

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

AUGUST SESSION, 1996

SANDALOS A. BLAIR, )  
 )  
 Appellant, )  
 )  
 )  
 VS. )  
 )  
 STATE OF TENNESSEE, )  
 )  
 )  
 Appellant. )

C.C.A. NO. 02C01-9508-CR-00224

SHELBY COUNTY

HON. BERNIE WEINMAN  
JUDGE

(Post-Conviction)

**FILED**  
  
March 31, 1997  
Cecil Crowson, Jr.  
Appellate Court Clerk

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OPINION FILED \_\_\_\_\_

VACATED AND REINSTATED

JERRY L. SMITH, JUDGE

## **OPINION**

Appellant Sandalos Arnez Blair appeals the trial court's denial of his petition for post-conviction relief. He presents the following issues for review: (1) whether the trial court erred in failing to appoint new post-conviction counsel; (2) whether the trial court erred in finding that trial counsel provided effective assistance at trial; and (3) whether trial counsel was ineffective in failing to file an application for permission to appeal to the Tennessee Supreme Court or in failing to take appropriate steps to comply with Tenn. Sup. Ct. R. 14 regarding the withdrawal of counsel following first tier review of Appellant's case in this Court.

After a review of the record we find that Appellant's first two issues lack merit, however we grant relief with respect to the third issue presented.

### **I. FACTUAL BACKGROUND**

On March 31, 1989, a Shelby County Criminal Court jury found Appellant guilty of assault with intent to commit robbery with a deadly weapon, assault with intent to commit first degree murder, felony murder, grand larceny, aggravated assault, robbery with a deadly weapon, larceny from the person, and petit larceny. He received sentences ranging from three years to life imprisonment. On appeal, this Court vacated and remanded the robbery with a deadly weapon conviction but affirmed all other convictions. See State v. Blair, No. 63, 1991 WL 61291 (Tenn. Crim. App. April 24, 1991).

On October 11, 1993, Appellant filed a petition for post-conviction relief, alleging ineffective assistance of his appointed trial counsel. At the outset of the post-conviction hearing, Appellant requested that the trial court appoint new post-conviction counsel

because his current post-conviction counsel was working on another case with his allegedly-ineffective trial counsel. The trial court denied Appellant's request . At the conclusion of the hearing, the trial court also denied Appellant's petition.

## **II. POST-CONVICTION RELIEF**

Appellant alleges that the trial court erred both in refusing to appoint new post-conviction counsel and in finding that his trial counsel rendered effective assistance. In post-conviction proceedings, the defendant has the burden of proving the claims raised in the petition by a preponderance of the evidence. Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996); Wade v. State, 914 S.W.2d 97, 101 (Tenn. Crim. App. 1995). Findings of fact made by the trial court are conclusive on appeal unless the evidence preponderates against the judgment. Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn.1990).

### **A. APPOINTMENT OF POST-CONVICTION COUNSEL**

Appellant first argues that the trial court erred in refusing to appoint new post-conviction counsel. Appellant contends that, because of the professional relationship between his post-conviction counsel and his trial counsel, the effective and vigorous cross-examination of trial counsel was compromised. Appellant further contends that this conflict of interest impinged upon his constitutional right to the effective assistance of counsel at the post-conviction hearing. However, under well-settled Tennessee law, Appellant has no constitutional right to effective assistance of counsel in a post-conviction proceeding. House v. State, 911 S.W.2d 705, 712 (Tenn. 1995), cert. denied, 116 S. Ct. 1685 (1996); State v. Oates, 698 S.W.2d 79, 80 (Tenn. Crim. App.

1985). Therefore, even if Appellant could prove that this alleged conflict of interest impaired his representation, he would not be entitled to relief. See State v. Smith, No. 03C01 -9501-CR-00010, 1995 WL 380083, at \*2 (Tenn. Crim. App. June 22, 1995), perm. app. denied, (Tenn. Nov. 6, 1995).

Once assured by post-conviction counsel that he could effectively cross-examine trial counsel and zealously represent Appellant within the bounds of the law, the trial court determined that appointment of new counsel was not warranted. The trial court pointed out that post-conviction counsel and trial counsel shared no financial interest in the other case in which they were involved. In light of the foregoing, we conclude that the trial court did not abuse his discretion in denying Appellant's request for the appointment of new counsel.

#### **B. EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL**

Appellant also argues that the trial court erred in finding that his trial counsel rendered effective assistance. Appellant alleges the following deficiencies in his trial counsel's representation:

- (1) failure to effectively cross-examine Brian Livingston, a co-defendant and witness for the State;
- (2) failure to explain the difference between first degree and second degree murder to him;
- (3) failure to observe the murder scene;
- (4) failure to obtain a transcript of the juvenile court proceeding; and

(5) failure to conduct a photo comparison for identification purposes.

When an appeal challenges the effective assistance of counsel, the appellant has the burden of establishing (1) deficient representation and (2) prejudice resulting from that deficiency. Strickland v. Washington, 466 U.S. 668, 686 (1984); Barr v. State, 910 S.W.2d 462, 464 (Tenn. Crim. App. 1995). Deficient representation occurs when counsel provides assistance that falls below the range of competence demanded of criminal attorneys. Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim App. 1991). Prejudice is the reasonable likelihood that, but for deficient representation, the outcome of the proceedings would have been different. Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994). On review, there is a strong presumption of satisfactory representation. Barr, 910 S.W.2d at 464.

With regard to the first alleged deficiency, Appellant submits that Livingston, as “the only feasible link between [Appellant] and the various allegations,” was the most damaging State witness. He maintains that the allegedly ineffective cross-examination of Livingston affected the outcome of his case. Appellant complains that Livingston’s motivation for testifying against him was not brought out during cross examination; however, the record reflects persistent questioning by trial counsel that clearly reveals Livingston’s bias and casts doubt on his credibility:

TRIAL COUNSEL: “Now haven’t you made a deal with the State in regard [to] your testimony?”

LIVINGSTON: “No, ma’am.”

TRIAL COUNSEL: "Entering a plea in this case?"

LIVINGSTON: "No, ma'am."

TRIAL COUNSEL: "You have no offer?"

LIVINGSTON: "No, ma'am."

TRIAL COUNSEL: "Come on, Mr. Livingston. You're up there and you could be given the death penalty for this and you haven't been promised anything?"

LIVINGSTON: "No, ma'am."

TRIAL COUNSEL: "And you're just sitting up there telling these stories and you don't know what's going to happen to you. Is that what you're saying?"

LIVINGSTON: "That's right."

TRIAL COUNSEL: "Isn't it you're understanding that you're going to enter a guilty plea and get a deal?"

LIVINGSTON: "My understanding is that I'll be able to cop out."

TRIAL COUNSEL: "That is you're understanding?"

LIVINGSTON: "Yes, ma'am."

TRIAL COUNSEL: "And avoid the death penalty?"

LIVINGSTON: "I would think so."

At the post-conviction hearing, trial counsel testified that she had no recollection of any additional motivation for Livingston to fabricate his testimony. In light of the trial transcript and the testimony of trial counsel during the post-conviction hearing, we do not believe that the evidence preponderates against the judgment of the trial court that Appellant's co-defendant was effectively cross-examined. See Butler, 789 S.W.2d at 899.

Appellant concedes that the next four alleged deficiencies, standing independent of one another, probably fail to meet the standard set out in Strickland; however, he contends that, considered in the aggregate, these deficiencies affected the outcome of his case. As to the failure to explain the difference between first and second degree murder claim, trial counsel testified that, while she had no specific recollection of the discussion, distinguishing between the two offenses for the benefit of the accused is routine and she was confident that she had done so. She further testified that Appellant never seemed confused about the charges against him. As to the failure to observe the murder scene claim, Appellant fails to demonstrate how this alleged deficiency prejudiced his defense or how the outcome of his trial would have been any different had trial counsel observed the murder scene. See Overton, 874 S.W.2d at 11. As to the failure to obtain a transcript of the juvenile court proceeding, trial counsel testified that she received and relied upon notes taken by Appellant's attorney at the proceeding. Again, Appellant fails to demonstrate how this alleged deficiency prejudiced his defense or how the outcome of his trial would have been any different had trial counsel obtained a verbatim transcript of the proceeding. See id. Finally, as to the failure to make a photo comparison, Appellant points out that one of the witnesses at his juvenile court proceeding misidentified him. He contends that trial counsel, in an effort to impeach the witness' identification, should have shown the witness photos of Appellant and an individual named Anthony Rosser, who allegedly looked a great deal like Appellant. However, Appellant fails to offer any proof that he and Rosser resembled each other sufficiently to cast doubt on the identification. Furthermore, there is no evidence in the record that, had trial counsel shown the witness a photo comparison, she

would have been unable to identify Appellant. In sum, we do not believe that any of these claims, whether viewed independently or in the aggregate, rise to the level of deficient representation anticipated in Strickland and Barr, nor do we believe that Appellant has made an adequate showing of prejudice.

### **C. EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL**

In his last issue presented for review Appellant maintains that trial counsel was ineffective in failing to file an application for permission to appeal to the Tennessee Supreme Court following the affirmance in this Court of Appellant's conviction. Trial counsel testified that, in her opinion, there was no merit to petitioning the Supreme Court for a writ of certiorari and that she notified Appellant of her opinion by letter. Counsel candidly admitted that following first tier review in this Court on direct appeal she never filed a motion to withdraw pursuant to Tenn. Sup. Ct. R. 14. Rule 14 provides:

Permission for leave to withdraw as counsel for an indigent defendant after an adverse final decision in the Court of Criminal Appeals and before preparation and filing of an Application for Permission to Appeal to the Supreme Court must be obtained from the Court of Criminal Appeals by filing a motion with the clerk of that Court not later than seven (7) days after the Court's entry of final judgment.

The motion shall state that written notice has been given the defendant advising that (1) counsel does not intend to file an Application for Permission to Appeal and leave of Court is being sought to withdraw; (2) that defendant may file a pro se application for Permission to Appeal with the Clerk of the Supreme Court, if filed within thirty (30) days after entry of final judgment in the Court of Criminal Appeals. . . .

Rule 14 was promulgated in an attempt to remedy the situation presented in the instant case. Compliance with Rule 14 ensures that an indigent defendant knows of counsel's decision to not file an application for permission to appeal to



the Supreme Court, and of the time deadlines for doing so should the defendant wish to proceed pro se. Although trial counsel testified she notified Appellant of her decision that an application pursuant to Tenn. R. App. P. 11 would be meritless, she did not file a motion to withdraw pursuant to Rule 14. Thus, the record is devoid of any proof that Appellant knew that he could file an application pro se, or that he knew of the time limits for doing so. Under similar circumstances this Court has vacated its judgments on direct appeal and re-entered same so as to give Appellants an opportunity to pursue their direct appeals to our Supreme Court. See e.g., State v. Harry Eugene Holmes, Davidson Co., No. 89-139-III, Tenn. Crim. App., February 9, 1990; see also, Pinkston v. State, 668 S.W.2d 676,677 (Tenn. Crim. App. 1984). We are constrained to grant Appellant this same relief.

Accordingly, this Court's judgment in State v. Blair, No. 63, 1991 WL 61292 (Tenn. Crim. App., April 24, 1991) is vacated and re-entered so as to begin anew the time for filing an application pursuant to Tenn. R. App. P. 11. In all other respects the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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WILLIAM M. BARKER, JUDGE