IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1997 SESSION

FILED

February 28, 1997

Cecil W. Crowson
Appellate Court Clerk

DELTA RAY VANDYGRIFF,	)	
	)	**C.C.A. NO. 01C01-9603-CC-00089**
Appellant,	)	
	)	**MAURY COUNTY**
VS.	)	
	)	**HON. JIM T. HAMILTON,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-conviction)

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The petitioner was convicted by a jury of assault with intent to commit murder in the first degree and sentenced to twenty-seven years enhanced by an additional consecutive five years for use of a deadly weapon, for a total of thirty-two years. His conviction was affirmed on direct appeal. In this petition for post-conviction relief, the petitioner complains of the lower court's refusal to appoint an expert and he claims that he received ineffective assistance of counsel at trial. Following our review of the records of both this proceeding and the trial, we affirm the judgment below.

Prior to the post-conviction relief hearing, the petitioner filed a "motion for expert defense services: psychologist/alcoholism expert." Via this motion, the petitioner attempted to have the court below provide him with funds to obtain an expert in order that he might prove that he was prejudiced by his trial counsel's failure to obtain such an expert for the trial. The court below denied the motion. The petitioner now contends that this was error. We disagree. As correctly noted by the State in its brief, our Supreme Court has recently held that "the state is not required to provide expert assistance to indigent non-capital post-conviction petitioners." Davis v. State, 912 S.W.2d 689, 696-97 (Tenn. 1995). This issue is without merit.

The defendant also contends that he received ineffective assistance of counsel at trial in that his trial lawyer did not move the trial judge to recuse himself; did not hire an expert on alcoholism; called no witnesses at the sentencing hearing; did not object to the court's jury instruction on premeditation and deliberation; and misstated the law on these issues during closing argument. In reviewing this 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, the 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 first of the petitioner's allegations of ineffective assistance is that the trial judge was biased against him and his lawyer should therefore have moved for the judge's recusal. He rests this claim on the fact that the trial judge also heard his divorce proceedings approximately one month prior to the criminal trial. During the post-conviction hearing, the petitioner's trial counsel testified that he remembered the trial judge having commented during the divorce proceeding that the petitioner's actions for which he was later tried constituted "one of the wors[t] situations of domestic violence he had ever seen." However, trial counsel also testified that he could not think of anything which the trial judge had done or said during the course of the criminal trial which might have influenced the jury's verdict.

Whether or not trial counsel should have made a motion for recusal, the petitioner must show in this proceeding that counsel's failure to do so prejudiced him so far as to call into doubt the jury's verdict. Strickland, 466 U.S. 668 (1984). In other words, the petitioner must have established not only that the trial judge was improperly biased against him, but that this bias wrongfully influenced the jury against him. However, the proof at the post-conviction hearing established that the trial court neither

said nor did anything improper which influenced the jury toward a verdict of guilt. Our review of the trial record leads to the same conclusion. Thus, the petitioner failed to establish that he was prejudiced at the guilt phase of his trial by his lawyer's failure to ask the trial judge to recuse himself.

Nor are we swayed by the petitioner's argument that his maximum sentence is proof in and of itself of improper bias on the part of the trial judge. This Court upheld the petitioner's sentence on direct appeal as "valid and appropriate." State v. Delta Ray Vandygriff, C.C.A. No. 01C01-9001-CC-00018, Maury County (Tenn. Crim. App. filed September 19, 1990, at Nashville). The trial court's opinion that this was the worst case of domestic violence he had ever seen does not render the sentence invalid or inappropriate. This issue is without merit.

The petitioner's contention that his trial counsel erred by not hiring an expert on alcoholism also falls short for failure to establish any prejudice. There was no proof introduced at the post-conviction hearing of what such an expert could have testified to at trial which would have helped the petitioner. As set forth above, the State was not required to furnish this proof to the petitioner at its expense. The petitioner's failure to otherwise furnish such proof is fatal to his claim of ineffective assistance of counsel on this ground. This issue is therefore without merit.

Likewise, the petitioner has failed to establish what prejudice he suffered because his trial counsel called no witnesses at his sentencing hearing. In order to establish such prejudice, the petitioner would had to have elicited favorable testimony at the post-conviction hearing which would have been available at his sentencing hearing. This the petitioner failed to do. This issue is therefore without merit.

The petitioner's next argument also fails. The petitioner contends that his trial counsel should have objected to the trial court's jury instructions on premeditation and deliberation. The instructions given on these issues conformed with the pattern instructions in effect at the time of the trial.[1] The petitioner is correct that our Supreme Court later decided to abandon the instruction that "premeditation may be formed in an instant." State v. Brown, 836 S.W.2d 530, 543 (Tenn. 1992). However, trial counsel's failure to predict the future and his consequent failure to somehow convince the trial court to give an instruction that varied from the then current pattern instruction, does not mean that he was ineffective. This issue is without merit.[2]

With respect to the petitioner's contention that his lawyer was ineffective because he misstated the law on the issues of premeditation and deliberation during closing argument, we disagree. Trial counsel argued to the jury that the State had to "prove that [the assault] was intentional, and that it was premeditated. The Judge is going to instruct you on what that is. And I think what you're talking about is a cool reflection, and a reflection that the Judge's instructions are going to be that that intent can be arrived at in a second or an instant." This argument did not materially misstate the actual instructions given. However, had counsel set forth the instructions which our Supreme Court later endorsed in Brown, his argument would have been at odds with the trial court's instructions. While we appreciate the defendant's contention that the Brown decision did not create new definitions of the mens rea requirements for first degree murder, but merely clarified existing law, we decline to hold that defense counsel should have argued the Brown interpretation -- before that case even existed -- knowing that the court's instructions would be different. This issue is without merit.

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[1] See T.P.I. -- Crim. 20.01 (2d ed. 1988).

[2] We also note that this Court has repeatedly held that the Brown decision on the contested jury instruction is not to be applied retroactively. See, e.g., Lofton v. State, 898 S.W.2d 246, 250 (Tenn. Crim. App. 1994).

The judgment below is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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DAVID H. WELLES, Judge

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JERRY L. SMITH, Judge