IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE SESSION, 1995

FILED

March 1, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

WILLIAM RAY HUTCHINS,	)	
	)	
Appellant,	)	No. 03C01-9502-CR-00029
	)	
	)	Sullivan County
v.	)	
	)	Hon. Frank L. Slaughter, Judge
	)	
STATE OF TENNESSEE,	)	(Post-conviction)
	)	
Appellee.	)	

For the Appellant:

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For the Appellee:

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The petitioner, William Ray Hutchins, appeals as of right from the dismissal of his petition for post-conviction relief by the Sullivan County Criminal Court. The petitioner was convicted of attempted second degree murder, a Class B felony, pursuant to a guilty plea and received a sentence of ten years as a Range I, standard offender to be served in the custody of the Department of Correction. The conviction was affirmed on direct appeal. State v. William Ray Hutchins, No. 03C01-9302-CR-00044, Sullivan Co. (Tenn. Crim. App. Dec. 7, 1993), app. denied (Tenn. Apr. 4, 1994).

The petitioner asserts that the trial court erred in denying him relief and that he is entitled to a withdrawal of his guilty plea and to a new trial. He claims on appeal as follows:

> (1) that the trial court erred in concluding that his claims of ineffective assistance of counsel against his guilty plea counsel had been either previously determined or waived, and
>
> (2) that the trial court erred in concluding that he received the effective assistance of counsel at his motion to withdraw his guilty plea hearing and on direct appeal.

Originally tried and convicted of attempt to commit first degree murder and aggravated assault in January of 1992, the petitioner successfully moved for a new trial. On August 24, 1992, the first day of his new trial, the petitioner entered a guilty plea to attempted second degree murder. On August 28, 1992, the petitioner filed a pro se motion to withdraw his guilty plea. Counsel was appointed for the hearing on the motion to withdraw and continued his representation of the petitioner in the direct appeal to this court.

A post-conviction evidentiary hearing was held on November 30, 1994. The petitioner testified that he is presently incarcerated at the Northeast Regional

Correction Center pursuant to his guilty plea for assault with intent to commit second degree murder. He said that he was initially convicted of assault with intent to commit first degree murder and aggravated assault but was successful on his motion for new trial. He claimed ineffective assistance of counsel on the part of his guilty plea attorney and his motion to withdraw and direct appeal attorney.

The petitioner said that his guilty plea attorney was ineffective in telling him that he would only be required to serve thirty percent of his sentence as a standard offender when, in fact, the thirty percent is only a release eligibility date. However, he admitted that he did not tell the trial court about this alleged misrepresentation at his motion to withdraw his guilty plea hearing. He also claimed that he was not allowed to take his medication on the day of the guilty plea submission and that this led to an inability to think clearly. However, he admitted that this issue was raised on direct appeal. He claimed that his attorney coerced him into pleading guilty by mentioning that his daughter would testify against him. However, he admitted that he was worried that his daughter might say unfavorable things about him.

Regarding his attorney at the motion to withdraw his guilty plea and direct appeal, the petitioner testified that the attorney was ineffective in failing to communicate with him. He claimed that he attempted to contact the attorney numerous times before the motion hearing but they only discussed the case for about ten minutes on the day of the hearing. He said that he attempted to contact the attorney regarding issues he wanted raised on appeal but that the attorney never returned his phone calls. He stated that if the attorney had returned the phone calls, he would have asked the attorney to raise an issue challenging the existence of his conviction offense under the law at the time of his guilty plea.[1] When confronted with

[1] The petitioner contended that he pled guilty to assault with intent to commit second degree murder, which did not exist in our statutes at the time of the offense or the guilty plea. However, we may take judicial notice of the court records in the direct appeal. See Delbridge v. State, 742 S.W.2d 266, 267 (Tenn. 1987). Those records show that although the trial judge, at one point, asked the petitioner about his pleading guilty to assault with intent to commit second degree murder, the petitioner

the fact that the issue on appeal was the voluntariness of his guilty plea and asked if there was anything that the attorney failed to raise, the petitioner admitted that he raised everything relative to the guilty plea issue.

The petitioner's attorney at the guilty plea submission testified that he represented the petitioner after he was granted a new trial. He stated that he never promised the petitioner that he would be released after serving thirty percent of his sentence. He said that the release eligibility percentages were discussed in the plea negotiations and that he was certain the parole board's role was also discussed. He stated that the petitioner understood the negotiations and even proposed being sentenced as a mitigated offender. He stated that he did not coerce the petitioner into pleading guilty with references to his daughter's testimony, but merely informed the petitioner that the state intended to call his children as witnesses.

The petitioner's attorney at the motion to withdraw his guilty plea hearing and the direct appeal testified that the petitioner was incarcerated in prison when he was appointed to his case. He admitted that he did not telephone the petitioner in prison, but denied that he failed to keep the petitioner informed. He said that he and the petitioner discussed the case in some detail on October 13, 1992, and identified a letter written by the petitioner confirming this call. He also identified a letter written by the petitioner and dated October 31st that discussed some issues the petitioner wanted raised at the hearing. The attorney testified that he addressed each of the petitioner's allegations one by one at the motion to withdraw the guilty plea hearing. In addition to this correspondence, the attorney said that he and the petitioner met for twenty to thirty minutes on the day of the hearing and discussed the allegations of his motion.

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was actually made fully aware, in substantial detail, of the offense of which he was going to be, and was, convicted, i.e., attempt to commit second degree murder.

The attorney admitted that he had refused a call from the petitioner once when he was in the middle of a trial. He said that he may have failed to return phone calls on two or three occasions, but that he was in contact with the petitioner's mother some seven to ten times during the appellate process. As for the petitioner's claim that the attorney failed to raise several issues on appeal, the attorney said that the petitioner sent him two pro se briefs and that he filed one of them with the court of criminal appeals but felt that nothing in the brief had any merit. He said that the petitioner had an opportunity to testify at the motion hearing and aired his complaints before the trial court. On cross-examination, the attorney said that he could not recall any complaints about the guilty plea attorney misleading the petitioner regarding his release date.

In rebuttal, the petitioner presented testimony from his sister, Brenda Hood. She testified that she spoke with the petitioner's guilty plea attorney after the guilty plea submission hearing and that the attorney told her that he felt that the petitioner would serve thirty percent of his sentence with time for good behavior. She stated that the attorney did not mention that the petitioner could serve more time than thirty percent.

In dismissing the petition for post-conviction relief, the trial court found that it was "abundantly clear" that the petitioner's guilty plea attorney made no guarantee that the petitioner would be released after the service of thirty percent of his sentence. The trial court concluded that the issue of trial counsel's effectiveness was previously litigated on direct appeal and not subject to post-conviction review. The trial court found that the petitioner's counsel at his motion to withdraw his guilty plea and direct appeal acted competently in his representation of the petitioner, concluding that the petitioner received the effective assistance of counsel at the motion to withdraw his guilty plea and on direct appeal.

The burden was on the petitioner in the trial court to prove his factual allegations that would entitle him to relief by a preponderance of the evidence. Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990).

Regarding the claim of ineffective assistance of counsel at the guilty plea submission stage, the trial court ruled that it had been previously litigated on direct appeal and was not subject to post-conviction review. On direct appeal, this court was asked to hold counsel to be ineffective, but it found "no evidence that counsel was ineffective." Hutchins, slip op. at 6. The court discussed the fact that the evidence against the petitioner was overwhelming and concluded that the petitioner's "plea was a voluntary and intelligent choice among the available alternatives." Hutchins, slip op. at 7. Thus, the trial court correctly concluded that the petitioner's claim of ineffective assistance of counsel at his guilty plea submission hearing has been previously determined and is not subject to post-conviction review. T.C.A. §§ 40-30-111 and -112.

Relative to the petitioner's allegations of ineffective assistance on the part of his motion hearing and appellate counsel, we note that under the Sixth Amendment, when a claim for ineffective assistance of counsel at trial is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, __, 113 S. Ct. 838, 842-44 (1993). The Strickland standard has been applied, as well, to the right to counsel under Article I, Section 9 of the

Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn.), cert. denied, 493 U.S. 874, 110 S. Ct. 211 (1989). Likewise, the same standard applies under due process for counsel on appeal. Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993); Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) and United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973), cert. denied, 444 U.S. 944, 100 S. Ct. 302 (1979). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982) (counsel's conduct will not be measured by "20-20 hindsight"). Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See Hellard v. State, 629 S.W.2d at 9; United States v. DeCoster, 487 F.2d at 1201.

Also, we note that the approach to the issue of ineffective assistance of counsel does not have to start with an analysis of an attorney's conduct. If prejudice is not shown, we need not seek to determine the validity of the allegations about deficient performance. Strickland v. Washington, 466 U.S. at 687, 104 S. Ct. at 2069.

The petitioner claims that his motion hearing and appellate counsel was ineffective in failing to communicate with him and keep him informed of the progress of his case. However, this claim was refuted by the attorney's testimony at the post-conviction hearing that he discussed the petitioner's motion with him at least three times in the month preceding the hearing and that he kept in touch with the petitioner and his mother throughout the appellate process. Furthermore, letters written by the petitioner confirming conversations with the attorney refute the petitioner's claim that the attorney failed to communicate with him. The petitioner also complains that the attorney was ineffective in pursuing his appeal. He claims that the attorney failed to raise issues on appeal that he urged should be raised. The attorney testified that he filed the petitioner's pro se brief on appeal but felt that none of the issues were of any merit. At the post-conviction hearing, the petitioner admitted that the attorney raised all issues surrounding the guilty plea, acknowledging that the voluntariness of the guilty plea was the predominant basis for his appeal. We conclude that the petitioner has not shown how he was prejudiced by any of the alleged errors of counsel. The trial court found that the petitioner was afforded the effective assistance of counsel. We find nothing in the record that would sway us to disagree with that finding.

The record fully supports the trial court's findings and conclusions. The judgment of the trial court is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

__(not participating)_____
Jerry Scott, Presiding Judge

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J.S. Daniel, Special Judge