IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JULY 1998 SESSION

FILED

September 16, 1998

Cecil Crowson, Jr.
Appellate Court Clerk

JERRY WHITESIDE DICKERSON,	)	
	)	
Appellant,	)	No. 03C01-9710-CR-00472
	)	
	)	Knox County
v.	)	
	)	Honorable Richard Baumgartner, 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, Jerry Whiteside Dickerson, appeals as of right from the Knox County Criminal Court's order denying him post-conviction relief from his 1992 convictions for first degree murder and especially aggravated robbery for which he is presently serving an effective sentence of life imprisonment. He contends that the trial court erred in holding that he received the effective assistance of counsel. We affirm the trial court.

The opinion in the direct appeal reflects that police found the fingerprints of John Tory at the scene of the victim's murder. Under questioning, Tory implicated the petitioner and two other individuals. Upon later questioning, the petitioner admitted to participating, but he claimed at trial that he was forced to participate by Tory. State v. Dickerson, 885 S.W.2d 90, 91 (Tenn. Crim. App. 1993), app. denied (Tenn. Nov. 29, 1993).

The petitioner presents multiple complaints about his appointed attorney's representation of him in the convicting case. Under the post-conviction law controlling this case, the burden was on the petitioner in the trial court to prove by a preponderance of the evidence the factual allegations that would entitle him to relief. Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). In this respect, the petitioner has the burden of illustrating how the evidence preponderates against the judgment entered.

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 were 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, 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, 629 S.W.2d at 9; 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 of deficient performance. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

First, the petitioner complains about his attorney's failure to interview John Tory or to call him as a witness relative to the petitioner's duress defense. At the post-conviction hearing, the attorney testified that he had attended Tory's trial and watched Tory testify. He said that Tory was a person of small stature and he did not think Tory had anything to say that would support the petitioner's defense. The trial court found that the attorney's decision not to use Tory was legitimate trial strategy. We tend to agree under the record before us. In any event, we note that Tory did not testify at the hearing. Thus, the petitioner has failed to show any prejudice resulting from Tory not testifying.

Second, the petitioner complains about the attorney opening the door to the admission into evidence of codefendant Cynthia Bell's hearsay statement through a police detective's testimony. The attorney elicited from the detective in cross-examination that Bell said that Tory had threatened her with a pistol, the attorney thereby attempting to show by implication that the petitioner had been coerced, as well. However, the state was allowed to prove that Bell had also said that the petitioner wanted to return to the victim's home. At the evidentiary hearing, the attorney testified that he was fully aware of the risks, but he thought it most important to show that another participant was being forced by Tory. The trial court found the attorney's actions to be legitimate trial strategy. The record supports this conclusion.

Third, the petitioner complains about the attorney not getting a copy of the evaluation notes made during the petitioner's psychological evaluation which were ultimately used by the state to impeach the petitioner's testimony through inconsistent statements. The petitioner testified at the post-conviction hearing that if he had known about the statements, he would not have wanted to testify. The attorney acknowledged that he was unaware of the notes and of the fact that they contained the petitioner's statements regarding the events. He said that the petitioner did not tell him that the

petitioner had talked about the events during the evaluation. He said that he might have tried to stay away from the inconsistent areas if he had known of them beforehand. However, he asserted that he still would have wanted the petitioner to testify because it was the main way to present his duress defense. The trial court found that the attorney's decisions were reasonable, and it stated that in the context of the overall trial, the incident made no difference and did not suggest that the case ended in a questionable result. The record supports these conclusions.

Fourth, the petitioner complains about the attorney not appealing the trial court's denial of his motion to suppress the statement that he had given to the police. At the hearing, the attorney testified that he did not appeal this issue because he believed that it had no merit. The trial court found that this was an appropriate decision in that there was no merit to the issue. The petitioner has not shown otherwise in this appeal. The record supports the trial court's conclusion.

Last, the petitioner claims that the low rate of compensation paid to appointed counsel prohibited his attorney from being effective. The attorney testified that the quality of his representation was not driven by the quantity of his compensation. He said he met with the petitioner twenty to thirty times, interviewed the state's witnesses, performed legal research, and conducted discovery. The trial court found that the attorney prepared properly for a difficult case, noting that the petitioner had already given an incriminating statement to the police. The record supports the trial court's findings.

We conclude that the petitioner has failed to show that the trial court erred in any of its findings and conclusions. Considering the foregoing and the record as a whole, we affirm the judgment of the trial court.

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Joseph M. Tipton, Judge

CONCUR:

_____
Gary R. Wade, Presiding Judge

_____
David H. Welles, Judge