IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
APRIL SESSION, 1996

FILED

September 19, 1996

Cecil W. Crowson
Appellate Court Clerk

JIMMY DALE HILL,	)	
	)	No. 01C01-9508-CC-00283
Appellant	)	
	)	MOORE COUNTY
vs.	)	
	)	Hon. Lee Russell, Judge
STATE OF TENNESSEE,	)	
	)	(Post-Conviction)
Appellee	)	

For the Appellant:

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Jimmy Dale Hill, appeals the Moore County Circuit Court's denial of his petition for post-conviction relief. On February 22, 1994, pursuant to a plea agreement, the appellant pled guilty to vehicular assault and was sentenced as a Range 1 standard offender to the Department of Correction for seven years.[1] The plea agreement provided, and the trial court ordered, that this sentence be served concurrently with three prior unserved sentences from Coffee County. On June 20, 1994, the appellant filed a petition for post-conviction relief, alleging that the Department of Correction refused to acknowledge the provision of the judgment of conviction relating to concurrent service of the appellant's sentences.[2]

On June 6, 1995, the Moore County Circuit Court conducted a post-conviction hearing. At the hearing, the appellant alleged that his plea was not entered knowingly and voluntarily, because he entered the plea believing that his Moore County and Coffee County sentences would expire at the same time. According to the appellant, the Coffee County sentences "expired" in August, 1994.[3] With respect to the Moore County sentence, the appellant stated that he was released and placed on parole in September, 1994. His parole was revoked in February, 1995, due to the appellant's failure to pass a drug urine screen.

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[1]Initially, the grand jury returned a seven count indictment against the appellant. The appellant waived his right to trial by jury and was tried and convicted of vehicular assault and reckless endangerment by the Moore County Circuit Court. For the vehicular assault conviction, the Moore County Circuit Court sentenced the appellant as a Range II offender to the Department of Correction for eight years. For the reckless endangerment conviction, the court imposed a sentence of 11 months and 29 days, to be served consecutively to the eight year sentence. On appeal, this court vacated the judgments of conviction and remanded the case for further proceedings, finding the indictment to be defective. State v. Hill, 847 S.W.2d 544 (Tenn. Crim. App. 1992).

[2]At the post-conviction hearing, the appellant's trial attorney testified that he had convinced the Department of Correction to amend its records to reflect concurrent sentencing.

[3]We assume that the appellant's use of the term "expired" was intended to reflect his complete service of the Coffee County sentences. The record does not otherwise indicate when the appellant's Coffee County sentences did, in fact, "expire."

On appeal, the appellant argues only that he received ineffective assistance of counsel during the guilty plea proceedings, because trial counsel advised him that his Moore County and Coffee County sentences would expire at the same time. The appellant contends that he relied upon this advise when he accepted the State's plea offer. Furthermore, the appellant testified that counsel informed him that, due to the number of days of pre-trial jail credit accumulated by the appellant, he would be eligible for release immediately.[4] The appellant acknowledged that a comparison of his current sentence with his original sentence revealed that he had benefited from the plea agreement negotiated by trial counsel.

The appellant's trial counsel testified that, on the day of the appellant's guilty plea, the appellant informed counsel that he wanted a sentence no longer than seven years, which the appellant would serve concurrently with the Coffee County sentences. Counsel also testified that "[the appellant] wanted when he got out that [his sentences] all be over. He did want that. There was no way I could guarantee that." Counsel asserted that he never guarantees expiration dates to his clients. Finally, counsel stated that he could not recall ever informing the appellant that his Moore County sentence and his Coffee County sentences would expire simultaneously. He noted that, had he been asked, he would have explained to the appellant that expiration dates are determined by sentence reduction credits which must be calculated by the Department of Correction.

At the conclusion of the hearing, the post-conviction court dismissed the appellant's petition. With respect to the trial attorney's performance, the court made the following findings of fact:

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[4]The appellant had remained incarcerated during the pendency of his first, successful appeal and, according to testimony at the hearing, was entitled to receive pre-trial jail credit for the period of incarceration extending from July 19, 1991, to February 22, 1994.

> I found [defense counsel's] testimony completely credible in his description of the representations that he made to his client/defendant at that time. ... I therefore do not believe that the defendant/petitioner has met his burden of proof ... as to whether there was any error or omission made by his counsel at that time. [Defense counsel] told him exactly what the situation was and what he could expect. ... [I]n fact all he was promised was what he got. He was promised a concurrent sentence and that is what he got.

After reviewing the record, we affirm the judgment of the post-conviction court.

ANALYSIS

Reduced to its simplest terms, the appellant now raises in this collateral attack the critical question, "Why ain't I free." Although there are undoubtedly several possible responses to the appellant's inquiry, including the appellant's apparent failure to comply with the conditions of his parole, the record simply does not support the appellant's allegation of deficient performance by trial counsel. In post-conviction proceedings, the appellant must prove the allegations in his petition by a preponderance of the evidence. Davis v. State, 912 S.W.2d 689, 697 (Tenn. 1995). Moreover, on appeal, this court is bound by the post-conviction court's findings of fact unless the evidence in the record preponderates against those findings. Id. See also Black v. State, 794 S.W.2d 752, 755 (Tenn. 1990).

When a claim of ineffective assistance of counsel is raised, the appellant bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). With respect to deficient performance, the court must decide whether or not counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To satisfy the prejudice prong of the Strickland test, the appellant must show a reasonable probability that, but for counsel's ineffective performance, the result of the proceeding would have been different.

Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. Accordingly, when the appellant seeks to set aside a guilty plea on the ground of ineffective assistance of counsel, he must demonstrate a reasonable probability that, but for counsel's deficiency, he would have insisted upon proceeding to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1991); Manning v. State, 883 S.W.2d 635, 637 (Tenn. Crim. App. 1994).

Again, we conclude that the appellant has failed to satisfy his burden of proof. Indeed, the record clearly reflects that appellant's trial counsel rendered effective assistance. Accordingly, the judgment of the post-conviction court is affirmed.

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DAVID G. HAYES, Judge

CONCUR:

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JOE B. JONES, Presiding Judge

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JOHN H. PEAY, Judge