IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

SEPTEMBER 1995 SESSION

FILED

October 4, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

MICHAEL RAY RIPPY,	)
	) C.C.A. No. 01C01-9406-CR-00188
Appellant,	)
	) Davidson County
V.	)
	) Hon. Ann Lacy Johns, Judge
	)
STATE OF TENNESSEE,	) (Post-Conviction: Aggravated Robbery)
	)
Appellee.	)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, Michael Ray Rippy, pled guilty to aggravated robbery. He received a sentence of fifteen (15) years confinement. Appellant filed a petition for post-conviction relief alleging ineffective assistance of counsel. The trial court conducted a full evidentiary hearing and denied relief. Appellant appeals. We affirm.

Appellant was charged with two counts of aggravated robbery and three counts of especially aggravated kidnapping. Pursuant to a plea agreement, appellant pled guilty to a single count of aggravated robbery. Appellant's principal basis for setting aside his guilty plea is an allegation of ineffective assistance of counsel. He contends that had counsel filed a notice of intent to use an entrapment defense, he would not have pled guilty. Appellant further alleges that counsel failed to advise him of the elements of the charges against him. Neither the proof nor the record substantiates his theory of ineffectiveness.

At the evidentiary hearing, appellant's trial counsel testified that, in his opinion and given the totality of the circumstances, the appellant did not have a viable entrapment defense. Counsel reasoned that:

> . . . we looked at his prior record, that -- if I remember correctly, there were three, I believe, burglary convictions, a possession for resale, maybe another possession for resale, some shoplifting. And I talked to him about that and had felt that a Jury could find a predisposition to commit that crime by looking at his record, if nothing else.

The appellant's mere assertion that he committed the robbery under duress because of a drug debt owed to a co-defendant fails to establish a defense of entrapment. Moreover, appellant's counsel was not ineffective by failing to preserve or raise the defense. The theory of defense is a tactical decision made by counsel. Unless the strategy is outside the range of professional competence, it is not subject to judicial hindsight. Hellard v. State,

629 S.W.2d 4 (Tenn. 1982); see also State v. Swanson, 680 S.W.2d 487, 490 (Tenn. Crim. App. 1984) (holding this Court does not second-guess trial counsel's strategic and tactical choices pertaining to defenses).

The evidentiary hearing judge found that counsel had advised appellant of the elements of the charged offenses. "Mr. Rippy stated under oath at the submission hearing . . . that the elements had been explained to him." The hearing judge further found that appellant had not requested counsel to file a notice of intent to rely upon an entrapment defense. The judge also noted that counsel "thought [the defense] through, discussed it with [appellant] and . . . found that the facts simply did not support entrapment."

The appropriate test for determining whether counsel provided effective assistance at trial is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). Appellant must establish by a preponderance of the evidence that: (1) the services rendered or the advice given by counsel fell below "the range of competence demanded of attorneys in criminal cases," and (2) but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985); Porterfield v. Tennessee, 897 S.W.2d 672, 677-78 (Tenn. 1995).

In post-conviction proceedings, the petitioner has the burden of proving the allegations in his petition by a preponderance of the evidence. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the findings of the trial court in post-conviction 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); Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978).

Appellant has not carried his burden of proving the allegations in his petition. The hearing judge chose to accredit the trial lawyer's testimony over that of the petitioner. That is the trial judge's prerogative. We find that the evidence does not preponderate against the post-conviction findings of the trial court. We, therefore, affirm the dismissal in all respects.

AFFIRMED

_____
PAUL G. SUMMERS, JUDGE

CONCUR:

_____
JOHN H. PEAY, JUDGE

_____
DAVID H. WELLES, JUDGE