IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
SEPTEMBER SESSION, 1996

FILED

March 25, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

DEMETRICE LEJUAN BAKER,	)	
	)	No. 03C01-9512-CR-00416
Appellant	)	
	)	HAMILTON COUNTY
vs.	)	
	)	Hon. Douglas A. Meyer, Judge
STATE OF TENNESSEE,	)	
	)	(Post-Conviction)
Appellee	)	

For the Appellant:

Robert N. Meeks
Parklon Building, Suite Six
4548 Brainerd Road
Chattanooga, TN 37411

For the Appellee:

John Knox Walkup
Attorney General and Reporter

Eugene J. Honea
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

William H. Cox III
District Attorney General

Yolanda Mitchell
Asst. District Attorney General
Courts Building, 600 Market St
Chattanooga, TN 37402

OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

On June 15, 1992, the appellant, Demetrice Lajuan Baker, pled guilty in the Hamilton County Criminal Court to first degree murder, especially aggravated robbery, aggravated kidnapping, and theft of property.[1] The trial court imposed concurrent sentences of life imprisonment, twenty-five years, twelve years, and four years respectively. On November 21, 1994, the appellant filed a petition for post-conviction relief. The post-conviction court appointed counsel, who, on May 31, 1995, filed an amended petition. On September 6, 1995, the post-conviction court conducted an evidentiary hearing and dismissed the appellant's petition. On appeal, the appellant alleges ineffective assistance of counsel, specifically contending that trial counsel failed to adequately investigate evidence that the appellant was intoxicated at the time of the murder. The State asserts that the appellant has failed to carry his burden of proof.

Following a thorough review of the record, we affirm the post-conviction court's dismissal of the appellant's petition.

I. Factual Background

Following the appellant's arrest, his family retained an attorney, Mr. Lloyd Levitt, who had been engaged in the practice of law for eight years and had previously represented defendants charged with murder. Subsequently, the State notified the appellant that it would seek the death penalty. Accordingly, at a pre-trial hearing on December 16, 1991, Mr. Levitt asked that the trial court

[1]At the submission hearing, the State alleged the following factual basis to the appellant's pleas. On May 5, 1991, the appellant and his co-defendant, Michael Hale, observed the victim at a laundromat and asked the victim if he would drive them to a convenience store. The victim agreed, and, *en route* to the store, the appellant and Hale drew a weapon and, threatening the victim, seized $1 from him. The appellant and Hale then instructed the victim to drive to a wooded area, where they forced him to remove his pants and, while he begged for his life, shot him twice in the back of the head. They fled in the victim's car and were ultimately apprehended in Florida. The appellant confessed to the police that he had fired the second shot into the victim's head. His co-defendant claimed that the appellant had fired both shots. The State asserted at the submission hearing that the victim's wounds were "consistently close to each other," indicating that the appellant had probably fired both shots.

appoint to the appellant's case an attorney possessing experience in capital litigation. The trial court ultimately appointed, as lead counsel, Mr. John Cavett. Mr. Cavett had been practicing law since 1981 and had previously provided representation in one death penalty case. Mr. Cavett and Mr. Levitt also received some assistance from Ms. Ardena Garth, the Public Defender for Hamilton County. Moreover, defense counsel received a "tremendous amount of assistance" from the Capital Case Resource Center.

At the post-conviction hearing, Mr. Cavett testified on behalf of the appellant. He stated that, prior to the entry of the appellant's plea, he met with the appellant at least five times, and spent approximately 66.4 hours on the appellant's case. He carefully reviewed documents pertaining to the appellant's case, including two confessions by the appellant to authorities in Florida and Tennessee.

> I did a lot of research at the time to make sure that I recalled and understood the, the law concerning the death penalty, the aggravating/mitigating factors as well as the body of law that surrounds picking juries in death penalty cases ... . I also spent some time, you know, researching some issues related to the motions to suppress ... . I also spent some time researching the procedure for having a psychologist appointed ex parte. ... And, of course, I spent a lot of time conferring with Mr. Levitt and Ardena Garth about the case. ... I think the bulk of my time involved conferences in which we were analyzing the case; conferences with [the appellant] about the propriety of entering a plea; conferences with him about ... [the possible] outcome of the motions that were pending and so forth ... .

Mr. Cavett stated that he thoroughly reviewed the facts of the case with the appellant. He further observed that Mr. Levitt had also "expended a considerable amount of time" working on the appellant's case. Mr. Cavett utilized the considerable results of Mr. Levitt's investigations. Moreover, counsel arranged an evaluation of the appellant by a psychologist. Mr. Cavett could not recall whether or not he discussed with the appellant the possibility that the appellant had been intoxicated at the time of the offense. He certainly did not recall being informed of any involuntary intoxication.

According to Cavett, from the time of his appointment, he was considering any possible mitigating factors, in anticipation of the penalty phase of the trial. Additionally, with respect to mitigation, Mr. Cavett recounted that Mr. Levitt had developed a "close, ongoing" relationship with members of the appellant's family. The record further reflects that, at the submission hearing, defense counsel were prepared to subpoena approximately fifty witnesses for the guilt and penalty phases of the trial. Mr. Cavett conceded, "[I]t was not a case that I felt was going to be won at trial on guilt or innocence ... ." Moreover, Mr. Cavett believed that, had the appellant elected to proceed to trial, he may have received the death penalty:

> [W]hat kept going through my mind was that the victim was murdered and they stole one dollar from him, and I remember having visions of a prosecutor ... hammering and hammering and hammering away at the fact that this person was killed for one dollar, but, you know, they also took his car. ... [The appellant] did have some strong mitigating factors ... but given the facts concerning the case, ... he had a definite risk of getting the death penalty.

Mr. Cavett stated that the appellant pled guilty in order to escape the possibility of the death penalty.

Lloyd Levitt also testified at the post-conviction hearing:

> [The appellant] was definitely the focus of my practice at that time, because it was such a serious case. ... I'm sure I've put in excess of well over 100 hours on the case ... .

Indeed, at the pre-trial hearing on December 16, 1991, Mr. Levitt informed the trial court that he had devoted approximately twenty-five percent of his practice to the appellant's case. Moreover, Mr. Levitt testified at the post-conviction hearing that he had

> reviewed all the statements that [the appellant and his co-defendant] had given, interviewed numerous witnesses, talked to family members. I had a lot of family members lined up as potential witnesses in the case as far as [the appellant's] character.
>
> ... [W]e at some point in time, I think after the death penalty notice was filed, asked the Court to let us retain an expert ... Eric Engum, who has got excellent credentials, he's a neuropsychologist. He did an examination of [the appellant], and some of the things he

> had in there would have helped more on the sentencing part of the case that the guilt part of the case ... it would not have provided us a defense, and so yeah, I've done quite a bit of work on the case, interviewing witnesses, reviewing state's evidence.

Mr. Levitt stated that Mr. Cavett and Ms. Garth duplicated much of his investigation in order to ensure that he had not overlooked anything. He observed:

> I just felt strong that basically [the appellant] had made a horrible mistake and I wanted to fight for him, and I think we did fight for him, I really believe that, we fought hard for him.

Mr. Levitt did not believe that the appellant had ever informed him that he was intoxicated at the time of the offense. Mr. Levitt testified, "There is no way we could have avoided a first degree murder conviction in that case, in my opinion." He further opined that the appellant could probably have avoided the death penalty, but that, given the circumstances of the case, a risk that the jury would impose the death penalty had existed.

The record additionally reflects that, at the pre-trial hearing on December 16, 1991, the prosecuting attorney testified, under oath, that, in the appellant's case, his office was essentially operating pursuant to an "open file policy." Moreover, he observed that Mr. Levitt had been doing an "excellent" job.

> [F]rom what I've seen so far, [defense counsel] are aware of all the issues in the guilt or innocent phase. Now as to their involvement in the sentencing phase, I know that Mr. Levitt has done --- he turned over to me I think it may be as many as 25 letters or more from everybody within the community, explaining why his client should not be sentenced to death. ... So he has done some significant work already in the sentencing phase.

The co-defendant's attorney, an attorney with considerable experience in capital litigation, also stated to the trial court at this hearing that, while he would recommend the appointment to the appellant's case of an attorney experienced in capital litigation, Mr. Levitt's performance had been "excellent." He stated, "Mr. Levitt is a highly --- not only a very competent lawyer, but a very --- a lawyer who has the law and the courts at heart."

At the post-conviction hearing, the appellant testified on his own behalf. He asserted that immediately prior to the offense, he and his co-defendant had been drinking. The appellant had also smoked approximately five or six marijuana cigarettes. After smoking the cigarettes, he learned that his co-defendant had laced the cigarettes with cocaine. Significantly, however, the appellant could not recall whether the cigarettes had impaired his mental faculties. He did recall informing his attorneys that he had been drinking and smoking marijuana prior to the murder, but did not remember mentioning the cocaine. With respect to his plea of guilty, the appellant testified:

> I thought at the time it would be in my best interest if I was able to take a life sentence, but, you know, upon me doing a little research inside the Department of Corrections, I've, I've concluded -- this is my own personal thought -- that maybe I shouldn't have accepted a life sentence, you know, this is just me.

He stated that his attorneys could not have done anything more to assist him, other than represent him at trial. Indeed, the transcript of the submission hearing similarly reflects that the appellant was satisfied with the representation that he received. Finally, the appellant wrote to Mr. Levitt, following the entry of his plea, stating, "I would like to thank you once again for doing all that you could do concerning my case ... ."

II. Analysis

In post-conviction proceedings, the appellant bears the burden of proving the allegations in his petition. Davis v. State, 912 S.W.2d 689, 697 (Tenn. 1995). Moreover, on appeal, this court is bound by the post-conviction court's findings of fact unless the evidence in the record preponderates against those findings. Davis, 912 S.W.2d at 697. See also Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990).

Specifically, when a claim of ineffective assistance of counsel is raised, the appellant bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). With respect to deficient performance, the court must decide whether or not counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To satisfy the prejudice prong of the Strickland test, the appellant must show a reasonable probability that, but for counsel's ineffective performance, the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. Accordingly, when the appellant seeks to set aside a guilty plea on the ground of ineffective assistance of counsel, he must demonstrate a reasonable probability that, but for counsel's deficiency, he would have insisted upon proceeding to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985); Manning v. State, 883 S.W.2d 635, 637 (Tenn. Crim. App. 1994); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991).

We agree that the appellant has not carried his burden of proof. Even assuming prejudice, the appellant has failed to establish that counsel's failure to investigate his alleged intoxication at the time of the murder was beyond the range of necessary competence. The record reflects that, generally, trial counsel engaged in an extensive investigation of the appellant's case, for the purposes of both the guilt and penalty phases of the trial. Moreover, the appellant has not demonstrated that he ever informed his attorneys, during numerous conferences, that he had been intoxicated at the time of the murder.[2] The reasonableness of counsel's investigative decisions depends critically upon

[2]The appellant's conclusory assertions at the post-conviction hearing are insufficient to meet his burden of proof. Brown v. State, No. 03C01-9107-CR-00233 (Tenn. Crim. App. at Knoxville, June 26, 1992)(citing McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983)).

information supplied by a defendant to his attorney. Burger v. Kemp, 483 U.S. 776, 795, 107 S.Ct. 3114, 3126 (1987)(citing Strickland, 466 U.S. at 691, 104 S.Ct. at 2066); Whitmore v. Lockhart, 8 F.3d 614, 621 (8th Cir. 1993). Nothing in the record suggests that counsel otherwise learned or should have learned of the appellant's alleged intoxication. Accordingly, we affirm the judgment of the trial court.

_____
DAVID G. HAYES, Judge

CONCUR:

_____
JOHN H. PEAY, Judge

_____
WILLIAM M. BARKER, Judge