

OPINION

This is an appeal as of right from the Robertson County Circuit Court's denial of appellant's petition for post-conviction relief pursuant to Tennessee Code Annotated section 40-30-101 *et seq.* (1990). Finding no merit in appellant's issues, we affirm the trial court's dismissal of the petition.

Appellant, James Kelly Cauley, was convicted of two counts of first degree murder in October of 1989 and received consecutive life sentences. This Court upheld his convictions on direct appeal. State v. Cauley, No. 01-C-01-9004-CC-00100 (Tenn. Crim. App. at Nashville, April 16, 1992). On appeal to the supreme court, appellant's convictions and sentences were again affirmed. State v. Cauley, 863 S.W.2d 411 (Tenn. 1993). The only issue addressed in that opinion was the validity of a search warrant; the court stated that all other issues raised by appellant were adequately addressed in the intermediate appeal. Id at 418. Appellant's *pro se* post-conviction petition was filed January 14, 1994; the record does not reflect that an amended petition was filed after the appointment of counsel.

On appeal, appellant argues that he received ineffective assistance of counsel in that the public defender failed to warn him against discussing his case with others. The second facet to the claim is that the cumulative errors committed at trial and at the appellate level were sufficient to violate his constitutional right to effective counsel. At the hearing on the post-conviction petition, the trial court found that appellant received effective assistance of counsel and dismissed the petition. In its ruling, the trial court specifically made a finding that appellant's trial counsel did in fact warn him about discussing his case with others.

In reviewing the appellant's Sixth Amendment claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To prevail on a claim of

ineffective counsel, an appellant “must show that counsel’s representation fell below an objective standard of reasonableness” and that this performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694, 104 S.Ct. 2052, 2064, 2067-68, 80 L.Ed.2d 674 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985). The most difficult burden on an appellant is demonstrating the prejudice he has suffered by the alleged error. In order to prevail on that ground, the appellant must show a reasonable probability that but for counsel’s error the result of the proceeding would have been different. Id.

In order to sustain his post-conviction petition, the appellant must prove the allegations of ineffective assistance by a preponderance of the evidence. See McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the factual findings of the trial court in hearings “are conclusive on appeal unless the evidence preponderates against the judgment.” State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983). Appellant fails to carry this burden.

He first attacks his counsel as ineffective for failing to instruct him not to discuss his case with other persons while incarcerated. The trial court specifically found that counsel did instruct appellant in this respect. Finding that the evidence does not preponderate against this finding, we affirm the trial court’s ruling.

Appellant was sixteen years of age when he was arrested on murder charges and incarcerated. After being transferred from juvenile court to criminal court to be tried as an adult, he was incarcerated in the Robertson County Jail. Upon his request and that of his parents, appellant was placed with the general adult population at the jail. He remained there until his trial. During his incarceration, appellant bragged to his cellmate that he had participated in the murders and that a jury would never convict him. That cellmate was called by the State as a witness at trial and testified to appellant’s admissions. Appellant maintains on appeal that this testimony was false. His claim is that his attorney never advised him not to talk to others while incarcerated. He alleges the failure to do so is tantamount to ineffective assistance of counsel.

This issue was addressed at the hearing on the post-conviction petition. After hearing the testimony of the public defender and of appellant, the trial court found that the public defender had indeed warned appellant not to talk while in jail. The transcript from that hearing supports the trial court's finding. When testifying, the public defender stated that he always advises his clients not to talk to anyone while in jail. He now uses appellant's case as an example of the consequences. The public defender's statement that it was his standard practice to give such warnings to clients supports the trial court's factual finding.

Furthermore, appellant has failed to demonstrate that he suffered prejudice from the alleged failure to warn. Although appellant stated that counsel never advised him to keep quiet, he stated that during this time he was aware of his Miranda rights. He stated that he understood he did not have to talk to anyone and, that if he did, it could be used against him. He also stated that he knew this applied to all individuals, not just police officers. In addition, appellant stated that he knew not to talk to anyone in jail and that was just common sense. From appellant's statements, it appears that whether the attorney advised him in such a way was irrelevant; appellant knew he was supposed to keep quiet. He suffered no prejudice from counsel's alleged failure to warn.

We are somewhat perplexed by appellant's position on this issue. While maintaining that the cellmate's testimony was false and that he never made the statements, appellant still argues that he suffered prejudice from his counsel's alleged failure to warn against talking to other inmates. This is an untenable contention; appellant is arguing two sides of the coin. He either: (1) made the statements to the cellmate and alleges that his counsel failed to warn him about talking to others, the result of which he suffered prejudice; or (2) appellant did not make the statements, as he contends, and counsel's failure to warn him was irrelevant. Appellant cannot have it both ways. If scenario (1) is correct, the trial court found that counsel did give appellant the proper warnings. This is supported by the evidence. On the other hand,

if scenario (2) is correct, appellant suffered no prejudice from counsel's alleged failure to warn. If appellant never made any statements and the cellmate fabricated the entire story, this is no fault of counsel. Any prejudice suffered by a cellmate's dishonesty cannot be imputed to appellant's counsel as ineffective assistance. Neither option supports a claim of ineffective assistance.

Moreover, the record indicates that counsel's handling of the cellmate's unexpected testimony was more than adequate. After finding out on the eve of trial that the cellmate, Michael Vincent would testify, counsel sought to suppress his testimony. After a lengthy hearing, the trial court denied the motion. Counsel then prepared to rebut the testimony. He interviewed several inmates who said that appellant never made any statements. One such inmate testified at trial. In addition, counsel verified that Vincent's fingerprints were on hearing transcripts that appellant had in his cell. This evidence tended to substantiate appellant's theory that Vincent read the transcripts and fabricated the statements to obtain a favorable deal with the State. Also, counsel investigated Vincent's criminal background to prepare for his cross-examination. His performance simply cannot be characterized as ineffective.

Appellant's second allegation of ineffective assistance of counsel is premised on the cumulative effect of errors at trial and on appeal. Appellant does not contend that any one error would have constituted ineffective assistance of counsel. Rather, he argues that the effect of the errors coupled with the failure to warn appellant was sufficient to constitute a denial of constitutionally-mandated legal assistance. We will address the allegations in turn, but find them to be without merit.

Appellant attacks the waiver of certain issues on appeal due to counsel's failure to object to them at trial. Notwithstanding the fact that these were waived, this Court on direct appeal chose to review the issues. State v. Cauley, No. 01-C-01-9004-CC-00100 (Tenn. Crim. App. at Nashville, April 16, 1992). On each issue, the Court held that the appellant suffered no prejudice from the error. Appellant fails to satisfy one of the elements of ineffective assistance and no further inquiry is warranted. See

Strickland v. Washington, 466 U.S. 668, 697, 104 S.Ct. 2052, 2069, 80 L.Ed.2d 674 (1984) (if prejudice is not shown, it is unnecessary to determine the validity of the allegations regarding deficient performance).

Appellant also contends that counsel failed to adequately investigate certain State's witnesses to reveal agreements made with these witnesses. Although appellant does not specify which witnesses, the transcript reflects that counsel did investigate the possibility of such agreements with Vincent and also State's witness Donna Regan. He stated that at the time of trial, no deals had been made with either. Both were cross-examined on this point. Although appellant testified at the hearing that he believed Vincent did receive a deal with the State after his trial, he offered nothing to corroborate these beliefs. The issue is without merit.

Appellant also contends that counsel was deficient in not obtaining the presence of Joey Holland, a witness who presumably would have rebutted Vincent's testimony about appellant's admissions. Despite counsel's attempts to locate Holland, he could not be found at the time of trial. Appellant asserts that counsel had represented Holland in the past, implying that this increases counsel's ability to produce the witness. An attorney cannot produce witnesses who cannot be found; prior representation is irrelevant. In addition, appellant did not present this witness at the post-conviction hearing to demonstrate what his testimony at trial would have been. Therefore, he has not demonstrated any prejudice. See Black v. State, 794 S.W.2d 752, 767 (Tenn. Crim. App. 1990) (when petitioner contends that counsel failed to discover or present witnesses in support of his defense, these witnesses must be presented at the evidentiary hearing to demonstrate that appellant suffered prejudice).

Appellant also alleges that a conflict of interest existed between his counsel and Larry Poole, a witness who could have been a potential suspect in the murders. Appellant testified to his belief that the public defender represented him and Mr. Poole contemporaneously, but stated that he never asked counsel about this. Counsel

stated that he had represented Mr. Poole on criminal and civil matters prior to appellant's trial, but not at any time in close proximity to appellant's representation. Counsel also stated that he was not ethically restrained in any way by his previous representation of Mr. Poole and performed a complete cross-examination of him, including information about his prior criminal history. Counsel's performance was not deficient in this respect.

Appellant also attacks counsel's failure to anticipate a Telfaire issue for identification purposes. He contends that counsel should have requested a particular jury instruction on identity. However, counsel stated that he did not believe identity was an issue in appellant's case and that no request was warranted. We must give deference to tactical decisions if they are informed ones that are the result of adequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982) (citations omitted). Other evidence besides eyewitness identification incriminated appellant in the crime and counsel's evaluation of identification as a non-issue does not appear to be error. The issue is without merit.

Appellant has failed to satisfy the requirements for a claim of ineffective assistance of counsel. Accordingly, we affirm dismissal of the post-conviction petition.

William M. Barker, Judge

Paul G. Summers, Judge

David H. Welles, Judge