

**IN THE CIRCUIT COURT OF TENNESSEE
SIXTEENTH JUDICIAL DISTRICT AT MURFREESBORO**

JIMMY HEARD,)	
)	
Petitioner,)	
)	NO. 68961
v.)	
)	(POST-CONVICTION)
STATE OF TENNESSEE,)	
)	
Respondent.)	

ORDER DENYING POST-CONVICTION RELIEF

This matter came on to be heard on October 30, 2013, upon the Petition for Post Conviction Relief filed by JIMMY HEARD on November 1, 2012. After examining the Petition and other records relating to Petitioner’s conviction in Case No. F-58542A, and further considering the testimony of the Petitioner and trial counsel, and arguments of counsel, the Court hereby DENIES post-conviction relief in accordance with the following findings of fact and conclusions of law:

I. PROCEDURAL HISTORY

The Petitioner was arrested on September 15, 2005, the date of the incident giving rise to the charges against him. On December 15, 2005, the general sessions court held a preliminary hearing, found probable cause, and set bond at \$175,000.00. The Petitioner was indicted on January 3, 2006. On January 13, 2006, the Petitioner filed a motion with the trial court, seeking a remand to the general sessions court due to the lack of a record of the prior general sessions proceedings; that motion was granted by the trial court on March 2, 2006, and the case was remanded -- without dismissal of the indictments -- to the general sessions court. A second preliminary hearing was held by the general sessions court on March 28, 2006, at which time probable cause was again found on all charges. Superceding Indictments were returned by the Grand Jury on May 3, 2006.

On April 1, 2007, the Petitioner was convicted by a jury of his peers. Thereafter, the Petitioner filed a Motion for New Trial, which was granted in part (as to Count 3 only) on July 18, 2007. The State appealed, and the Court of Criminal Appeals affirmed the trial court on March 18, 2009. The Petitioner then pled guilty to Count 3 on March 22, 2010.

The original trial transcript was apparently destroyed or lost during the Nashville flood, and the original court reporter was evidently unable to reproduce the transcript.

II. FACTS

A. Testimony of Mr. Heard

The Petitioner alleges that his trial counsel, Brad Hornsby, rendered ineffective assistance in connection with his trial by jury and subsequent appeal. Specifically, the Petitioner alleges that Mr. Hornsby: (1) failed to raise the issue of a bond reduction, and failed to preserve that issue for appeal; (2) failed to raise the issue of an allegedly illegal police interrogation on appeal; (3) failed to raise a double-jeopardy issue on appeal; and (4) failed to provide effective assistance with regard to his guilty plea on Count 3 of the Indictment.

In addition, the Petitioner alleges certain improprieties by the trial judge, the Honorable Don Ash. Specifically, the Petitioner complains that the trial judge: (1) improperly failed to recuse himself; (2) improperly remanded the case to general sessions court for the setting of bond; (3) improperly failed to instruct the jury that its verdict must be unanimous; and (4) improperly severed Count 3 of the Indictment from the remaining counts.

With regard to his pre-trial bond, the Petitioner complains that, on the day of his arrest, the judicial commissioner raised his bond from \$31,500 to \$100,000 without a hearing, and without affording him the right to counsel. The Petitioner complains that Mr. Hornsby failed to raise this issue subsequently, despite his request to do so. The Petitioner acknowledged that he

was being held on a separate charge for first degree murder during the pendency of these proceedings.

With regard to the police interrogation, the Petitioner complains that he was interrogated by the Murfreesboro Police Department after asking for counsel. The Petitioner complains that Mr. Hornsby failed to raise this issue on appeal.

With regard to double jeopardy, the Petitioner complains that he pled guilty to Count 3 of the Indictment without knowing that the jury's prior conviction on that same Count had never been vacated by Order of the trial court, in spite of the trial court's ruling to grant a new trial on that Count. The Petitioner complains that Mr. Hornsby failed to raise this issue on appeal. The Petitioner further complains that Mr. Hornsby provided ineffective assistance with regard to his guilty plea to Count 3, by failing to inform him that the jury's conviction on that Count had not previously been vacated. The Petitioner testified, however, that he understood what he was doing when he pled guilty, but that he decided to plead guilty because he was "worn out." The Petitioner acknowledged that the trial judge asked him about all of his rights when he pled guilty, and that he told the trial court the truth during the colloquy.

With regard to Judge Ash's failure to recuse himself, the Petitioner complains that Judge Ash stated, on the record, that he had received *ex parte* information from the Sheriff's Department about a death threat made by the Petitioner. Judge Ash, in the Petitioner's estimation, should have recused himself upon disclosing the alleged threat. In a somewhat related issue, the Petitioner complains that Judge Ash announced via letter (Exhibit 3) that Senior Judge Donald Harris had agreed to preside over the trial, but that Judge Ash inexplicably ended up presiding instead. The Petitioner also takes issue with Judge Harris being the author of the Court of Criminal Appeals' Opinion in this case.

With regard to the trial court's remand to general sessions court, the Petitioner complains that such was procedurally improper, because the trial court was required to dismiss the Indictments prior to remanding the case to general sessions.

With regard to the trial judge's charge to the jury, the Petitioner complains that, during deliberations, the jury sent a question to the court, asking whether unanimity was required; according to the Petitioner, both attorneys initially agreed that the court should answer the jury's question in the affirmative, but the trial judge disagreed and answered the jury in the negative. The jury thereupon returned a guilty verdict.

With regard to what he characterizes as an improper severance, the Petitioner complains that it was error for the trial court to order a new trial only for Count 3, rather than ordering a completely new trial on all charges. The Petitioner argues that these actions violated Tenn. R. Crim. P. 8 and 14.

B. Testimony of Mr. Hornsby

The Petitioner's trial court counsel, Brad Hornsby, testified that he has practiced criminal law for 31 years, and has had at least 100 jury trials. Mr. Hornsby testified that he spent hundreds of hours on this case, and that he and the Petitioner got along very well throughout the proceedings. Mr. Hornsby testified that the Petitioner wanted a jury trial, and he got one.

Mr. Hornsby filed a motion regarding the Petitioner's bond, which was heard and denied. Mr. Hornsby testified that the Petitioner had a "hold" on him from Kentucky or Clarksville. The bond issue was not, however, raised on appeal.

With regard to the Petitioner's complaints about the trial judge's actions in remanding the case to general sessions court, Mr. Hornsby pointed out that the Petitioner received *two* preliminary hearings, which was not to his detriment.

Mr. Hornsby filed numerous pre-trial motions for the Petitioner, but as a matter of trial strategy decided to take a “rifle approach” rather than a “shotgun approach” in his motion filings, acting in his client’s best interests at all times. Mr. Hornsby filed a motion seeking Judge Ash’s recusal, but was unable to procure a transcript of the hearing wherein Judge Ash disclosed the alleged death threat; accordingly, Mr. Hornsby called the Petitioner as a witness at the recusal hearing, in an effort to preserve the record for appeal. Mr. Hornsby could not recall why Judge Ash apparently changed his mind about presiding over the trial after previously announcing that Judge Harris would preside.

With regard to Count 3 of the Indictment, Mr. Hornsby opined that the Petitioner waived any double jeopardy issues by pleading guilty, and further pointed out that the Petitioner did not receive any additional jail time as a result of the plea. Mr. Hornsby testified that he spent “a lot” of hours discussing the plea agreement with the Petitioner, and that the plea agreement was in the Petitioner’s best interests. The proof, in Mr. Hornsby’s opinion, was strong enough for the jury to have returned a first degree murder conviction, had the correct jury instruction been given at trial. In addition, Mr. Hornsby testified that he was present when the Petitioner entered his plea, and that the trial judge went over the Petitioner’s rights, and further that the Petitioner knew what he was doing when he entered the plea. Mr. Hornsby denied coercing or misleading the Petitioner into pleading guilty.

Finally, Mr. Hornsby testified that the trial judge did indeed instruct the jury that unanimity was required.

III. LAW

The Sixth Amendment of the U.S. Constitution and Art. I, Section 9 of the Tennessee Constitution both guarantee the right to “reasonably effective” assistance of counsel, which is assistance that falls “within the range of competence demanded of attorneys in criminal cases.”

Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also* Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must establish two prongs: (1) that counsel's performance was deficient; and (2) that the deficient performance prejudiced the defense. Strickland, *supra*, at 687. The petitioner's failure to establish either prong is fatal to a claim of ineffective assistance of counsel. Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

To establish the first prong of deficient performance, the petitioner must demonstrate that the attorney's "acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Vaughn v. State, 202 S.W.3d 106, 116 (Tenn. 2006) (internal quotation marks and citation omitted). Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law. Baxter, *supra*, at 934-35. A reviewing court "must be highly deferential and must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." State v. Honeycutt, 54 S.W.3d 762, 767 (Tenn. 2001) (internal quotations and citation omitted). Counsel will not be deemed ineffective merely because a different strategy or procedure might have produced a more favorable result. Rhoden v. State, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991).

To establish the second prong of prejudice, the petitioner must prove a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. Vaughn, *supra*, at 116. A "reasonable probability" is a probability that is sufficient to undermine confidence in the outcome. Strickland, *supra*, at 694.

When a petitioner makes a claim of ineffective counsel within the context of a guilty plea, the petitioner must demonstrate that, but for counsel's deficiency, the petitioner would not

have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

In a post-conviction relief evidentiary hearing, the petitioner has the burden of proving the allegations of fact by “clear and convincing evidence.” T.C.A. § 40-30-110(f). Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. Grindstaff v. State, 297 S.W.2d 208, 216 (Tenn. 2009). There is a rebuttable presumption that a ground for relief not raised before a Court of competent jurisdiction in which the ground could have been presented is waived. Id.

IV. ANALYSIS

A. Actions of Trial Counsel

This Court finds that the Petitioner has failed to meet his burden of showing, by clear and convincing evidence, that his trial counsel’s performance was deficient. This Court specifically accredits the testimony of Mr. Hornsby, and finds that he met and exceeded all standards of competency for criminal defense attorneys in Tennessee and any other state. Additionally, the Court finds that Mr. Hornsby fully apprised himself of the facts and law applicable to the Petitioner’s case, and that he explored all potential strategies and defenses.

This Court further finds that Mr. Hornsby vigorously represented the Petitioner throughout all stages of this case, and that the Petitioner wanted and received a jury trial. Further, Mr. Hornsby was partially successful in pursuing a motion for new trial, which ultimately resulted in the plea agreement as to Count 3, wherein no additional jail time resulted. Although there is no transcript of the plea hearing, this Court finds that the trial judge explained all of the Petitioner’s rights before accepting his plea. This Court further finds that Mr. Hornsby spent ample time reviewing the negotiated plea agreement with the Petitioner prior to the plea hearing, that the Petitioner signed said agreement, and that the Petitioner made a rational,

informed, voluntary decision to enter the plea. The absence of an Order specifically vacating the jury's verdict as to Count 3 is inapposite, as the trial court had previously granted a new trial as to that Count, and the Court of Criminal Appeals had affirmed that ruling; the jury verdict as to Count 3 had therefore been nullified pursuant to Tenn. R. Crim. P. 33.

With regard to the allegedly illegal police interrogation, the Petitioner offered no proof as to how the interrogation violated his constitutional rights. Mr. Hornsby raised this issue in the trial court, which found that the Petitioner did not actually make any statements during the interrogation, and therefore did not present "any evidence which would be subject to suppression" had his rights been violated. *See* 10/16/06 Trial Court Order. A bare assertion that a constitutional right has been violated is not sufficient to sustain a post-conviction relief petition. T.C.A. § 40-30-106(d).

In short, the Petitioner has failed to prove that his trial counsel's performance was deficient in any way. As the Petitioner has failed to meet his burden under the first prong of the Strickland test, it is unnecessary to examine the second prong, and the Petitioner's claim must fail. *See Goad, supra*, at 370.

B. Actions of Trial Judge

With regard to the Petitioner's allegations of impropriety by Judge Ash, this Court finds that the Petitioner has not articulated any constitutional basis upon which post-conviction relief could be granted.

The issue of Judge Ash's recusal was addressed on direct appeal, with the Court of Criminal Appeals finding the record "totally devoid of any evidence to support the Defendant's contention that the trial judge should have recused himself." State v. Heard, 2012 WL 976188 at *6. Although no transcript exists of the hearing wherein the alleged death threat was disclosed, Judge Ash's June 22, 2006 Order denying the motion to recuse contains specific findings of fact

regarding the alleged threat and communications with the Sheriff's Department regarding the alleged threat. This Court further finds no basis for post-conviction relief in Judge Ash's letter (Exhibit 3) regarding Senior Judge Harris potentially presiding over the trial; the record contains an Order wherein Judge Ash found that "the reasoning for the trial having been set before other judges in the past was due to scheduling conflicts, and in both cases the conflicts were resolved and Judge Ash was able to hear the case." *See* 3/19/10 Trial Court Order. Further, there is no proof that Judge Harris was actually involved in this case at the trial level in any fashion. The Petitioner has failed to meet his burden of proof on this issue.

The issue of the trial court's procedure in remanding the case to general sessions for a second preliminary hearing is likewise without merit. Although the case law cited by the Petitioner supports his position that the trial court should have dismissed the Indictments before remanding the matters to general sessions, the subsequent action of the Grand Jury in returning Superseding Indictments cured the lack of dismissal. "[E]ven after the return of an indictment, the district attorney retains the discretion to reconvene the grand jury for consideration of additional evidence and the possible return of a superseding indictment -- that is, an indictment obtained without the dismissal of a prior indictment." State v. Mangrum, 403 S.W.3d 152, 163-64 (Tenn. 2013) (internal citation omitted).

With regard to the trial court's instructions to the jury regarding unanimity, this Court finds that no constitutional basis for post-conviction relief has been articulated by the Petitioner; nonetheless, this Court finds Mr. Hornsby's testimony credible regarding the trial court's proper instruction of the unanimity requirement to the jury.

With regard to whether the trial court's actions in granting a new trial solely as to Count 3 constituted an improper severance, this claim was waived upon the Petitioner's subsequent plea

of guilty to that Count. *See* State v. Gross, 673 S.W.2d 552, 553 (Tenn. Crim. App. 1984); State v. McKissack, 917 S.W.2d 714, 716 (Tenn. Crim. App. 1995).

IV. CONCLUSION

Accordingly, Mr. Heard's petition for post-conviction relief is not well-taken, and the same is hereby DENIED.

IT IS SO ORDERED.



M. KEITH SISKIN
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Order has been mailed, postage prepaid, to the following:

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This the _____ day of _____, 20____.

Deputy Clerk