

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON
DECEMBER 1995 SESSION

FILED
May 17, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

CALVIN FIGGURES,)
)
Appellant,)
)
VS.)
)
STATE OF TENNESSEE,)
)
Appellee.)

C.C.A. NO. 02C01-9504-CC-00114
MADISON COUNTY
HON. FRANKLIN MURCHISON,
JUDGE
(Post-Conviction)

FOR THE APPELLANT:

FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,
Judge

OPINION

In September of 1989, the petitioner was convicted at a jury trial of possession with intent to sell and/or deliver more than thirty grams of cocaine. The trial court sentenced him to forty years imprisonment at Range II. His conviction and sentence were affirmed by this Court on direct appeal. See State v. Calvin Figgures, C.C.A. No. 2, Madison County (Tenn. Crim. App. filed January 23, 1991, at Jackson). The petitioner later filed for post-conviction relief alleging that his trial counsel was ineffective. After an evidentiary hearing on November 22, 1994, the trial court denied the petition. We affirm the judgment of the trial court.

In the petition for post-conviction relief, the petitioner contends that his trial counsel was ineffective for (1) failing to discuss with him the possible sentence he might receive if convicted as opposed to the State's plea offer; (2) failing to advise him concerning the State's Notice for Enhanced Punishment; and, (3) failing to file a Motion for Re-Sentencing or Reduction of Sentence. At the hearing on the post-conviction petition, the petitioner testified that his trial attorney, Ms. Marcus Reaves, had brought the State's plea offer of twenty-five years to him. He commented that twenty-five years was "a lot of time." According to the petitioner, Reaves agreed with him and advised him not to accept the State's plea offer. Based on his trial counsel's advice, the petitioner declined the State's plea offer and proceeded to trial, where he was eventually convicted and sentenced to forty years.

The petitioner testified further that, prior to trial, Reaves had not discussed the possible sentence he might receive should he be convicted. Furthermore, Reaves did not advise the petitioner regarding the State's Notice for Enhanced Punishment.

According to the petitioner, they never discussed what significance his prior convictions would have at sentencing. The petitioner testified that had he been fully advised of his situation, he would have accepted the State's plea offer of twenty-five years rather than proceed to trial.

In addition, because the trial court denied the petitioner's request for a continuance at the sentencing hearing, he was unable to present testimony from character witnesses who were absent on that day. According to the petitioner, Reaves told him that she would file a Motion for Re-Sentencing so that he could present the testimony of his absent character witnesses. Reaves, however, never filed the motion.

Marcus Reaves testified that she had visited the petitioner to discuss his case at least ten times. On one of those visits, she took the State's plea offer to the petitioner. She explained that the sentencing range for the crime was ten years to life and, because of his prior convictions, his sentencing range would be thirty-five years to life if he were convicted. According to Reaves, she fully discussed the State's Notice for Enhanced Punishment with the petitioner. She informed him that, because of the Notice for Enhanced Punishment, the State could mention his prior convictions if he chose to testify at trial, and his prior convictions could be used to enhance his sentencing range if he were convicted. The petitioner stated that he wanted to proceed to trial because he was not guilty.

Once the petitioner had been convicted, the trial judge set the date for the sentencing hearing in late September, 1989. Reaves requested a continuance so that the petitioner could present additional character testimony from absent witnesses. The trial judge denied the request for a continuance and sentenced the petitioner to forty

years, but informed the petitioner that he would entertain a motion for resentencing on October 26, 1989, provided that the petitioner had affidavits from the character witnesses who were out of the state. According to Reaves, the petitioner stated that he would procure the affidavits. Reaves was unable to file a motion for re-sentencing by October 26, 1989, because the petitioner never acquired the affidavits.

At the conclusion of the testimony in the hearing on the post-conviction petition, the trial court denied the petition. The trial court specifically found that Reaves had advised the petitioner of the State's plea offer and of what his sentencing range would be if he were convicted. In addition, the trial court found that Reaves had indeed informed the petitioner regarding the State's Notice for Enhanced Punishment and the effect the notice would have upon his trial and sentence. Furthermore, the trial court stated that Reaves was not at fault for the petitioner's failure to acquire affidavits for his out-of-state character witnesses. Based on all the evidence presented at the hearing on the post-conviction petition, the trial court concluded that Reaves' performance was within the level of competence demanded of attorneys in criminal cases.

"In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his [or her] petition by a preponderance of the evidence." McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the factual findings of the trial court in hearings "are conclusive on appeal unless the evidence preponderates against the judgment." State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983).

In reviewing the petitioner'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, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. There must be a reasonable probability that but for counsel's error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985).

From our review of the entire record, we can only conclude that the evidence does not preponderate against the findings of the trial court. After hearing all of the testimony and judging the credibility of the witnesses, the trial court found that Reaves had advised the petitioner regarding his potential sentencing range as well as the significance of the State's Notice for Enhanced Punishment and that Reaves was not at fault for the petitioner's failure to obtain affidavits as he had promised. The trial court was essentially faced with a credibility contest and resolved that contest against the petitioner. We find that the record fully supports the trial court's decision. As a result, we conclude that the petitioner has failed to demonstrate that his trial counsel's representation fell below the level of competence demanded of attorneys in criminal cases.

For the reasons set out in the foregoing discussion, the judgment of the trial court is affirmed.

JOHN H. PEAY, Judge

CONCUR:

GARY R. WADE, Judge

DAVID H. WELLES, Judge