

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

Assigned on Briefs April 9, 2002

**JERMAINE A. PAINE v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Shelby County**  
**No. P-22868 Joseph B. Dailey, Judge**

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**No. W2001-01564-CCA-R3-PC - Filed May 24, 2002**

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On February 23, 1999, the Defendant, Jermaine Payne, pled guilty to one count of second degree murder and two counts of attempted first degree murder. He was sentenced to twenty-five years for the second degree murder and fifteen years for each of the attempted murders. The sentences were to be served concurrently. The Defendant subsequently filed a pro se Petition for Post-Conviction relief which was amended with the aid of appointed counsel. The petition alleged that the Defendant was denied effective assistance of counsel. A hearing was held on the petition on January 12, 2001, and relief was denied. The Defendant now appeals the trial court's denial of post-conviction relief. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

DAVID H. WELLES, J., delivered the opinion of the court, in which DAVID G. HAYES and JAMES CURWOOD WITT, JR., JJ., joined.

C. Ann Tipton, Memphis, Tennessee, for the appellant, Jermaine A. Paine.

Paul G. Summers, Attorney General; Braden H. Boucek, Assistant Attorney General; William L. Gibbons, District Attorney General; and Amy Weirch, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The Defendant was indicted for one count of first degree murder and two counts of attempted first degree murder. The facts presented at the guilty plea hearing recite that the murder victim was shot and killed as he sat in an automobile. The victims of the two attempted murders were also present in the automobile with the murder victim. The Defendant and another individual were the assailants who fired into the automobile occupied by the victims. In exchange for his guilty plea to one count of second degree murder and two counts of attempted first degree murder, the Defendant was sentenced to concurrent sentences of 25 years, 15 years and 15 years.

In his petition, the Defendant alleges that his trial counsel was ineffective due to failure to adequately investigate the Defendant's case, failure to adequately prepare for trial, failure to file a motion to suppress, and failure to timely convey and explain settlement offers to the Defendant. Both the Sixth Amendment to the United States Constitution and Article I, § 9 of the Tennessee Constitution guarantee a defendant the right to representation by counsel. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). This right to counsel includes the right to effective counsel. See Strickland v. Washington, 466 U.S. 668, 686 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

To sustain a petition for post-conviction relief, a defendant must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-210(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or reevaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The trial judge's findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578-79.

To determine whether counsel provided effective assistance at trial, the court must decide whether counsel's performance was within the range of competence demanded of attorneys in criminal cases. See Baxter, 523 S.W.2d at 936; Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998). To succeed on a claim that his or her counsel was ineffective at trial, a defendant bears the burden of showing that counsel made errors so serious that he or she was not functioning as counsel as guaranteed under the Sixth Amendment and that the deficient representation prejudiced the defendant resulting in a failure to produce a reliable result. See Strickland, 466 U.S. at 687; Burns, 6 S.W.3d at 461; Hicks, 983 S.W.2d at 245. To satisfy the second prong, the defendant must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding the defendant's guilt. See Strickland, 466 U.S. at 694-95. This reasonable probability must be "sufficient to undermine confidence in the outcome." Id. at 694; see also Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994); Owens v. State, 13 S.W.3d 742, 750 (Tenn. Crim. App. 1999).

When reviewing trial counsel's actions, this Court should not use the benefit of hindsight to second-guess trial strategy and criticize counsel's tactics. See Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982); Owens, 13 S.W.3d at 749. Counsel's alleged errors should be judged at the time they were made in light of all facts and circumstances. See Strickland, 466 U.S. at 690; Hicks, 983 S.W.2d at 246.

This two part standard of measuring ineffective assistance of counsel also applies to claims arising out of the plea process. See Hill v. Lockhart, 474 U.S. 52, 57 (1985). The prejudice requirement is modified so that the defendant "must show that there is a reasonable probability that,

but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59; see also Hicks, 983 S.W.2d at 246.

The Defendant claims that counsel did not interview several witnesses, including Francesca Taylor, prior to the trial date, did not prepare the Defendant for his testimony at the motion to suppress the Defendant's confession, or give the Defendant the discovery material provided by the State. In contrast, trial counsel testified at the hearing on the Petition for Post-Conviction Relief and stated that he went over the discovery material "verbatim" with the Defendant and discussed his testimony at the suppression hearing and its importance at great length. Additionally, trial counsel stated that he interviewed Ms. Taylor the day of trial because, despite diligent efforts, he was unable to locate her prior to that time. Ms. Taylor informed trial counsel that she intended to testify for the State and identify the Defendant as one of the men that "ambushed" the victims in the case. The Defendant's brief also lists Johnny and Tomika Graham, victims in this case, Tony Freeman, and Christopher Boyd as potential witnesses that trial counsel failed to interview. However, there is no evidence in the record concerning what the testimony of these witnesses would have been or how their testimony would have aided the Defendant's defense.

The Defendant also claims that he was not informed that he would be required to serve all twenty-five years of his sentence. The Defendant argues that because he has an I.Q. of 54, he was unable to understand the term "100%," and his attorney never adequately explained that he would be required to serve the entire length of his sentence. Trial counsel testified to the contrary that he repeatedly explained the plea agreement to the Defendant including that he would be required to serve the entire length of the sentence. Additionally, the lengthy transcript of the Defendant's guilty plea hearing reveals that the trial judge taking the Defendant's plea repeatedly asked the Defendant if he understood that he would serve "25 years in the Tennessee Department of Corrections."

In dismissing the petition the trial court stated that

[trial counsel] did in fact thoroughly and properly represent Mr. Payne. [Trial counsel] had filed and argued a Motion to Suppress. He had thoroughly investigated the case and talked to the various witnesses involved. He had consulted on numerous occasions with his client. He ultimately was successful in negotiating the case down from an offer from life imprisonment to the offer of 25 years at 100% which the Defendant accepted. Defendant's claim that he did not understand what the term "100%" meant is, in this Court's opinion, totally groundless and patently unbelievable. Based on his answers during the acceptance of the guilty plea before Judge Blackett in February of 1999 and on his testimony in this court in January of 2001, it is very apparent that Mr. Payne was fully aware of the terms of this plea. This Court finds that [trial counsel]'s representation of Mr. Payne was thorough and outstanding in every regard and fell well within the standard set in Baxter v. Rose.

After a thorough review of the record, we conclude that the evidence supports the findings of the trial court. The Defendant failed to prove by clear and convincing evidence the factual

assertions supporting his alleged grounds for post conviction relief. The trial court properly dismissed the Petition for Post-Conviction Relief.

**CONCLUSION**

Accordingly, for the foregoing reasons, we AFFIRM the judgment of the trial court.

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DAVID H. WELLES, JUDGE