IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL 1996 SESSION

ERIC LaVAUGHN ANDERSON,	*	No. 03C01-9508-CR-00224
APPELLANT,	*	HAMILTON COUNTY
VS.	*	Hon. Russell C. Hinson, Judge
STATE OF TENNESSEE,	*	(Post-Conviction)
APPELLEE.	*	

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Eric LaVaughn Anderson, appeals from the denial of post-conviction relief. He maintains that he was denied his right to the effective assistance of counsel and that his guilty pleas to three counts of aggravated rape were not made voluntarily, knowingly, and intelligently. The trial court denied the petition after appointing counsel and conducting an evidentiary hearing. We find no error and affirm the judgment.

The appellant was twenty-one years of age when he pled guilty to three counts of aggravated rape on May 30, 1991. He was sentenced to serve fifteen years in the Department of Correction for each offense; the sentence in case number 187547 was ordered to run consecutively to the sentences in case numbers 186288 and 186289. The effective sentence was thirty years.[1]

At the post-conviction hearing, the appellant related his version of the events that led to his pleas of guilty. He met with trial counsel two or three times for five to ten minutes. Although he told counsel that he had been sexually abused as a child, counsel did not discuss possible defenses or investigate the appellant's background. Counsel also did not tell the appellant that "penetration" was an element of the offenses. Counsel told the appellant that the State would use the appellant's confessions against him and would also show that one of the victims apparently had contracted gonorrhea from the appellant.

The appellant testified that trial counsel told him that he "may as well" plead guilty because of the confessions. Counsel said that he would receive a fifteen year sentence if he pled guilty; otherwise he faced a possible sentence of forty-five to seventy-five years. The appellant said that counsel discussed consecutive and concurrent sentences but that he, the appellant, did not understand the difference. He believed he

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[1] Aggravated rape is a class A felony. For range I standard offenders, the punishment is fifteen to twenty-five years. Tenn. Code Ann. § 40-35-112(a)(1).

would receive a sentence of fifteen years. He acknowledged that the trial court announced the sentence of thirty years in the plea submission hearing, but he thought it was too late to say anything.

The appellant testified that he did not penetrate the victim as charged in case number 187547; however, he conceded that he told investigating officers that he "stuck his pinkie in [the victim's] vagina." The appellant also conceded he told officers that he touched the other two victims and that he needed help for his "problem of touching kids." The appellant testified, however, that the statements were not true; he said that he lied to the officers because they would not believe him and that he was "probably" under the influence of "crack fumes" when he made the statements. The appellant said that he would not have pled guilty had counsel investigated possible defenses or explained the element of penetration.

Linda Howie, the appellant's mother, testified that she did not recall being contacted by trial counsel. She would have told counsel that her son had been abused by two adult men when he was nine or ten years of age. She also would have told counsel that she had sexual relations with her son pursuant to the teachings of a "cult" she had been involved with. She believed that the information may have reflected on the appellant's mental health and his ability to know right from wrong.

Thomas Walter Ford testified that he was a clinical psychologist and the Clinical Director at the Johnson Mental Health Center when the appellant was evaluated in April of 1991. The facility had been asked to determine the appellant's competency and his mental state at the time of the crimes. On April 26, 1991, James Maguire, the Mental Health Center's forensic services coordinator, sent a letter to the appellant's trial counsel requesting information that would assist in conducting the evaluation. According to Ford, there was no indication in the records that counsel responded to the letter either in writing

or by telephone. Ford conceded that he did not know whether counsel had contact with James Maguire.

Ford testified that on May 31, 1991, the Mental Health Center sent a letter to the court and to the parties that detailed the results of the evaluation. The letter indicated that the appellant was competent to stand trial and was not legally insane at the time of the offenses. Ford acknowledged that the appellant told examiners that he had been sexually abused by an adult male. Ford did not know whether the Mental Health Center learned that the appellant had been sexually abused by his mother. He believed that the information "could have" had an impact on the evaluation depending on the nature and frequency of the abuse. Ford agreed, however, that he had seen nothing in the record that altered the results of the evaluation.

Trial counsel testified that he was an assistant public defender when he represented the appellant. He met with the appellant at the Hamilton County Jail on May 7, 1991. The appellant said that he had been sexually molested and that he had received counseling. The appellant also said he would accept three concurrent fifteen year sentences provided he could "tell his side of the story."[2] Counsel testified that prior to the plea submission hearing, he fully explained to the appellant that the sentence for one of the offenses (case number 187547) had to be served consecutively because it was committed when the appellant was on bond for the other two offenses. Counsel testified that he always left the decision to plead guilty to his clients.

Counsel said that he met with the appellant to discuss the State's proof. They reviewed the appellant's confessions and the victims' statements. They also discussed the fact that one of the victims had contracted gonorrhea from the appellant.

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[2] Counsel's notes from this meeting stated, in part: "Client says he wants to accept the 3 concurrent 15 year sentences which were offered by [the assistant district attorney general] but he wants to tell his side of the story...."

Counsel testified that he talked to Jim Maguire at the Johnson Mental Health Center in response to the letter of April 26, 1991. According to counsel, Maguire was aware that the appellant had been sexually abused by an adult male. Counsel conceded that the Mental Health Center's letter of May 31, 1991, which summarized the findings relative to the evaluation of the appellant, arrived after the pleas were entered. However, he recalled talking to Maguire about the results of the evaluation before the pleas were entered.

At the conclusion of the evidentiary hearing, the trial court noted that the appellant had received a "good result" in that the length of each sentence was the minimum within the applicable range. The trial court found that the appellant's guilty pleas had been knowingly, voluntarily, and intelligently entered. The trial court also found that the appellant had not been denied his right to the effective assistance of counsel.

In post-conviction cases, the burden is on the petitioner to prove allegations by a preponderance of the evidence. Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988); Vermilye v. State, 754 S.W.2d 82, 84 (Tenn. Crim. App. 1987). On appeal, we are bound by the trial court's findings of fact unless the evidence in the record preponderates against those findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. 1990). The appellant has the burden of illustrating how the evidence preponderates against the judgment entered. Id.

I

To establish a claim of ineffective assistance of counsel a petitioner must show (a) that the services rendered by counsel were deficient and (b) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984). When the petitioner seeks to set aside guilty pleas on this ground, he must demonstrate a reasonable probability that, but for counsel's deficiency, he would have insisted on going to trial. Hill

v. Lockhart, 474 U.S. 52, 59 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991).

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 services rendered were within the range of competence demanded of attorneys in criminal cases. 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; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. Hellard v. State, 629 S.W.2d at 9.

The appellant alleges multiple grounds in support of his ineffective assistance of counsel claim: that counsel "misrepresented" the length of the sentence he would receive by pleading guilty; that counsel failed to advise him of the "penetration" element for aggravated rape; that counsel failed to review the appellant's confession in case number 187547; that counsel failed to investigate a possible insanity defense; and that counsel failed to cooperate with the Johnson Mental Health Center. In addition to testifying about these grounds, the appellant asserted that, but for counsel's deficiencies, he would have insisted on going to trial.

Our review of the evidence indicates that the evidence does not preponderate against the trial court's judgment. With regard to the claim of "misrepresenting" the sentence, the submission hearing reveals that the trial court explained the litany of rights the appellant waived by pleading guilty. See Boykin v. Alabama, 395 U.S. 238, 243 (1969); State v. Mackey, 553 S.W.2d 337, 341 (Tenn. 1977). The trial court also informed the

appellant that the total sentence was thirty years in the Department of Correction. Moreover, the trial court asked the appellant on two occasions if he understood the terms of the sentence. The appellant answered "yes" on both occasions. Similarly, in the post-conviction hearing, trial counsel testified that he told the appellant that the sentence would be thirty years. He also told the appellant that the sentence in case number 187547 had to run consecutively because the offense was committed while the appellant was on bond for the other two offenses. Additionally, counsel told the appellant that the decision to plead guilty was his own to make.

With regard to the "penetration" element, trial counsel testified that he met with the appellant to discuss the evidence the State would prove if the case went to trial. They discussed the appellant's confessions and the victims' statements. They also discussed the fact that one of the victims contracted gonnerea from the appellant. In the submission hearing, the appellant admitted that he was guilty of the offenses and that he was satisfied with counsel's representation.

With regard to the appellant's confessions, counsel recalled reviewing the confessions for each of the cases and discussing the confessions with the appellant. Counsel acknowledged that his file did not contain a copy of the confession in case number 187547. The appellant conceded that he had confessed to an act of digital penetration in case number 187547 and that he told officers he needed help for his problem. The appellant now maintains that none of his confessions were true and that he may have been high on crack fumes when he made the statements. He does not, however, contend that counsel should have sought to suppress the confessions on this basis, nor does he show that a suppression motion would have been successful.

With regard to the possible defense of insanity, counsel testified that he was aware the appellant had been sexually abused as a child. Counsel also testified that he

knew the appellant was going to be evaluated for competency and insanity at the Johnson Mental Health Clinic. Counsel believed that he discussed the case with Jim Maguire, the Forensic Services Coordinator, and that Maguire was aware the appellant had been sexually molested as a child. Finally, counsel testified that he learned the results of the evaluation--that the appellant was competent to stand trial and not legally insane at the time of the crimes-- prior to the entry of the guilty pleas.[3]

The trial court resolved the conflicts in the testimony by finding that trial counsel had afforded effective representation. After a thorough review, we conclude that the evidence in the record does not preponderate against that judgment. See Black v. State, 794 S.W.2d at 755.

II

A constitutionally valid guilty plea must be voluntarily and knowingly entered. Boykin v. Alabama, 395 U.S. at 243; Johnson v. State, 834 S.W.2d 922, 923 (Tenn. 1992). Our supreme court has said that it "is recognized in this State, as in all jurisdictions, that a plea of guilty must be made voluntarily and with full understanding of the consequences." State ex rel. Barnes v. Henderson, 220 Tenn. 719, 727, 423 S.W.2d 497, 501 (1968); see also Parham v. State, 885 S.W.2d 375, 380 (Tenn. Crim. App. 1994).

The appellant argues that his guilty pleas were not knowing, voluntary and intelligent because counsel "misrepresented" the length of the sentences he would be required to serve. The appellant claims that he was under the "mistaken impression" that he would receive three concurrent fifteen year sentences and that he was not told that one

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[3] The trial court commented that the psychiatric examiners "asked their own questions and developed the information that they needed to make their evaluation and conclusions." We further note that the appellant has not shown that the result of the evaluation would have been different had counsel supplied additional information to the Mental Health Center. See, e.g., Mark W. Rawlings v. State, No. 02C01-9504-CR-00112 (Tenn. Crim. App., Apr. 17, 1996, Jackson)(ineffective counsel not proven where no proof in the record of what a mental evaluation would have revealed).

of the sentences would be served consecutively. Counsel testified, however, that he fully informed the appellant that one of the sentences would run consecutively to the other two for an effective total of thirty years. The plea submission hearing indicates that the trial court imposed a thirty year sentence and, on two occasions, asked the appellant if he understood the nature of the sentences. The appellant replied that he did understand the sentences and that he was entering the pleas voluntarily.

As noted in the preceding issue, the trial court resolved the conflicts in the evidence. The trial court also found that the guilty pleas had been entered knowingly, voluntarily, and intelligently. The evidence in the record does not preponderate against the trial court's findings. See Black v. State, 794 S.W.2d at 755.

III

In a final issue, the appellant reiterates that he was denied the effective assistance of counsel and that his guilty pleas were involuntary because the mental health evaluation was not completed at the time he entered the guilty pleas. The evidence showed that the evaluation was requested in April of 1991, and that a letter setting forth the results was dated May 31, 1991. Counsel testified, however, that he obtained the results from the forensic services coordinator prior to the entry of the guilty pleas; thus, he was aware that the appellant had been found competent to stand trial and not legally insane at the time of the offenses. Accordingly, the appellant has not shown that he is entitled to relief on this ground.

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William M. Barker, Judge

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Gary R. Wade, Judge

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David H. Welles, Judge