IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

MAY 1995 SESSION

FILED

September 27, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

KELVIN SANDERS,	)	
	)	**C.C.A. NO. 02C01-9411-CV-00260**
Appellant,	)	
	)	**McNAIRY COUNTY**
VS.	)	
	)	**HON. JOE H. WALKER,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post Conviction)

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I ON

The petitioner was convicted by a McNairy County jury in case number 338 for the sale of cocaine and received an eight year sentence. This conviction was affirmed by this Court on appeal. During the appeal of that case the petitioner was indicted in case numbers 495, 496, 497, 499, and 502 for the sale of cocaine to which he plead guilty to four of those charges and received concurrent nine year sentences to run consecutively to the conviction in case number 338.[1] The other two indictments were dismissed. The petitioner filed a pro se petition for post-conviction relief in February, 1994, and an amended petition was filed in March, 1994. Counsel was appointed and a second amended petition was filed by counsel. After an evidentiary hearing, the trial court dismissed the petition in August ,1994, and the petitioner appeals from that order.

In this appeal as of right, the petitioner asserts that the trial court erred in dismissing his petition for post-conviction relief by holding that he received effective assistance of counsel. Specifically, the petitioner presents five sub-issues on his claim of ineffective assistance of counsel:

> a) defense counsel was ineffective due to his failure to take necessary action to insure that the petitioner would have a fair trial, one involving an impartial jury of his peers, in case number 338;
>
> (b) defense counsel were ineffective (in case numbers 495, 496, and 497) due to their failure to inform the petitioner of the meaning of consecutive sentences and that consecutive sentencing was involved in his guilty pleas;
>
> c) defense counsel failed to adequately investigate the facts, interview the petitioner and witnesses, review the discovery materials prior to trial, and develop or prepare a proper defense;
>
> d) defense counsel were ineffective in their failure, at sentencing, to present proof of mitigating factors or to seek relief from a harsh sentence of seventeen years; and

[1] One of the indictments contained two counts.

e) counsel were ineffective in allowing the petitioner to enter pleas of guilty knowing that such pleas were not the voluntary and intelligent choice of the petitioner.

The facts presented at the hearing on the post-conviction petition reveal that the petitioner was convicted in case number 338 for the sale of cocaine, and that he was represented by Mr. D.D. Maddox in that case. Mr. Maddox also represented the petitioner in case number 496, which was one of several charges the petitioner received while case number 338 was on appeal. Although Mr. Maddox never talked with the petitioner about the other cases, he was the one who worked out the guilty pleas on all of the pending indictments.

The plea agreement stipulated that case numbers 499 and 502 be dismissed in exchange for the petitioner's guilty pleas in case numbers 495 (two counts), 496 and 497. The petitioner received concurrent nine year sentences on all four charges which were ordered to run consecutively to the eight year sentence he had received in case number 338, giving him an effective sentence of seventeen years for the five convictions. The petitioner was represented by Mr. Ken Seaton in case number 495 and Mr. Joe Hailey, who is in partnership with Mr. Seaton, in case number 497. It is unclear from the record if counsel had been appointed in case numbers 499 and 502 before they were dismissed.

The petitioner's complaint is with all three attorneys who represented him. He testified that he felt Mr. Maddox's representation at trial had been ineffective because he did not call Ms. Regina Newsom to rebut a State witness who allegedly lied. He also charges that Mr. Maddox was ineffective because he did not review the jury list with him; as it turned out, there were no African-Americans on the jury, and the petitioner is African-American. He was displeased with Mr. Seaton's representation because counsel did not review the evidence or discuss the case with him. He claims that he only spoke

with Mr. Seaton a total of thirty minutes through the cell door flap. The petitioner testified that Mr. Hailey's assistance was ineffective because he had never discussed the case strategy with him. However, the record reveals that Mr. Hailey did review the discovery with the petitioner and that he met with the petitioner several times. The petitioner complains that none of his attorneys ever mentioned the possibility of asking the court for a suspended sentence or community corrections. Mr. Hailey was present with Mr. Maddox on the day of the guilty pleas and did complete the requisite forms for case numbers 495 and 497.

In his first ineffective assistance of counsel claim, the petitioner contends that Mr. Maddox was ineffective due to his failure to ascertain the racial composition of the jury before trial and his failure to file a written, pretrial motion to quash the jury venire. 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).

The testimony of Mr. Maddox indicates that he moved to dismiss the panel after he realized on the morning of the trial that the panel included only two African-Americans. He testified that the reason he did not know this prior to the morning of the trial was because the jury list he had received did not specify the race of the members of the panel. The petitioner asserts that the African-American population of McNairy

County where he was tried is seven to eight percent and that he does not need to show that racial bias was present in the jury selection process. Instead, the petitioner believes he must only show that the issue of racial bias was not raised properly before trial as required under Tennessee law.

Although the selection of a jury panel from a representative cross-section of the community is an essential component of the Sixth Amendment right to a jury trial,[2] we believe the defendant is confused as to his burden of proof and the law regarding the fair cross-section requirement. A jury venire does not have to be a perfect mirror of the community or accurately reflect the proportionate strength of every identifiable group in the community. Swain v. Alabama, 380 U.S. 202 (1965); State v. Blunt, 708 S.W.2d 415, 417 (Tenn. Crim. App. 1985). A showing of systematic exclusion of a group is necessary to demonstrate a constitutional infirmity in a jury. Blunt, 708 S.W.2d at 417; See Taylor, 419 U.S. at 530. In the case at bar there has been no showing of the systematic exclusion of a group, specifically of African-Americans. In order for the petitioner's ineffective assistance claim to stand under Strickland, there must be evidence of prejudice stemming from an omission of counsel. Since the petitioner has not met this burden, this claim of ineffective assistance of counsel is without merit.

In his second claim of ineffective assistance of counsel the petitioner contends that none of his counsel informed him that the nine year sentence for the charges in case numbers 495, 496 and 497 would be served consecutively to the eight year sentence in case number 338 which was on appeal when he entered his guilty pleas. He further asserts that had he known the sentences were to be served consecutively, he would not have plead guilty. As stated previously, when making an ineffective assistance claim, the petitioner must prove that counsel's performance fell

[2] See Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

below an objective standard of reasonableness and that the petitioner was prejudiced by the defense. Strickland v. Washington, 466 U.S. at 668. However, where a guilty plea is involved, there are additional requirements the petitioner must fulfill in order to prove the prejudice prong of the Strickland test. 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 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991).

The facts presented at the post-conviction hearing do not support the petitioner's allegation. At the post-conviction hearing, Mr. Maddox testified that he told the petitioner that his sentence would be served consecutively to the one he received in case number 338. Mr. Seaton, petitioner's counsel in case number 495, testified that he had probably informed the petitioner of the possibility of consecutive sentences. Mr. Hailey testified that he had definitely discussed the issue of consecutive sentencing with the petitioner. He also testified that the petitioner had not seemed worried about the possibility of consecutive sentences because he thought his prior conviction would be overturned on appeal. Moreover, the petitioner himself testified that his attorneys had possibly explained this issue to him. Furthermore, the trial court explained the issue of consecutive sentencing to the petitioner in detail at the guilty plea hearing. From these facts, it is evident to this Court that the petitioner was informed about the possibility of receiving consecutive sentences. This issue is, therefore, without merit.

The petitioner argues in his third claim of ineffective assistance of counsel that both Mr. Seaton and Mr. Maddox failed to investigate the facts of his case and adequately prepare for trial. Specifically, he asserts that Mr. Seaton did not investigate the facts of his case or develop a defense strategy and that Mr. Maddox failed to

interview a key witness to his defense in case number 338.

Mr. Seaton testified that the reason he had not spent much time investigating the petitioner's case was because he had been told that the case would not be tried during that term of court. He did speak with the undercover officer on the case and with the district attorney general about the facts of the case. He stated that he had then given the petitioner a summary of the facts of the case. He also stated that he knew his law partner, Mr. Hailey, had been speaking with the petitioner about the consequences of going to trial. He testified that he had not had any discussions about a plea offer with the petitioner, but was aware of discussions of an offer between the State, Mr. Maddox and Mr. Hailey. Mr. Seaton was not present the day the petitioner entered his pleas because he was out of town.

Nothing in these facts rises to the level of ineffective assistance as required by Strickland. Counsel's representation of the petitioner, given that the case was not supposed to go to trial until the next court term, did not fall below an objective standard of reasonableness, nor has any prejudice to the defense been proven. Although the petitioner testified that there was a possibility he would not have entered his pleas had he been more informed of the facts of case number 495, this statement does not rise to the standard of Hill which requires that the petitioner show a reasonable probability that he would not have pled guilty and insisted on going to trial. Hill v. Lockhart, 474 U.S. at 59. Instead, the petitioner testified that he entered the plea because he knew that it was a "good deal" for the charges against him and because two of the indictments had been dismissed. Thus, the record does not support the petitioner's assertion that Mr. Seaton's assistance was ineffective with regard to his preparation of the case.

With regard to Mr. Maddox's representation, the petitioner has failed to

carry his burden here as well. The petitioner testified that he felt Ms. Regina Newsom should have been called as a rebuttal witness to the State's witness, Mr. Wallace. The petitioner felt that Ms. Newsom's testimony concerning the fact that both the petitioner and Mr. Wallace were dating her would prove bias on the part of Mr. Wallace. Tennessee law is well established that a decision of counsel relating to a choice of trial or appellate strategy, even if improvident, cannot form the basis of an ineffective assistance of counsel claim. Williams v. State, 599 S.W.2d 276, 280 (Tenn. Crim. App. 1980). Therefore, counsel's choice not to call Ms. Newsom as a witness is an insufficient ground on which the petitioner bases his claim of ineffective assistance of counsel. Furthermore, even if counsel's failure to call this witness did prejudice the petitioner, he failed to call Ms. Newsom at the post-conviction hearing to show the content of her potential testimony, and under Tennessee law, the petitioner is not entitled to relief for this omission. Black v. State, 794 S.W.2d 752, 757-758 (Tenn. Crim. App. 1990).

In his fourth claim the petitioner argues that Mr. Maddox was ineffective in failing to present proof of mitigating factors at the sentencing hearing in case number 338. He also asserts that all of his attorneys should have requested that he be given a suspended sentence or placed on community corrections. Testimony at the post-conviction hearing indicates that mitigating proof was presented at the plea submission. Specifically, evidence of the petitioner's lack of a criminal record, his good standing in the community, and the fact that he owned his own business was submitted to the trial court. This is the same proof the petitioner argues was not presented. Thus, there was no omission by trial counsel and no prejudice to the petitioner as he received the minimum sentence of eight years anyway.

As to his claim that his attorneys should have requested a suspended sentence or community corrections, this argument is also without merit as there has been

no evidence offered by the petitioner that he would have been a good candidate for community corrections or probation. The defendant was not a candidate for a suspended sentence under T.C.A. § 40-35-303(a) because he received a sentence of greater than eight years. Furthermore, the mitigating factors that he contends made him a good candidate for community corrections were submitted to and considered by the trial court during sentencing. The Community Corrections Act of 1985 establishes a community based alternative to incarceration for certain offenders and sets out the minimum eligibility requirements. T.C.A. §§ 40-36-101 through -306. This Act does not provide that all offenders who meet the standards are entitled to such relief. State v. Taylor, 744 S.W.2d 919, 922 (Tenn. Crim. App. 1987). Because of the numerous offenses, the trial court obviously decided against the defendant as a favorable candidate for community corrections, and we will not disturb that judgment barring evidence to the contrary.

In his fifth and final claim of ineffective assistance of counsel, the petitioner alleges that his guilty pleas were not voluntarily submitted because of the failure of his attorneys to investigate and inform him of the facts in the two dismissed indictments. In Boykin v. Alabama, 395 U.S. 238, 242 (1969), the United States Supreme Court held that the record must show that a guilty plea was made voluntarily, understandingly and knowingly. The record in the instant case indicates that the petitioner knew of the facts surrounding the two indictments which were dismissed. Furthermore, the petitioner testified that he took the plea offer because he knew it was a good deal for all of the charges pending against him. No proof has been entered, as the petitioner submits, that those two indictments were used as leverage to obtain a guilty plea when those cases were weak initially. Nor has there been any offer of proof that the pleas were induced by threats or coercion. Therefore, the petitioner has not shown that there was a reasonable probability that he would have gone to trial but for counsel's mistake as required by Hill. There is nothing in the record to indicate the petitioner's pleas were not voluntary and

intelligent choices. Counsel apparently did an excellent job for the petitioner. He received concurrent nine year sentences for four convictions and had two additional charges dismissed. This is especially true since all of the charges arose while the petitioner was in the process of appealing a conviction on a similar charge.

For the above reasons, we affirm the judgment of the trial court.

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JOHN H. PEAY, Judge

CONCUR:

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DAVID G. HAYES, Judge

_____
WILLIAM M. BARKER, Judge