

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE**

**AT JACKSON**

**AUGUST SESSION, 1996**

<b>TIMOTHY L. LOVELACE,</b>	)	<b>C.C.A. NO. 02C01-9412-CC-00276</b>
	)	
Appellant,	)	
	)	
<b>VS.</b>	)	<b>FAYETTE COUNTY</b>
	)	
<b>STATE OF TENNESSEE,</b>	)	<b>HON. JOE H. WALKER</b>
	)	<b>JUDGE</b>
	)	
Appellee.	)	<b>(Post-Conviction Relief)</b>

FOR THE APPELLANT:

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OPINION FILED \_\_\_\_\_

AFFIRMED

JERRY L. SMITH, JUDGE

## **OPINION**

Appellant Timothy L. Lovelace appeals the trial court's denial of his petition for post-conviction relief. He presents the following issues for review: (1) whether the trial court erred in finding that his trial counsel rendered effective assistance; and (2) whether the trial court erred in finding that no due process violation occurred where the judgment offense was of a different class than the plea offense.

After a review of the record, we affirm the judgment of the trial court.

### **I. FACTUAL BACKGROUND**

The record reveals that, on August 2, 1993, Appellant pled guilty to, among other things, attempted aggravated arson. As a Range I standard offender, he received an effective sentence of eight and a half years. On July 27, 1994, Appellant filed a petition for post-conviction relief in the Fayette County Circuit Court, alleging that it was his intention to plead guilty only to simple arson. Following a hearing, the trial court denied Appellant's petition.

### **II. POST-CONVICTION RELIEF**

Appellant alleges that the trial court erred in denying his post-conviction petition. In post-conviction proceedings, the petitioner has the burden of proving the claims raised by a preponderance of the evidence. Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996); Wade v. State, 914 S.W.2d 97, 101 (Tenn. Crim. App. 1995). Findings of fact made by the trial court are conclusive on appeal

unless the evidence preponderates against the judgment. Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). Thus, we are bound to affirm the judgment unless the evidence in the record preponderates against the trial court's findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990).

#### **A. EFFECTIVE ASSISTANCE OF TRIAL COUNSEL**

Appellant first argues that the trial court erred in finding that his trial counsel rendered effective assistance. When an appeal challenges the effective assistance of counsel, the appellant has the burden of establishing (1) deficient representation and (2) prejudice resulting from that deficiency. Strickland v. Washington, 466 U.S. 668, 686 (1984); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Deficient representation occurs when counsel provides assistance that falls below the range of competence demanded of criminal attorneys. Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991). Prejudice is the reasonable likelihood that, but for deficient representation, the outcome of the proceedings would have been different. Overton v. State, 874 S.W.2d 6,11 (Tenn. 1994). On review, there is a strong presumption of satisfactory representation. Barr v. State, 910 S.W.2d 462, 464 (Tenn. Crim. App. 1995).

This two prong test applies to charges of ineffective assistance of counsel arising from guilty plea proceedings. Teague v. State, 772 S.W.2d 932, 934 (Tenn. Crim. App. 1988). In the context of a plea agreement, Appellant must show that, “but for” counsel's errors, Appellant would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 57 (1985).

Appellant's claim satisfies the first prong of the test. By erroneously advising Appellant that the charge of aggravated arson had been changed to arson instead of attempted aggravated arson, trial counsel's performance fell below the level of competence required of a criminal attorney.<sup>1</sup> Such an error is outside the range of reasonable professional assistance.

With respect to the second prong, Appellant argues that it was not his intention to plead guilty to attempted aggravated arson. Appellant goes on to argue that, if he had been accurately informed by his attorney, he would have elected to go to trial. We must first point out that a plea hearing is not a mere formality, as emphasized in State v. Neal, 810 S.W.2d 131 (Tenn.1991), and State v. Todd, 654 S.W.2d 379 (Tenn. 1983). A plea hearing serves to insure that the defendant understands his rights and the terms of his plea. See id. Here, the record reveals that the trial court explained to Appellant on three separate occasions that he was pleading guilty to attempted aggravated arson. Surely, the disparity between the information imparted at the plea hearing and the advice given by counsel should have at least put Appellant on notice to inquire of the judge as to exactly what he was doing. However, Appellant stated that he understood and accepted the plea agreement. Therefore, Appellant's claim that he was prejudiced by his trial counsel's deficiency is without merit.<sup>2</sup> Consequently, his ineffective assistance of counsel claim must fail.

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<sup>1</sup> Appellant's trial counsel admitted this error in a letter she wrote to Appellant.

<sup>2</sup> Appellant claims that he did not understand the trial court because he was high on marijuana. However, Appellant presents no evidence to sustain this claim. Moreover, Appellant's responses to the trial court's questions were clear, coherent, and showed no signs of impairment. See Martin v. State, No. 03C01-9601-CR-00047, 1996 WL 474409, at \*4 (Tenn. Crim. App. Aug. 20, 1996).

## B. CONTRACT THEORY

Appellant also argues that the trial court erred in finding that no due process violation occurred where the judgment offense was of a different class than the plea offense. Appellant likens his plea agreement to a contract. He maintains that his conviction for attempted aggravated arson failed to accurately reflect the terms of the plea agreement, as he understood them. As a result of this alleged breach of contract, Appellant believes that he should be allowed to withdraw his plea and proceed to trial.

A plea bargain is revocable and unenforceable until it is accepted by the trial court. State v. Todd, 654 S.W.2d 379, 382 (Tenn. 1983). At the plea hearing, the trial court reviewed the agreement and explained to Appellant that he was pleading guilty to attempted aggravated arson. Only after ensuring that Appellant was aware of the substance and consequences of the plea did the trial court accept the plea and therefore make its terms binding. These terms include Appellant's guilty plea to attempted aggravated arson.

Accordingly, the judgment of the trial court is affirmed.

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JERRY L. SMITH, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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WILLIAM M. BARKER, JUDGE