IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
JANUARY SESSION, 1997

FILED

July 18, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

GREGORY CUMMINGS,	)	
	)	**No. 02C01-9601-CR-00020**
Appellant	)	
	)	**SHELBY COUNTY**
vs.	)	
	)	**Hon. L. T. LAFFERTY, Judge**
STATE OF TENNESSEE,	)	
	)	**(Post-Conviction)**
Appellee	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Gregory Cummings, appeals the denial of his petition for post-conviction relief by the Shelby County Criminal Court. The appellant raises two related issues on appeal (1) the effective assistance of counsel and (2) the voluntariness of his guilty pleas, i.e. whether his guilty pleas were a voluntary and informed choice based upon advice supplied by trial counsel.

After a review of the record, we affirm the post-conviction court's judgment.

BACKGROUND

In this appeal, the appellant collaterally attacks his six guilty pleas which were entered on January 28, 1993. The judgments entered by the trial court reflect the following convictions: aggravated robbery, robbery, three counts of attempted first degree murder, and first degree murder. The appellant is currently serving a life sentence for these convictions.

The facts which form the basis for the six convictions established that the appellant and a co-defendant, the appellant's brother, committed an armed robbery upon a female at a Memphis business. During the robbery, two men arrived to assist the female. However, one was shot in the chest and killed, and the other was shot in the shoulder. While in pursuit of the wounded man, the appellant continued firing, nearly striking two bystanders. The defendants fled on foot from the crime scene, robbing another victim of her automobile a short distance away.

After the Grand Jury returned indictments on the above offenses, the State gave notice of its intent to seek the death penalty against the appellant. (Five witnesses identified the appellant as the person who did the shooting.) The State refused to sever the co-defendant's case and offered a sentence of 25 years for the co-defendant and an effective life sentence for the appellant. Both entered guilty pleas pursuant to the plea agreement.

At the post-conviction hearing, the appellant testified that he wanted to go to trial but his trial counsel coerced him into pleading guilty. Regarding the ineffective assistance claim, the appellant contends that trial counsel failed to discuss with him the results of any investigation, failed to obtain discovery, and failed to file a motion to sever his case from that of his co-defendant. At the conclusion of the hearing, the post-conviction court denied relief finding the appellant had failed to carry his burden of proof.

ANALYSIS

When an appeal challenges the Sixth Amendment right to effective assistance of counsel, the appellant has the burden of establishing that the advice given or services rendered by the attorney fell below the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Under Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (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 or she 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 appellant of a fair trial with a reliable result. Prejudice is shown by

demonstrating a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 693, 104 S.Ct. at 2068. This two part standard of measuring ineffective assistance of counsel also applies to claims arising out of the plea process. Hill v. Lockhart, 474 U.S. 52, 57, 106 S.Ct. 366, 370 (1985). The prejudice requirement is modified so that the petitioner "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." Id. at 59, 106 S.Ct. at 370. Under the Strickland test, a reviewing court's scrutiny "must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence. . . .", Strickland, 466 U.S. at 659, 104 S.Ct. at 2065. In fact, a petitioner challenging his counsel's representation faces a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. . . ." Id. at 689, 104 S.Ct. at 2065.

In a petition for post-conviction relief, the petitioner must establish his or her allegations by a preponderance of the evidence. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983) (citing Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978)). Furthermore, the findings of fact made by a trial judge in post-conviction hearings are conclusive on appeal unless the appellate court finds that the evidence preponderates against the judgment. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

First, the appellant contends that counsel was ineffective for failing to file appropriate motions, including a specific request for a motion to sever. Furthermore, the appellant contends that trial counsel failed to keep him apprised as to the results of any investigation. The record reflects that trial counsel filed twenty-one motions on behalf of the appellant. Counsel admitted that no motion for severance of the appellant's case from that of his brother's

was made because the State was strongly opposed to any such motion. Moreover, irrespective of the State's position, there is nothing before us that even suggests that trial counsel would have been successful in obtaining the requested severance. The charges against both arise from the same criminal episode and no Bruton claim was made. See Rule 14(c)(2)(1), Tenn. R. Crim. P. Regarding the claim of deficient performance, the post-conviction court found: "Trial counsel] has been practicing law since 1973 and has represented many persons in criminal cases. . . . The proof is overwhelming that the petitioner has failed to convince this court that [counsel] violated the mandates of Baxter v. Rose. . . ." We agree. This claim is without merit.

The appellant next contends that his guilty pleas were involuntary due to trial counsel's ineffectiveness. He argues that he was forced into pleading guilty because the ineffectiveness of his counsel left him with no other alternative. In North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164 (1970), the United States Supreme Court held, "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." In evaluating the knowing and voluntary nature of the appellant's pleas, this court must look to the totality of the circumstances. State v. Turner, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995), perm. to appeal denied, (Tenn. 1996). See also Chamberlain v. State, 815 S.W.2d 534, 542 (Tenn. Crim. App. 1990), perm. to appeal denied, (Tenn. 1991). We may consider any relevant evidence in the record of the proceedings, including post-conviction proceedings. Id.

> [A] court charged with determining whether ... pleas were "voluntary" and "intelligent" must look to various circumstantial factors, such as the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advise from counsel and the court concerning the charges against

> him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993).

Equally important to our review is an examination of the appellant's responses to questions posed by the trial court at the guilty plea hearing of January 28, 1993. In State v. Neal, 810 S.W.2d 131 (Tenn. 1991), our supreme court stated that the purpose for providing the *advice litney*, as required by State v. Mackey, 553 S.W.2d 337 (Tenn. 1977) and Rule 11, Tenn. R. Crim. P., is 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. At the guilty plea hearing, the appellant, while under oath, stated to the sentencing court that he was neither threatened, forced, nor coerced into pleading guilty. Moreover, the appellant informed the sentencing court that he was "satisfied with [trial counsel's] investigation, preparation, and presentation." We do not accept these statements as hollow expressions which, as the appellant argues, should simply be ignored. We agree with the post-conviction court's findings that: "The evidence is clear and convincing that after weighing all factors, the petitioner entered pleas of guilty freely and voluntarily. . . ." This issue is without merit.

Accordingly, we affirm the judgment of the post-conviction court.

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DAVID G. HAYES, Judge

CONCUR:

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JOE B. JONES, Presiding Judge

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THOMAS T. WOODALL, Judge