

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1999 SESSION

FILED
December 16, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

DANNY HOUSE,)
)
Appellant,)
)
VS.)
)
STATE OF TENNESSEE,)
)
Appellee.)

NO.M199800464CCAR3CD

DAVIDSON COUNTY

**HON. SETH NORMAN,
JUDGE**

(Post-Conviction)

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OPINION FILED: _____

REVERSED AND REMANDED

JOE G. RILEY, JUDGE

OPINION

Petitioner appeals the denial of his petition for post-conviction relief. On July 14, 1997, petitioner entered a best-interest guilty plea to one count of delivery of more than twenty-six grams of cocaine, a Class B felony. He received an agreed sentence of eight years to be served in community corrections. Petitioner now attacks the validity of his conviction charging that:

1. His plea was the product of ineffective assistance of trial counsel; and
2. The post-conviction court committed reversible error by quashing post-conviction counsel's subpoena requiring revelation of the state's confidential informant.

Upon a complete review of the record, we conclude that the post-conviction court erred in failing to find deficient performance by trial counsel and should not have quashed post-conviction counsel's subpoena for the confidential informant involved in the criminal transaction. Thus, we **REVERSE** the trial court's dismissal of the post-conviction petition and **REMAND** for further proceedings in accordance with this opinion.

I. PROCEDURAL HISTORY

On March 8, 1995, Tennessee Bureau of investigation (TBI) Agent, Patrick Howell, along with a confidential informant, purchased in excess of twenty-six grams of cocaine from an unknown individual. Howell later identified petitioner from a photograph as the individual who delivered the drugs.

A Davidson County Grand Jury indicted petitioner for knowingly delivering twenty-six grams or more of cocaine, a Class B Felony. Petitioner continually maintained his innocence and asked trial counsel to obtain the identity of the informant. Trial counsel never attempted to obtain the identity of the confidential informant involved in the drug transaction. In July 1997, on the day of trial,

petitioner agreed to enter a best-interest guilty plea in exchange for an eight-year community corrections sentence.

In March 1998, petitioner secured other counsel and filed a petition for post-conviction relief claiming his plea was not given “knowingly and intelligently,” but rather as a result of ineffective assistance of counsel. Specifically, petitioner charged trial counsel was ineffective in failing to secure the identity of the confidential informant.

The post-conviction court conducted an evidentiary hearing where it heard testimony from trial counsel, ex-TBI Agent Howell, and petitioner. However, it quashed the subpoena issued for the confidential informant by post-conviction counsel and denied relief. This appeal followed.

II. POST-CONVICTION HEARING

A. Testimony

1. Trial Counsel

Trial counsel testified regarding his forty-plus years of criminal defense experience and his representation of petitioner in this case. According to trial counsel, petitioner continually denied the allegation that he sold cocaine to the undercover TBI agent and confidential informant.

Trial counsel unsuccessfully attempted to interview the TBI agent involved in the investigation. Also, he did not file a motion to compel the state to reveal the identity of the confidential informant (CI). He had never filed such a motion in his practice and indicated uncertainty as to whether such disclosure could have been required of the state. Counsel was aware, however, that the CI was in the same vehicle with the TBI agent and was an eyewitness to the transaction.

Trial counsel admitted that a motion to reveal the CI's identity might have led to a denial that petitioner sold the cocaine. However, in his experience, informants were afraid to talk; and issuing a trial subpoena was potentially dangerous since he did not know what the CI would say.

On the day of trial, trial counsel presented the state's offer of an eight-year community corrections sentence to petitioner; and in his own words,

“thought it was a tremendous way out of this mess. Here's a young man that says, 'I didn't do it, I don't know anything about it.' He had an opportunity here to plead to eight years of community corrections. On the other hand, had it gone to trial and [he] was convicted, he stood a chance of receiving much more punishment.”

2. TBI Agent

Ex-TBI Agent Howell testified to the facts of the underlying offense. Howell and a confidential informant were together in an undercover vehicle on the lookout for another subject. Howell testified that petitioner approached their car and made some inquiries which resulted in an agreement to purchase cocaine from him.

Howell recalled that the seller identified himself as “Nudie,” but did not note a physical description in his report. That night or the following day, vice officers from the Metro Police Department provided Howell with a photograph of petitioner. Howell identified petitioner as the seller. Howell did not recall asking the CI to make an identification since Howell had already made a positive identification.

3. Petitioner

Petitioner, Danny House, testified that he did not sell drugs to Agent Howell, and that he never admitted committing this crime. He also testified that he asked trial counsel to obtain the identity of the CI prior to trial because he believed the CI's testimony would exonerate him. However, trial counsel told him the district attorney would not turn over his files. Further, trial counsel never discussed with petitioner

the requirement of disclosure of a CI's identity when the informant is a participant in the criminal activity.

Petitioner testified that he wanted to take this case to a jury right up until the day of trial. When trial counsel told him he would go to the penitentiary if convicted, petitioner agreed to the plea as the jury entered the courtroom.

4. Post-Conviction Court's Findings

Prior to the post-conviction court reaching its conclusions in this case, the following colloquy occurred:

COUNSEL: At this point, our next witness would be the informant, and he is under subpoena, in care of the Agent.

STATE: Your Honor, we filed a motion to quash that subpoena.

COURT: And I grant it. I grant the motion to quash the subpoena.

COUNSEL: Your Honor, may I make a proffer, please? I think . . .

COURT: No, sir. No, sir, I will not let you present the informant.

. . .

COUNSEL: Your Honor, the reason that I'm attempting to call the informant is because I have to establish the prejudice prong of Strickland.

The post-conviction court then stated the following:

"[Petitioner] has intelligently made a plea of guilty, a best interest plea, in this court. And now you're attempting to go behind this because he says, 'I don't think I did it.' And that's what he just said a minute ago. 'I don't think I'm guilty.'

. . .

I'm not going to allow you to set aside a plea in this case just because now he has changed his mind."

With that conclusion, the court denied the petition for post-conviction relief.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner asserts that trial counsel's failure to procure the identity of the CI in this case was so deficient as to deny him effective assistance of counsel in violation of his constitutional rights.

This Court reviews a claim of ineffective assistance of counsel under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The petitioner has the burden to prove that (1) the attorney's performance was deficient, and (2) the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2064; Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

A. Deficient Performance

Petitioner unequivocally showed that trial counsel failed to request disclosure of the CI's identity. Trial counsel candidly admitted that he never sought disclosure. Nevertheless, our review of the law reveals that petitioner had a constitutional right to obtain disclosure of the CI's identity since the CI was a material witness to the drug transaction. Roviaro v. United States, 353 U.S. 53, 61, 77 S.Ct. 623, 627, 1 L.Ed.2d 639 (1957); State v. Brown, 823 S.W.2d 576, 587-88 (Tenn. Crim. App. 1991); Roberts v. State, 489 S.W.2d 263, 265 (Tenn. Crim. App. 1972). In view of petitioner's continual denial of guilt and his best-interest guilty plea, the post-conviction court erred in failing to find that trial counsel's performance in this regard was deficient.

B. Prejudice

Discovery is now available in post-conviction proceedings. Tennessee Supreme Court Rule 28 § 6(C)(7) requires the state to provide:

“discovery of all those items deemed discoverable under Rule 16, Tennessee Rules of Criminal Procedure, if relevant to the issues raised in the post-conviction petition, and [to] provide any other disclosure required by the state or federal constitution.”

Id. Under the circumstances of this case, Rule 28 § 6(C)(7) requires the state to disclose the identity of the informant in this post-conviction proceeding.

In an attempt to establish the prejudice prong of Strickland, petitioner issued a subpoena for the TBI to produce the confidential informant at the post-conviction evidentiary hearing. The post-conviction court quashed the subpoena; effectively foreclosing petitioner’s sole avenue for establishing prejudice. Thus, the matter must be remanded for further proceedings.

C. Future Proceedings

We consider the facts of this case unique. We are not opening the door to all those convicted who did not know the identity of an informant. In this case, the petitioner requested his counsel to secure the informant’s identity; counsel erroneously failed to do so. Petitioner continually denied guilt and did not admit participation in the sale of cocaine by entering a best-interest plea.

Upon remand, petitioner still has the burden of establishing the prejudice prong of Strickland. 466 U.S. at 687, 104 S.Ct. at 2064. He must show there is a reasonable probability that, but for trial counsel’s error in failing to secure the identity of the CI, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). This may indeed be a difficult, if not insurmountable, burden depending upon whether the informant can be located, and if so, what his or her testimony would be. We voice no opinion on that ultimate issue. We simply conclude the petitioner must be allowed an opportunity to prove prejudice in light of trial counsel’s deficient failure to secure the CI’s identity.

CONCLUSION

Based upon our discussion above, we find it necessary to **REVERSE** the post-conviction court's dismissal of the petition for post-conviction relief. We **REMAND** the matter for further proceedings in which the post-conviction court is directed to order the state to disclose the identity of the informant involved in the transaction at issue.

JOE G. RILEY, JUDGE

CONCUR:

THOMAS T. WOODALL, JUDGE

JAMES CURWOOD WITT, JR., JUDGE