

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1996

**FILED**  
December 6, 1996  
Cecil Crowson, Jr.  
Appellate Court Clerk

ROBERT O'DELL,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

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C.C.A. NO. 03001-9601-CC-00002

COCKE COUNTY

HON. REX HENRY OGLE  
JUDGE

(Post-Conviction)

ON APPEAL FROM THE JUDGMENT OF THE  
CIRCUIT COURT OF COCKE COUNTY

FOR THE APPELLANT:

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Assistant Public Defender  
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FOR THE APPELLEE:

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OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

The Defendant, Robert O'Dell, appeals as of right from the trial court's denial of post-conviction relief from a conviction based upon a guilty plea. The Defendant pled guilty to one count of theft over ten-thousand dollars (\$10,000). In this appeal, he argues that he was denied the effective assistance of counsel. We affirm the judgment of the trial court.

The Defendant alleges that he was provided ineffective assistance of counsel for several reasons. He pled guilty to one count of theft of a Cadillac and some jewelry. He had a prior criminal history and the District Attorney intended to prosecute him as a Range III persistent offender. For the offense in question, the applicable sentencing range is fifteen to twenty years as a Range III offender. The Defendant asserts that counsel recommended his taking a plea agreement as a Range II offender with a sentence of ten years. He claims that counsel inaccurately informed him that the sentence for this offense would run concurrently with a previous sentence, and that he would not have entered the guilty plea had he known that the sentences would run consecutively.

The Defendant also argues that counsel failed to take appropriate steps to prepare his case for trial. Namely, he contends that counsel did not interview him before his appearance in court. He also contends that counsel failed to obtain discovery, interview the State's witnesses, obtain an alleged videotape of the crime, or investigate the fact that the Defendant was undergoing psychological counseling.

In determining whether counsel provided effective assistance at trial, the court must decide whether 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 succeed on a claim that his counsel was ineffective at trial, a petitioner bears the burden of showing that his counsel made errors so serious that he was not functioning as counsel as guaranteed under the Sixth Amendment and that the deficient representation prejudiced the petitioner resulting in a failure to produce a reliable result. Strickland v. Washington, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984); Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). To satisfy the second prong the petitioner must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding petitioner's guilt. Strickland, 466 U.S. at 695. This reasonable probability must be "sufficient to undermine confidence in the outcome." Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

When reviewing trial counsel's actions, this court should not use the benefit of hindsight to second-guess trial strategy and criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel's alleged errors should be judged at the time they were made in light of all facts and circumstances. Strickland, 466 U.S. at 690; see Cooper 849 S.W.2d at 746.

This two part standard of measuring ineffective assistance of counsel also applies to claims arising out of the plea process. Hill v. Lockhart, 474 U.S. 52 (1985). The prejudice requirement is modified so that the petitioner "must show

that there is a reasonable probability that, but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

The Defendant first contends that counsel did not interview him before his court appearance. Counsel testified at the post-conviction hearing that he met with the Defendant at least once and spoke with him on the telephone several times. Counsel noted that he interviewed the Defendant regarding the facts of the case and potential defenses, and had represented him at the preliminary hearing and found that "[r]eally, there was no defense in this case." Counsel testified that when interviewed, the Defendant gave no substantial alternate version of what occurred, nor did he provide witnesses or a defense. Counsel's testimony is corroborated by the fact that the two Codefendants in the case had cooperated with the police and had agreed to testify against the Defendant.

The Defendant also claims that counsel failed to interview the State's witnesses, obtain a videotape of the crime, or obtain discovery. Counsel testified that he did interview one Codefendant and another witness. Defense counsel also made a formal discovery request. The Defendant states that counsel did not obtain a videotape of the crime, yet its existence or content was not confirmed.

The Defendant contends that counsel failed to investigate a mental health evaluation that diagnosed him as depressed and that he had borderline intellectual functioning. Counsel testified that the psychological issue related to the Defendant's wife and presented nothing that was relevant to his case in terms of a defense. Also, there is no evidence in the record that the Defendant was impaired such that he was unable to knowingly and voluntarily enter a plea.

Finally, the Defendant asserts that he was pressured by counsel to accept the plea agreement offered by the State. He argues that counsel failed to investigate whether he was properly classified as a Range III offender. However, counsel had represented the Defendant on other criminal matters and was aware of his history. Defense counsel was aware that the State intended to seek a fifteen to twenty year sentence and he successfully negotiated the Defendant's sentence to ten years. The Defendant claims that he was not aware that his sentence might run consecutively to his sentence to be served as a result of his probation violation. However, the plea agreement form that the Defendant signed states specifically that the sentence would run concurrently "unless mandatory to run consecutively." The Defendant was on notice that he was subject to consecutive sentences.

It is apparent that counsel assessed the Defendant's case and determined that the proof against him was so strong that a guilty plea was in his best interest. We note that we have not been provided with the complete record in this case and, therefore, we are without a complete picture of the facts. We are unable to conclude that counsel failed, on the facts presented in this appeal, to provide competent representation.

The burden rests on the Defendant to prove his allegations by a preponderance of the evidence. Long v. State, 510 S.W.2d 83, 86 (Tenn. 1982). The Defendant has not shown that counsel made errors so serious that he was not functioning as counsel as guaranteed by the Sixth Amendment. We conclude that the Defendant has failed to carry his burden of showing that either prong of the Strickland test has been met. Because the trial court's findings of

fact are afforded the weight of a jury verdict, this court is bound by those findings unless the evidence contained in the record preponderates against them. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). Here, they do not. This issue has no merit.

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DAVID H. WELLES, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JERRY L. SMITH, JUDGE