

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1996 SESSION

<p><b>FILED</b></p> <p><b>September 30, 1996</b></p> <p><b>Cecil W. Crowson</b> Appellate Court Clerk</p>
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JOHNNY E. FOSTER,	)	NO. 01C01-9510-CC-00342
	)	
Appellant	)	COFFEE COUNTY
	)	
V.	)	HON. JOHN W. ROLLINS, JUDGE
	)	
STATE OF TENNESSEE	)	(Post-Conviction)
	)	
Appellee	)	

FOR THE APPELLANT

FOR THE APPELLEE

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OPINION FILED: \_\_\_\_\_

AFFIRMED

William M. Barker, Judge

OPINION

This is an appeal as of right from the Coffee County Circuit Court's dismissal of appellant's post-conviction relief petition. Appellant claims that he was denied the effective assistance of counsel in violation of both the United States Constitution and the Tennessee Constitution. Appellant also claims that he involuntarily entered a plea bargain agreement with the State of Tennessee and that therefore his right against self-incrimination under the United States Constitution was violated.

We find that there is no merit to appellant's claims and accordingly affirm the trial court's dismissal of appellant's petition.

On November 16, 1993, the appellant pled guilty to robbery and evading arrest in the Coffee County Circuit Court. He was sentenced to ten years imprisonment as a Range II multiple offender in the Tennessee Department of Correction (TDOC) for his robbery conviction, and eleven months and twenty-nine days in the Coffee County Jail for his evading arrest conviction, both sentences to be served concurrently.

On July 21, 1994, the appellant filed his post-conviction petition attacking those convictions. The trial court appointed appellant new counsel and held evidentiary hearings on May 17 and July 28, 1995.

In his post-conviction petition appellant claimed that his former appointed counsel was ineffective because she allowed him to plead guilty under a plea bargain agreement that he had not bargained for. Appellant further claimed that his guilty plea was involuntary because he accepted the plea without fully understanding its ramifications.

Appellant was indicted on July 14, 1993 for charges of robbery and evading arrest. Before the case went to trial the prosecution offered appellant a plea bargain agreement under which he would serve ten years in the TDOC. Appellant accepted the plea bargain agreement, but he claims that he conditioned his acceptance on his belief that he would be able to serve his sentence in the Coffee County Jail instead of in the TDOC. Appellant further claims that his counsel advised him that she had reached an agreement with the Coffee County Sheriff and the District Attorney that he

would be able to serve his sentence at the Coffee County Jail, and that but for this advice appellant would not have accepted the plea bargain agreement. After the plea acceptance hearing, appellant was transported to a TDOC facility to complete a previously imposed sentence and to serve the newly imposed ten year robbery sentence.

Following an evidentiary hearing, the post-conviction court dismissed the petition, finding that the appellant had failed to establish by the preponderance of the evidence that he had been denied the effective assistance of counsel and that his guilty plea had been involuntary. We agree.

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The Ineffective Assistance of Counsel Claim

In reviewing the 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 competency 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 plea process. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694, 104 S.Ct. 2052, 2064, 2067-68, 80 L.Ed. 674 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985). To satisfy the requirement of prejudice, he would have had to demonstrate a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. See Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370, 88 L.Ed. 203 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim App. 1991).

The appellant testified at the post-conviction hearing that his former counsel advised him that even though he was pleading to a ten year prison sentence in the TDOC, that he would be able to serve his sentence in the Coffee County Jail. The post-conviction court's findings do not support such a claim. The post-conviction court found that appellant's former counsel did not make any errors that constituted

ineffective assistance of counsel. The transcript of the guilty plea hearing clearly reflects that the sentence imposed was announced in open court to be served by the appellant in the penitentiary. Further, appellant's claim that his former counsel told him that he would be able to serve his time in the Coffee County Jail is without merit, because even though it may have appeared to appellant as if some kind of agreement had been reached with the Coffee County Sheriff to keep appellant in the Coffee County Jail, his former counsel repeatedly told him that it would be impossible under Tennessee law for a judge to sentence anybody to a ten year prison term in a county jail. See Tenn. Code Ann. § 40-35-314 (Supp. 1995). Therefore, we agree with the post-conviction court and conclude that appellant's former counsel's representation was objectively reasonable and that the appellant has failed to meet his burden of establishing by a preponderance of the evidence that he was prejudiced by his former counsel's advice.

#### The Involuntary Guilty Plea Claim

In reviewing an involuntary guilty plea claim this Court would ordinarily analyze the relevant facts under the standard announced in State v. Neal, 810 S.W.2d 131(Tenn. 1991) and clarified in Johnson v. State, 834 S.W.2d 922 (Tenn. 1992). In this case, however, appellant has alleged no constitutional violations that would warrant a reversal due to an involuntary guilty plea. Instead, the appellant has alleged that his guilty plea was involuntary because he was under the impression that he might be able to serve his prison term in the Coffee County Jail as opposed to in the TDOC. This claim, as has been previously discussed, is without merit since appellant's counsel repeatedly informed him that such a sentence could not be carried out under Tennessee law.

Accordingly, the post-conviction court's denial of the post-conviction relief petition is affirmed.

WILLIAM M. BARKER, JUDGE

CONCUR BY:

GARY R. WADE, JUDGE

JOSEPH M. TIPTON, JUDGE