

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
MAY SESSION, 1995

FILED

February 21, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

MICHAEL J. BOYD,

Appellant

vs.

STATE OF TENNESSEE,

Appellee

No. 02C01-9406-CR-00131

SHELBY COUNTY

Hon. **JOSEPH B. McCARTIE**, Judge

(Post-Conviction)
(Capital Murder)

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(ON APPEAL)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Michael Joe Boyd, whose legal name is now Mika'eel Abdullah Abdus Samad, appeals as of right from the dismissal of his petition for post-conviction relief by the Criminal Court of Shelby County. On March 10, 1988, the appellant was convicted by a Shelby County jury of felony murder and two counts of robbery with a deadly weapon. The appellant was sentenced to death by electrocution for the murder conviction and to life imprisonment for each of the two counts of robbery with a deadly weapon. The trial court ordered that the sentences be served consecutively. On September 24, 1990, the Tennessee Supreme Court affirmed the appellant's convictions and sentences, State v. Boyd, 797 S.W.2d 589 (Tenn. 1990), and on January 22, 1991, the United States Supreme Court denied *certiorari*, Boyd v. Tennessee, 498 U.S. 1074, 111 S.Ct. 800 (1991).

On April 1, 1991, the appellant filed a petition for post-conviction relief.¹ On May 6, 1993, the court appointed Dan Seward to represent the appellant for post-conviction purposes. On January 21, 1994, the post-conviction court conducted an evidentiary hearing and, on March 21, 1994, entered its findings of facts and conclusions of law, denying the appellant's petition. The appellant immediately filed his notice of appeal.

The appellant presents the following eleven issues for our review:

- (1) Whether the post-conviction court committed error during the post-conviction hearing by denying the appellant's motion and request for a copy of the trial transcript;

¹At the post-conviction hearing, the appellant presented over one hundred alleged errors through his *pro se* petition and his amended petition for post-conviction relief. These errors can be categorized into six cognizable areas: ineffective assistance of trial counsel; improper jury instructions; constitutional errors by the trial court; improper conduct by the State; ineffective assistance of appellate counsel; and the imposition of the death penalty.

- (2) Whether the post-conviction court committed error by denying the appellant's request for a continuance of the post-conviction hearing;
- (3) Whether the appellant's trial counsel provided ineffective assistance;
- (4) Whether the appellant's appellate counsel was ineffective;
- (5) Whether the due process rights of the appellant were violated when the appellant was not appointed an attorney until more than two years after the filing of the petition;
- (6) Whether the trial court committed error by giving improper jury instructions;
- (7) Whether the trial court committed error at the trial level;
- (8) Whether the appellant should have received the death penalty and whether the Tennessee death penalty is constitutional;
- (9) Whether the appellant was entitled to expert services at his capital post-conviction hearing;
- (10) Whether trial counsel was ineffective for failing to collaterally attack the appellant's prior conviction for second degree murder as this conviction was used as an aggravator at the penalty phase of the trial; and
- (11) Whether the post-conviction court properly denied the appellant's right to a full hearing by ruling allegations in the petition to be previously determined without allowing any evidence from the appellant as to why the grounds raised have not been previously litigated.

After reviewing the record before us, we conclude that the findings of the post-conviction court are correct, and affirm the dismissal of the appellant's post-conviction petition.

I. FACTUAL BACKGROUND

This proceeding arises from the appellant's collateral attack on his convictions for the November 8, 1986, armed robbery of William Price and David Hippen, which resulted in the murder of William Price. The evidence at trial established that Price and Hippen drove into downtown Memphis for the purpose of soliciting female companionship. Boyd, 797 S.W.2d at 592. An unknown

individual directed them to Raiford's Lounge, where two women, Barbara Lee and Renita Tate, agreed to accompany them. Id. The foursome drove to the Lorraine Motel, where Price gave one of the women a \$100 bill to rent two rooms. Id. The women began to argue about which one of them would go to the office to pay for the rooms. Id. While the women were arguing, the appellant (Lee's boyfriend) and two other men drove up alongside Price's van. Id. The appellant got out of his car, stepped up to the van, pointed a pistol towards Hippen's face and demanded money. Id. The appellant robbed Price and Hippen of approximately \$130 dollars. Id. Price then grabbed the appellant's arm, the appellant fired the gun, and the three men began to struggle over the gun. As Price started the van and attempted to drive away, the appellant "emptied" his gun at him. Id. Five to six bullets struck Price's body resulting in his death. Id.

II. ANALYSIS

Initially, we note that the following issues have been waived since the appellant has failed to cite any authority in support of his arguments as required by Tenn. R. App. P. 27(a)(7) and Tenn. Ct. Crim. R. App. 10(b): (1) Issue # 5, "Due Process Rights violated by failure to appoint counsel until two years after filing of pro se petition;" (2) Issue #7, "Errors committed by the trial court;" (3) Issue #8, "Constitutionality of the Tennessee Death Penalty;"² (4) Issue #10, "A collateral attack should have been presented challenging the appellant's second degree murder conviction prior to the death penalty post-conviction;" and (5) Issue #11, "The post-conviction court erred in prohibiting evidence as to

²Additionally, issue #8 has been previously determined by the supreme court on direct appeal. Boyd, 797 S.W.2d at 595-96.

previously determined issues."³ Because the appellant has waived these issues, we find it unnecessary to address these contentions in our analysis.

1. MOTION AND REQUEST FOR COPY OF TRANSCRIPT

On December 13, 1993, post-conviction counsel filed a "motion to have the clerk of court copy record and to deliver copy to petitioner." On December 14, 1993, the post-conviction court denied the motion. The appellant argues that this ruling is in error. We disagree and find this issue to be without merit.

There is no dispute that "an indigent defendant has a constitutional and statutory right . . . to a free transcript in order to prosecute a claim for post-conviction relief where that is essential in order for him to demonstrate his right to such relief." Jones v. State, 457 S.W.2d 869, 870 (Tenn. Crim. App.), cert. denied, (Tenn. 1970); see also Cauley v. State, No. 01C01-9310-CR-00367 (Tenn. Crim. App. at Nashville, Mar. 2, 1995); Pettigrew v. State, No. 02C01-9203-CC-0065 (Tenn. Crim. App. at Jackson, Aug. 25, 1993). In order to establish entitlement to a "free transcript," a defendant must allege a constitutional ground for relief. The trial court, in turn, must determine whether the transcript is necessary to further meritorious claims.

In the present case, the appellant had access to a "free transcript." In fact, the appellant conceded this point in a contemporaneous motion. In conjunction with the appellant's "motion to have the clerk of court copy record," the appellant filed a "motion to transcribe record of opening statement." In that

³Issue #11 is without merit. The record indicates that the post-conviction court did not prevent the appellant from presenting evidence on issues that is found to be previously determined. Rather, when the State requested that numerous issues be dismissed because they had previously been determined on direct appeal, the post-conviction court allowed the petitioner to argue why those issues were not previously determined and to present his proof.

motion, which was granted by the post-conviction court, the appellant stated ". . . all parts of the relevant record. . . have been transcribed and are available to Petitioner's attorney" with the exception of the opening statements. Additionally, we note that, on November 19, 1993, post-conviction counsel filed a motion with the Tennessee Supreme Court at Jackson "to have trial transcript and evidentiary hearings returned to original court of jurisdiction for sixty days."⁴ On November 23, 1993, Justice Daughtrey granted this motion. The order specified that the original trial transcript and any transcript regarding evidentiary hearings, including all exhibits, were to be sent to the Clerk of the Criminal Court for the Thirtieth Judicial District of Shelby County.

Clearly, the appellant through his post-conviction counsel had access to all relevant parts of the transcript "necessary to further meritorious claims."⁵ Thus, even if counsel was inconvenienced by not having a personal copy of the transcript, the appellant was not prejudiced by the post-conviction court's denial of this request. This issue is without merit.

2. MOTION FOR CONTINUANCE

The appellant contends that the post-conviction court erred in denying his motions for a continuance, which were filed and argued on the morning of the evidentiary hearing.

Immediately preceding the post-conviction hearing, the appellant moved for a continuance. The appellant argued that a continuance of about four

⁴The entire case file, which included the transcript of the proceedings, exhibits, and the technical record, remained with the Supreme Court at Jackson following that court's review on direct appeal.

⁵The record does not reflect whether the post-conviction court found that a copy of the transcript was "necessary to further meritorious claims."

months was necessary in order for Inquisitor, Inc., a private investigation firm, to complete research of the appellant's educational records and former prison record. This motion was denied. The appellant contends that the information from this investigation "would [have been] useful potentially at the hearing."

After this denial, the appellant requested a continuance in order to obtain witnesses for the hearing. Specifically, the appellant argued that certain witnesses either could not be found or did not respond to their subpoenas. This motion was likewise denied by the post-conviction court as there was little or no evidence of the materiality or relevance of these witnesses' testimony.

A decision whether to grant a continuance "rests within the discretion of the trial court." State v. Morgan, 825 S.W.2d 113, 117 (Tenn. Crim. App. 1991). Moreover, a denial of a continuance will not be disturbed "unless it appears upon the face of the record that the trial judge abused his discretion and prejudice ensued to the accused as a direct result of the trial judge's ruling." State v. Dykes, 803 S.W.2d 250, 257 (Tenn. Crim. App. 1990). Additionally, in the context of a post-conviction proceeding, the denial of a motion for continuance must implicate a constitutional right. "It is settled law that a habeas petitioner who claims that the state trial court's refusal to grant a continuance denied him due process of law must demonstrate, first that the trial court abused its discretion, and second, that its action rendered the petitioner's trial fundamentally unfair." Conner v. Bowen, 842 F.2d 279, 283 (11th Cir. 1988). "A ruling involving the grant or refusal of a continuance is addressed to the sound discretion of the trial court and rarely reaches constitutional proportions." Knighton v. Maggio, 740 F.2d 1344, 1351 (1984).

We are not persuaded by the facts presented, that the post-conviction court's denial of the appellant's motion for additional time to investigate or to

secure the presence of subpoenaed witnesses implicates due process. In determining whether the post-conviction court's action rendered the appellant's hearing fundamentally unfair, we must look for actual prejudice to the appellant. However, the appellant has failed to identify any prejudice affecting his conviction or sentence. Continuances may be granted for the purpose of securing the presence of identifiable witnesses if those witnesses' testimony is material and admissible. In this case, the appellant sought a continuance, hoping to secure witnesses, whose testimony was unknown, and to gather useful information which, at the time of the motion, was also largely unknown. Accordingly, we conclude that the post-conviction court did not abuse its discretion by denying the appellant's motion for continuance. This issue is without merit.

3. INEFFECTIVENESS OF COUNSEL

The appellant next contends that he was denied the effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Tennessee Constitution. Specifically, the appellant contends that his counsel was ineffective for the following reasons:

- (a) Counsel failed to investigate the personal background and medical history of the appellant for the existence of mitigating evidence and/or to present such evidence during the penalty phase of the trial;
- (b) Counsel failed to request and obtain adequate expert and investigative assistance;
- (c) Counsel failed to develop a reasonable trial strategy or defense for the appellant;
- (d) Counsel failed to investigate and present all available evidence that would support the appellant's claims of innocence regarding all charges including, but not limited to, the first degree murder charge;
- (e) Counsel failed to properly rebut the State's case at either the guilt/innocence phase or the sentencing phase of trial;

- (f) Counsel failed to investigate for witnesses and/or prepare and present them during the penalty phase of trial to demonstrate all aspects of the appellant's character and background that would support a sentence less than death;
- (g) Counsel failed to adequately prepare for either the guilt phase or the penalty phase of the trial and to develop and present to the jury a coherent theory of defense at either phase;
- (h) Counsel lacked the experience and knowledge necessary for effective representation of the appellant in a death penalty case;
- (i) Counsel failed to properly voir dire jurors;
- (j) Counsel failed to properly voir dire jurors for racial bias;
- (k) Counsel failed to object to the exclusion of jurors because of their general opposition to the death penalty;
- (l) Counsel failed to file necessary motions before, during, and after trial, on direct appeal, or at post-conviction;
- (m) Counsel failed to present evidence at the sentencing hearing, other than the testimony of the appellant, and defense witnesses, who were not under subpoena, left or did not come to court, leaving the appellant with no available remedy as the court ordered the case to proceed.
- (n) Counsel failed to raise and/or properly brief claims now raised in this petition for post-conviction relief;
- (o) Counsel failed to adequately investigate and prepare the cases for trial and/or appeal;
- (p) Counsel failed to investigate all witnesses for the defense and to properly impeach the witnesses for the State at trial;
- (q) Counsel failed to present mitigating evidence, on behalf of the defendant, by not issuing subpoenas, resulting in loss of all evidence of mitigation;
- (r) Counsel failed to object to certain irrelevant and inflammatory evidence during the appellant's trial;
- (s) Counsel failed to present a consistent theory throughout the guilt phase and sentencing phase of the trial;
- (t) The appellant was denied the effective assistance of counsel on his direct appeal to the Tennessee Supreme Court; and
- (u) Counsel failed to raise the above ineffective assistance of counsel claims on motion for new trial, on appeal, or in prior

post-conviction proceedings;⁶

In a post-conviction proceeding, the petitioner has the burden of proving the grounds raised in the petition by a preponderance of the evidence. State v. Clark, 800 S.W.2d 500, 506 (Tenn. Crim. App. 1990). Furthermore, the factual findings of the post-conviction court are conclusive unless the appellate court finds that the evidence preponderates against them. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990); State v. Swanson, 680 S.W.2d 487, 490 (Tenn. Crim. App. 1984). Moreover, the uncorroborated statements of the petitioner do not suffice to establish ineffective assistance of counsel. State v. Kerley, 820 S.W.2d 753, 757 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1991).

When the appellant's post-conviction claim involves the Sixth Amendment right to effective assistance of counsel, this court must determine whether the performance of counsel was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). In order to obtain a reversal on these grounds, the appellant must show by a preponderance of the evidence, Taylor v. State, 875 S.W.2d 684 (Tenn. Crim. App. 1993), perm. to appeal denied, (Tenn. 1994), that counsel's representation was deficient and that there was prejudice resulting from that deficiency. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984). Counsel's representation is deficient if the errors were so serious as to deprive the appellant of representation guaranteed him by the Sixth Amendment. Cox v. State, 880 S.W.2d 713, 717 (Tenn. Crim. App. 1994). The deficient representation becomes prejudicial when the appellant is deprived of a fair trial with a reliable result. Id.

⁶Appellant's issues (a) through (s) relate to his ineffectiveness of trial counsel claim; issues (t) and (u) relate to his ineffectiveness of appellate counsel claim.

Moreover, this court may first look at the prejudice prong of Strickland. If the court finds that the defendant suffered no prejudice, a deficiency if any, is considered harmless. Strickland, 466 U.S. at 693, 104 S.Ct. at 2067. Therefore, even if there are attorney errors, the appellant must show that "there is a reasonable probability that, but for, counsel's unprofessional errors, the result of the proceeding would have been different" in order to succeed on an ineffectiveness claim. Id. at 693, 104 S.Ct. at 2068.

A. Ineffectiveness of Trial Counsel

At the post-conviction hearing, the appellant was the only witness called by the defense. We note that the majority of the appellant's direct examination consisted of the appellant's post-conviction counsel reading the specific claims for post-conviction relief and the appellant responding that he had no comment and/or was relying on the allegations as described in the petition itself.⁷ In any event, in support of his claim of ineffective assistance of counsel, the appellant testified that Robert Jones and Ed Thompson, both Shelby County Public Defenders, represented him at the trial level. The appellant observed that counsel "didn't appear to me as being able to handle such a case because of the magnitude of the case. He [Mr. Jones] didn't have the time, you know, to do the work that he needed because he was involved in a lot more cases, you know." Moreover, the appellant stated that trial counsel failed to properly investigate his case "because they didn't have no witnesses to come in and testify in my behalf, you know."

Specifically, the appellant testified that, in preparation for the sentencing

⁷ At the hearing, in response to this manner of questioning, the post-conviction court stated, "This court will not regard the mere recitation of language found in the petition as an offer of proof sufficient to meet burden of proof by a preponderance of the evidence. Kerley, 820 S.W.2d at 757." Accordingly, the court found that numerous issues, not presented in this appeal, were waived.

hearing, his trial attorneys did not properly investigate his personal background and medical history for the existence of mitigating evidence. The appellant remarked that, at his sentencing hearing, he had wanted trial counsel to call people that knew him, e.g., Lenoir Patties, Sally Sykes, Ms. Wallace. The appellant added that he had given the names of Lenoir Patties and Sally Sykes to the investigator. He admitted that he did not know the addresses of these people. Nevertheless, according to the appellant, both of these individuals would have testified on the appellant's behalf. They were not called. The appellant also stated that his mother was willing to testify at the sentencing hearing, but she was not called. The appellant met with a psychologist, or "some fellow at the jail," but no witnesses were called regarding a mental evaluation. In fact, the only witness called at the sentencing hearing was Anthony Boyce, who voluntarily left the courtroom during the proceeding and was not heard because the court ordered the trial to proceed. As a result, the appellant was the only witness to testify at his sentencing hearing.⁸

The appellant further complained that, although he had been "locked up most of [his] life," his trial counsel failed to inquire about his criminal record. He also noted errors in the pre-sentence report, including the information that his father was deceased.

With respect to the guilt phase of the trial, the appellant expressed his opinion that, "We didn't have no strategy in this courtroom." He added that "Barbara Lee . . . gave a statement . . . in regard to the fact that I never had a gun and Bruce Ryder alleged that I had a gun, so by them not bringing Barbara

⁸ At the sentencing hearing, the appellant testified that he had not intended to kill anyone. He further stated that, at the time of the murder, he was not in possession of a gun. The appellant asserted that the victim pulled a gun on him, and that the appellant was "just fighting for his life." He concluded that the victim died during a struggle. The appellant also very briefly told the jury about his second degree murder conviction, implying that the crime occurred during a fight over a woman.

Lee in to testify to the fact that I never had a gun, that is what I was talking about here."

The appellant added that his attorneys did not conduct a proper jury voir dire. He claimed that he had wanted his attorneys to file a motion for individual voir dire and a motion for expert services, but neither motion was filed. The appellant further alleged that counsel failed to adequately advise him regarding his decision to testify and failed to object to the prosecutor's improper statements during the trial. Counsel also failed to object to the State's discriminatory exercise of peremptory challenges and to improper jury instructions.

At the post-conviction hearing, the State called Robert Jones as its first witness. Jones testified that he is a member of the capital defense team in Shelby County and has worked in that capacity for thirteen of his sixteen years with the Public Defender's Office. He added that he has handled "somewhere between five and six hundred [capital murder] cases."

Jones was appointed to represent the appellant at the preliminary hearing, where he replaced the appellant's private counsel, A.C. Wharton. Edward Thompson, who had twenty years capital case experience, was subsequently appointed co-counsel. Jones testified that he met personally with the appellant over twenty times prior to trial, and that, during these meetings, he obtained information from the appellant about the criminal charges. Jones further stated that the case was investigated by the Public Defender's Office. Because two investigators worked on the case, trial counsel concluded that expert services were not required for the appellant's defense.

Jones added that, based upon the appellant's statements, they relied upon the theory of self-defense. He explained that, at trial, they "tried to

establish who had the guns. And to discredit witnesses that contradicted our defense." Jones noted that Barbara Lee was not cooperative, and that trial counsel decided not to use her because her statement kept "going backward and forward." He observed that Lee would have been impeachable due to her prior inconsistent statement.

Jones also testified that, although he could not remember the racial makeup of the jury, neither could he recall the systematic exclusion of any particular race. Moreover, he could not recall failing to comply with any request of the appellant during the trial. Finally, Jones concluded that he filed all necessary motions, numbering between twenty-five and thirty.

With respect to the penalty stage, Jones testified that he investigated the appellant's background through interviews with family, friends and neighbors. The appellant's mother and brother were serving sentences in federal correctional facilities at the time of the appellant's trial. However, Jones did talk with the appellant's grandfather and a cousin, who is an attorney and whom they planned to call at the penalty stage. Indeed, Jones testified that, at the penalty stage, the defense team had Jean Withers, Randy Withers, and Anthony Boyce ready to testify, but all three witnesses left the courtroom before they were called. After the trial, Jones confronted Boyce, who claimed that the appellant's brother, Mitchell Boyce, told the witnesses to leave the courtroom. Thus, only the appellant testified at the penalty stage. Additionally, Jones stated that he "was not aware of any medical information that would have been of benefit to [the appellant] in the trial."

On cross-examination, Jones stated that he could not recall any mental evaluation of the appellant, since it was not relevant to the theory of self defense. Jones further conceded that he unsuccessfully attempted to impeach two State

witnesses, Hippen and Wright, but had no basis or real evidence upon which to impeach.

The post-conviction court, in its thorough and detailed "Findings of Fact and Conclusions of Law," found that the appellant "failed to meet a single prong of the Strickland test, much less both." Specifically, the post-conviction court noted:

Trial counsel has discretion in conducting the defense and must employ his or her best judgment in determining trial strategy; allegations of ineffective assistance of counsel relating to matters of trial strategy or tactics do not ordinarily provide a basis for post-conviction relief. See Taylor v. State, 814 S.W.2d 374, 378 (Tenn. Crim. App. 1991). In this case, it is evident that the Petitioner was represented by counsel experienced in the representation of murder suspects and well aware of the strategies and tactics necessary to mount a defense. This court will not use hindsight when reviewing every tactic used by the trial attorney. See State v. Martin, 627 S.W.2d 139, 142 (Tenn. Crim. App. 1981).

The Petitioner also contends that his trial attorney failed to call witnesses that would have been beneficial at the sentencing phase of the trial. The Petitioner seems to argue that their presence would have helped him establish mitigating circumstances. However, the only proof offered by the Petitioner at the Evidentiary Hearing was that these "witnesses" would have testified that they "knew" the Petitioner. The Petitioner has failed to show how there [sic] testimony would provide evidence of statutory mitigating circumstances.

A petitioner . . . who asserts that the attorney failed to use certain evidence must produce that evidence, not only to show the evidence is producible, but also to show that it would have been helpful to the case. State of Tennessee v. Walker, C.C.A. No. 02C01-9203-CC-00068 (Tenn. Crim. App. Feb. 24, 1993). The Court finds these averments to be totally baseless. . . . counsel testified . . . that the decision not to call certain witnesses was intentional, made because counsel feared that the witnesses in question would cause more harm to the Petitioner's case than any possible benefit they could confer. The conduct of the trial attorney in relationship to witness issues has not been proven to be anything other than an attorney's judgment of proper trial strategy and tactics.

The court then stated that "[t]he Petition's claims of ineffective assistance of counsel are not supported by the proof," and, accordingly, dismissed all claims

relating to this issue.

Having reviewed the record, we also conclude that the appellant has failed to demonstrate ineffective assistance of counsel at the trial level. Accordingly, we must uphold the decision of the post-conviction court.

B. Ineffectiveness of Appellate Counsel

In support of his claim of ineffective assistance of appellate counsel, the appellant alleges that appellate counsel failed to raise the following issues: the ineffective assistance of counsel at trial; whether the jury should have been permitted to find the appellant guilty of both first degree murder and felony murder; whether the trial court erred by failing to sufficiently instruct the jury that deliberation and premeditation are separate essential elements of first degree murder, and by instructing the jury that premeditation can be formed in an instant. The appellant further argues that all of his attorneys were ineffective for failing to raise the issue that the felony murder aggravating factor is invalid, as announced in State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992). He contends that all of his attorneys were ineffective for not attacking the appellant's prior conviction for second degree murder, since it is the only other aggravating factor supporting the death sentence of the appellant.

Mark Ward, appellate counsel, testified for the State at the post-conviction hearing. He stated that he was a private attorney in Memphis, but was under contract with the Public Defender's Office. He further testified that, during his eleven years as a contract attorney with the Public Defender's Office, he had prepared sixteen capital appeal cases. The appellant's case was his tenth capital appeal. Ward explained his procedure in preparing appeals, which

includes reading the entire record and formulating a list of issues. He then reviewed the issues raised in the appellant's appeal. Ward stated that, if he failed to raise an issue, he did so because the issue was without merit or not viable at that time. However, he agreed that, under the subsequent supreme court holding in Middlebrooks, the appellant would have an issue regarding the jury's consideration of the felony murder aggravator.

The post-conviction court, citing Fisher v. State, No. 88-226-III (Tenn. Crim. App. at Nashville, Sept. 29, 1989), perm. to appeal denied, (Tenn. 1990), found no merit to the appellant's assertion that appellate counsel was ineffective for failing to "submit a voluminous list of alleged errors on appeal." Moreover, the post-conviction court remarked that "It was sound judgment for the appellate counsel to limit to scope of the appeal and to have done otherwise would have called into question the competence of counsel." The post-conviction court then dismissed all allegations of ineffective assistance of counsel on appeal.

Again, the evidence presented by the appellant does not preponderate against the findings of the post-conviction court. Therefore, this issue is likewise without merit.

4. EXPERT SERVICES AT POST-CONVICTION HEARING

The appellant contends that he is entitled to an opportunity to demonstrate his need for expert services. The appellant cites the case of Gaile K. Owens & Pervis Tyrone Payne v. State, C.C.A. No. 02C01-9111-CR-00259 (Tenn. Crim. App. at Jackson, March 25, 1994), as authority for his position.⁹

⁹We note that, since the filing of appellant's brief, the Tennessee Supreme Court has held that Tenn. Code Ann. § 40-14-207(b) (1995 Supp.), authorizing special support services to indigent defendants, applies to post-conviction capital

The appellant is correct in his assertion that a petitioner convicted of a capital offense is entitled to an *ex parte* hearing in order to establish a need for expert services at the post-conviction level. See Owens and Payne, 908 S.W.2d at 923. However, the supreme court, in Owens and Payne, held that, in order to obtain an *ex parte* hearing, a post-conviction petitioner must comply with the procedural guidelines set forth in Tenn. Sup. Ct. Rule 13 (2)(B)(10). Id. at 928. Moreover, "the trial court should grant the motion if, at the hearing, the petitioner demonstrates that investigative or expert services are necessary to ensure the protection of the petitioner's constitutional rights." Id. Specifically, "the petitioner must demonstrate by specific factual proof that the services of an expert or investigator are necessary to establish a ground for post-conviction relief, and that the petitioner is unable to establish that ground for post-conviction relief by other available evidence." Id.

The record before us is devoid of any reference to a "particularized" need for expert services at the post-conviction level. In fact, the appellant did not submit a motion for expert services to the post-conviction court, nor did he request an *ex parte* hearing. Moreover, the appellant has not complied with the procedural requirements of Rule 13(2)(B)(10); he has not stated what expert services are necessary; and he has not asserted what constitutional rights would be protected by obtaining such services.

Furthermore, since this issue is raised for the first time on appeal and was not raised at the post-conviction hearing, it is presumed waived. Butler, 789 S.W.2d at 902; Cone v. State, 747 S.W.2d 353, 356 (Tenn. Crim. App. 1987); Gribble v. State, No. 02C01-9303-CC-00039 (Tenn. Crim. App. at Jackson, Feb. 8, 1995). Accordingly, this issue is without merit.

cases. Owens and Payne v. State, 908 S.W.2d 923, 928 (Tenn. 1995).

5. IMPROPER JURY INSTRUCTIONS

The appellant next argues that the trial court committed error by submitting improper instructions to the jury during the penalty phase of his trial, in violation of State v. Middlebrooks, 840 S.W.2d at 317.¹⁰ During the penalty phase of the trial, the jury unanimously found two statutory aggravating factors: (1) "the defendant was previously convicted of one or more felonies . . . which involve the use or threat of violence to the person;" and (2) "the murder was committed while the defendant was engaged in committing, . . . any first degree murder, arson, rape, burglary, larceny, kidnapping, . . ." The appellant, citing Middlebrooks, contests the use of this second aggravating factor to support his death sentence.

At the post-conviction hearing, the court accepted the appellant's argument that the felony murder aggravating circumstance is not valid, noting:

In Middlebrooks, the Tennessee Supreme Court held that under the Tennessee Constitution, Article I, §16, it was unconstitutional to use the felony murder aggravating circumstance to support the imposition of the death penalty for a conviction of felony murder. The court held that the use of the felony murder aggravator served to duplicate the elements of the underlying crime, thus failing to narrow the class of death-eligible murderers as required by both the Tennessee Constitution and the United States Constitution.

However, the post-conviction court noted that "the Court cannot agree with the Petitioner's argument that this serves to invalidate the sentence of death."

The court compared the appellant's case to that of State v. Howell, 868 S.W.2d 238 (Tenn. 1993), and found that, pursuant to the test set forth in Howell, 868 S.W.2d at 260, the use of the felony murder aggravator in the

¹⁰At the time of the appellant's trial, [four years before the release of the supreme court's decision in Middlebrooks], a jury could consider the felony murder aggravating factor in imposing the death penalty upon a defendant found guilty of felony murder. See State v. Pritchett, 621 S.W.2d 127, 140-41 (Tenn. 1981).

appellant's case was harmless error. Since (1) the jury did not find any mitigating factors; (2) the appellant had a prior conviction for second degree murder; and (3) the invalidating aggravator did not "taint the jury because it was merely a consequence of the underlying felony, requiring no additional evidence above that used to convict the Petitioner of the murder," the post-conviction court found the death sentence to be valid.

Neither the United States Constitution nor the Tennessee Constitution prohibit a reviewing court from upholding a death sentence that is based, in part, upon an invalid aggravating factor. State v. Hartman, 896 S.W.2d 94, 103 (Tenn. 1995). However, in order to guarantee the appellant an individualized sentence, the reviewing court must either reweigh the mitigating and aggravating evidence or conduct a harmless error review. Id. (citations omitted).

Before a jury's consideration of an invalid aggravating factor may be declared harmless error, "an appellate court must conclude, beyond a reasonable doubt, that the sentence would have been the same had the sentencing authority given no weight to the aggravating factor." Barber v. State, 889 S.W.2d 185, 187 (Tenn. 1994) (citation omitted). The procedure to be followed was announced by our supreme court in State v. Howell, 868 S.W.2d 238, 260-61 (Tenn. 1993):

In order to guarantee the precision that individualized sentencing considerations demand and provide a principled explanation for our conclusion in each case, it is important, when conducting harmless error review, to completely examine the record for the presence of factors which potentially influence the sentence ultimately imposed. These include, but are not limited to, the number and strength of the remaining valid aggravating circumstances, the prosecutor's argument at sentencing, the evidence admitted to establish the invalid aggravator, and the nature, quality and strength of mitigating evidence.

Thus, even when an aggravating circumstance is invalidated, leaving only a

single valid aggravating circumstance, the sentence of death can still stand in certain cases.

At the appellant's trial, the jury found one remaining aggravating circumstance, that "the defendant was previously convicted of one or more felonies which involve the use or threat of violence to the person." To reach this finding, the jury relied upon the State's proof at the penalty phase of the trial. This proof consisted of the testimony of Gloria Low, an employee of the Shelby County Criminal Court Clerk's Office. Ms. Low testified, in conjunction with the introduction of a certified copy of the judgment entered on indictment number 95310, that the appellant was convicted on October 17, 1983, of second degree murder. Beverly Sakyi, an employee of the State of Tennessee Parole Board, identified the appellant as being the Michael Joe Boyd who was convicted of second degree murder on October 17, 1983. We conclude that the evidence overwhelmingly supports the jury's finding that the appellant has a previous conviction for a violent offense.

We next consider the extent to which the prosecutor emphasized the felony murder aggravator during argument at the sentencing phase of the appellant's trial. During its opening statement, when listing the aggravating circumstances supporting a penalty of death, the State only briefly mentioned the felony murder aggravator. A review of the prosecutors' closing statements reveal that the State focused primarily on the aggravator that "the appellant created a great risk of death to two or more persons, other than the victim, during his act of murder"¹¹ and the aggravator involving the second degree murder conviction. Again, the prosecution made only cursory reference to the felony murder

¹¹ This aggravating circumstance was rejected by the jury.

aggravator, relying upon the finding of the jury at the guilt phase of the trial.¹²

In Howell, the supreme court stated that "an aggravating factor which duplicates the elements of the underlying crime has less relative tendency to prejudicially affect the sentence imposed than invalid aggravating factors which interject inadmissible evidence into the sentencing calculus, or which require the sentencing jury to draw additional conclusions from the guilt phase evidence." Howell, 868 S.W.2d at 261. In the instant case, the State did not present any evidence at the sentencing hearing, but relied upon the proof presented during the guilt phase to establish the felony murder aggravating circumstance. Thus, no inadmissible evidence was "thrust into the sentencing calculus," and the jury was not required to draw additional conclusions from the guilt phase evidence. See Barber, 889 S.W.2d at 189. Finally, the jury was unable to find any statutory mitigating circumstances. After a review of the record, we agree with the jury's finding.

Based upon our thorough review of the record and after a careful analysis in conformity with Howell, we conclude, beyond a reasonable doubt, that the sentence would have been the same had the jury given no weight to the invalid felony murder aggravator. Therefore, since the invalid aggravating circumstance is harmless beyond a reasonable doubt, we affirm the sentence of death.

III. CONCLUSION

¹² Assistant District Attorney General Hughes remarked in closing, "There's no question that we've proven two of the aggravating circumstances: Murder in the Perpetration of a Robbery, and the fact that Mr. Boyd has killed before." In rebuttal to the appellant's closing statement, Assistant District Attorney General Beasley stated, "You've already found that it was a murder in the perpetration of a robbery, that Michael Boyd wanted to rob these people of their money and he killed one of them in the act."

The record fully supports the post-conviction court's findings and conclusions. The appellant has clearly not met his burden of proof. We conclude that the petition for post-conviction relief was properly denied.

For the reasons we have stated, the judgment of the post-conviction court is affirmed.

David G. Hayes, Judge

CONCUR:

John H. Peay, Judge

William M. Barker, Judge