IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1999 SESSION

ROBERT ROGER BREWINGTON,	)	
	)	**C.C.A. NO.M1998 00420 CCA R3 PC**
Appellant,	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. SETH NORMAN,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-conviction)

FOR THE APPELLANT:

JUSTIN JOHNSON
203 Second Ave. N.
P.O. Box 190582
Nashville, TN 37219-0582

FOR THE APPELLEE:

PAUL G. SUMMERS
Attorney General & Reporter

ELIZABETH B. MARNEY
Asst. Attorney General
425 Fifth Ave. N.
Nashville, TN 37243

VICTOR S. JOHNSON III
District Attorney General

JOHN C. ZIMMERMAN
Asst. District Attorney General
Washington Square, Suite 500
222 Second Ave. N.
Nashville, TN 37201-1649

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

Petitioner was convicted by a jury in 1988 of first-degree murder, aggravated kidnapping, and armed robbery. He was sentenced to life imprisonment for the murder, forty years for the kidnapping, and thirty-five years for the robbery, each consecutive to the others. Petitioner's convictions and sentences were affirmed on direct appeal. State v. Robert Roger Brewington, Jr., C.C.A. No. 89-232-III, Davidson County (Tenn. Crim. App. filed June 20, 1990, at Nashville). Petitioner filed for post-conviction relief in June 1992; a hearing was held in May 1998; and the trial court denied relief by written order in July 1998. In this appeal as of right, petitioner raises the following issues:

> 1. Whether his trial counsel was ineffective;
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> 2. Whether an inadequate psychological evaluation presented at his sentencing hearing violated his constitutional rights;
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> 3. Whether the kidnapping conviction must be set aside under State v. Anthony;
>
> 4. Whether he was unconstitutionally deprived of an acceptance hearing following his transfer from juvenile court to criminal court; and
>
> 5. Whether the State's failure to file a responsive pleading to his petition entitles him to relief.

Upon our review of the record, we affirm the judgment of the trial court.

The only testimony at the hearing was petitioner's and his trial lawyer's. Petitioner testified that he was sixteen years old when he was arrested, and did not understand his transfer hearing. Following his transfer hearing, he did not see or speak with a lawyer until his arraignment, when his trial lawyer was appointed. Because of this, he claims, he missed his opportunity for an acceptance hearing.

Petitioner also testified that his trial lawyer failed to file a motion for change of venue; met with him an inadequate number of times; did not do enough to pick an

impartial jury; failed to call any witnesses or otherwise mount a defense; and failed to represent him adequately at his sentencing hearing. Petitioner's trial counsel testified that he did not file a motion for change of venue because he didn't think there were adequate grounds for it. He admitted that he called no witnesses at trial because there were none to call. Petitioner had voluntarily confessed to his participation in the crimes to the police, and there was simply very little counsel could do in terms of a defense strategy.

With respect to petitioner's contention that he received ineffective assistance of counsel at trial, the court below found that petitioner did not carry his burden of proving that his trial lawyer's performance was below the standard required. We agree. "In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his petition by a preponderance of the evidence." McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983).[1]

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 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985).

[1]Petitioners filing for post-conviction relief after May 10, 1995, must prove their allegations of fact by clear and convincing evidence. T.C.A. § 40-30-210(f)(1997).

Petitioner's proof fell far below the standard required for proving either that his lawyer's performance fell below an objective standard of reasonableness, or that his lawyer's performance prejudiced his defense. Petitioner failed to produce any witnesses who might have testified favorably at either his trial or sentencing hearing, thus precluding this Court from finding that trial counsel erred by not calling these persons. Moreover, petitioner did not prove that his trial lawyer failed to prepare adequately; indeed, the preponderance of the proof is that he did prepare adequately. 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), and 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). This issue is without merit.

Petitioner next contends that he was denied his due process and equal protection rights because the psychological evaluation performed for his sentencing hearing was inadequate. Apparently, he thinks that a more comprehensive evaluation would have resulted in lesser sentences. However, petitioner cites us to no legal authority for the proposition that the "inadequate" evaluation constituted a violation of his constitutional rights. Accordingly, this issue is waived. Ct. Crim. App. R. 10(b). Moreover, petitioner's sentences were reviewed on direct appeal and affirmed. Therefore, the issue of the appropriateness of his sentences has been previously determined. T.C.A. § 40-30-112(a) (repealed 1995). Finally, there is no proof in the record to support petitioner's argument, because he offered no evidence of what an "adequate" evaluation would have provided, or how it would have mitigated his sentences. This issue is therefore without merit, and petitioner is entitled to no relief on

this ground.

Next, petitioner contends that his kidnapping conviction must be set aside under State v. Anthony, 817 S.W.2d 299 (Tenn. 1991),[2] which was decided after petitioner's direct appeal. However, State v. Anthony did not announce a new rule of constitutional law, and the rule in that case is not applied retroactively. State v. Denton, 938 S.W.2d 373, 377 (Tenn. 1996). Nor is petitioner entitled in this proceeding to Anthony-like relief on general due process principles. Such a claim could have been raised at any time during the trial or the direct appeal process. Denton, 938 S.W.2d at 377. Accordingly, it has been waived for the purposes of this proceeding, T.C.A. § 40-30-112(b) (repealed 1995), and petitioner is therefore not entitled to post-conviction relief on this ground.

Petitioner also claims that he was unconstitutionally deprived of an acceptance hearing following his transfer from juvenile to criminal court. Upon a juvenile court's order transferring a juvenile to criminal court to be tried as an adult, the juvenile has ten days to file a motion in criminal court for an acceptance hearing. See T.C.A. § 37-1-159(d) (Supp. 1987). If the motion is not filed within that period, the juvenile's right to an acceptance hearing is waived. Id. Petitioner did not file the requisite motion for an acceptance hearing after the juvenile court transferred him to criminal court, and he thereby waived his right to same. He argues now that his waiver resulted from his lack of understanding his right to an acceptance hearing, and his lack of access to his juvenile court attorney during the relevant time period. In other words, he contends that his waiver was neither knowing nor voluntary. However, the juvenile court's order of transfer

[2] State v. Anthony held that, where an accused is charged with kidnapping and an accompanying felony, such as robbery, due process prohibits a separate conviction for kidnapping where the requisite confinement, movement or detention is "essentially incidental" to the accompanying felony. 817 S.W.2d at 306.

recites that it "explained to the [petitioner] his right to an acceptance hearing in Criminal Court." This order also makes clear that petitioner's attorney was present at the time. Upon comparing this order with petitioner's assertions to the contrary at the post-conviction hearing, the court below found that petitioner had "intelligently waived his rights." The evidence does not preponderate against this finding, and we therefore decline to overturn it. See State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983) (the factual findings of the trial court in hearings "are conclusive on appeal unless the evidence preponderates against the judgment."). This issue is without merit.

Finally, petitioner contends that he is entitled to post-conviction relief because the State never filed a responsive pleading to his petition. While we agree with petitioner that the State is required to file a responsive pleading, see T.C.A. § 40-30-114(a) (repealed 1995), we fail to see how petitioner was prejudiced by the State's failure in this regard. The State was present at the post-conviction hearing and defended the petition. The State's defense offered no surprises, and consisted of cross-examining the petitioner about his contentions, and then calling his trial lawyer to testify. The petitioner is not entitled to post-conviction relief on this ground.

The judgment of the trial court is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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DAVID H. WELLES, Judge

_____
JOHN EVERETT WILLIAMS, Judge