IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1999 SESSION

FILED

November 30, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

HARTWELL DEE PRICE, 01C01-9901-CC-00027	*	C.C.A. #
Appellant,	*	CHEATHAM COUNTY
VS.	*	Honorable Robert E. Burch, Judge
STATE OF TENNESSEE,	*	(Post-Conviction Relief)
Appellee.	*	

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

JOHN EVERETT WILLIAMS,
Judge

OPINION

The petitioner, Hartwell Dee Price, appeals from the Cheatham County Circuit Court's order denying his petition for post-conviction relief after an

evidentiary hearing. The petitioner pled nolo contendere to a charge of murder in the first degree and received a life sentence without parole. On appeal, he asserts that he did not understand the terms of his plea and that his trial counsel was ineffective. We AFFIRM the trial court's order denying the petition.

BACKGROUND

On August 29, 1996, the petitioner entered a plea of nolo contendere to a charge of murder in the first degree. He then filed a petition for post-conviction relief asserting ineffective assistance of counsel. Appointed counsel subsequently amended that petition. On June 26, 1997, the trial court held a hearing in consideration of this petition. The petitioner, his father, and his trial counsel, Steve Stack and Shipp Weems, testified. After the hearing, the trial court denied the petition.

At the post-conviction relief hearing, the petitioner testified that his trial counsel guaranteed him Special Needs placement if he entered the plea of nolo contendere. However, at the time of this appeal the petitioner is not in Special Needs but rather incarcerated at South Central, where only a "step-up-step-down" program is offered.[1] The petitioner claims that Special Needs placement was essential to his plea and important to him and therefore states that his counsel "lied to [him]."

The petitioner testified that his counsel contacted him only once before his plea hearing. He said that he did not remember what happened during that visit. Further, the petitioner stated that on the day of his plea hearing he was improperly medicated and therefore not totally coherent. He stated that he remembers some, but not all, events that occurred on the day of the plea hearing. Of the plea colloquy, he stated that he remembers only a few

[1] While "step-up-step-down" offers counseling and group therapy, the petitioner testified that he requires the particular group therapy offered in Special Needs. He does attend the group therapy offered him, however, only for the seventeen cents per hour pay.

questions; in addition, he testified that his answers were given simply pursuant to the instructions of his counsel and not after any meaningful thought or deliberation.

The petitioner stated that prior to his current incarceration he had been in mental hospitals approximately four to five times.[2] Additionally, although he was not evaluated before the plea hearing, he testified that a psychologist visited him at the jail and asked him various questions.

The petitioner testified that his counsel ineffectively investigated potential witnesses. He testified the counsel told him that his named witnesses would be of assistance only if those witnesses saw him the day of the crime. The petitioner said that he wished trial counsel to interview and prepare several witnesses. One witness apparently observed, from a distance, some of the investigation occurring at the residence after the homicide. However, this witness would have been called by the state. Another was a counselor he met at South Central, after he had actually entered the plea. Apparently, this witness could testify to the petitioner's character. Finally, the petitioner complained that counsel did not investigate one other witness; however, the petitioner admitted he never told his counsel about her.

The petitioner's father, Hartwell Price, Sr., testified that he did not believe that his son entered a knowing, voluntary, and intelligent plea. Mr. Price recorded an audiotape of the conversation with the petitioner's counsel regarding his son's legal options and the likelihood of placement in Special Needs. This audiotape was offered into evidence. Mr. Price further testified that he understood that Special Needs was only trial counsel's "best guess" as to the location and manner of incarceration. However, he added that he believed that trial counsel left the petitioner with the impression that his options were either a plea and Special Needs placement or a jury trial and the death penalty.

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[2] Petitioner has been diagnosed as schizophrenic.

Steve Stack, one of the appointed public defenders serving as trial counsel for the petitioner, testified that he commenced investigation early in the murder case proceedings. He gathered information from the officers that were involved and received complete discovery, including statements of the petitioner, lab reports and other data. Regarding witnesses, Stack testified that the petitioner's named witnesses, by his estimation, would have been helpful only at the sentencing. Stack said that these witnesses nevertheless maintained contact with the petitioner and were prepared for trial. All in all, Stack testified that he felt that the evidence was sufficient for a jury conviction.

Stack testified that he did discuss a psychiatric evaluation with the petitioner. The petitioner gave the names of several doctors that had treated him previously. Stack said that although the petitioner wanted his last treating physician to be the one evaluating him, Stack explained his preference for someone with more trial experience. Further, the public defender's office filed motions to obtain psychiatric evaluation, and these motions were to be heard on the day that the petitioner entered the guilty plea. Stack testified that he discussed the insanity defense with the petitioner. In this regard, he advised that evaluation might be beneficial, but he knew that any selected expert witness could not conclusively establish the insanity defense, a decision ultimately resting within the jury's exclusive domain. Further, he expressed grave doubts as to the insanity defense's efficacy. He believed that a Cheatham County jury would not credit that defense under the facts of this case.

Stack also recalled one or two occasions where the jail allowed the father to visit the petitioner while counsel spoke with the petitioner. Stack said that he and co-counsel told the petitioner and his father that their best guess regarding incarceration placement in the event of a plea was Special Needs. Stack felt the petitioner sufficiently understood these conversations and all the subsequent proceedings.

Shipp Weems, petitioner's trial co-counsel and public defender for the 23rd Judicial Court Circuit, also testified. Weems testified that his office had filed a sealed ex parte motion for psychiatric evaluation. Weems testified that his office supplied the court with the required cost estimates, of approximately $11,000 for a mitigation specialist and $2000-4000 for a clinical psychologist's testimony. Recalling the ex parte discussion in the trial judge's chambers regarding the motion and estimates, Weems testified that the trial court would not consider approving those expenditures as long as the possibility of settlement existed. Weems testified that he felt that the petitioner was competent to enter his plea.

Finally, regarding the plea itself, the record indicates that the trial court engaged in the appropriate colloquy and that the petitioner answered all the trial court's questions. The state provided a factual basis for the plea:

(1) Shoes that the petitioner had worn during the day of the murder matched shoeprints removed from a little-used front porch of the victim's home.

(2) Investigators matched the petitioner's fingerprints with those recovered from the scene.

(3) Blood from the kitchen sink corresponded with the petitioner's blood: that blood could have only been from one in 110,000,000 Caucasian people.

(4) The petitioner's statement to police investigators indicated that he broke into the residence for money to pay for drugs he had been "fronted," that the fifty-two year old victim came home from her employment, that he and the victim scuffled, that she got a knife, and that he stabbed her in the chest.

(5) Witnesses placed the petitioner in the general area of the crime within the corresponding time frame.

ANALYSIS

The petitioner asserts that the trial court committed error by denying his petition alleging ineffective assistance and an unknowing plea.

On our review, the trial judge's findings of fact on post-conviction hearings are conclusive unless the evidence preponderates otherwise. See

Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990); Adkins v. State, 911 S.W.2d 334, 341 (Tenn. Crim. App. 1994). The trial court's findings of fact are afforded the weight of a jury verdict, and this Court is bound by those findings unless the record preponderates against them. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). This Court may not reweigh or reevaluate the evidence, nor may it substitute its inferences for those drawn by the trial judge. See Henley, 960 S.W.2d at 578-79. Questions concerning the credibility of witnesses and the weight and value to be given their testimony are resolved by the trial court, not this Court. See Henley, 960 S.W.2d at 579. The burden of establishing that the evidence preponderates otherwise is on the petitioner. See Black v. State, 794 S.W.2d at 752, 755 (Tenn. Crim. App. 1990).

INEFFECTIVE ASSISTANCE OF COUNSEL

When a petitioner presents a challenge based on his Sixth Amendment right to effective assistance of counsel, this Court reviews the claim 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 (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. See Strickland, 466 U.S. at 687; Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994); Butler, 789 S.W.2d at 899.

A counsel provides effective assistance if his performance is within the range of competence demanded of attorneys in criminal cases. See Baxter, 523 S.W.2d at 936. The petitioner must overcome the presumption that counsel's conduct falls within the wide range of acceptable professional assistance. See Strickland, 466 U.S. at 689; Alley v. State, 958 S.W.2d 138, 149 (Tenn. Crim. App. 1997); Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998). Therefore, in order to prove a deficiency, a petitioner must show that counsel's acts or omissions were so serious as to fall below an objective standard of

reasonableness under prevailing professional norms. See Strickland, 466 U.S. at 688; Henley, 960 S.W.2d at 579.

In reviewing counsel's conduct, a "fair assessment . . . 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. The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choice applies only if the choices are informed ones based upon adequate preparation. See Goad, 938 S.W.2d at 369; Alley, 958 S.W.2d at 149. Further, the petition must demonstrate prejudice by showing a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. See Strickland, 466 U.S. at 694.

In this case, the petitioner's ineffectiveness claims may be divided into three components:

(1) Failure to obtain a mental evaluation.

(2) Failure to adequately investigate a defense.

(3) Failure to properly advise the petitioner of the alternative to and consequences of his plea.

Failure to Obtain Mental Evaluation

The petitioner asserts that his counsel erred by failing to have his mental capacity adequately evaluated prior to entering a plea. His counsel testified that they were prepared to pursue psychiatric evaluation and had filed motions to that end; however, the trial court would not approve the requisite funding until a plea settlement was no longer a real possibility. Counsel, left to negotiate with the prosecution, reasonably concluded that a plea was the best option of avoiding the death penalty, for even if a mental evaluation produced evidence of mental disturbance, as it most likely would, counsel, based on experience and legal reasoning, felt that no Cheatham County jury would accept an insanity defense

from the petitioner. They concluded that the severity and gruesomeness of the crime would weigh heavily in the mind of the jury. Agreeing, the trial court found that counsel, aware of the petitioner's mental problems, were not ineffective but rather acted and advised reasonably. Petitioner has not demonstrated that the evidence preponderates against this finding. Therefore, we find no merit in this claim.

Failure to Investigate a Defense

The petitioner asserts that his trial counsel were ineffective in their failure to investigate and to prepare a defense; further, he contends that they failed to pursue "meaningful" contact with him and failed to seek out witnesses on his behalf. The submitted record does not comprise the preponderance of evidence necessary to overcome the trial court's findings that the counsel conducted sufficient investigation of the facts prior to recommending the plea and made reasonable tactical decisions based on this investigation. Counsel testified that they obtained the investigation reports, that they considered the relevance and efficacy of the potential testimony of the petitioner's witnesses, and that they concluded that the petitioner's best option, especially considering the likelihood of a death penalty sentence on conviction, was a plea. The petitioner failed to supply any of his witnesses at the hearing or to prevent any convincing argument contradicting the trial court's findings. The petitioner's testimony and that of his father do not constitute the preponderance of evidence necessary for this Court to disturb the trial court's judgment. The trial court found that counsel conducted extensive investigation of the facts, obtained the relevant reports, contacted the petitioner, and interviewed relevant witnesses. Therefore, we find no merit in this claim.

Failure To Properly Advise On Plea

The defendant contends that his counsel failed to properly advise him of the alternatives to and consequences of entering a guilty plea. First, he claims that trial counsel guaranteed him placement in Special Needs. However, the trial court found that counsel did not, in fact, make such guarantee, and we cannot conclude that the record preponderates against this finding. Counsel testified that it was their "best guess;" further, counsel is heard on the tape-recording saying that is not a "guarantee." The petitioner's testimony and that of his father do not preponderate against this evidence nor the trial court's finding. Therefore, we find no merit in this issue.

The petitioner claims that trial counsel improperly advised him that his only option other than a plea agreement was a jury trial and the death penalty. Again, the petitioner has not demonstrated that such was the case. Instead, it was explained to the petitioner that he had every right to proceed to a trial at which he could be found guilty or not guilty. Counsel further advised that the chances of conviction and a sentence of death in the event of a trial were very high. The trial court likewise found that this advice was reasonable. The petitioner has not established otherwise; therefore, we find no merit in this issue.

UNKNOWING AND INVOLUNTARY PLEA

The petitioner alleges that he was incompetent to enter a plea on the day of the hearing. Trial counsel were familiar with the petitioner's psychological background and aware that it presented certain problems and issues as well as a potential defense an trial. Their testimony indicated that, nevertheless, trial counsel believed him to be competent, rational, and in possession of sufficient understanding of the proceedings. The trial court credited this testimony and found the petitioner's plea knowingly entered. It noted, in particular, the length of the questioning and the responsiveness of the petitioner. We cannot conclude that the evidence preponderates against those findings. Therefore, we find no merit in this issue.

Further, the petitioner seems to argue that the "guarantee of Special Needs" rendered his plea involuntary. However, again, he does not demonstrate that the findings of the trial court were in error. The trial court found that no guarantee was offered. Therefore, we find no merit in this issue.

CONCLUSION

We AFFIRM the trial court's order denying the petition for post-conviction relief.

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JOHN EVERETT WILLIAMS, Judge

CONCUR:

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JOHN H. PEAY, Judge

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DAVID H. WELLES, Judge