IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER 1995 SESSION

FILED

January 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

DEXEL LYNN PARTON,	)	
	)	**C.C.A. NO. 03C01-9406-CR-00242**
Appellant,	)	
	)	**KNOX COUNTY**
VS.	)	
	)	**HON. RICHARD BAUMGARTNER,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-conviction)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The petitioner was indicted[1] in 1987 for burglary; grand larceny; receiving stolen property; concealing stolen property; "offering to pass and transfer . . . [a] forged . . . check" in the amount of three hundred twenty dollars ($320); and under the habitual criminal statute. Pursuant to a plea bargain agreement, he pled guilty to third-degree burglary; grand larceny; and "attempt to transfer of [sic] a forged instrument exceeding $200 in amount, as charged." The State's recommended punishment for these offenses was the maximum sentence for each conviction. The court accepted the State's recommendation and sentenced the petitioner to ten years as a Range II aggravated and persistent offender for each of the offenses, to run consecutively, for an effective sentence of thirty years.

The petitioner subsequently filed his petition for post-conviction relief, alleging ineffective assistance of counsel. The lower court dismissed this petition on January 10, 1994, after an evidentiary hearing. The petitioner filed his notice of appeal on March 14, 1994.[2] Specifically, he complains that he would not have pled guilty to a thirty year sentence if his lawyer had

> 1) advised him correctly on the maximum sentence for an attempt to pass a forged instrument;
>
> 2) urged him to seek a continuance; and
>
> 3) timely communicated with the district attorney during plea bargain negotiations.

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[1] Although the petitioner was actually charged by a presentment, the term "indictment" is used throughout the record of this matter and will be used in this opinion.

[2] Although the petitioner's notice of appeal was not timely filed, the State has made no complaint and we therefore waive the timely filing of the notice in the interest of justice. T.R.A.P. 4(a).

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).

To satisfy the requirement of prejudice, the petitioner must demonstrate a reasonable probability that, but for his counsel's errors, he would not have pled guilty and would have insisted on going to trial. See Hill v. Lockart, 474 U.S. 52, 59 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991).

The indictment issued against the petitioner concerning the forged check states "the said Dexel Lynn Parton, Alias, was thereby unlawfully, falsely, fraudulently, feloniously and knowingly guilty of offering to pass and transfer said false, fraudulent, forged and counterfeit check . . . with the intent . . to injure and defraud . . . First Tennessee Bank" (emphasis added). This language tracked the language contained in the statute making the transfer of forged paper a criminal offense: "Any person who fraudulently passes or transfers, or offers to pass or transfer, any forged paper, knowing it to be forged, with intent to defraud another, is guilty of a felony." T.C.A. § 39-3-804 (1982) (repealed 1989) (emphasis added). Thus, it is clear that the petitioner was indicted for the offense of offering to pass a forged instrument. The penalty for violating this statute was imprisonment in the penitentiary for not less than three years and not

more than ten years. T.C.A. § 39-3-820(b) (1982) (repealed 1989); §39-3-1104(a) (1982) (repealed 1989); § 39-3-1103 (1982) (repealed 1989). See also Smith v. State, 369 S.W.2d 537 (Tenn. 1963).

The petitioner contends that, notwithstanding the language of the indictment, he pled guilty to and was convicted of an attempt to pass a forged instrument, which should have been considered a violation of T.C.A. § 39-1-501 (1982) (repealed 1989). This statute provided, "[i]f any person attempts to commit any felony . . . where the punishment is not otherwise prescribed, he shall, on conviction, be punished by imprisonment in the penitentiary not exceeding five (5) years." Id. The petitioner rests his argument on the description of the indicted charge contained in his plea and judgment forms: "Attempt to transfer a forged instrument exceeding $200." This same language was used to describe the convicted offense on the judgment form. The trial court also used this language in describing the indicted charge to the petitioner at his sentencing hearing. The petitioner is trying to change the nature of his offense based on this vernacular use of the term "attempt" in place of the statutory term "offer."[3] The petitioner's effort, however, fails.

Although the statute addressing the transfer of forged paper did not use the term "attempt," it is clear from the plain meaning of the term "offer" that the statute was aimed at unsuccessful efforts to transfer forged paper, that is "attempts" to transfer, as well as successful efforts. Thus, this statute incorporated both offenses of actually passing forged paper and merely trying to do so. In the case of attempts to pass forged instruments, there were two statutes which were arguably applicable: the specific statute

[3]This case illustrates the wisdom of tracking the language of the presentment or indictment in all subsequent repetitions, oral and written, of the charges against the petitioner, including the language describing any resulting convictions.

titled "transfer of forged paper" and the general attempt statute titled "attempt to commit felony." General rules of statutory construction require us to give effect to the specific statute in preference to the general one. State ex rel. Cordova Area Residents for the Env't v. City of Memphis, 862 S.W.2d 525, 526-7 (Tenn. App. 1992). Moreover, if an unconsummated effort to pass a forged check was properly cognizable as a violation of Tennessee's general attempt statute, then the language "offer to pass or transfer" contained in the specific statute becomes superfluous. The rules of statutory construction prohibit this result. See, e.g., Loftin v. Langsdon, 813 S.W.2d 475, 479 (Tenn. App. 1991). Therefore, the petitioner's attempt to pass or transfer a forged check was properly considered to be a violation of T.C.A. § 39-3-804 and not a violation of T.C.A. § 39-1-501.

Accordingly, the petitioner's trial counsel was not ineffective for failing to advise his client that the maximum penalty for "attempting to transfer a forged instrument" was five years. As set forth above, the maximum penalty was ten years.[4] This issue is without merit.

The petitioner also complains that his trial counsel was ineffective because he did not timely communicate with the district attorney during the plea bargain negotiations, resulting in an increase in the State's offer from twenty-five years to thirty years. However, both the petitioner's trial counsel and the prosecuting district attorney testified that they had no recollection of any offer of under thirty years. The only proof of an offer of less than thirty years was testimony by the petitioner. Moreover, the petitioner testified that he had initially rejected the alleged twenty-five year offer, and that

[4]Although Smith v. State, 369 S.W.2d 537 (Tenn. 1963) indicates that § 39-3-820(b) applied to the transfer or attempted transfer of a forged instrument, arguably § 39-3-820(a) was the applicable penalty. This subsection provided for a term of imprisonment of "not less than two (2) years nor more than fifteen (15) years." Thus, it is possible that the petitioner could have been sentenced to an even longer term.

the offer had been increased to thirty years because the district attorney was angry that the earlier offer had been rejected. Thus, even if a twenty-five year offer had been outstanding at one time, the petitioner himself rejected it. There is no proof in the record that any subsequent increase in the offered sentence was the result of ineffective assistance of counsel. This issue is without merit.

Finally, the petitioner complains that his trial counsel did not disclose to him "the actual probability for a continuance," meaning that his counsel privately considered the actual probability of obtaining a continuance on the grounds that the habitual criminal statute would soon be repealed to be very great. The petitioner's case was set for trial two months before the habitual criminal statute was to be repealed. The petitioner claims that, had his lawyer told him that there was a good chance of getting a continuance such that the statute would no longer be applicable, he would not have pled guilty.

This Court should not second-guess trial counsel's tactical and strategic choices unless those choices were uninformed because of inadequate preparation, Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. Williams v. State, 599 S.W.2d 276, 280 (Tenn. Crim. App. 1980). Moreover, there is no doubt in this Court's mind that had the petitioner's lawyer assured him that a continuance would have been granted and then failed to obtain one[5] with the result that the petitioner had been sentenced to life under the habitual criminal statute, the petitioner would now be complaining that his counsel had been ineffective for the very reason that he had recommended moving for a continuance. This issue is

[5]The judge who would have presided over the petitioner's trial was called at the post-conviction hearing and testified that he would not have granted a continuance to the petitioner solely on the ground of the impending repeal of the habitual criminal statute.

without merit.

The petitioner having failed to carry his burden of proving that his trial counsel's performance fell below the appropriate standard and that his performance prejudiced the petitioner, the lower court's dismissal of the petition for post-conviction relief is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

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DAVID G. HAYES, Judge