IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

OCTOBER 1999 SESSION

FILED

December 10, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

BOBBY KENNETH NASH, JR.,	)	
	)	
Appellant,	)	C.C.A. No.M1998 00406 CCA R3 PC
	)	
vs.	)	Davidson County
	)	
STATE OF TENNESSEE,	)	Hon. Seth Norman, Judge
	)	
Appellee.	)	(Post-Conviction)
	)	

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OPINION FILED:_____

AFFIRMED

JAMES CURWOOD WITT, JR., JUDGE

OPINION

The petitioner, Bobby Kenneth Nash, Jr., appeals from the Davidson County Criminal Court's dismissal of his petition for post-conviction relief. Nash is presently serving a life sentence for the first degree murder of his aunt. See State v. Bobby Kenneth Nash, Jr., No. 01C01-9409-CR-00330 (Tenn. Crim. App., Nashville, Apr. 24, 1997), perm. app. denied (Tenn. 1997). The trial court conducted a hearing on the post-conviction petition, at which the petitioner was represented by appointed counsel. The trial court found the allegations of the petition unsubstantiated by the proof presented and denied relief. The petitioner now appeals, raising the following issues for our consideration.

1. Whether the trial court erred by dismissing the petition before cross-examination of the petitioner and presentation of proof at the hearing was complete.

2. Whether the trial court erred in failing to issue a written order of dismissal in which it stated its findings of fact and conclusions of law.

3. Whether the petitioner was denied the effective assistance of counsel.

Upon review of the record, the briefs of the parties, and the applicable law, we affirm the judgment of the trial court.

This case presents us with the opportunity to consider an unusual question – whether a trial court's ability to exercise appropriate control over a proceeding empowers the court to cut short the cross-examination testimony of a party and rule on the merits of the case. We hold that in a factually appropriate case, such as the one at bar in which the defendant had already fully presented his case, the court has such authority.

At the post-conviction hearing, the petitioner first presented the testimony of his trial attorney. Trial counsel stated that the defendant had always maintained that, at the time the defendant killed the victim in the presence of

several witnesses, the victim had a gun. In view of the abundant eyewitness information that contradicted the claim, trial counsel did not rely upon a self-defense strategy. Rather, counsel tried to convince the jury that the defendant was so overwhelmed by his belief that the victim was responsible for his father's death that he was provoked by passion and, in any event, lacked the capacity to premeditate first degree murder. Trial counsel said that evidence established that the defendant believed the victim had killed the defendant's father and showed that the defendant was very upset about this circumstance. Trial counsel thought the self-defense claim was "a burden more than a help" because of the eyewitnesses and the fact that no gun was found. Trial counsel denied having advised the defendant to testify falsely; he told the petitioner to tell the truth. He also recalled that there was never a notice filed that the state was seeking the death penalty, and he had discussed the lack of death penalty aggravators with the defendant. To counsel's knowledge, the petitioner never believed he was in danger of receiving the death penalty.

The petitioner then took the stand and testified that he told his trial attorney that the victim of his crime had a gun in her hand when he shot her. The petitioner repeated this story to a psychiatrist. This story was false; however, the petitioner claimed he made it up after he was advised by other jail inmates that he would receive the death penalty unless he claimed self-defense. Three months prior to trial, the petitioner told his attorney the self-defense claim was false. He claimed he wanted to recant his claim that the victim had a gun, and his attorney told him he would take care of it. Three weeks before trial, the petitioner learned that his attorney had done nothing in this regard. At trial, just before the petitioner took the stand, he asked his attorney what he should do. He claimed counsel encouraged him to testify falsely because changing his story would not look good. Accordingly, the petitioner testified falsely at trial.

In an effort to demonstrate prejudice, the petitioner claimed the trial court excluded evidence at trial of prior conflict between himself and the victim over the petitioner's father's death and estate. He testified that this evidence would have been helpful in demonstrating that he was guilty of no more than the lesser grade offense of voluntary manslaughter. However, he claimed that the court based its decision to exclude this evidence and not to give a jury instruction on voluntary manslaughter upon the self-defense theory presented.

During the state's cross-examination of the petitioner at the hearing, the court announced that it would not hear further testimony and dismissed the petition. The court summarily recited, "There's no proof whatsoever of anything this Court could grant a petition for post conviction relief on. He has just stated positively that a lawyer told him to testify the way he thought was right."

Thereafter, the petitioner filed this appeal.

I

First, we consider whether the trial court erred by dismissing the post-conviction petition before the defendant's testimony was complete and all proof had been received.

In Tennessee, "the propriety, scope, manner and control of the examination of witnesses is a matter within the discretion of the trial judge, subject to appellate review for abuse of discretion." State v. Caughron, 855 S.W.2d 526, 540 (Tenn. 1993); cf. Tenn. R. Evid. 611(a) (trial court has authority to "exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel"). In post-conviction matters, proof shall be limited to the allegations of fact in the petition. Tenn. Code Ann. § 40-35-210(c)

(1997).

In the case at bar, the petitioner was greatly aggrieved of the victim's alleged involvement in his father's death, a civil lawsuit involving his father's estate, and distribution of the estate. These events had occurred in the months before the petitioner killed the victim. The petition did not contain factual allegations about these events which might demonstrate their relevance to the alleged constitutional infirmities of the petitioner's conviction. At the post-conviction hearing, the petitioner tried repeatedly to testify about these matters. During the petitioner's direct examination, he and his counsel were admonished by the court to limit his testimony to matters related to the post-conviction claim and to refrain from testifying about his "life history," "the matter involving the deceased," or "any long[,] rambling statements." At the end of his direct examination, the petitioner affirmed that he had raised all of the issues that he wished to bring before the court. Thereafter, the state began cross-examination of him, during which the petitioner began testifying about the victim's alleged involvement in killing his father and the victim having allegedly "extorted" money from his father. It was at this point that the court announced the hearing was over and made its ruling. Neither the petitioner nor his counsel objected or otherwise indicated that there was more evidence they desired to present.

On these facts, we see no abuse of discretion. The petitioner acknowledged at the end of direct examination that he had presented the proof he desired on all of his post-conviction allegations. The court curtailed the state's cross-examination of him when he returned to subjects the court had admonished him were irrelevant. We see no indication that the petitioner was prevented from presenting evidence in support of his post-conviction petition. Furthermore, we agree with the trial court that the prior conflicts between the petitioner and his victim

were irrelevant to the issue of trial counsel's effectiveness and therefore inadmissible. See Tenn. R. Evid. 401, 402.

II

Next, the petitioner claims that the trial court erred by failing to issue a written order containing findings of facts and conclusions of law.

The Post-Conviction Procedure Act requires

> Upon the final disposition of every petition, the court *shall* enter a final order, and except where proceedings for a delayed appeal are allowed, *shall* set forth in the order or a written memorandum of the case all grounds presented, and *shall* state the findings of fact and conclusions of law with regard to each such ground.

Tenn. Code Ann. § 40-30-211(b) (1997) (emphasis added). We have observed on many occasions that this duty is mandatory, and it facilitates and is often essential to appellate review. See, e.g., Claude Francis Garrett v. State, No. 01C01-9807-CR-00294, slip op. at 12 (Tenn. Crim. App., Nashville, June 30, 1999); Steve E. Todd v. State, No. 01C01-9612-CR-00503, slip op. at 6 (Tenn. Crim. App., Nashville, Jan. 26, 1999); Joe L. Utley v. State, No. 01C01-9709-CR-00428, slip op. at 3 (Tenn. Crim. App., Nashville, Dec. 8, 1998). In many cases, the absence of an adequate order prevents us from our task of appellate review and requires us to remand the case for entry of a proper order. See, e.g., Claude Francis Garrett, slip op. at 13; Steve E. Todd, slip op. at 8; Joe L. Utley, slip op. at 4.

In the case at bar, the court made very minimal findings from the bench which were announced on the record. The transcript of the hearing along with the court minutes, both contained in the appellate record, inform us that the petition was dismissed and that the trial court found no proof to sustain the petitioner's allegations. In this case, we are able to infer that the trial court accredited the testimony of the petitioner's trial counsel and discredited that of the

petitioner. As such, we find the court's error harmless. See Tenn. R. Crim. P. 52(a). However, failure to abide by the statute may not always be harmless. See Curtis Anthony Miller v. State, No. 01C01-9701-CR-00026, slip op. at 4 (Tenn. Crim. App., Nashville, Jan. 9, 1998).

III

Finally, we take up the substantive issue of ineffective assistance of counsel.

The petitioner bears the burden of establishing his claim by clear and convincing evidence in all claims filed under the Post-Conviction Procedure Act of 1995. Tenn. Code Ann. § 40-30-210(f) (1997). In evaluating claims of ineffective assistance, the finder of fact must indulge a strong presumption that counsel's conduct falls within the range of reasonable professional assistance and must evaluate counsel's performance from counsel's perspective at the time of the alleged error and in light of the totality of the evidence. Strickland v. Washington, 466 U.S. 690, 695, 104 S. Ct. 2066, 2069 (1984). The petitioner must demonstrate that there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. Strickland, 466 U.S. at 695, 104 S. Ct. at 2069. 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).

In the present case, the essential question was one of witness credibility. The petitioner testified that his trial attorney counseled him to testify falsely, despite his wishes to do otherwise, and his attorney testified that he gave

no such advice. The trial court accredited the testimony of counsel and discredited that of the petitioner. Thus, the petitioner failed to establish his claim by clear and convincing evidence. On appeal, the evidence does not preponderate against the trial court's determination. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997) (questions of witness credibility are for the trial court, not the appellate court).

Because no error requiring reversal is presented, we affirm the judgment of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE

CONCUR:

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JOE G. RILEY, JUDGE

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THOMAS T. WOODALL, JUDGE