IN THE COURT OF CRIMINAL APPEALS

AT JACKSON

OCTOBER 1995 SESSION

TERRY L. HICKS, JR.,	)	NO. 02C01-9503-CC-00071
	)	
Appellant	)	MADISON COUNTY
	)	
V.	)	HON. JOHN FRANKLIN MURCHISON
	)	JUDGE
STATE OF TENNESSEE,	)	
	)	(Post-Conviction - Voluntary
Appellee	)	Manslaughter)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

This is an appeal by Terry L. Hicks, Jr. from the dismissal of his post-conviction relief petition by the Circuit Court of Madison County.

The appellant was indicted for first degree murder and possession of a deadly weapon with the intent go armed. At the time the indictment was returned, the appellant was facing a felony drug charge as well. Ultimately, the appellant pled guilty to the offense of voluntary manslaughter. As part of the plea agreement the appellant was sentenced to a term of imprisonment of ten (10) years as a standard Range I offender and the drug charge was reduced to a misdemeanor.[1] At the time the appellant was sentenced, the maximum sentence upon a conviction of voluntary manslaughter as a standard Range I offender was six (6) years.

The appellant filed his petition for post-conviction relief in which he alleged that his guilty plea was not knowingly and voluntarily entered, the sentence imposed was both excessive and illegal, and he was denied the effective assistance of counsel when he was advised to take a sentence which was outside of the range for the offense for which he was convicted. The trial court appointed counsel for the appellant, held an evidentiary hearing, and thereafter dismissed the petition for post-conviction relief.

The appellant claims that his guilty plea was not voluntarily, knowingly, and intelligently made because his trial counsel failed to inform him that the law under which he was sentenced did not provide for a ten-year sentence. [2] The 1989 Sentencing Reform Act under which the appellant was sentenced provided a maximum six-year (6) sentence for a Range I standard offender convicted of voluntary

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[1] The record does not reveal the disposition of the weapon charge. However, the appellant states in his brief that the charge was dropped as part of the plea agreement.

[2] The appellant does not contend that his guilty plea was entered without understanding the waiver of the privilege against compulsory self-incrimination, the right to a jury trial, and the right to confront his accusers as contemplated by Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L. Ed. 2d 274 (1969) and State v. Mackey, 553 S.W.2d 337 (Tenn. 1977).

manslaughter. The appellant claims not to have known that he was agreeing to a sentence greater than the maximum penalty within the range.

Appellant's trial counsel testified that he explained to the appellant that he would be pleading to a sentence outside of the range as part of the plea agreement and in exchange the State would reduce the charge from first-degree murder to voluntary manslaughter. The trial court obviously accredited the testimony of appellant's trial counsel over that of the appellant. The evidence more than sufficiently showed that the appellant knew that in exchange for his plea of guilty to a reduced charge, his sentence was to be beyond the range in which his crime fell. Accordingly, we conclude that the trial court properly refused to grant relief to the petitioner on the question of whether he knowingly, voluntarily, and intelligently entered a plea of guilty to the charge of voluntary manslaughter. See State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983) (trial court's factual findings "are conclusive on appeal unless the evidence preponderates against the judgment").

The appellant contends that this court should conduct a de novo review of the "excessive" sentence imposed in his case. In State v. Terry, 755 S.W.2d 854, 855 (Tenn. Crim. App. 1988), this court was faced with a similar case. In Terry, the defendant pled guilty to kidnaping and agreed to a ten-year (10), Range I standard offender sentence. At the time of the plea, the Range I penalty for kidnaping was a sentence of not less than two (2) nor more than six (6) years. This Court held that because the sentence of ten (10) years was within the statutory penalty for kidnaping, although outside of the penalty for Range I, the sentence was not illegal. Further, we held that "[a]ny irregularity as to classification or release eligibility was waived by the plea of guilty knowingly and voluntarily entered." Id.; see also State v. Mahler, 735 S.W.2d 226 (Tenn. 1987). In the case at bar, the ten-year (10) sentence was within the statutory range for voluntary manslaughter. The maximum penalty for voluntary manslaughter is fifteen (15) years. However, as the appellant correctly notes, the

maximum penalty for voluntary manslaughter as a Range I, standard offender is six (6) years. As in Terry, we hold that the appellant's right to complain about any irregularity in this sentence was waived by the plea of guilty which was knowingly and voluntarily entered.

Next appellant contends that he was denied the effective assistance of counsel because his attorney advised him to accept a plea agreement which included the imposition of a sentence which was greater than the maximum sentence allowed within the range.

In reviewing appellant's Sixth Amendment claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To prevail on a claim of ineffective counsel, appellant must show that counsel's representation fell below an objective standard of reasonableness and that this performance prejudiced the defense. The appellant, charged with first degree murder, possession of a deadly weapon with the intent to go armed and felony drug possession, faced a possible sentence of life in prison if he had gone to trial and been found guilty. The hearing revealed that the appellant had virtually no evidence to support a defense to the charges brought against him. We agree with the trial court that appellant's trial counsel ably represented the appellant by securing a ten-year (10) sentence for the appellant under the circumstances. Having failed to establish that his counsel's representation fell below the standard required, the trial court properly denied post-conviction relief to the appellant on grounds of ineffective assistance of counsel.

Accordingly, the judgment of the trial court is affirmed.

WILLIAM M. BARKER, JUDGE

CONCUR BY:

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JOE B. JONES, JUDGE

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PAUL G. SUMMERS, JUDGE