IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

AUGUST SESSION, 1999

FILED

December 28, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

LESLIE MAURO HUDSON,	)	**C.C.A. NO. W1999-00429-CCA-R3-PC**
	)	
Appellant,	)	
	)	
	)	**HAYWOOD COUNTY**
VS.	)	
	)	**HON. DICK JERMAN, JR.**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	**(Post-Conviction - First Degree Murder)**

FOR THE APPELLANT:

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OPINION FILED ________________________

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

The petitioner, Leslie Mauro Hudson, appeals the Haywood County Circuit Court's order denying his petition for post-conviction relief. He is presently serving a life sentence as a result of his conviction for the 1987 first degree murder of Michael Ray Chaney. In 1992, the petitioner filed a *pro se* petition for post-conviction relief alleging numerous constitutional violations. Subsequently, counsel was appointed, and the petitioner filed an amended petition claiming ineffective assistance of counsel. After an evidentiary hearing, the trial court denied post-conviction relief. After a thorough review of the record before this Court, we affirm the trial court's judgment.

I.

A. Trial

In 1988, the petitioner was convicted of premeditated first degree murder and sentenced to life imprisonment. This Court affirmed his conviction, and the Supreme Court denied permission to appeal. State v. Leslie Mauro Hudson, C.C.A. No. 3, Haywood County (Tenn. Crim. App. filed November 8, 1989, at Jackson), *perm. to app. denied* (Tenn. March 5, 1990). To place the petitioner's issue in proper perspective, we will recite the facts as set out by this Court on direct appeal:

> The victim, Michael Ray Chaney, and the defendant were flea market merchants, who would travel from their home in Virginia to Texas to purchase flea market goods. They would then return to Virginia, selling their merchandise at flea markets along the way. On June 16, 1987, the victim and the defendant left Virginia on just such a trip. They were traveling in the defendant's converted school bus, and the defendant was carrying a .32 caliber revolver, ammunition, and a shoulder holster.
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> Their purpose apparently accomplished, the victim and the defendant headed for Virginia east-bound on Interstate Route 40.
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> They exited the interstate on the morning of June 24, 1987, stopping for fuel at a filling station in Haywood County, near

> Stanton-Koko road. On that morning, the victim and the defendant were seen together in Hudson's bus, at about 9:00 a. m., on Stanton-Koko Road. Approximately two hours later, the bus became stuck in a ditch on Stanton-Koko Road. According to two witnesses who helped free the bus, the victim was no longer inside, nor was he seen anywhere near it. Five days later, the victim's body was discovered less than a mile from the same ditch.
>
> The body was shoeless, and was clothed in blue jeans and a black t-shirt bearing the legend "Men at Work." There was no sign of a struggle.
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> Based on an autopsy, Richard Harruff, M.D., Ph.D., board-certified forensic pathologist and Shelby County Medical Examiner, found that death had occurred between the 21st and 25th of June, 1987. By reconstructing the victim's skull, Dr. Harruff determined that he had sustained at least five gunshot wounds to the head, including two at the front of the head, one between the eyes, and one to the right cheek. Each would have been fatal.
>
> Two spent .32 caliber bullets were recovered from the victim's body. Ballistics tests indicated that they were S. & W. long Norma brand lead "wadcutter" bullets.
>
> On September 19, 1987, the defendant was arrested in connection with a burglary. During an inventory search of his bus, the police discovered, among other things, a live .32 caliber bullet and five black t-shirts bearing the legend "Men at Work."
>
> Ballistics tests performed at the Tennessee Bureau of Investigation Crime Lab confirmed that the .32 caliber live round found on the defendant's bus was consistent in weight, design, and type with the bullets recovered from the victim's body. Further testing showed that, like the bullets recovered from the victim's body, the live round was also an S. & W. long Norma brand lead "wadcutter."
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> When questioned by the police, the defendant initially denied ever owning a .32 caliber weapon. He later admitted having owned a .32 caliber pistol, but stated that he had "got rid of it a long time ago." Similarly, he denied having been on the road where the victim's body was discovered, but after being told that two witnesses had seen him there, he admitted having been on that road.
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> The defendant also told police that he had last seen the victim on July 22, 1987, in Texas, but was unable to explain how the victim got to Tennessee. Also, he told them that the victim had stolen twelve hundred dollars from him and had "gone off with a Mexican girl."
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> The defendant did not testify at trial.

State v. Leslie Mauro Hudson, C.C.A. No. 3, slip op. at 2-4.

B.

The petitioner testified at the post-conviction hearing that he has been under psychiatric care since he was approximately seven (7) years old. He was

repeatedly admitted to psychiatric hospitals as a result of his unruly and, at times, criminal behavior. He further stated that during a previous stay in prison, he sustained a head injury as a result of being stabbed in the head with an ice pick. The petitioner stated that he was represented at trial by James Haywood and J. Roland Reid. He testified that he and his attorneys discussed his mental problems on numerous occasions and that Haywood asked him if he wished to have a mental examination. The petitioner acknowledged that he declined such an examination.

The petitioner claimed that, at the time of trial, he was paranoid and did not trust his attorneys. He believed that his attorneys were lying to him and were conspiring against him with the district attorney and the trial judge. He testified that he advised his attorneys of his paranoia and distrust of them. He further claimed that he smoked marijuana frequently while incarcerated in the Haywood County jail awaiting trial.[1] The petitioner stated that, at the time of trial, he was not competent to assist his attorneys in the preparation of his defense. He, therefore, claimed that his attorneys were ineffective for failing to request that he undergo a mental evaluation.

The petitioner claimed that he killed the victim in self-defense, but his attorneys would not allow him to testify accordingly.[2] He acknowledged that his attorneys had negotiated a plea bargain agreement wherein he could have pled to second degree murder and received a sentence of twenty-five (25) years. However, due to his prior experiences with the criminal justice system and his overall paranoid nature, the petitioner declined the state's offer.

In conjunction with the petitioner's testimony, the trial court admitted records from various psychiatric institutions in which the petitioner had been admitted. The records indicate that the petitioner has a history of impulsive behavior. Diagnosing physicians characterized the petitioner as "depressed,"

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[1] Dr. Lawrence Weitz, a clinical psychologist at the DeBerry Special Needs Facility, testified that use of marijuana increases feelings of paranoia.

[2] It appears from the record that the trial court advised the petitioner that he had a right to testify at trial; however, the petitioner stated that he did not wish testify.

"anxious, alienated, withholding, suspicious, resentful," "withdrawn," and "evasive." In 1968, the petitioner was admitted to Saint Elizabeth's Hospital in Washington, D.C., pursuant to a court-ordered mental competency evaluation;[3] however, the doctors concluded that, although the petitioner suffered from "passive-aggressive personality with schizoid features," the petitioner was competent to stand trial. Other diagnoses of the petitioner's mental condition included "Hysterical Neurosis, dissociative type"[4] in 1975, and "Intermittent Explosive Disorder" and "Antisocial Personality"[5] in 1985.

The petitioner admitted on cross-examination that he is highly intelligent and received his Master's Degree while incarcerated in this state.[6] He acknowledged that he frequently lied to his attorneys and "played games" with them. He had prior experience with the criminal justice system in that he had three (3) prior convictions for car theft. Although the petitioner conceded that he had never been found legally insane, he claimed that he was found incompetent to stand trial on a previous occasion.

Dr. Lawrence Weitz, a clinical psychologist at the DeBerry Special Needs Facility, testified that the petitioner was a participant in an "Anger Management Group" for prisoners established by Dr. Weitz. At the time of the hearing, Dr. Weitz had been seeing the petitioner in a professional capacity for approximately ten (10) months. The doctor testified that, while the petitioner was not mentally ill, he had been on medication during his professional relationship with the doctor. Dr. Weitz testified that, after reviewing the petitioner's records, he learned that the petitioner previously suffered from "an explosive and impulsive disorder." The doctor explained that such a disorder would be characterized by a failure to resist aggressive impulses and feelings of paranoia. He further stated that the

[3] The petitioner had been charged with interstate transportation of a stolen motor vehicle in the United States District Court for the Eastern District of Virginia, Alexandria Division.

[4] Roanoke Valley Psychiatric Center in Salem, Virginia.

[5] St. Louis State Hospital in St. Louis, Missouri.

[6] The petitioner holds a degree in Psychology.

petitioner's mental condition would not improve without treatment. The doctor acknowledged that the petitioner was competent to stand trial at the time of the post-conviction hearing; however the doctor could not give an opinion regarding the petitioner's competency at the time of trial in 1988.

Attorneys James Haywood and J. Roland Reid[7] also testified at the hearing. Both attorneys testified that the petitioner was extremely intelligent, cooperative, articulate and helpful in preparing his defense. Neither attorney noticed any signs that the petitioner distrusted them, was unhappy with their representation,[8] or was mentally ill. From their perspective, the petitioner was very well-informed with the legal system. They filed an enormous amount of pretrial motions on the petitioner's behalf, and Haywood testified that they would have made "the appropriate motions" had they had any indication that the petitioner had mental problems. The petitioner never informed them that he had mental difficulties, and as stated by Reid, "[a]t no time did Mr. Hudson ever give me any indication other than he was the most articulate and intelligent defendant that I had ever represented." As a result, they did not request that the petitioner receive a mental evaluation nor did they attempt to formulate a defense on the basis of mental defect.

Haywood testified that the petitioner never advised them that he shot the victim in self-defense, nor was there any proof to substantiate a self-defense claim. The petitioner made the decision not to testify after being fully informed by his attorneys.

In a written order, the trial court denied post-conviction relief. The trial court found that, although the petitioner had been treated for mental illness throughout his life, he never gave any indication to his attorneys that he was mentally ill. The court found that the petitioner is "an admitted 'liar' and his credibility should be scrutinized based upon a long standing pattern of being

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[7] Reid is now a General Sessions Judge in Haywood County.

[8] At the hearing, the state introduced a letter written by the petitioner wherein the petitioner commends both attorneys on their excellent representation.

untruthful to his attorneys, the authorities and the court on previous occasions." The trial court determined that both attorneys were "extremely diligent in their pursuit of any legitimate defense that could be asserted" on the petitioner's behalf. The post-conviction court further determined that, "[i]n reviewing the entire record, it is obvious that not only did actions of counsel not fall below an objective standard of reasonableness, but that the petitioner had the assistance of not one, but two diligent and competent attorneys to represent him throughout the proceedings." In addition, the trial court found that the petitioner had not presented any evidence that would "indicate the availability of any mental defense or that would render in anyway suspect" the petitioner's competency to stand trial in 1988. The trial court concluded that the petitioner had not established that counsel were deficient or that he was prejudiced by any of the alleged deficiencies; thus, the trial court denied the petition for post-conviction relief.

From the order denying relief, the petitioner now brings this appeal.

II.

In his sole issue on appeal, the petitioner contends that trial counsel were ineffective in failing to request that he undergo a mental evaluation.[9] He alleges that because he did not trust his attorneys, he could not have effectively assisted his attorneys in the preparation of a defense in his trial; therefore, he claims that a mental evaluation would have demonstrated that he was not competent to

[9] Initially, we must note that the amended petition for post-conviction relief alleging ineffective assistance of counsel is not in the record before this Court. On October 15, 1999, this Court filed an order directing that the record be supplemented with the amended petition alleging ineffective assistance of counsel. However, the "supplemental record" provided to this Court is a photocopy of a *pro se* amended petition in which there is no allegation of ineffective assistance of counsel. The absence of the amended petition alleging ineffective counsel is sufficient grounds for this Court to affirm the trial court's denial of post-conviction relief. *See* Tenn. R. App. P. 24(b); State v. Ballard, 855 S.W.2d 557, 560-61 (Tenn. 1993) (the appellant's failure to provide this Court with a complete record relevant to the issues presented for review constitutes a waiver of the issue); *see also* Jimmy Earl Lofton v. State, C.C.A. No. 02C01-9603-CR-00073, 1997 Tenn. Crim. App. LEXIS 219, at *2, Shelby County (Tenn. Crim. App. filed March 7, 1997, at Jackson) (issues not presented in the post-conviction petition cannot be raised for the first time on appeal). However, because all parties apparently agree that the issue of ineffective assistance of counsel is properly before this Court, we elect to review the petitioner's issue on the merits.

stand trial. Secondly, he argues that evidence of a mental illness would have been relevant in establishing a defense to first degree murder.

A. Standard of Review

In post-conviction proceedings, the petitioner bears the burden of proving the allegations raised in the petition by a preponderance of the evidence.[10] Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996); Wade v. State, 914 S.W.2d 97, 101 (Tenn. Crim. App. 1995). Moreover, the trial court's findings of fact are conclusive on appeal unless the evidence preponderates against the judgment. Tidwell v. State, 922 S.W.2d at 500; Campbell v. State, 904 S.W.2d 594, 595-96 (Tenn. 1995); Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993).

B. Ineffective Assistance of Counsel

The Sixth Amendment to the United States Constitution provides, in part, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." Similarly, Article I, § 9 of the Tennessee Constitution guarantees an accused "the right to be heard by himself and his counsel . . ." Additionally, Tenn. Code Ann. § 40-14-102 provides, "[e]very person accused of any crime or misdemeanor whatsoever is entitled to counsel in all matters necessary for such person's defense, as well to facts as to law."

The United States Supreme Court articulated a two-prong test for courts to employ in evaluating claims of ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Court began its analysis by noting that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686, 104 S.Ct. at 2064. When challenging the effective assistance of counsel in a post-conviction proceeding, the petitioner bears the burden of establishing (1) the attorney's representation

[10] Under the 1995 Post-Conviction Procedure Act, the petitioner has the burden of proving his claims by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f). However, since the present petition was filed in 1992, the petitioner's claims must be proven by a preponderance of the evidence.

was deficient; and (2) the deficient performance resulted in prejudice so as to deprive the defendant of a fair trial. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; Powers v. State, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). This Court is not required to consider the two prongs of Strickland in any particular order. Harris v. State, 947 S.W.2d 156, 163 (Tenn. Crim. App. 1996). "Moreover, if the Appellant fails to establish one prong, a reviewing court need not consider the other." Id.

The test in Tennessee in determining whether counsel provided effective assistance at trial is whether counsel's performance was "within the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975); *see also* Harris v. State, 947 S.W.2d at 163. In order to demonstrate that counsel was deficient, the petitioner must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688, 104 S.Ct. at 2064; Harris v. State, 947 S.W.2d at 163.

Under the prejudice prong of Strickland, the petitioner must establish that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

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, 104 S.Ct. at 2065. The mere failure of a particular tactic or strategy does not *per se* establish unreasonable representation. Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996). However, this Court will defer to counsel's tactical and strategic choices only where those choices are informed ones predicated upon adequate preparation. Id.; Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

C. Failure to Secure a Mental Evaluation

The petitioner claims that trial counsel were aware of his mental illness; thus, they were ineffective for failing to secure a mental evaluation. In support of this argument, the petitioner points to two statements given to police officers which were provided to counsel in discovery. In one statement, the petitioner's wife informed a TBI agent that there was a "possibility" that the petitioner had received psychiatric treatment in an institution, but "she did not know this for a fact." The second statement was given by the petitioner's stepson, who claimed that the petitioner was schizophrenic. Reid testified that, although he was aware of the two statements, he did not give the statements much credence and considered them insufficient to warrant a mental evaluation.

The trial court found that "[t]he petitioner failed to disclose or to indicate to counsel any basis whatsoever concerning a need for competency evaluation or the raising of any mental defenses." In making this finding, the trial court expressly discredited the petitioner's testimony that he disclosed this information to his attorneys and found that the petitioner was an "admitted 'liar.'" The trial court is in a much better position than this Court to judge the credibility of witnesses.

Additionally, David Cook, the Director of the Haywood County Pathways Counseling Officer, testified on the petitioner's behalf as an expert on forensic evaluations. Cook stated that many mental disorders are not noticeable to a lay person. Dr. Weitz also stated that a person suffering from paranoia would not be obvious to those untrained in the field of psychology. The petitioner's own experts agree that the petitioner's mental condition would not have been readily apparent to his attorneys without some specialized knowledge in psychology.

This Court has previously held that trial counsel's performance cannot be deemed deficient for failure to secure a mental evaluation in the absence of a factual basis to support a mental evaluation. *See* State v. Kerley, 820 S.W.2d 753, 755 (Tenn. Crim. App. 1991); Edward A. Wooten v. State, C.C.A. No. 01C01-9702-CC-00067, Sequatchie County (Tenn. Crim. App. filed May 21, 1998, at Nashville). The trial court found that the petitioner's attorneys had no

indication that a mental evaluation was necessary in the preparation of his defense. The evidence in the record does not preponderate against this finding. Therefore, we agree with the trial court that the petitioner has not met his burden of establishing that counsel's performance was deficient in this regard.

Moreover, the petitioner has not demonstrated how he was prejudiced by his attorneys' alleged deficiency. Notwithstanding the petitioner's diagnosed mental disorder, there is nothing in the record to indicate that the petitioner was legally incompetent to stand trial in 1988. In addition, although the petitioner claims that his mental illness would have established a defense to first degree murder, at the time of trial, the petitioner insisted that he did not kill the victim.[11] The petitioner now claims that he killed the victim in self-defense; however, both of his attorneys testified at the hearing that the petitioner never indicated that he wished to plead self-defense.[12] As a result, any defense based upon the petitioner's mental illness would not have been appropriate. Therefore, the petitioner has not shown how he was prejudiced.

III.

The petitioner has not shown that trial counsel's representation fell below an objective standard of reasonableness, nor has he demonstrated a reasonable probability that, but for any alleged deficiency, the result of the proceeding would have been different. Because the petitioner did not meet his burden for establishing ineffective assistance of counsel, the trial court properly denied the petition for post-conviction relief. Accordingly, the judgment of the trial court is affirmed.

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[11] Although the petitioner did not testify at trial, he gave multiple statements to law enforcement authorities that he had no involvement in the victim's death.

[12] The trial court did not make a specific finding with regard to whether the petitioner advised his attorneys that he killed the victim in self-defense. However, because the trial court explicitly rejected the petitioner's testimony as incredible, we conclude that the trial court implicitly accredited the attorneys' testimony in this regard.

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JERRY L. SMITH, JUDGE

CONCUR:

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DAVID H. WELLES, JUDGE

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JAMES CURWOOD WITT, JR., JUDGE