

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

FILED

November 27, 1996

Cecil W. Crowson
Appellate Court Clerk

FRANK CRITTENDEN,)
)
Appellant)
)
vs.)
)
STATE OF TENNESSEE,)
)
Appellee)

No. 01C01-9510-CR-00344

DAVIDSON COUNTY

Hon. J. Randall Wyatt, Jr., Judge

(Post-Conviction)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Frank Crittenden, appeals the Davidson County Criminal Court's dismissal of his petition for post-conviction relief. In his petition, the appellant alleges that, but for the ineffective assistance of his trial counsel, he would have timely filed a notice of appeal from the trial court's sentencing decision. Consequently, the appellant asks this court to find that, due to this constitutional violation, he is entitled to a delayed appeal of his original sentences.

After reviewing the record, we conclude that the appellant's issue is without merit. Accordingly, we affirm the trial court's order denying post-conviction relief.

I. Background

On December 15, 1994, the appellant pled guilty to eight counts of a thirty-six count indictment charging him with multiple offenses of aggravated rape and aggravated sexual battery of his daughter. Pursuant to an open plea agreement, a sentencing hearing was held on February 10, 1995. Consequently, the court sentenced the appellant to twenty-five years incarceration for each count, four counts to run concurrently, four counts to run consecutively, for a total effective sentence of one hundred years. At the conclusion of the sentencing hearing, the trial court permitted retained trial counsel to withdraw as counsel of record for the appellant.

Notwithstanding this termination, trial counsel visited the appellant on

February 23, 1995. During this visit, trial counsel advised the appellant of his right to appeal the sentences imposed by the trial court and of his right to waive this right to appeal. The appellant signed the waiver of appeal, which trial counsel filed on February 27, 1995. On March 25, 1995, the appellant filed a motion to file a belated notice of appeal. The court appointed the appellant counsel, who correctly captioned this motion as a petition for post-conviction relief. The appellant filed this petition on May 31, 1995, and a post-conviction hearing was held on June 7, 1995.

At the hearing, the appellant confirmed that trial counsel had visited him on February 23. However, the appellant asserted that trial counsel instructed him to sign both the waiver of his right to appeal and the notice of appeal. Trial counsel then instructed the appellant to "call him the next morning" when he decided what course of action to take. The appellant explained that trial counsel "told [him] that if [he] filed an appeal, that the Parole Board . . . would hold that against [him]. [Trial counsel] told [him] that if [he] filed for an appeal, the appellate court could and probably would raise [his] sentence because [he] had appealed it." He further stated that trial counsel had told him that he only had until February 24, to file an appeal.¹

The appellant testified that his "phone calls were refused [by trial counsel], so [he] could never get in touch with him." Finally, the appellant states that, in desperation, he wrote trial counsel a letter, on March 8, 1995, instructing trial counsel to either file an appeal or have an attorney appointed for him.² Trial counsel returned this letter, unopened, with a letter stating that he was no longer representing the appellant and that there would be no further contact between

¹An appellant must file a notice of appeal "within thirty days after the date of entry of the judgment appealed." Tenn. R. App. P. 3 & 4(a); see also Tenn. R. Crim. P. 37. Accordingly, the appellant had until March 13, 1995, to file a notice of appeal.

²The appellant's letter is somewhat contradictory as it states, "I was not able to contact you because I was not on the phone system yet."

the two.

The appellant's trial counsel testified that, on February 23, he met with the appellant to discuss the appellant's right to appeal his sentences. Although the court had relieved him from any further representation of the appellant, trial counsel stated that he felt that he had a duty to inform the appellant of this right. During this meeting, trial counsel discussed the appellant's "right to appeal . . . that he could waive that right . . . [and] about accepting responsibility for the abuse of his daughter." The appellant indicated that he fully understood his right to appeal the range, length, and manner of service of his sentences and his right to waive that right. Trial counsel added that he brought four copies of both the notice of appeal and the waiver of appeal. The appellant signed four copies of the waiver of appeal, one of which counsel filed with the court. Apparently, trial counsel subsequently discarded the unsigned notice of appeal. Trial counsel also stated that he had not received any telephone calls from the appellant after the signing of the waiver. Finally, when questioned about the letter from the appellant dated March 8, trial counsel testified that he received the letter on March 13, and returned the letter unopened to the appellant.

The trial court concluded that the appellant had knowingly and intelligently waived his right to appeal. Accordingly, the court denied the appellant's petition for post-conviction relief, because trial counsel had "represented Mr. Crittenden as effectively as could have been done by any other lawyer faced with the circumstances and facts that he had in trying to defend Mr. Crittenden in this case."

II. Analysis

The appellant filed a petition for post-conviction relief alleging that, due to the ineffectiveness of his trial counsel, he was denied his right to appeal his sentences.³ As such, he asks this court to grant him a delayed appeal. We conclude that the trial court properly denied the appellant's post-conviction petition.

When a defendant is denied his right to appeal, the trial court is authorized to grant a delayed appeal. Hurt v. State, No. 01C01-9207-CC-00213 (Tenn. Crim. App. at Nashville, Feb. 18, 1993) (citations omitted). If the trial court denies a delayed appeal, that decision is subject to review by this court. Id. (citing State v. Wilson, 530 S.W.2d 766, 769 (Tenn. 1975)); Tenn. Code Ann. § 40-30-122 (1990) (repealed 1995) (current version at Tenn. Code Ann. § 40-30-216 (1996 Supp.)). However, a delayed appeal is only proper if the defendant was erroneously denied the right to appeal his original conviction in violation of the United States or Tennessee Constitutions. Tenn. Code Ann. § 40-40-120 (1990) (repealed 1995) (current version at Tenn. Code Ann. § 40-30-213 (1996 Supp.)). See also State v. Parks, No. 01C01-9506-CC-00177 (Tenn. Crim. App. at Nashville, July 5, 1996). Whether a defendant has been denied his constitutional right to appellate review depends on the facts and circumstances of each case. State v. Travis, No. 88-30-III (Tenn. Crim. App. at Nashville, Sept. 28, 1988) (citing State, ex rel. Doyle v. Henderson, 425 S.W.2d 593, 596 (1968)). Moreover, a defendant may only seek a delayed appeal through the procedures of the Post-Conviction Procedure Act. Handley v. State, 889 S.W.2d 223, 224 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1994) (citing Owens v. State, No. 03C01-9205-CR-177 (Tenn. Crim. App. at Knoxville, Apr. 23, 1993); see also Parks, No.01C01-9506-CC-00177.

³An appeal properly lies from a sentence pursuant to Tenn. R. Crim. P. 11(e). See Tenn. R. App. P. 3(b); Tenn. R. Crim. P. 37(b)(2)(ii).

To secure post-conviction relief, the appellant must prove an abridgement of a federal or state constitutional right by a preponderance of the evidence. Tenn. Code Ann. § 40-30-105 (1990) (repealed 1995) (current version at Tenn. Code Ann. § 40-30-203 (1996 Supp.)); Rawlings v. State, No. 02C01-9504-CR-00112 (Tenn. Crim. App. at Jackson, Apr. 17, 1996) (citing McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983)). The appellant, in his petition, asserts that he was denied his constitutional right to effective assistance of counsel. Specifically, he contends that, "but for [trial counsel's] unwillingness to communicate with Petitioner during [the thirty day filing period], petitioner has been denied his absolute right to appeal his sentence[s]."

In reviewing an effectiveness claim, this court must determine whether the advice given or services rendered by the appellant's attorney meet the threshold of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 830, 936 (Tenn. 1975). Coincidentally, to succeed on an ineffectiveness claim, the appellant must show that counsel's representation was deficient and that there was prejudice resulting from that deficiency. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2064 (1984) (emphasis added). Thus, even if there is attorney error, the appellant must still show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 693, 104 S.Ct. at 2068.

In the present case, trial counsel acknowledged that he felt obligated to inform the appellant of his right regarding appeal even though he no longer represented the appellant. Trial counsel added that he advised the appellant of his right to appeal his sentences. Nonetheless, the appellant, in an informed decision, indicated his intention to waive that right and, subsequently, signed four copies of a waiver, which trial counsel filed. The trial court, in denying the

appellant's petition, accredited the testimony of the appellant's trial counsel over the testimony of the appellant.

The trial court made a specific finding of fact that the appellant signed an appeal waiver form and that he voluntarily and knowingly waived his right to appeal after consultation with counsel.⁴ The findings of fact by the trial court are entitled to the same weight as a jury verdict, unless the evidence in the record preponderates against these findings. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990) (citations omitted); see also Rawlings, No. 02C01-9504-CR-00112 (citing State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983)); Wilson v. State, No. 03C01-9307-CR-00204 (Tenn. Crim. App. at Knoxville, Nov. 9, 1994) (citing Janow v. State, 470 S.W.2d 19, 21 (1971)). The evidence in the record does not preponderate against the trial court's determination.⁵ Consequently, the appellant has failed to carry his burden. We conclude that the appellant's claim is without merit. Accordingly, we affirm the judgment of the trial court.

DAVID G. HAYES, Judge

CONCUR:

⁴A defendant's right to one level of appellate review of his conviction is guaranteed by the Constitution. Douglas v. California, 372 U.S. 353, 356, 83 S.Ct. 814, 816 (1963); Collins v. State, 670 S.W.2d 219, 221 (Tenn. 1984). However, "the law does not require an appeal of a conviction in a criminal case in the event the defendant, for reasons satisfactory to himself, desires not to have such an appeal." Collins, 670 S.W.2d at 221. Nonetheless, any purported waiver of appellate review must be scrutinized. Thus, this court must determine whether the waiver was done knowingly and voluntarily. See Collins v. State, 670 S.W.2d at 221.

⁵E.g., Cauley v. State, No. 01C01-9310-CR-00367 (Tenn. Crim. App. at Nashville, Mar. 2, 1995), perm. to appeal denied, (Tenn. May 30, 1995); Pettigrew v. State, No. 02C01-9203-CC-0065 (Tenn. Crim. App. at Jackson, Aug. 25, 1993), perm. to appeal denied, (Tenn. Dec. 6, 1993); Snead v. State, No. 03C01-9204-CR-00145 (Tenn. Crim. App. at Knoxville, Dec. 1, 1992); Travis, No. 88-30-III.

JOHN H. PEAY, Judge

WILLIAM M. BARKER, Judge