

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1996 SESSION

FILED
July 26, 1996
Cecil W. Crowson
Appellate Court Clerk

TIMOTHY BROWN,)
)
 Appellee,)
)
 v.)
)
 STATE OF TENNESSEE,)
)
 Appellant.)

No. 01C01-9507-CR-00216

Davidson County

Hon. J. Randall Wyatt , Judge

(Post-Conviction)

For the Appellant:

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OPINION FILED: _____

AFFIRMED IN PART; REVERSED AND REMANDED IN PART

Joseph M. Tipton
Judge

OPINION

The petitioner, Timothy Brown, appeals from the Davidson County Criminal Court's denial of his petition for post-conviction relief. The petitioner was convicted in 1993 upon his pleas of guilty to three counts of sale of cocaine in excess of one-half gram. He was sentenced as a Range II, persistent offender to twenty years, fifteen years and fifteen years, respectively, with one fifteen-year sentence to be served consecutively to concurrent sentences of twenty and fifteen years, for an effective sentence of thirty-five years. No direct appeal of his sentences was made. In this appeal as of right, the petitioner asserts that (1) his guilty pleas were not entered knowingly and voluntarily, (2) trial counsel was ineffective in advising him relative to the entry of his guilty pleas and (3) he is entitled to a delayed appeal.

An evidentiary hearing was held regarding the petitioner's claims of an involuntary plea and the ineffective assistance of his retained counsel. The record reflects that, during plea negotiations, the petitioner was offered a total effective sentence of twenty years in exchange for his guilty pleas to the three offenses and his testifying against a codefendant at trial. The petitioner turned down the offer and the case proceeded to trial. After jury selection, the petitioner decided to plead guilty when he noticed that a confidential informant had appeared to testify. Trial counsel inquired about the previous plea offer of twenty years to which the prosecution replied that the state had no interest in pursuing a plea agreement on the day of trial. After conferring with trial counsel, the petitioner chose to enter guilty pleas with no agreed sentence or recommendations by the state. The petitioner testified that trial counsel advised him that his total sentence would probably be about twenty years. Trial counsel testified that he informed the petitioner of the entire range of punishment and that the trial court would make the final determination of the sentences.

The transcript of the guilty plea submission hearing reflects that the petitioner fully understood that he was entering the guilty pleas without sentence recommendations. The petitioner also indicated that he understood that he was facing a possible sentence of ninety years, depending upon his offender status, and the imposition of consecutive sentences. The petition to enter guilty pleas that was signed by the petitioner reflects that the pleas were entered without a recommendation as to sentence. The trial court also inquired as to the petitioner's understanding that he was waiving any right to appeal these convictions by pleading guilty to which the petitioner replied that he understood.

At the sentencing hearing several months later, the petitioner was sentenced to thirty-five years. At the post-conviction hearing, the petitioner testified that his trial counsel told him that he would appeal the petitioner's sentences, but trial counsel testified that he made no such statement and that he did not believe that there was reason for such an appeal. Trial counsel acknowledged, though, that he did not appeal the sentences and did not advise the petitioner of any time limit for the appeal or of any other procedures for appeal.

At the post-conviction hearing, the trial court found that the petitioner's pleas had been knowingly and voluntarily entered and that trial counsel did not ineffectively advise him to enter the pleas. The trial court also denied the petitioner's request for a delayed appeal, stating that the petitioner had waived any right to appeal by entering guilty pleas. It further concluded that the petitioner had waived any right to appeal the sentences because the petition to enter guilty pleas included the following statement: "I agree to accept any punishment which the law permits the Court to impose."

On appeal, we are bound by the trial court's findings of fact in a post-conviction case 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). In this respect, the state argues that the record fully supports the trial court's determinations relative to the voluntariness of the petitioner's pleas and the effectiveness of trial counsel's advice regarding those pleas, but concedes that the petitioner should be granted a delayed appeal. We agree in all aspects.

As previously indicated, the record reflects that the petitioner was well aware of his rights and the alternatives available to him when he entered his guilty pleas. Likewise, there has been no showing that trial counsel provided any improper representation through the plea process.

However, the trial court's determinations regarding the petitioner's appeal of his sentences are not supported by the record. The plea hearing transcript reflects that the trial court addressed the petitioner regarding his waiver of appeal by pleading guilty relative to his underlying convictions -- no mention being made about the sentences to be imposed at a later date. Moreover, the order granting the guilty plea petition refers only to the waiver of an appeal for the convictions, not the sentences. Finally, the petitioner's guilty plea petition included the following provision upon which the trial court relied to find waiver of any sentence appeal:

10. My attorney has discussed with me whether I am eligible for alternative sentencing, including probation. I understand my attorney's statements on this issue. Although, if eligible, I hope to receive probation or other alternative sentencing, I agree to accept any punishment which the law permits the Court to impose.

In context, this provision is nothing more than a statement by the petitioner that he understands that he will not be entitled to withdraw his guilty plea merely because he receives an unanticipated sentence. It certainly cannot be interpreted in this case to

be a presentence waiver of the right to appeal any then-unknown sentences, regardless of their level of compliance with the sentencing laws.

In substance, the record shows that the petitioner's trial counsel essentially abandoned the petitioner relative to any appeal of his sentences and failed to advise the petitioner of such steps as would preserve any right to appeal. Under these circumstances, we conclude that the petitioner is entitled to a delayed appeal pursuant to T.C.A. § 40-30-120 in order to have the validity of his sentences reviewed.

In consideration of the foregoing, we affirm the trial court's determinations that the petitioner's convictions upon his guilty pleas were validly obtained. However, the trial court's denying the petitioner a delayed appeal is reversed and the case is remanded for the trial court to enter an order granting the petitioner a delayed appeal after which time the petitioner's time for appeal will be begin to run.

Joseph M. Tipton, Judge

CONCUR:

Paul G. Summers, Judge

David H. Welles, Judge