IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1996 SESSION

FILED

December 4, 1997

Cecil W. Crowson
Appellate Court Clerk

AARON WARNER BOLTON,	)	
	)	
Appellant,	)	No. 01C01-9505-CC-00128
	)	
	)	Maury County
v.	)	
	)	Honorable Jim T. Hamilton, Judge
	)	
STATE OF TENNESSEE,	)	(Post-Conviction)
	)	
Appellee.	)	

For the Appellant:

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For the Appellee:

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The petitioner, Aaron Warner Bolton, appeals as of right from the Maury County Circuit Court's denial of his petition for post-conviction relief. He is presently serving an effective sentence of sixty-six years in the custody of the Department of Correction for various convictions involving drug felonies, possession of counterfeit money, and keeping a gambling room or table. He contends that his convictions and sentences result from the ineffective assistance of counsel. We disagree.

In the direct appeal of the petitioner's convictions, this court stated the basic evidence to be as follows:

> A confidential informant assisted law enforcement officers in making undercover purchases of cocaine from the appellant. The purchases occurred on November 1, 3, and 8, 1988. On each occasion one-half ounce of cocaine was purchased for $800.00. On November 15, 1988, the informant purchased $100.00 worth of cocaine from a barmaid at the appellant's lounge. On November 29, 1988, an undercover Tennessee Bureau of Investigation agent purchased seven ounces of cocaine from the appellant for $9,100.00. After that sale was consummated, the appellant was arrested. The appellant cooperated with the law enforcement officers after his arrest and provided them with access to his residence and businesses. Counterfeit money was found in his possession when he was arrested and additional counterfeit money was found at his residence. His gambling equipment was also found and confiscated.

State v. Warner Bolton, No. 01-C-01-9008-CC-00187, Maury County, slip op. at 7 (Tenn. Crim. App. Apr. 4, 1991), app. denied (Tenn. Sept. 9, 1991). Consecutive sentences were affirmed upon the trial court's finding that the petitioner was a "'professional criminal, who had knowingly devoted himself to criminal acts as a source of livelihood over the last three to five years at least.'" Id. at 9. A Tennessee Bureau of Investigation agent testified that the petitioner said that he was getting cocaine in quantities of three to six pounds at the time and that he was receiving shipments of marijuana twice a week. Also, although the petitioner claimed that he was only

"puffing," the petitioner told the agent that his weekly income from drug sales had been as much as two hundred sixty-four thousand dollars.

The petitioner's complaints relate to his trial attorney's advising him to consent to searches of his property, advising him to sell real property during the pendency of the prosecution, failing to file pretrial motions, and failing to make certain trial objections. At the post-conviction evidentiary hearing, evidence by stipulation or testimony was received from the petitioner, his father, T.B.I. Agent Maxie Gilliland, assistant district attorneys, the attorney for the petitioner's codefendant, and the trial attorney. The evidence reflects that the petitioner was arrested at a Holiday Inn on November 30, 1988, after he sold seven ounces of cocaine to an undercover agent for nine thousand one hundred dollars. Law enforcement had already made three previous buys of cocaine from the petitioner, the transactions being tape-recorded. Moreover, the petitioner had discussed delivering larger quantities of cocaine with an undercover agent.

It was at this point, that the petitioner's trial attorney was summoned to the Holiday Inn. Agent Gilliland explained to the attorney the nature of the evidence they had against the petitioner and expressed an interest in having the petitioner cooperate and testify regarding other individuals who were being investigated, as well. The attorney was made aware of the petitioner's exposure to maximum sentences as a Class X felon given the timing and quantity of the petitioner's sales. As the attorney put it, he had "to make the best out of a bad situation." An assistant district attorney arrived in order to provide authority for enforcement of any agreement.

Although the testimony of the petitioner, his attorney, and Agent Gilliland do not coincide as to what specific offers were made, it is clear that the petitioner refused to testify against other people. The attorney remained concerned about the

potential Class X status and was hoping to reach an understanding that would benefit the petitioner. Agent Gilliland asked about the petitioner consenting to searches of his place of business, home, and other locations, noting that they had enough information for a search warrant. Although the petitioner testified that he wanted to require the agents to obtain search warrants, his attorney said that with the agents having the right to get search warrants anyway, they may go easier on the petitioner if he consented. Ultimately, the petitioner agreed and consented. These searches uncovered marijuana, counterfeit money, and gambling material. The record also reflects that counterfeit money was found in the coat that the petitioner was wearing when he was arrested.

After the petitioner was indicted, the state made an offer to settle the case for twenty-five years and twenty-five thousand dollars, apparently as a fine. The petitioner testified that he could only raise twenty thousand dollars at that time. Then the state raised the offer to thirty years and thirty thousand dollars. The petitioner claimed that he was unable to raise that much money. The petitioner blamed his lack of ability to raise money on previous misadvice given by his attorney.

After the petitioner's arrest, the state filed a complaint to abate the petitioner's place of business as a public nuisance and filed notice of seizure. The petitioner testified that his attorney advised him to sell the place, which he did. However, according to the petitioner, he paid off the mortgage of some forty-four thousand dollars, with personal and borrowed funds, as part of the transaction. Ultimately, the establishment was seized by the state, which the state then possessed free and clear of any indebtedness. The petitioner claimed that these were the circumstances that caused him not to be able to raise the money to meet the state's offer to settle the case.

The trial attorney acknowledged that he advised the petitioner to make an arm's-length sale of the business because of the nuisance abatement case, but he denied suggesting that the petitioner pay off the mortgage and denied any knowledge of the petitioner doing so. The attorney said that after the petitioner said that he had twenty thousand dollars and the state ultimately went to thirty thousand dollars, the petitioner said he was tired of dickering with the state.

In any event, the case went to trial. The trial attorney acknowledged that he did not file any motion to suppress, but he believed that there was no basis for such a motion. Also, he acknowledged that there were occasions in which he could have objected during the trial, but did not. He explained that on some of the occasions, there would have been objections that would have only drawn the jury's attention to negative points. However, he also admitted that he did not object to the state presenting evidence of a previous drug sale, a reported stolen gun being found in the petitioner's house, and guns being found in his car the day of the arrest.

The codefendant's counsel testified that he did not cooperate with the authorities and would only do so upon having an explicit agreement. He said that the codefendant only received a three-year sentence. He acknowledged, though, that this relative success at trial may have been because the petitioner did not testify against the codefendant.

During the course of the evidentiary hearing, the trial court indicated that the lack of objections by the attorney did not affect the outcome of the trial, given the overwhelming evidence against the petitioner. In its order overruling the petition, the trial court stated the following:

> That petitioner was represented at trial by retained counsel who has extensive experience in the practice of criminal law, has demonstrated his expertise in this field on many occasions, and is recognized by members of the bar of this

> state as a lawyer who has demonstrated a range of competence well above the average range of competence in this area for attorneys practicing criminal law; that from the proof introduced at the hearing on this petition for post-conviction relief the court is convinced that the matters complained of in said petition as being indicative of ineffective assistance of counsel were matters of trial strategy and that the defendant participated in the formulation of said strategy and took an active part in the ongoing strategy of his defense in this case and was made aware of counsel's intentions and plans and fully concurred with them at the time; that his complaint now is more in the nature of a complaint that his pre-trial and trial strategy failed to produce the desired results; that failure to obtain a desired result in any criminal case does not amount to ineffective assistance of counsel or entitle petitioner to any relief.

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is upon the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 369-72, 113 S. Ct. 838, 842-44 (1993). The Strickland standard has been applied, as well, to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from

counsel's perspective at the time." Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982) (counsel's conduct will not be measured by "20-20 hindsight"). Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See Hellard v. State, 629 S.W.2d at 9; United States v. DeCoster, 487 F.2d at 1201.

Also, we note that the approach to the issue of the ineffective assistance of counsel does not have to start with an analysis of an attorney's conduct. If prejudice is not shown, we need not seek to determine the validity of the allegations about deficient performance. Strickland v. Washington, 466 U.S. at 697, 104 S. Ct. at 2069.

We believe that the result reached by the trial court was correct. The record reflects that the petitioner was confronted with strong evidence of his guilt for serious crimes when he was arrested. His trial attorney was aware that the petitioner's position was serious. However, the petitioner refused to agree to cooperate and testify against other individuals -- a specific request made by the state as part of its on-the-scene offer.

The advice by the attorney that the petitioner should consent to the searches was based upon the belief that search warrants could be obtained any way and that the consent could help the petitioner's ultimate position. The petitioner has not proven that warrants would have been unobtainable and we will not presume that the warrant process would have been flawed. Likewise, the fact that the petitioner apparently received no ultimate benefit from his consent does not alter the fact that the attorney's advice to him was a legitimate position to take under difficult circumstances.

As for the subsequent offers by the state, we do not believe that the petitioner's inability to meet their financial requirements was caused by misadvice by his attorney. The petitioner's financial arrangement for the sale of his property with no mortgage resulted from the petitioner's doings, not the attorney's.

Finally, as to the attorney's failure to object to the introduction of evidence regarding such things as a prior drug sale and weapons, we note that the petitioner has not presented any authority that such evidence was inadmissible under the circumstances in this case. In any event, even if we were to conclude that the attorney should have objected to this evidence, we could not conclude that the evidence affected the verdict to the petitioner's prejudice. The evidence of the tape-recorded drug sales, the counterfeit money found on the petitioner's person and in his home, the gambling material and marijuana found during the searches of the petitioner's home and business establishment was, essentially, unrefuted. Thus, the petitioner has failed to show that his convictions and sentences resulted from the ineffective assistance of counsel.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

_____
Paul G. Summers, Judge

_____
David H. Welles, Judge