IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER 1995 SESSION

FILED

December 13, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

CEDRIC BEASON,	)	
	)	C.C.A. No. 02C01-9504-CR-00099
Appellant,	)	
	)	Shelby County
V.	)	
	)	Hon. Will Doran, Judge
	)	
STATE OF TENNESSEE,	)	(Post-Conviction)
	)	
Appellee.	)	

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

The petitioner, Cedric Beason, pled guilty pursuant to a "package deal"[1] plea agreement to one count of attempted first degree murder after pleading guilty earlier in the same day to first degree murder and especially aggravated robbery. The petitioner received a fifteen year sentence in the attempted murder conviction and a concurrent life sentence for the earlier convictions. The petitioner subsequently filed a petition for post-conviction relief attacking the validity of his guilty plea to attempted first degree murder.[2] The state did not file a response to the petition which, following an evidentiary hearing, was dismissed by the trial court.

The petitioner brings this appeal alleging that: 1) he was denied the effective assistance of counsel and 2) the guilty plea was not knowing and voluntary. Following our review, we affirm the trial court's dismissal of the petition.

The petitioner's claims are really intertwined in that he argues counsel's ineffectiveness was her failure to fully inform him of his right against self-incrimination. He contends that this failure caused him to involuntarily plead guilty to attempted first degree murder. We disagree.

The appropriate test for determining whether counsel provided effective assistance is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1974). In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that in such a claim the defendant must show

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[1]The assistant district attorney offered petitioner an all or nothing deal. He had the opportunity to plead guilty in two separate cases or go to trial on both. The petitioner opted for the prior.

[2]The petitioner filed a petition for post-conviction relief as to his first degree murder and especially aggravated robbery convictions alleging ineffective assistance of counsel and involuntary guilty plea. Pursuant to Rule 20 of the Tennessee Court of Criminal Appeals, this Court affirmed the trial court's dismissal of the petition. Cedric Beason v. State, No. 02C01-9309-CR-00196 (Tenn. Crim. App. Oct. 26, 1994).

that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Id. at 687.

In order to prove a deficient performance by counsel, a defendant must prove that counsel's representation fell below an objective standard of reasonableness. Strickland, 466 U.S. at 688. A reviewing court must indulge in a strong presumption that counsel's conduct falls within the wide range of professional assistance. Id. at 689. To prove the second element of prejudice, the defendant must show that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Id. at 694.

In Hill v. Lockhart, 474 U.S. 52 (1985) the Supreme Court applied the two-part Strickland standard to ineffective assistance claims arising out of the plea process. However, the Court modified the prejudice requirement by requiring a defendant to show that there is a reasonable probability that, but for counsel's errors, he would not have pled guilty and instead have insisted on going to trial. Id. at 59.

Petitioner testified at the post-conviction hearing that he had not understood his right against self-incrimination. The petitioner claimed that Ed Thompson, who stood in for primary counsel Carolyn Watkins, told him "that basically [he] would just say, yes, sir, to everything that was asked." Petitioner admitted that he responded affirmatively when asked by the trial judge whether he understood his right against self-incrimination but insists he did so only on counsel's advice. He now claims that had he understood his right against self-incrimination he would not have pled guilty and would have insisted on going to trial. He further asserts that he was prejudiced as a result of this action.

Petitioner does not contend that the trial judge's guilty plea colloquy

concerning his constitutional rights was invalid. Instead, he claims that due to counsel's performance, he did not understand his right against self-incrimination. Trial counsel, Carolyn Watkins, testified at the post-conviction hearing that it was a regular practice of her office to discuss with clients their right not to testify or their choice to testify. Given the facts of the present case, counsel felt sure that the petitioner would not have been discouraged from testifying in light of his basically non-existent prior criminal record. The guilty plea transcript reveals that petitioner was questioned twice regarding his privilege against self-incrimination. On both occasions, he gave unequivocal answers that he understood this right.[3]

Petitioner argues briefly that by failing to present the testimony of Ed Thompson, co-counsel, the state failed to rebut the statements made by petitioner regarding his guilty plea. We note that Ms. Watkins was unable to attend the guilty plea hearing but explained Mr. Thompson's substitution at the submission of the guilty plea. Ms. Watkins indicated that she and Mr. Thompson were both assigned to the petitioner's case but that she was the primary counsel. Petitioner's argument has no merit.

Within his argument, the petitioner asserts that he was coerced into pleading guilty due to counsel's repeated advice that the state would likely use an attempted murder conviction to seek the death penalty in the separate first degree murder trial. Therefore, we review counsel's basis for informing the

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[3]The following questions were asked of petitioner during the guilty plea hearing by the trial court and by defense counsel during direct examination:

> THE COURT: And, if you went to trial you could not be compelled to testify and you through your lawyer could cross-examine the witnesses?
>
> [PETITIONER]: Yes, Sir.
>
> *
> *
> *
>
> MR. THOMPSON: [Y]ou would have the right to testify or not testify at trial. If you choose not to testify they couldn't use that against you as evidence of your guilt.
>
> [PETITIONER]: Yes, Sir.

petitioner that the death penalty was a potential punishment.

Counsel testified that when she was assigned to the case she had an initial meeting with the petitioner to discuss the charges and the facts surrounding them. At that meeting the petitioner admitted that he and the victim had had an altercation at a party. He told her that he was driving down a road when shots came from the victim's car. The petitioner admitted that he had fired back into the other vehicle but wanted to assert a self-defense theory at trial. However, when the petitioner's list of witnesses were interviewed, these individuals differed as to who fired the first shot. At that point it became a credibility question for the jury to resolve.

Counsel told the petitioner that, as defense counsel, she had no control over which case was tried first. She explained that if the petitioner chose not to plead guilty, the state's intention was to try the attempted murder case first so as to use the conviction as an aggravating factor in the first degree murder case.[4] As stated above, the state did not give the petitioner the option of going to trial on one case and pleading on the other. Counsel told petitioner that it was an all or none "package deal." Based upon this information we find that counsel properly advised the petitioner of the state's intent to seek the death penalty.

At the plea hearing, the trial court conducted the following relevant discussion with the petitioner:

> THE COURT: You are doing so [pleading guilty] voluntarily? Do you know what voluntarily means?
>
> [PETITIONER]: Yes, Sir.
>
> THE COURT: That you are doing it on your own, freely, nobody is forcing you to do it.

[4]Counsel testified on cross-examination that two factors would have been used by the state in seeking the death penalty -- murder during the perpetration of a felony and prior crime of violence, to wit: the current attempted murder charge. Even though State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992) overturned the use of felony murder as a basis for seeking the death penalty in some circumstances, trial counsel properly advised the petitioner as to the law applicable at the time.

[PETITIONER]: Yes, Sir.

It appears from the record that each answer was given without hesitation. The record does not support a claim that petitioner did not wish to plead guilty, had second thoughts or felt coerced. Certainly, the petitioner was faced with a difficult decision and most likely was under significant pressure. He was to choose whether to go to trial and potentially face the death penalty or plead guilty and receive a substantial sentence. However, we cannot place the blame for petitioner's anxiety on counsel. As counsel stated during the hearing, telling the client the truth does not equate to coercion. The choice was his and from this record we find that it was an informed and voluntary one. This issue is without merit.

The trial judge's findings of fact on post-conviction hearings are conclusive on appeal unless the evidence preponderates otherwise. Butler v. State, 789 S.W.2d 898, 899-900 (Tenn. 1990). This Court may not reweigh or reevaluate the evidence, nor substitute its inferences for those drawn by the trial judge. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). The burden of establishing that the evidence preponderates otherwise is on the petitioner. Id. In the present case, the petitioner has failed to meet his burden.

In conclusion, we do not find that petitioner's counsel was ineffective or that his guilty plea was involuntary. The trial court's dismissal of the petition for post-conviction relief is, in all respects,

AFFIRMED.

PAUL G. SUMMERS, Judge

CONCUR:

DAVID H. WELLES, Judge

WILLIAM M. BARKER, Judge