IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1995 SESSION

FILED

October 10, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

DAVID BRUCE CRESS,	)	**C.C.A. No. 03C01-9409-CR-00316**
	)	
Appellant,	)	**HAMBLEN COUNTY**
	)	
VS.	)	**Hon. Ben K. Wexler**
	)	
STATE OF TENNESSEE,	)	**(Petition for Post Conviction Relief)**
	)	
Appellee.	)	**No. 93-CR-225 BELOW**

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and
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OPINION FILED:_____

AFFIRMED

Cornelia A. Clark, Special Judge

OPINION

The petitioner, David Bruce Cress, appeals the trial court's denial of his petition for post-conviction relief. The issues presented for our review are as follows:

1. Whether petitioner was denied the effective assistance of counsel at the time he entered a guilty plea to first degree murder; and

2. Whether any statements made by petitioner to law enforcement personnel after his request for counsel, but before counsel arrived to assist him, would be admissible at trial.

We find no error and therefore affirm the judgment of the trial court.

Mary Bradley was reported missing by her husband on April 22, 1992. Later that day her car was found abandoned with a large amount of blood inside the trunk. On April 23 a jewelry box and several credit cards belonging to Mrs. Bradley were discovered in a dumpster in a nearby community. Authorities immediately suspected foul play, but their initial investigation turned up no substantial suspects.

The petitioner in this case is married to Mary Bradley's niece. On the morning of April 24, 1992, petitioner's wife confronted him about the possibility of his involvement in her aunt's disappearance. Petitioner denied killing Mrs. Bradley, but admitted that he was in her home and took her jewelry box. His wife threatened to call the police if the petitioner did not turn himself in.

At approximately 10:30 a.m. on April 24, the petitioner unexpectedly entered the Morristown Police Department and stated that he wanted to turn himself in for "the missing woman". Petitioner stated that "they" went to the house to rob the Bradleys but did not know that anyone was at home. Morristown Police Captain

Wayne Fowler told the petitioner that he would call Hamblen County Sheriff Charles Long. Captain Fowler obtained the petitioner's name and address. Petitioner stated that he needed protection because when the family found out what he had done they would be after him. Petitioner stated that he was married to the victim's sister's daughter. Petitioner talked to his wife on the telephone and then indicated to Captain Fowler his wife wanted to speak to an officer. Petitioner asked if an attorney would be appointed for him. Captain Fowler told him the Sheriff would advise him of his rights. Petitioner was then taken to the Sheriff's Department.

At the Sheriff's office the petitioner talked to Sheriff Long and T.B.I. Agent Rick Morrell. They were not advised that petitioner had previously asked about an attorney. Petitioner stated "I did it", and "I know about the disappearance". When he was told that the jewelry box had been found, he stated "I know because I'm the one who threw it in the dumpster out in the Witt area next to Union Camp". The sheriff and T.B.I. Agent Rick Morrell then attempted to inform the petitioner of his rights. In response to petitioner's request to speak to a lawyer, the public defender's office was called. Petitioner stated that the body was not far from the Sheriff's Department. He further stated that he had been involved in the robbery with an individual named "Dickie", whom he described to Agent Morrell. Sheriff Long then left the office to interview petitioner's wife. Petitioner's wife did give a statement indicating what petitioner had told her earlier about his involvement, and did sign a consent to search their home.

At the request of law enforcement authorities, an assistant Public Defender came to the Sheriff's office, reviewed Agent Morrell's notes which contained the "Dickie" story, and then talked to the petitioner for thirty to forty minutes. The conversation included discussion of possible charges and punishments, including the death penalty, first degree murder, second degree murder, felony murder, and robbery. Since petitioner had mentioned sexual assault to the officers, the assistant specifically explained to him that rape only requires penetration, not ejaculation. This explanation appeared to cause the petitioner concern. He did not want to risk the imposition of the death penalty. The assistant Public Defender described

petitioner as very rational, calm and deliberative considering the situation. They talked about the manner of disposal of the body. Petitioner wanted to discuss the location of the body, but the assistant did not receive that information.

The District Public Defender arrived at the Sheriff's office later that day and talked to his assistant, District Attorney General Berkeley Bell, and Agent Morrell. He was aware at the time that petitioner's wife had talked to the police. After talking with petitioner, he felt the petitioner understood the applicable law well, based on his discussions with the assistant Public Defender. The Public Defender did, however, discuss matters in more detail with both his assistant and petitioner present. The petitioner was focused on second degree murder, and was very anxious to work out a deal that day. Petitioner was reminded of his right to remain silent. He was also reminded of the importance of being truthful with his attorneys. Petitioner verified to the Public Defender that his wife's statement to the police was consistent with what he had told her. The police investigation to that point had produced the victim's car with blood in the trunk, the discarded jewelry box, the victim's home in disarray, the petitioner's initial unsolicited statements, and the statement of petitioner's wife substantiating his involvement.

The Public Defender discussed the matter with the District Attorney, but the only plea offer the District Attorney made was for a sentence of life imprisonment on a plea of first degree murder, with full cooperation from the petitioner in attempting to find the victim. The Public Defender did not make a recommendation to petitioner, but did inform him that that was the best offer the District Attorney would make on that day. The Public Defender followed the petitioner's lead in the discussions. He did not talk petitioner out of cooperating, but did explain everything to him and gave him every opportunity to change his mind and to remain silent. Petitioner was anxious to reach agreement.

Before a plea agreement was signed, the Public Defender explained all risks

to the petitioner and explained all the ways in which the case could evolve and turn out. Petitioner was informed that he had two options, and that one was to stop the process and remain silent. He was also informed that he was not bound by the plea agreement and that he could always choose the option of a jury trial. Petitioner was concerned at that time that the body would be found, and indicated to his attorney that the victim was still breathing when he and "Dickie" got rid of the body. The Public Defender discussed certain portions of petitioner's story that seemed incredible, but petitioner stuck to his story.

As a result of these discussions, the petitioner entered into a written plea agreement. Then, along with both counsel, he led police to the mutilated body and gave the authorities a statement concerning his involvement, and that of "Dickie", in the case. All of this occurred on April 24, 1992.

It became immediately apparent to the police that the "Dickie" story was not accurate. The state indicated its intention to withdraw from the plea agreement based on petitioner's lack of veracity, which was a condition of the agreement. This would have resulted in reinstatement of the death penalty request. On April 28, 1992, petitioner gave a second statement to police indicating that he alone was involved in the murder. That statement included an acknowledgment that he had sexually penetrated the victim.

Shortly thereafter petitioner began informing his attorney that he was hearing voices in jail and that "the devil made him do it". Citing hallucinations, his attorney filed a motion to have petitioner undergo a mental evaluation, believing an insanity defense might be a possibility. The attorney visited Middle Tennessee Mental Health Institute on two occasions while petitioner was there, and met with both the petitioner and the medical staff. Petitioner ultimately was found to be sane at the time of the offense and competent to stand trial.

Between April 28 and August 21, the Public Defender visited petitioner in jail well over twenty times. He also met with petitioner's father, mother, and brother. Information they gave was passed on to those doing the mental evaluations. The Public Defender advised those persons and the petitioner that he had the option of withdrawing from the plea agreement and requesting a trial by jury.

Prior to the entry of the plea, the victim's husband filed a third party motion requesting that the court revoke the guilty plea agreement and reinstate the death penalty request. Petitioner and his attorney discussed that motion. Petitioner knew that it was to be heard on August 21, immediately prior to the entry of his plea of guilty. He understood that the courtroom would be full of persons who were anxious to see him go to trial so that the death penalty could be sought. He also knew and understood that if he did not want to plead guilty, the sole reason for the hearing would be eliminated. Prior to entering the courtroom the attorney read the plea to the petitioner and explained it. Counsel asked petitioner if he had any questions, and allowed him to read and sign the plea. Petitioner was coherent and clear-headed. After the third party motion was heard and denied, the petitioner entered a plea of guilty to first degree murder in perpetration of a felony by recklessly killing Mary Frances Bradley during the perpetration of aggravated rape. He was sentenced in accordance with the agreement to life imprisonment. During that hearing the nature of the offense, and petitioner's right to withdraw his plea, were fully explained. The judge even commented that it was "passing strange" that though the state was bound by the agreement, the defendant still had the right to demand a jury trial. Petitioner stated that his plea was voluntary and that he was satisfied with his attorney's representation.

At the post-conviction hearing on April 8, 1994, the petitioner testified in part as follows: (1) the assertions made in his pro se post-conviction petition, filed September 4, 1993, are all untrue; (2) his April 24, 1992, story regarding "Dickie" is untrue; (3) his "devil made me do it" story and his claim of hearing voices are

untrue; (4) his statement to police on April 28, 1992, is untrue; (5) his story to his wife is untrue; (6) he lied to his original attorneys at a time when they were attempting to aid him; and (7) the statements he made in court on August 21, 1992, are all untrue. However, he averred that all his testimony at the post-conviction hearing itself was true. He asserted that he took cocaine before making his initial statement to police. He believed he was never given any options but life imprisonment or death. He described the Public Defender as being in a panic to reach settlement. He claimed the Public Defender only saw him two or three times between April 28 and August 21. He asserted he was never told the actual charges against him. He never knew rape was alleged. He claimed he was on Thorazine on August 21. He also asserted he did not know any people would be present for the hearing.

Subsequent to the evidentiary hearing, on April 22, 1994, the trial court made its findings. The court accredited the testimony of the petitioner's original counsel, found that an adequate defense strategy had been implemented, and ruled generally that the petitioner had received the effective assistance of counsel.

Petitioner's claim of ineffective assistance of counsel is grounded in four bases: (1) failure to investigate; (2) failure to evaluate the likelihood of conviction of first degree murder and the threat of imposition of the death penalty, particularly based on autopsy results; (3) failure to communicate effectively with him; and (4) failure of "courtroom professionalism". In view of his guilty plea, his ineffective assistance of counsel claim is only relevant to the degree that it shows his plea of guilty was not knowing or voluntary. Housler v. State, 749 S.W.2d 758, 760 (Tenn. Cr. App. 1988).

In order for petitioner to be granted relief on grounds of ineffective assistance of counsel, he must establish that the advice given or the services rendered are not within the range of competence demanded of attorneys in criminal cases. The petitioner must not only show that the performance of his counsel was less than acceptable but that he was likely prejudiced as a result of the deficient performance.

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d. 674 (1984); Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). In Hill v. Lockhart, 474 U.S. 52, 88 L.Ed.2d 203, 106 S.Ct. 366 (1985), the Supreme Court applied the Strickland two-part standard to ineffective assistance of counsel claims arising out of the plea process. The court in Hill modified the "prejudice" requirement by requiring that the defendant show that, but for counsel's errors, he would not have entered a guilty plea and would have insisted on going to trial. 474 U.S. at 59; Bankston v. State, 815 S.W.2d 213, 215 (Tenn.Cr.App. 1991).

In post-conviction proceedings the petitioner has the burden of proving the allegations in his petition by a preponderance of the evidence. Clenny v. State, 576 S.W.2d 12 (Tenn. Cr. App. 1978). The findings of fact made by the trial court are conclusive on appeal unless the evidence preponderates against the judgment. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

Applying the above standards, a careful review of the record in this case fails to show that the evidence preponderates against the findings of the trial judge. As is frequently the case, a discrepancy exists between the testimony of the petitioner and his counsel. While petitioner contends his attorneys did nothing to investigate the case or to evaluate properly the likelihood of conviction of first degree murder, both members of the public defender's office testified that they had communicated extensively with petitioner on April 24. More important, the record reflects that the discussions about the entry of the guilty plea did not end on that day, but continued up through the date of the actual entry of the plea on August 21. The Public Defender visited petitioner in jail over twenty times during that period. He also met with petitioner's father, mother, and brother. All parties involved were fully advised that he could withdraw from the plea at any time and request a trial by jury. His counsel filed a motion to have him undergo mental evaluation, and visited both petitioner and the medical staff while he was at Middle Tennessee Mental Health Institute. Counsel believed this case was one where the death penalty might be

imposed. Petitioner was anxious to avoid that possibility.

The trial court credited counsel's testimony over that of the petitioner on each of the issues involving investigation, evaluation, communication, and professionalism. Discussions and evaluation of the case continued from April through August. There is no indication in the record that the appellant was anything but calm and in full control of his reasoning ability at the time of the actual entry of the guilty plea. His options were clearly explained. His is not a decision that was made on a single day and never again reevaluated.

The trial court found that the petitioner's attorneys adequately represented him and fully advised him of his rights and options. The record supports the findings of the trial court. This issue is without merit.

The appellant finally contends that his initial statement to the police is constitutionally infirm because, despite his repeated requests, he was denied the right to consult an attorney in violation of his rights under the Sixth Amendment of the United States Constitution right to counsel and Article I, Section 9 of the Tennessee State Constitution. This issue may not be litigated by the appellant in this suit because it was waived when he entered the plea of guilty to the offense of murder in the perpetration of a felony. Shannon Darrell Young v. State of Tennessee, No. 02-C-01-9212-CR-00275 (Tenn. Cr. App., Jackson, February 2, 1994). It is a fundamental rule of law that the entry of a guilty plea has the legal effect of waiving all prior nonjurisdictional, procedural and constitutional defects in the proceedings. State v. Wilkes, 684 S.W.2d 663, 667 (Tenn. Cr. App. 1984); Ingram v. Henderson, 2 Tenn. Cr. App. 372, 454 S.W.2d 167 (1970).

This issue is also without merit.

The judgment of the trial court is affirmed.

_____
CORNELIA A. CLARK
SPECIAL JUDGE

CONCUR:

_____
GARY R. WADE
JUDGE

_____
JOSEPH M. TIPTON
JUDGE

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AFFIRMED

JUDGMENT

Came the appellant, David Bruce Cress, by counsel, and also came the Attorney General on behalf of the State, and this case was heard on the record on appeal from the Criminal Court of Hamblen County; and upon consideration thereof, this Court is of the opinion that there is no reversible error on the record and that the judgment of the trial court should be affirmed.

In accordance with the Opinion filed herein, it is therefore, ordered and adjudged by this Court that the judgment of the trial court is affirmed, and the case is remanded to the Criminal Court of Hamblen County for further proceedings.

Costs of the appeal will be paid into this Court by the Appellant, for which let execution issue.

Judge Gary R. Wade
Judge Joseph M. Tipton
Special Judge Cornelia A. Clark