He concedes that the apartment was Ms. Shabareth's; her name was on the lease. He admits that he did not live in the apartment. He also contends that he was intoxicated by marijuana when he signed the consent form. Ultimately, he contends that his intoxication and the fact that the consent to search was coerced resulted in the illegal seizure and use of evidence against him at trial.

He states that, had counsel allowed his girlfriend to testify at the suppression hearing that she had been coerced into signing the consent to

search, this would have provided grounds to grant the motion to suppress the evidence. He argues that she would have also corroborated his contention that he was intoxicated and this affected the voluntariness of statements he made to the police.

The Petitioner's trial counsel testified that she made several attempts to contact Ms. Shabareth before the suppression hearing. An investigator attempted to locate her and found her sister as well as her employer, former employer and her sister's employer. There was no response from Ms. Shabareth until she appeared in the courtroom midway through the suppression hearing proceedings. The Petitioner had been anxious to have his girlfriend testify that she rented the apartment and that he had no interest in it. He also wanted his girlfriend to confirm his drug use.

We first consider whether trial counsel's performance was deficient. Counsel testified at the post-conviction hearing that she found insufficient evidence of the Petitioner's intoxication to support his claim of inability to consent to the search or make a voluntary statement. At the suppression hearing, counsel chose to cross-examine the police officers regarding the Petitioner's appearance. Counsel did not put on any proof. On the intoxication issue, it is apparent that counsel assessed the proof and determined that it did not support a defense in that regard. We are reluctant to use hindsight to second-guess counsel's trial tactics. The trial court found, and we agree, that counsel was not ineffective on this issue.

Regarding the consent issue, counsel testified at the post-conviction hearing that because Ms. Shabareth only showed up during the suppression hearing, she chose not to have her testify. Although there was the opportunity to request a recess and talk with Ms. Shabareth, counsel made a tactical decision not to have her testify because her expected testimony would undermine the Petitioner's standing to assert a constitutional claim. In essence, Ms. Shabareth's expected testimony that only she had a possessory interest in the apartment would tend to remove any standing to contest the suppression issue on its merits.

The Fourth Amendment to the United States Constitution provides in part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The exclusionary rule may operate to bar the admissibility of evidence directly or derivatively obtained from an unconstitutional search or seizure. See Wong Sun v. United States, 371 U.S. 471, 485, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963). One must have a possessory interest in a home to have standing to pursue a constitutional claim of an illegal search of the home. The consent for a search from the person with the sole possessory interest in a dwelling may produce evidence that incriminates another. Even if the Petitioner cohabited with his girlfriend, "the consent of one who possesses common authority over premises or effects is valid as against the absent [or] nonconsenting person." State v. Bartram, 925 S.W.2d 227, 230-31 (Tenn. 1996). Furthermore, the assertion that Ms. Shabareth's consent was coerced and was therefore illegal provides no respite. Illegally obtained evidence may be used against one whose rights were not violated in the seizure of that evidence. Wong Sun, 371 U.S. at 492, 83 S.Ct.

at 419; see also United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969); Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968). The Petitioner's argument was that he had no interest in the apartment or its contents, therefore he possessed no interest or standing to assert a Fourth Amendment violation. Thus, the Petitioner may not seek to assert a right which is personal to Delilah Shebareth. Ms. Shabareth's claim, of course, is immaterial because she was accused of no crime for which the State has attempted to submit evidence against her.

Counsel testified that she attempted to explain the standing issue to the Petitioner and that he did not understand it. Given this, counsel made a legitimate choice to afford the best opportunity to have the constitutional issue heard on its merits. We cannot conclude that counsel's performance fell below the standard expected of criminal defense attorneys.

Because the Petitioner has not established the first prong of the Strickland test, we need not address the merits of the second prong. However, we note that in evaluating whether the failure to call a known witness has resulted in prejudice to the Petitioner, he must show that the witness "would have testified favorably in support of the defense if called." Black v. State, 794 S.W.2d 752, 758 (Tenn. Crim. App. 1990). Here, it is apparent that the proposed testimony was likely to undermine the Petitioner's standing. Therefore, no prejudice has been shown.

The trial court heard the Petitioner's claim on its merits and determined that his claims were insufficient to grant the petition. "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". McBee v. State, 655 S.W.2d 191, 195 (Tenn.Crim.App.1983). In addition, the factual findings of the trial court in post-conviction 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). For the foregoing reasons, we conclude that the Petitioner has failed to prove that the trial court erred by denying his petition for post-conviction relief on grounds of ineffective assistance of counsel. Accordingly, we affirm the judgment of the trial court.

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DAVID H. WELLES, JUDGE

CONCUR:

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JOHN H. PEAY, JUDGE

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JERRY L. SMITH, JUDGE