



# OPINION

The Petitioner, William Leon Leath, appeals as of right from the dismissal of his petitions for post-conviction relief in the Shelby County Criminal Court. In this appeal, Petitioner alleges that he received the ineffective assistance of counsel. After a careful review of the record, we affirm the trial court's dismissal of the petitions.

A somewhat lengthy procedural history precedes the instant appeal. This case previously came before this Court as two separate appeals from dismissals of post-conviction petitions. In case number P-7901, Petitioner filed a post-conviction petition regarding convictions of second degree murder and assault with intent to commit first degree murder. His convictions were affirmed by a panel of this Court. State v. William Leon Leath, WL 7704, Shelby County (Tenn. Crim. App., at Jackson, March 11, 1987) (No Rule 11 application filed). On March 16, 1990, Petitioner filed a pro se petition for post-conviction relief attacking these convictions, alleging that he received ineffective assistance of counsel. An evidentiary hearing was held on March 30, 1995, but the post-conviction court found by way of an Order filed December 5, 1995, that the petition was untimely filed and that Petitioner received the effective assistance of counsel. A Petition to Rehear was filed pro se by Petitioner with no stamp filed date appearing in the record, and it was denied on August 26, 1996. Petitioner then filed a pro se Notice of Appeal which was not stamp filed by the clerk, but the signature verification is dated September 2, 1996. On September 27, 1996, Petitioner further filed a pro se motion for a detailed "Designation of and Request for the Record on Appeal," including a request for the

transcript of the evidentiary hearing. An Order was signed by a judge on this Court on February 2, 1998 granting an extension of time until February 28, 1998, to file the transcript.

In case number P-08681, Petitioner filed a post-conviction petition attacking the conviction of bank robbery. In this case he was sentenced to serve thirty (30) years in prison as a Range II Offender. His conviction was affirmed on appeal on November 18, 1987, and the supreme court denied permission to appeal on February 1, 1988. State v. Leath, 744 S.W.2d 591 (Tenn. Crim. App. 1987), perm. to appeal denied (Tenn. 1988). On January 28, 1991, Petitioner filed a pro se petition for post-conviction relief attacking the 1986 bank robbery conviction on grounds of ineffective assistance of counsel and newly discovered evidence. An “Amended and Supplemental Petition for Post-Conviction Relief” was subsequently filed on April 19, 1996, by counsel for Petitioner. On August 26, 1996, an evidentiary hearing was conducted and the post-conviction court denied the petition in an Order on July 11, 1997, finding the Petitioner did receive the effective assistance of counsel. A “Notice of Appeal” was filed on August 18, 1997.

By Order of this Court on March 30, 1999, Petitioner’s appeals of denial of post-conviction relief in the Shelby County Criminal Court, case numbers P-7901 and P-08681, were consolidated for purposes of appeal. This Court also ordered the record to be supplemented with transcripts of the evidentiary hearings and Petitioner’s Petition for Post-Conviction Relief in case P-7901. The Order was complied with on June 4, 1999.

As to his first appeal (case P-7901), we will not address Petitioner's issues on the merits because we conclude, as did the trial court, that his petition for post-conviction relief is time-barred by the statute of limitations. At the time Petitioner's convictions became final, the statute of limitations applicable to post-conviction proceedings was three years. Tenn. Code Ann. § 40-30-102 (repealed 1995). Petitioner's convictions became final on March 11, 1987. However, Petitioner did not file his petition for post-conviction relief until March 16, 1990, beyond the statute of limitations period, thus barring any claims he might have had.

As to his second appeal (case P-08681), we will address the issues on the merits as the petition was filed within the applicable statute of limitations period. In post-conviction proceedings, a petitioner has the burden of proving his post-conviction allegations by a preponderance of the evidence. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). We note that Petitioner filed his original petition for post-conviction relief before the enactment of Tenn. Code Ann. § 40-30-210(f). A trial court's findings of fact following a post-conviction hearing have the weight of a jury verdict. Bratton v. State, 477 S.W.2d 754, 756 (Tenn. Crim. App. 1971). On appeal, those findings are conclusive unless the evidence preponderates against the judgment. Butler v. State, 789 S.W.2d 898, 900 (Tenn. 1990). With that standard of review in mind, we turn to the issue presented.

In reviewing the petitioner's 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, a 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, 104 S. Ct. 2052, 2064, 2067-68, 80 L. Ed. 2d 674 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1995).

This court should not second-guess trial counsel’s tactical and strategic choices unless those choices were uninformed because of inadequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 280 (Tenn. Crim. App. 1980).

At the post-conviction hearing, Petitioner testified that prior to trial he notified the trial court that he wished to have a different attorney appointed to represent him. Petitioner claimed counsel had lied to him and advised him that “he cared less whether [Petitioner] was innocent or guilty . . . and he wouldn’t or couldn’t spend any more time on one case than on the other cases.” Petitioner recalled that counsel only visited him prior to trial on three (3) or four (4) occasions. Petitioner testified that he gave counsel ten (10) to fifteen (15) names of witnesses he thought should be subpoenaed, but only three (3) or four (4) were actually subpoenaed. Petitioner further alleged that the FBI had information regarding another photograph of a bank robber which was crucial to Petitioner’s defense and that counsel failed to investigate. Also, Petitioner claimed that counsel failed to investigate or to conduct

appropriate discovery, resulting in prejudice to Petitioner's defense. Because the trial judge had to leave town and wanted the trial to be concluded within the week, Petitioner alleged that counsel shortened various witnesses' testimony in order to oblige the trial judge's wishes. He stated that counsel failed to object to the seating of jurors who were biased against the Petitioner. Petitioner believed that three (3) of the State's witnesses were biased due to their relationship with his first wife and his conviction for her murder, but that counsel failed to establish this bias. Finally, Petitioner alleged that his sentence was illegal and that counsel failed to object. We note that although not raised in the supplemental petition, Petitioner mentioned at the hearing that he had asked to take a lie detector test or to be given "truth serum," but that his requests were denied.

Trial counsel testified that he received Petitioner's case file on April 28, 1986, and that his records revealed that he met with the Petitioner on eleven (11) occasions prior to his trial on October 6, 1987. His investigator also met with the Petitioner several times prior to the trial date. Counsel and the prosecutor handling Petitioner's case shared discovery materials. After Petitioner advised counsel of those he wished to testify at his trial, counsel contacted each individual and determined which ones knew information about the case. Following his investigation, counsel determined that only a small number of these witnesses had information regarding the case and he brought them from out of state by subpoena to testify at trial. While counsel did not recall specifically when he received information from the FBI regarding Petitioner, he did recall investigating this information which came to a "dead end."

Regarding the photograph Petitioner complains should have been enlarged for trial, counsel stated that he took the photograph to some photographic experts to see if enlarging the photograph would improve the dimensions of it. Due to the photograph not being a full body shot and the grainy character of it, it was not recommended to be enlarged. Furthermore, counsel recalled that he did bring out the animosity of several of the State's witnesses who testified at trial regarding the murder of the Petitioner's wife and the possibility that these witnesses might have motive to lie about the Petitioner's role in this robbery. As far as putting Petitioner under hypnosis, using truth serum, or submitting him to a lie detector test, counsel stated that Petitioner's testimony at the post-conviction hearing was the first he had heard of it. In any event, in counsel's opinion, the results of any of these tests would have been inadmissible at trial.

The trial court found that Petitioner's first claim was without merit, reasoning that an indigent defendant is not entitled to the public defender of his choice, and therefore his allegation was irrelevant to a determination of effective representation. Petitioner's second claim that he was only interviewed three (3) times prior to trial was found to be without merit based on counsel's testimony that he met with Petitioner on eleven (11) occasions and provided the dates of those meetings. The trial court found Petitioner's third claim, that counsel failed to subpoena every alibi witness named by Petitioner, meritless based upon counsel's testimony that he interviewed each witness named by Petitioner and did not call those to testify who had no knowledge of the case. The trial court noted that counsel acted competently in not placing every witness Petitioner suggested on the stand. The fourth claim, that counsel failed to adequately investigate and present testimony regarding FBI

information of a subsequent robbery committed by a suspect whose appearance was similar to Petitioner's appearance, was also found to be without merit. The trial court noted that testimony indicated counsel attempted to introduce a photograph taken of this subsequent suspect, but the record does not reflect any further substantial information. The trial court found that while counsel did not subpoena the FBI files, this alone would not render his representation deficient. The court stated that Petitioner failed to prove that these actions deprived him of a fair trial or that the result would have been different.

The trial court went on to find that Petitioner's fifth claim, that counsel failed to adequately investigate the case and to seek discovery, was without merit based upon counsel's testimony that he conducted discovery with the prosecutor. Counsel also testified that he conducted numerous interviews of witnesses and explored possible alibi defenses. The trial court further found there was no evidence that counsel shortened any witnesses' testimony, Petitioner's sixth contention, in order to oblige the schedule of the trial court. The seventh claim, that counsel failed to demonstrate bias of various witnesses for the State, was found to be without merit based on counsel specifically recalling that this bias was in fact a major part of his defense. Finally, the trial court found Petitioner's eighth averment, counsel's failure to object to an illegal sentence, to be without merit because Petitioner was unable to demonstrate that his sentence is objectionable.

While not specifically noted within his petition, Petitioner testified that counsel failed to object to a questionable juror during voir dire. Petitioner claimed that this juror had expressed a bias against him if he did not testify at trial. However,

Petitioner did not state how the seating of this particular juror prejudiced his case. Furthermore, counsel's testimony indicated that he he challenged certain jurors and exercised his peremptory challenges and that this conduct with regards to proper voir dire fell within the range of competence demanded of an attorney in a criminal case.

In Petitioner's pro se "Amended and Supplemented Petition for Post-Conviction Relief," filed on February 3, 1999, he argues the trial court was in error in failing to address other evidentiary issues involving former counsel and counsel for his appeal during the post-conviction hearing. Initially, we note that this petition is in essence a supplemental brief. After reviewing his petition, we choose to follow the precedent which holds that once counsel is either retained or appointed, the petitioner loses his right to file pro se pleadings. See State v. Burkhart, 541 S.W.2d 365, 371 (Tenn. 1976); State v. Cole, 629 S.W.2d 915, 917-18 (Tenn. Crim. App. 1981). Therefore, since Petitioner is represented by appointed counsel, and was at the time of filing, his "amended pro se petition" will not be considered by this Court.

Based upon our review of the proof at the post-conviction hearing, the record and the briefs in the case sub judice, we agree with the trial court's findings and conclude that Petitioner has failed to demonstrate that counsel's performance was deficient so as to prejudice his defense and deprive him of a fair trial. Counsel's performance fell within the objective standards of reasonableness.

We affirm the denial of Petitioner's petitions for post-conviction relief.

---

THOMAS T. WOODALL, Judge

CONCUR:

---

GARY R. WADE, Presiding Judge

---

JOHN EVERETT WILLIAMS, Judge