IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MARCH 1996 SESSION

FILED

August 16, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

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| RONALD HORACE FREEMAN, JR., | ) | |
| | ) | No. 02-C-01-9510-CC-00300 |
| APPELLANT, | ) | |
| | ) | Henry County |
| v. | ) | |
| | ) | Julian P. Guinn, Judge |
| STATE OF TENNESSEE, | ) | |
| | ) | (Post-Conviction Relief) |
| APPELLEE. | ) | |

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OPINION FILED: ______________________________

AFFIRMED

JOE B. JONES, Presiding Judge

**O P I N I O N**

The petitioner, Ronald Horace Freeman, Jr., appeals as of right from a judgment of the trial court dismissing his suit for post-conviction relief. The trial court found that the petitioner received the effective assistance of counsel guaranteed by the United States and Tennessee Constitutions. In this Court, the petitioner contends that he was not afforded his constitutional right to the effective assistance of trial counsel because trial counsel failed to request a jury instruction regarding testimony of an accomplice. After a thorough review of the record, the briefs of the parties, and the law controlling the issue presented for review, it is the opinion of this Court that the judgment of the trial court should be affirmed.

The petitioner was convicted of burglary, a Class D felony, theft of property, a Class A misdemeanor, and public intoxication, a Class C misdemeanor, by a jury of his peers. Petitioner burglarized the Sulfur Wells Church of Christ and stole a keyboard. Brian Chadwick Clayton, the son of one of the police investigators in this case, testified against the petitioner at trial. When Mr. Clayton testified, he had been charged with the same burglary. The petitioner's trial counsel did not request a jury instruction regarding the testimony of an accomplice. The trial court did not include such an instruction in the charge given to the jury.

It is an elementary principle of law that an accused cannot be convicted of a felony on the uncorroborated testimony of an accomplice. State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994); State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992), cert. denied, __ U.S. __, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993); State v. Henley, 774 S.W.2d 908, 913 (Tenn. 1989), cert. denied, 497 U.S. 1031, 110 S.Ct. 3291, 111 L.Ed.2d 800 (1990); State v. McKnight, 900 S.W.2d 36, 47-48 (Tenn. Crim. App. 1994), per. app. denied (Tenn. 1995); State v. Adkisson, 899 S.W.2d 626, 643 (Tenn. Crim. App. 1994). However, this issue is not cognizable in a petition for post-conviction relief. Phillip Gene Debord v. State, Knox County No. 03-C-01-9408-CR-00288 (Tenn. Crim. App., Knoxville, February 8, 1995), per. app. denied (Tenn. 1995). While petitioner does properly phrase his post-conviction issue in terms of ineffective assistance of counsel, he does not argue the issue as such. The petitioner does not cite the proper constitutional standard for determining whether an

accused has been denied his constitutional right to the effective assistance of counsel. Likewise, he does not illustrate how this standard is met by his allegations that trial counsel did not request and the trial court did not give an instruction on the testimony of an accomplice.

Where, as here, the petitioner seeks to vitiate a conviction on the ground that the trial counsel was ineffective in his representation, the petitioner must establish by a preponderance of the evidence (a) the services rendered or advice given by counsel fell below "the range of competence demanded of attorneys in criminal cases," Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), and (b) "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 v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). In determining whether an accused has been denied his constitutional right to the effective assistance of counsel, an appellate court is bound by certain well-established standards. First, the Constitution does not require perfect representation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Second, it is not this Court's function to "second guess" trial counsel's tactical and strategic choices pertaining to matters of defense unless these choices are made without knowledge of the relevant facts or the law applicable to the issue. Hellard, 629 S.W.2d at 9; State v. Swanson, 680 S.W.2d 487, 490 (Tenn. Crim. App.), per. app. denied (Tenn. 1984); McBee v. State, 655 S.W.2d 191, 193 (Tenn. Crim. App.), per. app. denied (Tenn. 1983). As the United States Supreme Court said in Strickland v. Washington: "A fair assessment of attorney performance 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." 466 U.S. at 689, 104 S.Ct. at 2065, 80 L.Ed.2d at 694. Third, an accused is not deprived of the effective assistance of counsel because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 279-80 (Tenn. Crim. App.), per. app. denied (Tenn. 1980); Long v. State, 510 S.W.2d 83, 88 (Tenn. Crim. App.), per. app. denied (Tenn. 1974).

In the present case, the decision not to ask for an accomplice instruction was a

tactical decision. The petitioner's trial counsel elaborated on his decision not to ask for the instruction:

> I did not request an instruction for an accomplice jury instruction to the jury for [the] simple fact I tried to distance Mr. Freeman from Mr. Clayton. Mr. Clayton was charged with the same crime some two months after Mr. Freeman was charged. Mr. Chad Clayton was the son of the criminal investigator for the sheriff's department at that time. I questioned the police officers at the preliminary hearing and at the trial concerning that fact and tried to give the jury somebody else that was responsible for this crime other than Mr. Freeman. So no, I did not want an accomplice instruction made to those folks. . . . With Mr. Freeman not taking the stand, that's pretty much [the only defense] I had.

This Court is of the opinion that this was a valid trial strategy. If the instruction had been requested and the jury found Mr. Clayton to be an accomplice, it would have committed the jury to finding that the petitioner participated in the crime. On the other hand, this strategy allowed trial counsel to argue that Mr. Clayton was the only one involved in the burglary and that he implicated the petitioner in order to help his own cause. In other words, the petitioner was not an "accomplice" because he was simply not involved. While this tactic was obviously not effective, it was nevertheless reasonable. This Court may not second-guess a sound tactical decision made by trial counsel, even if a different decision would have produced a different result. State v. Matson, 729 S.W.2d 281, 282 (Tenn. Crim. App. 1986), per. app. denied (Tenn. 1987); Tolliver v. State, 629 S.W.2d 913, 914-15 (Tenn. Crim. App. 1981), per. app. denied (Tenn. 1982). Additionally, if the trial court had given the accomplice instruction, there was clearly sufficient corroborating evidence to support a conviction. The stolen property was seen in the appellant's car and was later found in the appellant's residence.

Petitioner has also failed to show by a preponderance of the evidence that he was prejudiced by the conduct of his trial counsel. The trial court made the following finding in his order denying the petition for post-conviction relief: "[A] review of the trial transcript does not establish [Mr. Clayton] as an accomplice." Even if the trial judge had given the accomplice instruction in this case, it does not appear likely that the jury would have made a different decision. Moreover, this Court has previously determined that the evidence adduced during the trial was sufficient to sustain his convictions. State v. Ronald Horace

Freeman, Jr., Henry County No. 02-C-01-9208-CC-00194 (Tenn. Crim. App., Jackson, June 23, 1993), per. app. denied (Tenn. 1993).

The petitioner failed to establish by a preponderance of the evidence that had counsel requested the accomplice instruction, the jury would have found the evidence insufficient to prove him guilty beyond a reasonable doubt.

This issue is without merit.

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JOE B. JONES, PRESIDING JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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WILLIAM M. BARKER, JUDGE