IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

DECEMBER 1996 SESSION

FILED

February 12, 1997

Cecil W. Crowson
Appellate Court Clerk

LOUIS WILLIAM ALFORD,	)	
	)	**C.C.A. NO. 01C01-9603-CC-00114**
Appellant,	)	
	)	**COFFEE COUNTY**
VS.	)	
	)	**HON. BUDDY D. PERRY,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee,	)	(Post-Conviction: Second Degree
	)	Murder)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

JOE G. RILEY
JUDGE

O P I N I O N

This is an appeal from the dismissal of appellant's petition seeking post-conviction relief. The sole issue is whether appellant was deprived of effective assistance of counsel when he was convicted of second degree murder. We concur with the trial court's finding that appellant had effective assistance of counsel; therefore, we affirm the dismissal of the petition for post-conviction relief.

PROCEDURAL HISTORY

On December 11, 1990, appellant was tried for a murder committed on January 5, 1990. Appellant was found guilty of second degree murder and was sentenced by the trial judge to forty (40) years as a Range II, Multiple Offender. The conviction and sentence were affirmed by this Court on direct appeal. State v. Alford, C.C.A. No. 01C01-9110-CC-00300, Coffee County (Tenn. Crim. App. filed March 19, 1992, at Nashville). The petition for post-conviction relief was timely filed in the trial court and alleged ineffective assistance of counsel. After conducting a hearing on the merits of the petition, Honorable Buddy D. Perry issued an excellent memorandum opinion denying the petition. Appellant now appeals the dismissal of his petition.

FACTUAL BACKGROUND

In order to effectively address the claims made by appellant, a review of the pertinent proof at trial is in order. That proof was summarized by Judge Summers in the direct appeal of this case as follows:

> John Caughlin was the first witness who testified for the state. Mr. Caughlin, who was twenty-five years old at the time of trial, resided in Florida. He was in the insurance renovation business; and he was working at the Holiday Inn in Manchester on January 5, 1990. His crew was in the process of renovating the hotel. Mr. Caughlin was a temporary resident in Room 421 at the hotel when he saw and heard an altercation between the appellant and the victim, Mr. Woessner, from his hotel room.

A little after 10:00 PM on January 5th, Caughlin heard loud, angry voices. He saw the victim in an apparently exhausted or intoxicated state. The victim got inside a pickup truck and sat down. Seconds later a larger man, identified as the appellant, came running and went straight to the passenger door of the pickup truck. The appellant opened the door and apparently was inviting the victim to get out of the truck. After much shouting, the victim got out of the truck and threw his jacket on top of the truck. Then they both got "locked up in a fist fight."

Caughlin could see no knife in either the hand of the victim or the appellant. He only saw the two men fighting with their fists. He then went to the telephone in his room and called the front desk to ask for help. After returning to the window where he could see the fight, he saw a knife in one of the two men's hands; but he could not identify which man was holding the knife at this time. He then made a second call to the front desk advising them that the fist fight had turned into a knife fight.

After making the second call, he renewed his position to watch the fight. He saw the appellant walking back towards the truck in a nonchalant manner. He noticed that he had the knife in his hand and rubbed the knife against his pants. The appellant seemed to look with a quick glance to see if anybody was watching him. He walked to his truck in a very casual manner, backed out, and drove off.

At about the same time Mr. Caughlin saw the appellant walking toward his truck, he also noticed a body behind a trailer in the parking lot of the hotel. Steam was coming off of the body. The person was lying on his face. As the appellant left in his truck, Mr. Caughlin ran down to where the body was; and by that time a few motel employees had come to the scene. The victim was still alive at that point in time. He was cut in several places. The victim died shortly thereafter while lying in the road.

The autopsy report was introduced at trial, and the medical examiner's findings were stipulated. The cause of death of the victim was a stab wound to his chest which traversed his heart. There were also slashes to the victim's cheek and his arm.

One of the officers who investigated the case questioned the appellant at his residence. When he entered the appellant's house, he observed several knives which were stuck in the door facings throughout the house. The appellant commented that he carried knives because he could not carry a gun.

When the warrant for appellant's arrest was read to him at his home, he opened the front door as if he was going to leave with the officers. Instead, he fled the scene.

A Ms. Cargil testified that she overheard the appellant

> discussing the fact that he thought he had killed someone. She overheard the conversation which occurred between the appellant and her father. She then asked Mr. Alford about the incident wherein he thought he had killed somebody. He mentioned the victim by a nickname, and he said to Ms. Cargile that he and the victim had been in a fight and had stabbed Mr. Woessner. The appellant told Ms. Cargile that he had been mad at the victim because Mr. Woessner "was fixing to call the cops."
>
> After the state rested, the appellant presented no proof at trial. State v. Alford, supra at 2-4.

ISSUES FOR REVIEW

The appellant attacks trial counsel's representation in the following specific respects:

1. counsel failed to properly develop the "first aggressor" theory in support of self-defense; and

2. counsel erroneously advised appellant not to testify at trial.

STANDARDS FOR EFFECTIVE ASSISTANCE OF COUNSEL

In Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court established a two-prong analysis when an appellant claims that counsel's assistance was so defective so as to require a reversal. First, the appellant must show that counsel's performance was deficient and second, that the deficient performance prejudiced the appellant to the point that he was deprived of a fair trial. Id. at 687, 104 S.Ct. at 2064. As to the first prong, to prove a deficient performance, the appellant must prove that counsel's representation fell below an objective standard of reasonableness. Id. at 688, 104 S.Ct. at 2064-65. This evaluation must be accompanied by a strong presumption in the reviewing court that counsel's conduct falls within the wide range of acceptable professional assistance. Id. at 689, 104 S.Ct. at 2065. To meet the second prong, the appellant must prove that he was prejudiced by showing that there was a reasonable probability that, but for counsel's

errors, the result of the proceedings would have been different. Id. at 694, 104 S.Ct. at 2068.

In Tennessee, the appropriate test for determining whether counsel provided effective assistance of counsel at trial is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn.1975).

Furthermore, it is not the function of this Court to "second guess" the tactical and strategical choices made by trial counsel. Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993); Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). A defense attorney's representation cannot be measured by "20-20 hindsight" when deciding the issue of effectiveness of trial counsel. Hellard, 629 S.W.2d at 9.

Our scope of review is somewhat limited. The petitioner must establish his allegations by a preponderance of the evidence. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the findings of fact made by the trial judge are conclusive on appeal unless the appellate court finds that the evidence preponderates against the judgment. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

FIRST AGGRESSOR THEORY

Appellant contends trial counsel was ineffective in failing to properly develop the "first aggressor" theory relating to self-defense. More specifically, appellant contends counsel should have called Ronnie Bowers and the appellant's step-mother, Amelia Woessner, to testify concerning prior acts of violence by the victim.

At the post-conviction hearing Bowers testified that the victim had threatened him with a knife approximately 24 hours prior to the murder. Bowers testified he never told Alford about the confrontation. Counsel was unaware of Bowers as a potential witness

until the night before the trial when appellant gave counsel a list of witnesses to be subpoenaed. Counsel had asked appellant on several prior occasions to provide a list of witnesses. Appellant failed to do so until the night before trial. Counsel cannot be faulted for the failure to secure the attendance of Bowers. Furthermore, counsel had made an investigation in an attempt to establish any type of previous aggression of the victim and had been unable to develop such proof.

The victim's step-mother testified at the post-conviction hearing that her step-son regularly carried a knife and "could get violent or he could get mad." However, she stated she and her step-son had merely had arguments, and he would get mad and hit something. She further testified he was well-respected and not viewed among the community as a violent person. Counsel was in no way deficient for failing to call the victim's step-mother as a witness. The victim's step-mother clearly disfavored the appellant at the trial since he had taken the life of her step-son. If her post-conviction testimony had been offered at trial, it is speculative at best to argue that it would be more helpful than harmful. Counsel was not deficient by failing to call this witness and has failed to show prejudice.

Even if counsel had been deficient in failing to discover these witnesses, it is still questionable whether counsel could be faulted for failing to call them. This case was tried in December 1990. State v. Furlough, 797 S.W.2d 631 (Tenn. Crim. App. 1990), relied upon by the appellant, held that specific violent acts of a victim are admissible to corroborate a defendant's assertion that the victim was the first aggressor. Furlough was decided in April 1990 with permission to appeal being denied by the Supreme Court in July 1990. It was not decided under the Tennessee Rules of Evidence since the Furlough trial took place prior to January 1, 1990, the effective date of the Tennessee Rules of Evidence.

The case at bar was controlled by the Tennessee Rules of Evidence. Rule 404(a)(2) permits a defendant to offer proof of the victim's character for violent behavior

to help establish that the victim was the aggressor. Rule 405(a) allows such proof by reputation or opinion evidence and only on cross-examination. Such evidence would be substantive evidence. N. Cohen, D. Paine & S. Sheppeard, *Tennessee Law of Evidence*, § 404.4(3d ed. Supp. 1996).

Since the adoption of the Tennessee Rules of Evidence, some appellate decisions indicate the victim's prior violent acts are admissible for the purposes of corroborating the defendant's claim of self-defense. State v. Ruane, 912 S.W.2d 766, 780 (Tenn. Crim. App. 1995). This is corroborative proof and is not covered by Rule 404 or 405. *Tennessee Law of Evidence, supra.* Accordingly, such proof may be presented on direct examination. Id. But see State v. Hill, 885 S.W.2d 357, 362-63 (Tenn. Crim. App. 1994) suggesting that such evidence is only admissible on cross-examination.

On the date of the subject trial in December 1990, it was far from clear as to whether such testimony would be admissible on direct examination. Furthermore, trial counsel's tactical decision to rely upon the state's proof in an attempt to establish self-defense or secure a conviction for the lesser offense of voluntary manslaughter is not subject to post-conviction challenge.

In summary, appellant has not shown that trial counsel was deficient in failing to develop or present first aggressor evidence. Furthermore, appellant has not shown that there was a reasonable probability that the result of the proceedings would have been any different had such evidence been offered. This issue is without merit.

FAILURE TO TESTIFY

Appellant contends trial counsel improperly advised him not to testify at trial. Petitioner had six (6) prior felony convictions, two (2) of which were for aggravated assault. He had given inconsistent versions of the events and, in the opinion of counsel,

would make a very poor witness. Petitioner had left the scene of the crime, burned the weapon, lied to authorities and fled when officers came to his home to question him. Counsel also believed that the issues of self-defense and voluntary manslaughter could be raised based upon the state's proof. Based upon these factors counsel's recommendation that appellant not testify was an appropriate tactical decision and is not subject to post-conviction challenge. Furthermore, it was appellant who actually decided not to testify after consultation with trial counsel. This issue is without merit.

The trial court's dismissal of the post-conviction relief petition is **AFFIRMED**.

_____
JOE G. RILEY, JUDGE

CONCUR:

_____
PAUL G. SUMMERS, JUDGE

_____
WILLIAM M. BARKER, JUDGE