IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

FEBRUARY 1996 SESSION

FILED

May 6, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

JIMMY DAVID McELROY,	)	
	)	**C.C.A. NO. 03C01-9408-CR-00308**
Appellant,	)	
	)	**LOUDON COUNTY**
VS.	)	
	)	**HON. E. EUGENE EBLEN, JUDGE**
STATE OF TENNESSEE,	)	
	)	
Appellee.	)	(Post-conviction)

FOR THE APPELLANT:

ELLERY E. HILL, JR.
Charter Federal Bldg.
531 S. Gay St., Suite 1515
Knoxville, TN 37902

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

DARIAN B. TAYLOR
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

CHARLES E. HAWK
District Attorney General

ROGER DELP
Asst. District Attorney General
P.O. Box 703
Kingston, TN 37763

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The petitioner was charged with driving under the influence (DUI), second offense, on June 16, 1993. Although the technical record contains no other affidavit of complaint, he was apparently also charged with possession of a controlled substance (diazepam). The petitioner pled guilty in General Sessions Court to DUI, first offense. He apparently also pled guilty to the charge of possession although the record contains no copy of the judgment entered in that case. He was sentenced to eleven months, twenty-nine days on the DUI charge, suspended except for eight days. The conviction and sentence were upheld on direct appeal to the Criminal Court for Loudon County.[1]

The petitioner then filed this post-conviction petition, claiming that he pled guilty to the DUI charge as a result of ineffective assistance of counsel. The lower court denied the petition, and the petitioner now appeals.

The affidavit of complaint filled out by the arresting officer states, in pertinent part:

> Subject was traveling west on Sugarlimb Rd. Subject was driving in on[-]coming lane by about 2 feet. When I stopped subject I noticed a strong odor of an alcoholic beverage on his breath and beer cans littered throughout the subject[']s car. Subject was very unsteady on his feet and very thick tounged [sic]. Subject did very poorly on field sobri[e]ty test. Subject also said he had been takening [sic] medication for his

[1] In the order entered by the court below addressing the petitioner's direct appeal of his guilty plea to the Criminal Court for Loudon County, the judge found that the petitioner's sentence imposed by the General Sessions Court "should not be altered and the Court hereby sentences the defendant as follows: Driving While Under The Influence - 11 months/29 days in the Loudon County Jail, a fine of $500.00, license suspended for one (1) year, and the defendant shall serve ten (10) days in the Loudon County Jail." However, the judgment entered by the General Sessions Court on the DUI charge states "11 months and 29 days in the county jail . . . . Sentence suspended except for 8 days consecutive w[ith] 2 days on 77804 for total of 10 days." Apparently, No. 77804 was the misdemeanor possession charge.

> back pain. The type of medication is Phenergan with codeine . . . . Subject blew a .08 on the intoximeter 3000. Subject also had prior DUI in 1987.

The petitioner had also pled guilty to the 1987 DUI offense. He testified at his post-conviction hearing that his breath alcohol on that offense was .14.

The petitioner claims that his guilty plea was not knowing and voluntary because it was based on bad advice by his lawyer, Mr. James H. Simpson. Specifically, he claims that his lawyer did no investigation of the charges, that he did not tell the petitioner that the legal presumption for intoxication was .10, and that, after receiving the plea bargain offer, told the petitioner that he didn't have any choice but to take the offer. In his petition for post-conviction relief, the petitioner states that, if he had known that his blood alcohol level was below the threshold, he would have insisted on a jury trial.

At his hearing for post-conviction relief, the petitioner testified that, after getting the plea bargain offer, his attorney told him "this will be the best deal you can get. You better take it. If you go to the grand jury and they convict you, you're going to go back to the penitentiary." The petitioner further admitted that he had a prior record and that he had "served some time." Mr. Simpson testified that he had discussed the statutory presumption of intoxication with the petitioner and that he had known that the petitioner's blood alcohol had been under the presumptive level. He also testified that they had discussed the other circumstances in the case, including the fact that "he had been taking some type of intoxicating drug," and that, in the petitioner's case, his blood alcohol level was "not dispositive if the officer had other proof of driving under the influence." He also testified that the decision to plead guilty had been the petitioner's.

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).

Where a guilty plea is involved, to satisfy the requirement of prejudice, the petitioner must 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. Lockart, 474 U.S. 52, 59 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991).

"In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his [or her] petition by a preponderance of the evidence." McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the factual findings of the trial court in 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).

After hearing the petitioner’s testimony and that of his lawyer, the lower court denied relief, stating:

Petitioner has failed to establish his burden of showing that he

> received ineffective assistance of counsel at the trial level in General Sessions Court in this matter. His counsel testified that Mr. McElroy made the decision to enter this guilty plea based upon the options available to him, and as explained to him by Mr. Simpson. In addition, Mr. McElroy told the Court that his decision to enter this guilty plea was based in part upon factors outside the information and advice given to him by his counsel.[2] Mr. Simpson testified that he and his client had discussed the fact that the .08 reading was below the statutory presumptive level, but that the other factors involved in the case were such that his opinion of the matter was that the offer made to Mr. McElroy in General Sessions Court was a good offer under the circumstances of the case. It is therefore the opinion of the Court that defendant [sic] has been unable to corroborate the allegation in his Petition.

After a review of the record in the cause, we find that the evidence does not preponderate against the findings of the lower court, and affirm the judgment below.

_____
JOHN H. PEAY, Judge

CONCUR:

_____
DAVID G. HAYES, Judge

_____
WILLIAM M. BARKER, Judge

[2] Although not raised in the post-conviction petition, the petitioner also testified at the hearing about the guilty plea he had entered in his possession case. Basically, the petitioner testified that he had entered that plea out of financial considerations involving a bond he had posted and his co-defendant on the charge. Apparently, the lower court chose to address this issue even though not raised in the petition. To the extent that the petitioner is attempting to appeal on this basis, we affirm the lower court's denial of relief.