IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER SESSION, 1995

JERRY BUTLER,	)	**C.C.A. NO. 02C01-9503-CC-00072**
	)	
Appellant,	)	
	)	
	)	**MADISON COUNTY**
VS.	)	
	)	**HON. FRANKLIN MURCHISON**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-Conviction)

ON APPEAL FROM THE JUDGMENT OF THE CIRCUIT COURT OF MADISON COUNTY

FOR THE APPELLANT:

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

This is an appeal pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. After an evidentiary hearing, the trial court denied the Petitioner's request for post-conviction relief from his guilty plea to aggravated sexual battery. We affirm the judgment of the trial court.

Petitioner was indicted on February 27, 1989 for aggravated rape and aggravated sexual battery. His trial was set for May 2, 1989. On April 7, 1989, the Petitioner pleaded guilty to the second count, aggravated sexual battery, in exchange for a sentence of thirty (30) years as a Range II offender to be served at thirty-five (35) percent. The Petitioner filed his petition for post-conviction relief on the grounds that he was denied the effective assistance of counsel and that he did not voluntarily, knowingly, and intelligently enter his guilty plea. The trial court denied the petition stating that the Petitioner did not suffer the abridgment of any right guaranteed by the United States or Tennessee Constitutions.

In this appeal, the Petitioner first argues that he was denied the effective assistance of counsel because his counsel: (1) Allowed the Petitioner to plead to an excessive sentence; (2) allowed the trial court to use the age of the victim to find the offense to be aggravated, punish the Petitioner outside his range, justify an excessive sentence, and find that the "child abuse law" enhanced the Petitioner out of the lower range of sentencing for aggravated sexual battery; and (3) counsel did not inform the Petitioner of his possible eligibility to be sentenced under the 1989 Sentencing Act, which would have been a lesser sentence. The Petitioner also argues that his guilty plea was not entered voluntarily, knowingly, and intelligently.

I.

We first address the Petitioner's ineffective assistance of counsel claims. 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. This test was adopted by the Tennessee Supreme Court in Butler v. State, 789 S.W.2d 898 (Tenn. 1990). 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."

A.

The Petitioner first argues that his trial counsel was ineffective because counsel allowed the Petitioner to plead to an excessive sentence that was outside the sentencing range for which the Petitioner was eligible. The Petitioner argues that the prosecutor set out to have the Petitioner sentenced outside his range. He argues that the prosecutor's statement that there was no Range I sentence for the Petitioner's crime was incorrect and indicative of the prosecutor's intentions.

The Petitioner pleaded guilty to aggravated sexual battery. Aggravated sexual battery, under the law in effect at the time of the crime, was "unlawful sexual contact with a victim by a defendant or unlawful sexual contact with a defendant by a victim accompanied by any of the circumstances listed in § 39-2-603(a)." Tenn. Code Ann. § 39-2-606(a) (Supp. 1988). The circumstance listed in Tennessee Code Annotated section 39-2-603 that was applicable to the case sub judice is that "[t]he victim is less than thirteen (13) years of age." Tenn. Code Ann. § 39-2-603(4) (Supp. 1988). The victim in this case was twelve (12) years old at the time of the offense.

The Petitioner was properly sentenced within Range II. Tennessee Code Annotated section 40-35-107 states that an especially aggravated offense is "a violation of § . . . 39-2-606 . . . ." Tenn. Code Ann. § 40-35-107(5) (Supp. 1987). A defendant who has been found to have committed an especially aggravated offense "shall receive a sentence within Range II." Tenn. Code Ann. § 40-35-107(8) (Supp. 1987). The lower end of a Range II sentence is calculated by adding the minimum sentence plus one-half of the difference between the minimum and maximum sentences. Tenn. Code Ann. § 40-35-109(b) (Supp. 1987). The minimum sentence for sexual battery is five years and the maximum is thirty-five years. Tenn. Code Ann. § 39-2-606(b) (Supp. 1988). Therefore, the minimum sentence for aggravated sexual battery when the victim is under the age of thirteen was twenty years under the 1982 Act. The maximum was thirty-five years. The sentencing range for the Petitioner under the 1982 Act was

twenty to thirty-five years. The Petitioner agreed to a thirty-year sentence. The Petitioner's sentence was not excessive according to the law in effect at the time.

We cannot conclude that trial counsel made an error so egregious as to deny the Petitioner his right to the effective assistance of counsel. Trial counsel advised the Petitioner to agree to a plea bargain in which the more serious count, aggravated rape, was dropped. Therefore, the Petitioner was sentenced only for the aggravated sexual battery. Such advice certainly cannot be considered error.

This issue is without merit.

B.

The second argument the Petitioner submits is that trial counsel was ineffective in allowing the trial court to use the age of the victim to (1) find the offense to be aggravated; (2) punish the Petitioner outside of his range; (3) justify an excessive sentence; and (4) allow a finding that the "child abuse law" enhanced Petitioner out of the lower range of sentencing for aggravated sexual battery.

The trial court correctly sentenced the Petitioner within Range II. Because of the age of the victim, the offense was automatically considered aggravated sexual battery. Tenn. Code Ann. § 39-2-606(a) (Supp. 1988); Tenn. Code Ann. § 39-2-603(4) (Supp. 1988). The trial court did not punish the Petitioner out of his range. Because of the offense, the Petitioner was automatically sentenced as a Range II offender, regardless of his criminal history. Tenn. Code Ann. § 40-35-107(8) (Supp. 1987). The statute mandates that the Petitioner be sentenced as a Range II offender. The thirty-year sentence was offered by the State and accepted by the Petitioner. The trial court did not set the sentence using enhancement factors, but rather accepted the plea

agreement. Therefore, the trial court did not use the victim's age to justify the sentence. The law in effect at the time of the offense was admittedly very harsh on defendants who were guilty of sexual relations with a child under the age of thirteen (13). Because of the age of the victim, the offense was automatically considered to be an especially aggravated offense, which led to the defendant being automatically sentenced as a Range II offender, no matter what his previous history. Such treatment was mandated by statute.

In the case sub judice, the Petitioner was originally indicted for aggravated rape and aggravated sexual battery. Petitioner's trial counsel was able to work out an agreement with the State for the Petitioner to plead guilty to aggravated sexual battery, the State would dismiss the aggravated rape count, and the Petitioner would be sentenced to thirty years, which would be mid-range. Considering that the Petitioner admitted to the offense in a letter to the victim's mother and that he blamed the occurrence on being intoxicated at his guilty plea hearing, the Petitioner received a good bargain. We do not conclude that the Petitioner's trial counsel provided ineffective assistance.

This issue is without merit.

C.

The Petitioner's third reason for claiming he received ineffective assistance of counsel is because his trial counsel did not inform him of the possibility of being sentenced under the Criminal Sentencing Reform Act of 1989 as opposed to the 1982

Act that was in effect at the time. We disagree with the Petitioner's contention that he should have been informed of the possibility of being sentenced under the 1989 Act.

Tennessee Code Annotated section 40-35-117, of the Criminal Sentencing Reform Act of 1989, reads, "Unless prohibited by the United States or Tennessee constitution, any person sentenced on or after November 1, 1989, for an offense committed between July 1, 1982 and November 1, 1989, shall be sentenced under the provisions of this chapter."

In the case sub judice, the Petitioner committed the crime in January of 1989. A trial date was set for May 2, 1989. The Petitioner pleaded guilty on March 28, 1989. To be eligible to have his sentence calculated under the 1989 Act the Petitioner must have been sentenced after November 1, 1989. The Petitioner's guilty plea was entered on March 28, 1989, which date clearly did not fall after the November 1, 1989 date. The Petitioner's trial was set for May 2, 1989. If the Petitioner had been found guilty at trial there is no reason to believe that his sentencing would have occurred after November 1, 1989. If the sentencing had occurred before November 1, 1989, as is very likely, the Petitioner would have been sentenced under the 1982 Act, as he was for his guilty plea.

The failure of trial counsel to inform the Petitioner of the remote possibility that he could be sentenced under the 1989 Act if his sentencing occurred after November 1, 1989, was not an error so serious that trial counsel was not acting as counsel as guaranteed by the Sixth Amendment.

Therefore, this issue has no merit.

II.

The Petitioner also argues that his guilty plea was not entered into voluntarily, knowingly, and intelligently. The Petitioner argues that he did not enter his plea voluntarily, knowingly, and intelligently because he did not know that he was pleading to a punishment outside his range, his counsel allowed the out of range sentence to be imposed, his counsel was ineffective in allowing the age of the victim to be used as an aggravating factor three times, and his counsel failed to advise him of the passage of the 1989 sentencing act.

In Boykin v. Alabama, 395 U.S. 238 (1969), the United States Supreme Court held that the record must show that a guilty plea was made voluntarily, understandingly, and knowingly. Id. at 242. In State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), the Tennessee Supreme Court imposed stricter standards than the standards mandated in Boykin:

> A. Before accepting a plea of guilty, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> > (1) The nature of the charge to which the plea is offered, and the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and, if applicable, that a different or additional punishment may result by reason of his prior convictions or other factors which may be established in the present action after the entry of his plea; and
> >
> > (2) If the defendant is not represented by an attorney, that he has a right to be represented by an attorney at every stage of the proceeding against him, and if necessary, one will be appointed to represent him; and
> >
> > (3) That he has a right to plead not guilty or to persist in that plea if it has already been made, and, that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

> (4) That if he pleads guilty, there will not be a further trial of any kind except to determine the sentence so that by pleading guilty he waives the right to a trial; and
>
> (5) That if he pleads guilty, the court or the state may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement, and, further that upon the sentencing hearing, evidence of any prior convictions may be presented to the judge or jury for their consideration in determining punishment.
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> B. The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty results from prior discussions between the District Attorney General and the defendant or his attorney.
>
> C. Notwithstanding the acceptance of a plea of guilty, the court shall not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.
>
> D. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty, the record shall include, without limitation, (a) the court's advice to the defendant, (b) the inquiry into the voluntariness of the plea including any plea agreement and into the defendant's understanding of the consequences of his entering a plea of guilty, and (c) the inquiry into the accuracy of a guilty plea.

Id. at 341.

In State v. Neal, 810 S.W.2d 131 (Tenn. 1991), our supreme court stated that the purpose for these guidelines is to "seek to insulate guilty pleas from coercion and relevant defendant ignorance. They are designed to insure that guilty pleas are voluntary and knowing." Id. at 135. The Petitioner's arguments concerning whether his guilty plea was voluntarily, knowingly, and intelligently made are directly related to his arguments of ineffective assistance of counsel, which we have rejected. The Tennessee Supreme Court has stated:

> For the plea to be acceptable it must be voluntary. That does not mean that the defendant would want to plead guilty if he or she had

> the option available to go free. The option available is to go to trial, with its uncertainties, or to plead guilty. The knowledge that is most relevant to this decision of the accused pertains to the rights that are available to him or her upon a trial that are given up by pleading guilty.

Id.

The purpose of an appellate court when reviewing whether a defendant has made a voluntary, knowing, and intelligent plea is to ensure that the defendant has willingly waived those rights guaranteed him through the Constitution, that would be available to him if he went to trial, with no hint of improper coercion. The arguments made concerning this issue were addressed in the Petitioner's challenge to the effectiveness of his trial counsel. We concluded that these issues had no merit. They are also without merit when considering whether the Petitioner made a voluntary, knowing, and intelligent guilty plea.

We have reviewed the hearing of the trial court where the Petitioner pleaded guilty. The trial court was very clear in explaining the charge the Petitioner was pleading guilty to and the maximum and minimum sentence for the charge. The trial court also thoroughly explained the rights being waived by the Petitioner. The Petitioner replied that he understood all this information and agreed with the synopsis of the offense as stated by the prosecutor. We conclude that the Petitioner's guilty plea was voluntarily, knowingly, and intelligently made.

Therefore, this issue is without merit.

We agree with the trial court's denial of the Petitioner's request for post-conviction relief. The judgment of the trial court is affirmed.

DAVID H. WELLES, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JOHN H. PEAY, JUDGE