IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1995 SESSION

WILLIAM HATMAKER,	)	
	)	
Appellant,	)	No. 03C01-9506-CR-00169
	)	
	)	Campbell County
v.	)	
	)	Hon. James C. Witt, Jr. , Judge
	)	
STATE OF TENNESSEE,	)	(Post-Conviction)
	)	
Appellee.	)	

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The petitioner, William Hatmaker, appeals as of right from the judgment of the Criminal Court of Campbell County denying his petition for post-conviction relief. Pursuant to an agreement, the petitioner entered a guilty plea on July 6, 1991, to first degree murder, while charges of conspiracy and solicitation to commit first degree murder were dismissed. The petitioner is currently serving a life sentence in the Department of Correction. He asserts on appeal (1) that he received the ineffective assistance of counsel and (2) that he did not voluntarily and knowingly enter his guilty plea. We disagree.

BACKGROUND

The record on appeal contains few facts relating to the underlying events, and therefore, we rely primarily upon the factual summaries provided in the cases of the petitioner's co-defendants. See State v. Hutchison, 898 S.W.2d 161, 164 (Tenn. 1994), cert. denied, ___ U.S. ___, 116 S. Ct. 137 (1995); State v. Gaylor, 862 S.W.2d 546, 549 (Tenn. Crim. App. 1992), app. denied (Tenn. 1993). The evidence showed that the offense for which the petitioner entered a guilty plea stemmed from an agreement between the petitioner and several co-defendants to drown Hugh Huddleston and to collect almost $800,000 in insurance proceeds. The victim was drowned on August 14, 1988.

Before the petitioner's guilty plea, two codefendants were convicted by a jury of first degree murder and sentenced to death. See State v. Hutchison, 898 S.W.2d at 164. Hutchison was also convicted of conspiracy and solicitation to commit first degree murder. Id. Another codefendant was convicted of first degree murder and conspiracy to commit first degree murder and received concurrent sentences of life and ten years, respectively. State v. Gaylor, 862 S.W.2d at 549. At the codefendants'

trials, Johnny Rollyson, also a codefendant, testified that the petitioner pushed the victim into the water and wiped the boat with a rag and that the petitioner had promised him $12,500.00 of the insurance proceeds for his participation in the murder for hire. Other witnesses similarly implicated the petitioner as the principal actor in the murder.

EVIDENTIARY HEARING

At the post-conviction evidentiary hearing, the petitioner raised various contentions regarding the ineffective assistance of counsel and the validity of his plea. He testified that he was represented by John E. Appman and David Eldridge.[1] He asserted at the evidentiary hearing that Appman performed deficiently by giving to the prosecutor information without his consent. He stated that Appman continuously wanted to give the district attorney information, telling him that he would receive the death penalty if he did not provide them with some information. The petitioner also said that after the information was conveyed to the district attorney Rollyson became the main suspect and other codefendants were arrested. However, the petitioner testified that he knew that Appman was negotiating a plea and that the prosecutor had set deadlines for furnishing information in exchange for not seeking the death penalty. After Appman gave the information to the district attorney, the state filed a notice of intent to seek the death penalty.

The petitioner further argued that his trial counsel was ineffective by waiving his preliminary hearing without his consent. The evidence presented at trial showed that the petitioner was arrested on January 3, 1990. The warrant indicates that a preliminary hearing was scheduled for February 5, 1990, but was rescheduled twice for February 12 and February 28. The petitioner testified that the preliminary hearing set for February 12, 1990, had to be postponed because Tom Kimble, an assistant public defender who was initially appointed to represent him, was not prepared. He

[1] Unfortunately, neither Mr. Appman nor Mr. Eldridge was called to testify at the post-conviction hearing.

said that Kimble told him about an offer Appman negotiated for a thirty-year sentence for second degree murder. The petitioner said that he was indicted on the evening of February 12, following the rescheduling of the preliminary hearing and that he later learned that his attorney waived the preliminary hearing.

The petitioner also claimed ineffective assistance of counsel on the part of his trial counsel due to incorrect advice given regarding his eligibility for release on parole. The petitioner testified that after speaking to his attorneys he believed that a life sentence for first degree murder would require that he serve about ten years before he would be eligible for parole. He testified that he received a letter from Appman explaining eligibility for parole. He stated that Eldridge also sent him a letter regarding eligibility for parole but that he told him a different time period on other occasions. He claims on appeal that he is not eligible for parole until he serves thirty-six years of his sentence which can be brought down to twenty-five years with good behavior.

The letter from Appman dated February 12, 1990, detailed the demands and deadlines being made by the district attorney regarding plea negotiations. Appman expressed the opinion in his letter to the petitioner that the evidence could support a conviction for first degree murder although he may have a defense. It further stated that "if [the petitioner] were convicted of even murder in the second degree, the actual time that [he] would serve would not be significantly different." In the next paragraph of the letter, Appman conveyed that if the petitioner were to accept a thirty year sentence for second degree murder as a standard offender he would be eligible for parole in approximately nine years. The letter stated that good behavior could reduce the actual time to be served to approximately four to five years.

Another letter from Eldridge dated February 8, 1991, confirmed the petitioner's refusal to accept an offer made by the district attorney. The letter stated

that the district attorney offered to withdraw the notice of intent to seek the death penalty if the petitioner agreed to plead guilty to first degree murder, solicitation and conspiracy and to receive consecutive sentences of life imprisonment, twelve years, and ten years respectively. In this letter, Eldridge advised the petitioner that there was substantial proof against the petitioner and that based upon the evidence presented at Hutchison's trial, the petitioner was likely to be convicted and receive the death penalty. The letter warned the petitioner of codefendants' testimony that he would face if he chose to go to trial. Eldridge's recommendation in the letter was that the petitioner accept the offer of a life sentence for which he would be required to serve thirty years before being eligible for release on parole. The letter further stated that under the terms of the district attorney's offer he would be required to serve a total of 37.1 years for all convictions before he would be eligible for parole although sentencing credits might reduce the term of imprisonment.

The petitioner also testified that after being in jail for approximately a year and a half, he learned from memoranda written by Eldridge and contained in his file that the district attorney had decided before his guilty plea not to seek the death penalty in his case. One memorandum dated May 15, 1990, stated that Appman told Eldridge that the district attorney had informed him that the death penalty would not be sought against the petitioner if he could not get the death penalty against the other codefendants or if Olen "Eddie" Hutchison was convicted and received the death penalty. The memorandum stated that Eldridge explained to Appman that they could not be sure whether the district attorney would withdraw the notice to seek the death penalty until trial because the exposure to the death penalty would be used in plea bargaining. The petitioner testified that he pled guilty only because his attorneys guaranteed a sentence of death if he went to trial and that his attorneys told him to lie to the judge or he would be sentenced to death.

Bobbie Cox, the petitioner's sister, testified that she heard Appman tell her cousin that the petitioner would sue him in about three years for incompetent representation and would be released within six to seven years. She also stated that the petitioner's attorneys took the petitioner to a closed room twice before he pled guilty.

Millard C. Curnutt, the father of one of the codefendants who received a sentence of death and an acquaintance of the petitioner's mother and sister, testified that the petitioner appeared nervous and upset during the guilty plea hearing and that the proceedings were interrupted at least once in order to permit his attorneys to talk to the petitioner. On cross-examination, he stated that the petitioner acted calm when he entered his guilty plea.

Tom Kimble, an assistant public defender, testified that he was initially appointed to represent the petitioner. He said that the district attorney told him that if the petitioner agreed to give them information and to testify against his codefendants, the death penalty would not be sought and that they would "take care of him down the road." The deadline for giving the information was extended by the district attorney several times. Kimble stated that on several occasions he disclosed to the petitioner evidence that the district attorney had against him, but the petitioner refused to give information, believing that the district attorney had nothing against him.

Kimble also testified that the petitioner told him that Appman came back from his vacation and met with the district attorney concerning the case over the weekend. At that time, Appman told the district attorney that Johnny Rollyson was involved with the murder. Kimble said that the petitioner was very angry and excited that the information was given to the district attorney. He also stated that after the district attorney received the information that Rollyson was involved, several individuals

were arrested and Rollyson gave a statement that the petitioner was the killer. Kimble stated that in his opinion the information "cracked" the case. On cross-examination, he admitted that there was no way for him to know the full extent of the district attorney's knowledge. Kimble also testified on redirect examination that the district attorney had said that in exchange for information the petitioner would receive a reasonable bond of $10,000.00 and be located in a facility apart from his codefendants if he could not make bond. According to Kimble, the petitioner did not receive the reasonable bond amount and instead, Rollyson, who was not represented by counsel, received the deal offered by the district attorney.

Sherman Fetterman, an assistant public defender, testified that he was aware that Appman and the district attorney were negotiating a plea. Fetterman stated that he knew that Appman had provided the district attorney information that Rollyson was involved in the murder. He explained that the information was given because the district attorney had set a deadline for negotiations or else the death penalty would be sought against the petitioner.

At the end of the evidentiary hearing, the trial court found that trial counsel's performance was not deficient in any way and that the petitioner knowingly and voluntarily entered his guilty plea. In holding that counsel was not ineffective, the trial court commended them for their performance under the circumstances of the case. The trial court reasoned that the petitioner's attorneys continued to negotiate for a lesser sentence until the entry of his guilty plea, and were successful in dismissing two counts and in obtaining a sentence to be served in Morgan County. The trial court also concluded that the petitioner was properly advised that he would have to serve thirty years before he would be eligible for parole and that he would probably be eligible after twenty-five years when good behavior is taken into account.

In its decision that the petitioner's guilty plea was knowing and voluntary, the trial court found that the petitioner was aware of what he was doing, that he knew that he was receiving a life sentence, and that he had been advised that a life sentence was thirty years. It also stated that the petitioner understood the guilty plea proceedings and noted that the petitioner had several opportunities to notify the court of any deficient performance by trial counsel.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

In his first issue, the petitioner argues that trial counsel was ineffective in three respects: (1) by giving information to the district attorney during plea negotiations without obtaining concessions for the petitioner, (2) by waiving the preliminary hearing, and (3) by providing incorrect information regarding the petitioner's eligibility for parole. Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is upon the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 842-44 (1993). The Strickland standard has been applied, as well, to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn.), cert. denied, 493 U.S. 874 (1989).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973), cert.

denied, 444 U.S. 944 (1979). Also, in reviewing counsel's conduct, 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." Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982) (counsel's conduct will not be measured by "20-20 hindsight"). Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See Hellard v. State, 629 S.W.2d at 9; United States v. DeCoster, 487 F.2d at 1201.

Also, we note that the approach to the issue of the ineffective assistance of counsel does not have to start with an analysis of an attorney's conduct. If prejudice is not shown, we need not seek to determine the validity of the allegations about deficient performance. Strickland v. Washington, 466 U.S. at 697, 104 S. Ct. at 2069.

The burden was on the petitioner in the trial court to prove his allegations that would entitle him to relief by a preponderance of the evidence.[2] Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988). On appeal, we are bound by the trial court's findings unless we conclude that the evidence preponderates against those findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). In this respect, the petitioner has the burden of illustrating how the evidence preponderates against the judgment entered. Id.

A. DISCLOSURE OF INFORMATION

First, the petitioner claims that Appman was ineffective during the plea bargaining process in giving to the district attorney information that Johnny Rollyson

[2] For post-conviction petitions filed on or after May 10, 1995, petitioners have the burden of proving factual allegations by clear and convincing evidence. T.C.A. § 40-30-210(f).

was involved in the murder without obtaining concessions for the petitioner. The state argues that even if trial counsel's performance was deficient, the petitioner is not entitled to relief because he has failed to show how he was prejudiced by counsel's conduct. We agree that the petitioner has failed to establish that he suffered any prejudice.

At the evidentiary hearing, the petitioner asserted that Appman did not have his permission to disclose information to the district attorney. Testimony from Kimble corroborated the petitioner's testimony. However, the petitioner does not claim on appeal that Appman was not authorized to give the district attorney information that Rollyson was involved in the murder during plea negotiations. Instead, he asserts that the state did not abide by the agreement as understood by his attorneys. In addition to the petitioner, Kimble and Fetterman testified that the state agreed not to seek the death penalty if the petitioner gave them information regarding the murder.

The trial court found that the demand made by the district attorney in exchange for not seeking the death penalty was that the petitioner provide them with information and testify against his codefendants. However, the trial court stated that the petitioner would not agree to be a witness and denied that he even knew much about the crime. Further, the petitioner did not testify at the trial of his codefendants. In its decision, however, the trial court made no specific findings regarding Appman's authority to disclose information to the district attorney.

The evidence does not preponderate against the findings made by the trial court. Moreover, the petitioner has failed to show how he suffered prejudice by Appman's giving of information to the district attorney. The petitioner ultimately pled guilty to first degree murder in the face of substantial evidence supporting a conviction and sentence of death. Before the petitioner's guilty plea, two other codefendants had

received a death sentence. The trial court even expressed the opinion that the petitioner was in jeopardy of receiving the death penalty. We note, as well, that the petitioner has failed to show that Appman's giving of information about Johnny Rollyson would bar the state in a retrial from using evidence and witnesses derived from Rollyson's cooperation. In addition, the petitioner's trial counsel cannot be held accountable for the state's failure to comply with an agreement not to seek the death penalty as claimed by the petitioner on appeal. For these reasons, we hold that the petitioner has failed to meet his burden of proof.

B. WAIVER OF PRELIMINARY HEARING

The petitioner also claims that his trial counsel was ineffective by waiving his preliminary hearing without his consent. He concedes that there is no constitutional right to a preliminary hearing but argues that the denial of a preliminary hearing due to the ineffective assistance of counsel raises the error to a constitutional violation. See McKeldin v. State, 516 S.W.2d 82, 84 (Tenn. 1974); Smith v. State, 757 S.W.2d 14, 17-18 (Tenn. Crim. App. 1988). The state counters that the petitioner has failed to show how the alleged deficient performance by counsel resulted in prejudice under the standard set forth in Strickland v. Washington, 466 U.S. at 687, 104 S. Ct. at 2064 (1984). We agree that no prejudice has been shown.

Because the right to a preliminary hearing is not a constitutional right, the lack of a preliminary hearing due to counsel's waiver may be addressed at the post-conviction level only as it relates to the ineffective assistance of counsel. Smith, 757 S.W.2d at 17. However, a determination of deficient performance is not required when a showing of prejudice is lacking. Strickland v. Washington, 466 U.S. at 697, 104 S. Ct. at 2069.

In this case, the petitioner has failed to show what prejudice he suffered due to the waiver of the preliminary hearing. The record is devoid of any showing of prejudice suffered by the petitioner as a result of the lack of a preliminary hearing. The record reflects only the unsupported claims of the petitioner that witnesses would have testified differently had a preliminary hearing been conducted. Because no prejudice has been established, the bald assertion that the petitioner was entitled to a preliminary hearing is not sufficient to establish ineffective assistance of counsel when his counsel waived the preliminary hearing without the petitioner's consent.

C. ADVICE REGARDING PAROLE ELIGIBILITY

The petitioner also argues that he received ineffective assistance of counsel because his trial counsel did not provide him with correct information regarding parole eligibility and that as a consequence he did not knowingly and voluntarily enter his guilty plea. The state disagrees.

If a petitioner seeks to vacate convictions based upon his pleas of guilty on the ground that the pleas resulted from improper legal advice, the petitioner must show (1) that the advice given was deficient and (2) "that there is a reasonable probability that, but for counsel's error's, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985). Also, "[t]he findings of fact of trial judge on post-conviction hearings are conclusive on appeal unless the evidence preponderates against the judgment." Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

In this regard, there is substantive evidence in the record to support the trial court's determination that the petitioner's trial counsel properly advised him of the punishment to which he was exposed. At the guilty plea hearing, the trial court asked the petitioner whether he understood that he was pleading guilty to first degree murder

and that the sentence for first degree murder is life imprisonment. The petitioner responded affirmatively. Although the trial court told the petitioner that it did not know how long the petitioner would be imprisoned if he received a life sentence, the petitioner stated that he understood the punishment of a life sentence because his attorneys had talked to him about it. Also, the letter from Eldridge, approximately five months before the petitioner entered his guilty plea, focused on sentencing for first degree murder and correctly informed the petitioner regarding his eligibility for parole. Therefore, the petitioner's claim that he received the ineffective assistance of counsel is without merit.

II. INVOLUNTARY GUILTY PLEA

The petitioner next contends that he did not knowingly and voluntarily plead guilty because he was not properly advised of his constitutional rights when he entered his guilty plea. Although he asserted that he was not advised of his right to a preliminary hearing and to subpoena witnesses at the evidentiary hearing, on appeal he does not cite any specific omissions made by the trial court.

The issue concerning invalid guilty pleas is controlled by State v. Neal, 810 S.W.2d 131 (Tenn. 1991) and Johnson v. State, 834 S.W.2d 922 (Tenn. 1992), which bear upon the procedural and substantive requirements for the entry of a guilty plea in order that a valid judgment of conviction may be obtained and for subsequent review of the validity of a conviction based upon a guilty plea. These cases stem, in part, from Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969) in which the Supreme Court stated that entry of a guilty plea effectively constituted a waiver of certain constitutional rights: the right against compulsory self-incrimination, the right to confront one's accusers, and the right to trial by a jury. Boykin held that a valid waiver of such a right required the intentional relinquishment or abandonment of a known right and that such a waiver may not be presumed from a silent record. Id.

At the guilty plea hearing, the trial court informed the petitioner that he was waiving his constitutional rights to be free from compulsory self-incrimination, to a trial by jury, and to confront and cross-examine witnesses. Therefore, no Boykin violation occurred. We note that the trial court failed to follow the advice mandated by State v. Mackey, 553 S.W.2d 337, 341 (Tenn. 1977) and State v. McClintock, 732 S.W.2d 268, 273 (Tenn. 1987). First, the trial court did not inform the petitioner that the resulting judgment of conviction could be used in the future to enhance punishment for subsequent convictions. See McClintock, 732 S.W.2d at 273. Also, the petitioner was not told that his answers to the trial court's questions during the guilty plea hearing

could be used against the petitioner if the petitioner was charged with perjury. See Tenn. R. Crim. P. 11(c)(5); Mackey, 553 S.W.2d at 341. However, failure to give advice not required by Boykin is not proper grounds for post-conviction relief because the omission does not, by itself, rise to the level of constitutional error. See T.C.A. § 40-30-105; State v. Prince, 781 S.W.2d 846, 853 (Tenn. 1989); State v. Neal, 810 S.W.2d at 140. Therefore, post-conviction relief is not warranted in this case.

The trial court's findings of fact and conclusions that the petitioner's trial counsel performed competently and that the petitioner knowingly and voluntarily entered his guilty plea are amply supported by the record. Therefore, the judgment of the trial court is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

_____
Gary R. Wade, Judge

_____
John K. Byers, Senior Judge