IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER 1995 SESSION

FILED

April 17, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

MARK W. RAWLINGS,	)	
	)	**C.C.A. NO. 02C01-9504-CR-00112**
Appellant,	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. JOHN P. COLTON, JR. ,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-Conviction)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED:_____

AFFIRMED IN PART; DELAYED APPEAL GRANTED

JOHN H. PEAY,
Judge

O P I N I O N

The petitioner Rawlings was indicted for, and pled guilty to, three counts of especially aggravated robbery.[1] After a hearing, he was sentenced as a Range I standard offender to eighteen years for each offense, consecutive, for an effective sentence of fifty-four years.

The petitioner attempted to appeal his sentence, without the assistance of counsel, but mailed it to the wrong address. He then filed a petition for post-conviction relief, which was amended after counsel was appointed. As grounds for relief, the petitioner asserted that he did not plead guilty "freely and voluntarily" and that he was denied effective assistance of counsel both before and after his plea. The lower court denied relief after an evidentiary hearing, and the petitioner now appeals. He also requests that we allow a delayed appeal of his sentence because he had no contact with his lawyer after sentencing and was uncertain about his rights and appellate procedure. We find that the lower court improperly denied post-conviction relief and further, that the petitioner should have been granted a delayed appeal.

On July 5, 1991, Rawlings approached an uncle ("Mr. Green") for a loan of money. At the time, another man and a woman were visiting Mr. Green at his residence, both of whom also knew the petitioner. Mr. Green refused to make the loan. The petitioner then asked to borrow a claw hammer. He subsequently beat Mr. Green and both of Mr. Green's visitors in the head with the hammer. He broke the woman's hands with the hammer as she attempted to ward off the blows to her head. After beating the victims, the petitioner robbed them. All of the victims were seriously injured. The

[1] We note the petitioner was designated as "Mark W. Rawlings" in two of the indictments and as "Mark A. Rawlings" in the third.

wo0man was forty years old at the time of the offense[2] and the two men were in their sixties; the petitioner was thirty-four. All of the victims identified Rawlings as the attacker.

The petitioner complains that his lawyer was ineffective because she failed to investigate and pursue the potential defense of voluntary intoxication, and did not have a mental evaluation performed. He testified that he had been "high" on alcohol and cocaine when he committed the robberies[3] and that his sister, Debbie Rawlings, could have testified as to his mental condition. He complains that Ms. Mitchell never informed him about the State's burden of proving the mens rea element of his offenses, and had she done so he would not have pled guilty. Thus, he asserts, his guilty pleas were involuntary because they were based on ineffective assistance of counsel.

Debbie Rawlings, the petitioner's sister, testified that she had seen Rawlings after the robberies and that he had "looked like he was spaced out on drugs." However, she also testified that the petitioner did not act any differently when he was doing cocaine than he did when he was not. The record is unclear as to how much time passed between the crimes and the meeting between the petitioner and his sister.

Ms. Kathleen Mitchell of the Shelby County Public Defender's Office was appointed to represent the petitioner on February 7, 1992. Ms. Mitchell testified that she had met with the petitioner at the jail at least four times, and additional times at the courthouse. While she remembered that Rawlings had told her he was drinking on the day in question, she testified that he had not told her about also smoking crack cocaine. Nor had he told her the amount he had had to drink, which the petitioner admits. She also remembered that Rawlings had told her that his sister was a witness. However, a

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[2]At the guilty plea, the prosecutor stated this victim's age to have been forty at the time of the offense. Elsewhere in the record, she is described as "elderly" at the time.

[3]Rawlings testified that he had drunk a fifth of brandy and smoked the crack he had manufactured from approximately $150 worth of cocaine on the day he committed the robberies.

prior statement that the petitioner had made to another public defender indicated that his sister did not see him until two and one-half hours after the robberies. Based on this statement, Ms. Mitchell determined that the sister's perception of Rawlings was irrelevant.

Ms. Mitchell met with the prosecutor who let her review his entire file. She also interviewed the State's witnesses, including the victims. She repeatedly asked for a plea bargain offer, but the State steadfastly refused to make one. According to the prosecutor, the State intended to take this matter to trial, to seek the maximum sentences possible, and to seek consecutive sentences. In Ms. Mitchell's opinion, there was no "viable" defense for her client. Moreover, she was aware that her client had pled guilty to voluntary manslaughter several years before when he had killed his first wife. Accordingly, she advised her client to plead guilty in the hopes that the trial court would be less inclined to impose the maximum penalty on a plea rather than after a trial. In exchange for Rawlings' pleas, the prosecutor agreed to withhold numerous graphic photographs of the victims at the crime scene, and the testimony of the father of the woman Rawlings had killed.

"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).

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 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).

Thus, we must determine whether the evidence preponderates against the lower court's finding that Ms. Mitchell acted within the range of competence in advising the petitioner to enter guilty pleas. We find that it does not.

Given that the petitioner never told Ms. Mitchell that he was so intoxicated as to have legitimately raised the defense of voluntary intoxication (if, in fact, he was), and given that Ms. Mitchell had good reason to believe that Ms. Rawlings' contact with the petitioner was not timely with respect to bolstering any such defense, we agree with the trial court that Ms. Mitchell acted competently in determining that her client had no viable defense and in advising him to plead guilty. Moreover, as to the petitioner's contention that Ms. Mitchell should have used his voluntary intoxication as leverage to get an offer of plea bargain from the State, the prosecutor in the case testified at the post-conviction hearing that any claim of intoxication would not have mattered. Accordingly, even if her representation in this regard was deficient, the petitioner has not shown the required prejudice.

Ms. Mitchell was concerned that, if he went to trial, the petitioner would

receive the maximum sentences possible -- consecutive twenty-five year sentences. The prosecutor agreed to withhold numerous graphic photographs if Rawlings pled guilty, and to withhold the testimony of the father of the petitioner's first wife, whom the petitioner had killed several years earlier. The prosecutor abided by this agreement at the sentencing hearing and the court sentenced the petitioner to only eighteen years for each offense, in spite of the State's efforts to obtain the maximum. Obviously, Ms. Mitchell was successful in protecting her client from the potential seventy-five year sentence.

Finally, even if Ms. Mitchell should have more thoroughly investigated and discussed the affirmative defense of voluntary intoxication with the petitioner, the evidence does not preponderate against the lower court's findings that the petitioner's assertions in support of his petition are "not credible" and "not persuasive." Therefore, Rawlings has not satisfied the prejudice requirement of Strickland that, but for his attorney's alleged errors, he would have insisted on a trial.

The petitioner also complains that his counsel was ineffective because she did not order a mental evaluation done. The petitioner testified that he had been treated for mental illness in 1990 and 1991 after a suicide attempt, and that he had informed his lawyer of this. Ms. Mitchell did not remember whether the petitioner had told her this before his sentencing hearing, but she testified that she had not seen any reason to request an evaluation, that "at all times he seemed very coherent and able to help me."

There is no proof in the record of what such an evaluation would have revealed had one been performed. It is therefore impossible to conclude that the petitioner was prejudiced by Ms. Mitchell's failure to obtain one. Accordingly, we cannot find that the petitioner suffered from ineffective assistance of counsel in this regard.

The petitioner also complains that Ms. Mitchell's representation was

deficient because she did not inform him about his right to appeal, and never contacted him after he was sentenced. Rawlings tried to place a collect call to Ms. Mitchell's office, which was not accepted. He did not attempt to contact her again. Rather, he chose to try to file an appeal on his own. This appeal was never perfected because it was mailed to the wrong address.

Ms. Mitchell should have talked with the petitioner about his right to appeal the sentences imposed. When the trial judge explained the petitioner's appeal rights to him at the guilty plea, he did so in a confusing manner. Ms. Mitchell's representation was deficient in this regard. "[T]here is an affirmative duty on the part of counsel to advise his [or her] client of the right to appeal a sentence. The failure to do so qualifie[s] as a deficiency in performance." Shepherd v. State, No. 01C01-9303-CR-00080, Davidson County (Tenn. Crim. App. filed March 17, 1994, at Nashville) (citation omitted). The appropriate remedy for this deficiency is a delayed appeal. Id. A finding of prejudice is not required prior to the granting of this relief. State v. Herron, No. 03C01-9109-CR-00284, Hawkins County (Tenn. Crim. App. filed March 10, 1992, at Knoxville). We need not address the merits of the defendant's appeal issues before granting this relief. Id.; Pinkston v. State, 668 S.W.2d 676 (Tenn. Crim. App. 1984).

The petitioner has failed to carry his burden of proving that the evidence preponderates against the lower court's findings that he pled guilty freely and voluntarily and that he received effective assistance of counsel in entering his plea. Therefore, we affirm the lower court's judgment denying post-conviction relief with respect to the defendant's conviction. However, because the defendant was denied effective assistance of counsel on appeal, we grant the defendant a delayed appeal with respect to his sentence only.

JOHN H. PEAY, Judge

CONCUR:

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GARY R. WADE, Judge

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DAVID H. WELLES, Judge