IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL SESSION, 1995

KENNY TABOR,	)	**C.C.A. NO. 03C01-9411-CR-00405**
	)	
Appellant,	)	
	)	
	)	**SULLIVAN COUNTY**
VS.	)	
	)	**HON. EDGAR P. CALHOUN**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-Conviction)

ON APPEAL AS OF RIGHT FROM THE JUDGMENT OF THE CRIMINAL COURT OF SULLIVAN COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Petitioner appeals to this court from a judgment dismissing his petition for post-conviction relief.[1] The petition was based on alleged ineffective assistance of counsel resulting in his pleading guilty to two counts of selling cocaine. The trial court determined that the Petitioner was not entitled to relief. We affirm.

In September 1992, the Petitioner was twice observed selling cocaine to a wired police informant. He was on parole at the time for the felony of selling cocaine. After initially being represented by the Public Defender's Office, he was later represented by other appointed counsel. Counsel met with the Petitioner twice and talked with him over the phone several times before the day of the trial. Counsel also investigated the State's witness, the police informant, by seeing her testify at a different trial and reviewing her criminal record. He told the Petitioner that even though she was subject to impeachment, the jury would probably believe her. He subpoenaed a police officer who had previously prosecuted her to impeach her testimony at trial. Although the Petitioner did not listen to the police tapes, his wife listened to them, identified the voices, and relayed this information to the attorney. The Petitioner authorized his attorney to discuss a possible plea bargain with the State. Counsel procured a plea bargain for a ten-year sentence for each count, to be served concurrently, but the Petitioner would not accept it.

On the day of the trial, Counsel told the Defendant that the State intended to enhance the punishment against him if he was convicted and told him he might end up getting a total of twenty years, depending on the judge's "mood." The attorney told the Petitioner that the State had a good chance of convicting him and that because he was

[1]The pro-se Petitioner filed a "motion for reduction of sentence." The trial court appropriately treated it as a petition for post-conviction relief.

on parole, the sentence would probably be enhanced above the normal eight to twelve year range by consecutive sentences. The Petitioner agreed to plead to the State's offer of two nine-year concurrent sentences. He was afraid of getting the possible twenty years that his attorney had mentioned was a possibility.

During the plea hearing, the judge instructed the Petitioner of the possible ranges of punishment. The Petitioner added no more information to the facts stipulated at the hearing. He indicated to the judge that he was satisfied with his attorney's performance and that he was entering his guilty plea voluntarily.

The test to determine whether or not counsel provided effective assistance at trial is whether or not his performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). Under Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984), there is a two-prong test which places the burden on the appellant to show that (1) the representation was deficient, requiring a showing that counsel made errors so serious that he was not functioning as "counsel" as guaranteed a defendant by the Sixth Amendment, and (2) the deficient representation prejudiced the defense to the point of depriving the defendant of a fair trial with a reliable result. 466 U.S. at 687. To succeed on his claim, the appellant must show that there is a "reasonable probability," which is a probability sufficient to undermine confidence in the outcome that, but for the counsel's unprofessional errors, the results of the proceeding would have been different. Id. at 694. The burden rests on the appellant to prove his allegations by a preponderance of the evidence. Long v. State, 510 S.W.2d 83, 86 (Tenn. Crim. App. 1974). We also do not use the benefit of hindsight to second-guess trial strategy by counsel and criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

In Hill v. Lockhart, 474 U.S. 52 (1985), the Supreme Court applied the Strickland two-part standard to ineffective assistance of counsel claims arising out of the plea process. The Court in Hill modified the "prejudice" requirement by stating that "the defendant 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." On appeal, the findings of fact made by the judge at the evidentiary hearing have the weight of a jury verdict. Vermilye v. State, 754 S.W.2d 82, 84 (Tenn. Crim. App. 1987).

The Petitioner cannot prevail on his appeal because he has failed to show that his counsel's performance was ineffective under prevailing professional standards. Before the scheduled trial, the attorney investigated the State's witness to determine her impeachability and possible effectiveness, and even watched her testify at another trial. He talked with the Petitioner and reviewed the facts of the case and the possible punishment if he was convicted. He played the tapes of the police wire to the Petitioner's wife so that she could identify the voices. With the Petitioner's consent, the attorney sought out a plea bargain with the State, which was not accepted by the Petitioner.

On the day of the trial, counsel was able to work out a second, more favorable plea bargain for his client. He correctly advised the Petitioner he could receive consecutive sentences for each count, possibly twenty years total, if convicted. He advised the Petitioner that the State had a strong case. The Petitioner accepted the plea bargain voluntarily.

Counsel's pretrial research and preparation was satisfactory. He also worked out a favorable plea agreement of nine years for the Petitioner just before the trial which was one year above the minimum sentence. The Petitioner has not shown that in advising his client to accept the plea, his attorney made such serious errors that he

was not functioning as counsel as guaranteed by the Sixth Amendment. The Defendant has not met his burden in proving ineffective assistance of counsel.

The judgment of the trial court is affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

_____
DAVID G. HAYES, JUDGE

_____
JOHN A. TURNBULL, SPECIAL JUDGE