

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs July 12, 2016

ANTHONY L. WOODS v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Henderson County
No. 15133-1 Roy B. Morgan, Jr., Judge**

No. W2016-00188-CCA-R3-PC - Filed November 7, 2016

The Petitioner, Anthony L. Woods, appeals the denial of his petition for post-conviction relief. The Petitioner pled guilty to two counts of aggravated assault and one count of driving on a revoked license and received an effective six-year sentence to be served on probation. The Petitioner sought post-conviction relief, asserting that he received the ineffective assistance of counsel, which rendered his pleas unknowing and involuntary. The post-conviction court denied relief following a hearing. Upon reviewing the record and the applicable law, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Michael Thorne, Lexington, Tennessee, for the appellant, Anthony L. Woods.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Jerry Woodall, District Attorney General; and Angela R. Scott, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL AND PROCEDURAL HISTORY

On June 2, 2014, the Petitioner was indicted on two counts of aggravated assault and two counts of driving on a revoked driver's license, fifth offense. According to the transcript of the guilty plea hearing, he pled guilty to two counts of aggravated assault, each with a six-year sentence. He also pled guilty to two counts of driving on a revoked

license, which the trial court merged into one count. The Petitioner received a sentence of eleven months and twenty-nine days for driving on a revoked license. Pursuant to the plea, the trial court imposed an effective sentence of six years on probation.

Guilty Plea Submission Hearing

The plea submission hearing reveals that the Petitioner's aggravated assault convictions involved a firearm, which was seized by the Lexington Police Department. At the guilty plea submission hearing, the Petitioner merely stipulated to the facts as stated in his indictment. While the indictments are not included in the record, we glean from the petition for post-conviction relief and the amended petition that the Petitioner was charged with threatening a man and a woman with a weapon, and that a Co-Defendant, Jennifer Blackwell, was also charged with an offense in connection with the same events.

The Petitioner affirmed that he was not under the influence of drugs or alcohol at the time of the plea hearing; that he understood the crimes with which he was charged; that he faced a potential three- to six-year sentence for each aggravated assault conviction and eleven months and twenty-nine days for the revoked license convictions; that, by accepting the plea, he was waiving his right to plead not guilty, right to a jury trial, right to confront witnesses, right to present a defense, and right to testify; that he understood he was admitting guilt to every pled offense by entering the plea agreement; and that his guilty plea conviction could increase the penalty for future convictions he may face. The Petitioner affirmed that he was satisfied with trial counsel's representation; that he reviewed the facts in the indictment with trial counsel; that the facts in the indictment were "substantially correct"; and that, as a result of his plea agreement, he was to be sentenced to an effective six-year sentence to be served on probation. The trial court found that the Petitioner freely and voluntarily entered his guilty plea and did so knowingly and intelligently.

Post-Conviction Hearing

The Petitioner testified that he was arrested, arraigned about a month later in the general sessions court, and then released on bond about five to six months later. He testified that trial counsel was appointed at his arraignment and re-appointed after the Petitioner was indicted on the charges. The Petitioner stated that while incarcerated, he was visited by trial counsel once. The Petitioner testified that, at this meeting, trial counsel discussed the facts of his arrest and "that each of the aggravated assault charges carried 3 to 6 years." The Petitioner said he did not meet with trial counsel again until the day of the guilty plea submission hearing. The Petitioner also said they spoke by telephone on about two separate occasions regarding the plea negotiation.

The Petitioner said that the State first offered him a five-year sentence to be served in confinement and that he rejected the offer because he did not want to serve time in prison. He testified that he informed trial counsel he wanted to accept a plea agreement “if [trial counsel] could get [him] a state probation deal.” The Petitioner believed that, after telling trial counsel his parameters for negotiation, trial counsel proposed the six-year probation sentence, which the State accepted.

The Petitioner stated that at the time of the plea negotiations, he believed that he could receive consecutive six-year sentences if convicted of the two aggravated assault charges, resulting in an effective sentence of twelve years. He stated that trial counsel never discussed the difference between concurrent or consecutive sentences with him, which the Petitioner believed renders his pleas unknowing and involuntary. The Petitioner testified that he was not a convicted felon prior to accepting the plea agreement at issue. He maintained that trial counsel only informed him of the sentencing range of three to six years for an aggravated assault conviction and the consequences of revocation of probation. The Petitioner acknowledged that he may believed that he faced an aggregate twelve-year sentence not due to trial counsel’s advice but due to his own prior knowledge of sentencing because he “knew what concurrent and consecutive meant” and that he acquired this knowledge “from being in jail and ... talking to other people.”

The Petitioner explained that he told trial counsel to get him “[a]ny type of probation deal.” The Petitioner testified that he proposed the six-year probationary sentence in light of his belief that he could receive an effective twelve-year sentence if convicted at trial. He claimed that he would not have proposed a plea resulting in a six-year probated sentence if he had believed the maximum sentence at trial would be six years.

The Petitioner testified that the factual allegations included in the affidavits stated that the aggravated assaults arose from the same event and time but that the assaults involved two victims. He stated that he did not believe he was guilty of the aggravated assaults and that if he had believed that the maximum sentence he could receive would be six years to be served concurrently, he “would have taken it on to trial and probably been found not guilty.” The Petitioner elaborated on allegations in the petition that one of the victims had testified at the preliminary hearing that the Petitioner had not threatened him with the weapon at all and that the general sessions judge had stated that he did not believe the facts could support two counts of aggravated assault. The Petitioner stated that trial counsel did not properly cross-examine the witness at the preliminary hearing, and that the failure to cross-examine raised doubts about his trial counsel’s competency, because the Petitioner’s “whole defense ... was about this man going in his home and getting his gun before I retrieved mine.” The Petitioner asserted that he believed that,

despite his innocence, he would be sentenced to twelve years if he proceeded to trial with trial counsel. The Petitioner said trial counsel allowed him to erroneously believe that he could be sentenced to twelve years. Relating to the guilty plea submission hearing, the Petitioner testified that he told the trial court he was satisfied with trial counsel's representation because he was afraid that if he responded otherwise that he would be forced to have trial counsel represent him at trial.

On cross-examination, the Petitioner testified that trial counsel informed him that there was a risk that his sentences could run consecutively. He also testified that trial counsel informed him of the plea offer from the State that involved a concurrent sentence. The Petitioner admitted that he "ultimately ... got exactly what [he] wanted which was any probation sentence." Although the Petitioner testified that he did not believe trial counsel devoted adequate time to his representation, he acknowledged that trial counsel was aware of the facts of his case, discussed defenses and trial strategy with him, and received discovery from the State. The Petitioner said, "I don't guess there was anything else that I required of him that more time would have accomplished."

On re-direct examination, the Petitioner testified that he requested a six-year probationary sentence because he thought it was a "midway point" from the maximum twelve-year prison sentence. He testified that he openly discussed the concept of a twelve-year prison sentence with trial counsel who the Petitioner said did not make an effort to correct his misconception.

In response to questioning by the post-conviction court, the Petitioner testified that he filed his petition for post-conviction relief only after his probation was revoked. He explained that the violation of probation arose from a positive drug test and failure to pay fines associated with the probation. He acknowledged that in an amended warrant issued some weeks or months after his arrest for violating probation, he was also charged with possession of a firearm during commission of or attempt to commit a dangerous felony, aggravated assault, attempted murder, domestic reckless endangerment, and four counts of driving on a revoked license.

Trial counsel testified that on June 26, 2014, he met with the Petitioner and discussed the State's original plea offer, which he rejected. On July 9, trial counsel again met with the Petitioner and at that point the Petitioner "said he'd take 5 years on paper." Less than two weeks later, while at a court appearance, trial counsel talked with the Petitioner and asked the Petitioner to call him to discuss his case. After a series of messages back and forth, on August 25, trial counsel sent the State a counter-offer asking for a six-year probationary sentence as requested by the Petitioner. One week later, the State accepted the Petitioner's offer. On October 10, the Petitioner signed the plea agreement.

Trial counsel testified that after the Petitioner received the discovery on June 26, 2014, he met with the Petitioner in person to discuss the information contained in the discovery. He further testified that during the meeting, they also discussed the sentencing range as three to six years. Trial counsel believed that the offenses were “a single incident” and did not believe he ever mentioned the possibility of consecutive sentencing. He had “no idea” how the Petitioner came to believe he could be sentenced to twelve years. Trial counsel also did not remember the Petitioner being confused about what sentences he could face at trial or through a plea agreement.

On cross-examination, trial counsel testified that, in addition to discussing the discovery with the Petitioner, he also informed the Petitioner about defenses and “the nature of the charges.” He testified that at no point did the Petitioner convey to him that the plea agreement was unsatisfactory. Trial counsel served as the Petitioner’s counsel at the violation of probation hearing, during which the Petitioner did not complain about his sentence. Trial counsel first heard of the Petitioner’s unhappiness with the sentence only after the Petitioner’s probation was revoked. Trial counsel was appointed as the Petitioner’s counsel for later charges filed against him, and, at that time, the Petitioner still did not complain of his sentence to trial counsel.

The post-conviction court concluded that the Petitioner had failed to prove by clear and convincing evidence any of his allegations. The court found that the Petitioner did not offer “one iota of proof” that trial counsel failed to investigate his case. The court also found that the Petitioner did not establish by clear and convincing evidence that the Petitioner’s guilty plea was not knowingly and voluntarily entered. The court again found that the Petitioner did, in fact, enter his plea freely, knowingly, voluntarily, and intelligently. The court found no instance of “manipulation.” The court noted that the Petitioner received the sentence he wanted: probation of any term. The court also noted that the fact that the Petitioner did not lodge his challenge until after his probation was revoked reflected negatively on the Petitioner’s credibility.

ANALYSIS

On appeal, the Petitioner contends that because he received the ineffective assistance of counsel, his plea was unknowingly and involuntarily entered. The Petitioner argues that trial counsel failed to properly advise him on the potential jail time he would have faced if he had elected to go to trial. On the other hand, the State argues that trial counsel’s representation of the Petitioner was effective and that his guilty plea was, in fact, knowing and voluntary. Further, the State believes that the record that the Petitioner provided is insufficient for this court to review.

The State contends that because the record is devoid of the Petitioner's indictment, judgment sheets, and transcripts of the preliminary hearing and arraignment, the record is insufficient for appellate review. *See State v. Ballard*, 855 S.W.2d 557, 560-61 (Tenn. 1993) ("Where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue."). The appellate record, however, includes both the transcript of the post-conviction hearing and the transcript of the guilty plea hearing. The transcript of the guilty plea hearing includes information regarding the charges to which the Petitioner pled guilty and the sentences that he received. On appeal, the Petitioner does not raise any issues regarding the arraignment or the preliminary hearing. We conclude that the appellate record is adequate for this court to address the issues raised on appeal, despite the absence of the indictment and the judgment.

In evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31 (1970) (citations omitted). In making this determination, the reviewing court must look to the totality of the circumstances. *State v. Turner*, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995); *see Chamberlain v. State*, 815 S.W.2d 534, 542 (Tenn. Crim. App. 1990). Indeed,

a court charged with determining whether ... pleas were "voluntary" and "intelligent" must look to various circumstantial factors, such as the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (citation omitted).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citing *Alford*, 400 U.S. at 31). To succeed in a challenge for ineffective assistance of counsel, the petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Under *Strickland v. Washington*, 466 U.S. 668, 687 (1984), the petitioner must establish (1) deficient representation and (2) prejudice resulting from the deficiency. In the context of a guilty plea, to satisfy the

second prong of *Strickland*, the petitioner must show that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” *Lockhart*, 474 U.S. at 59; *see also Walton v. State*, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997). The petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonable trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceeding. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). However, this deference to the tactical decisions of trial counsel is dependent upon a showing that the decisions were made after adequate preparation. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

The issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). “A trial court’s findings of fact underlying a claim of ineffective assistance of counsel are reviewed on appeal under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise.” *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001) (citing Tenn. R. App. P. 13(d)). However, conclusions of law are reviewed under a purely de novo standard, with no presumption of correctness. *Id.* at 458. To obtain post-conviction relief, the Petitioner bears the burden of proving the allegations of fact in the petition by clear and convincing evidence. T.C.A. § 40-30-110(f).

The Petitioner argues that trial counsel was ineffective in failing to properly inform him of his possible sentence if convicted at trial. He contends that trial counsel erroneously informed him that he could be subject to consecutive sentencing, resulting in a potential effective sentence of twelve years. The Petitioner contends that his “erroneous” belief, that he could be sentenced to twelve years if convicted at trial, led him to agree to a guilty plea that he would not have otherwise accepted. He argues that trial counsel’s ineffectiveness rendered his guilty pleas unknowing and involuntary.

The post-conviction court found that “none of the allegations made by Petitioner [were] carried by clear and convincing evidence.” We agree. The testimony of trial counsel, which the post-conviction court credited, established that the Petitioner was informed of the potential sentences that he faced if convicted at trial. Trial counsel also testified that he did not tell the Petitioner that he faced a twelve-year sentence or discuss a twelve-year sentence with him. The Petitioner testified, at the guilty plea hearing, that he understood the potential convictions and sentences facing him. The Petitioner also testified that he did not believe that “there was anything else that [he] required of [trial counsel] that more time would have accomplished.” The post-conviction court also found that the Petitioner entered his guilty plea knowingly and freely. The post-

conviction court found that the Petitioner was not “manipulated” by trial counsel and that that he “got what he wanted.”

The post-conviction court essentially credited trial counsel’s testimony that he did not tell the Petitioner that he faced a potential twelve-year sentence, and it found that the Petitioner failed to establish by clear and convincing evidence that trial counsel misled the Petitioner regarding his potential exposure. We note that the Petitioner also failed to introduce any evidence or argument at the post-conviction hearing regarding whether he was actually eligible to be sentenced to consecutive terms under Tennessee Code Annotated section 40-35-115(b). While the Petitioner presents arguments on appeal that he is not a dangerous offender and was otherwise ineligible for consecutive sentencing, these arguments were not presented to the post-conviction court, have no factual basis in the record before us, and are therefore waived on appellate review. Tenn. Sup. Ct. R. 28, § 8(D)(4); T.R.A.P 13(b), (c). Accordingly, we agree with the post-conviction court that the Petitioner has failed to prove by clear and convincing evidence that trial counsel performed deficiently.

Moreover, “[i]t appears the Petitioner is suffering from a classic case of ‘Buyer’s Remorse.’” *Robert L. Freeman v. State*, No. M2000-00904-CCA-R3-PC, 2002 WL 970439, at *2 (Tenn. Crim. App. May 10, 2002). The post-conviction court found that the Petitioner’s credibility suffered, considering that the Petitioner did not complain of his guilty plea sentence or trial counsel’s quality of representation until after his probation was revoked. Trial counsel testified that he specifically followed the Petitioner’s request to negotiate a plea bargain that would keep him out of prison. Ultimately, the Petitioner received six years to be served on probation, whereas at trial he could have been sentenced anywhere from a three- to thirteen-year prison sentence. *See* T.C.A. § 39-13-102(a)(1)(A); *id.* §§ 40-35-105(a), -105(b), -112(a)(3), -115(b)(4); *id.* § 55-50-504(a)(1). It appears that the Petitioner got what he wanted: a sentence that afforded him the opportunity to remain out of prison.

The Petitioner has not met his burden of proof and is not entitled to post-conviction relief on the basis of ineffective assistance of counsel.

CONCLUSION

Based on the foregoing analysis, we affirm the judgment of the post-conviction court.

JOHN EVERETT WILLIAMS, JUDGE