IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

SEPTEMBER 1996 SESSION

RICKEY SAMS,	)	
	)	**C.C.A. NO. 03C01-9511-CC-00368**
Appellant,	)	
	)	**SULLIVAN COUNTY**
VS.	)	
	)	**HON. W. FRED AXLEY,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-conviction)

FOR THE APPELLANT:

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(At hearing and on appeal)

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The petitioner pled guilty to two counts of aggravated rape and one count of rape. On April 18, 1991, and pursuant to his plea agreement, the petitioner received an effective sentence of twenty years as a Range I standard offender. The petitioner subsequently filed for post-conviction relief, which was denied after a hearing. He now appeals, alleging that his guilty plea was not knowingly made and that he received ineffective assistance of counsel in conjunction with his guilty plea. After reviewing the record, we affirm the lower court.

As grounds for his claims, the petitioner argues that both the trial court and his lawyer misinformed him about the actual consequences of his plea. Specifically, he testified at the hearing on his petition that both his lawyer and the trial court told him that he would be eligible for parole after he had served six years of his sentence. However, at the time the petitioner was sentenced, sex offenders could not be released on parole "unless a psychiatrist or licensed clinical psychologist has examined and evaluated such inmate and certified that, to a reasonable medical certainty, the inmate does not pose the likelihood of committing sexual assaults upon release from confinement." T.C.A. § 40-35-503(c) (1990). Additionally, successful participation and completion of a sexual abuse treatment program for sex offenders was a requirement for parole. T.C.A. § 41-21-235(b) (1990). Thus, the petitioner argues, his "eligibility" for parole required not merely the passage of time, but also the satisfaction of these additional prerequisites. Since, he claims, he was not told of these prerequisites, he did not make his guilty plea "knowingly."

While the record does not contain a transcript of the guilty plea, the

petitioner's former lawyer, James Roach, read into the record of the post-conviction hearing a portion of the transcript[1] which reflects the sentencing judge as saying,

> Before he is eligible for release, right, he may not get out then. He may go to the penitentiary and have problems. They may keep him longer than that, but he is eligible for release after serving that minimum amount of time. It doesn't mean that he is released automatically. He has to go through some type of sexual offender's program before he can be released, in any event, that the Department of Corrections has set up, and is established by law.[2] That has to be approved by the Department of Corrections before he can be released.

Moreover, Mr. Roach testified that he had also explained to the petitioner the requirement that he complete a sex offenders program before he could be released on parole. In spite of this information, the petitioner had not applied to enter the program as of the time of the post-conviction hearing.

"In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his [or her] petition by a preponderance of the evidence." McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the factual findings of the trial court in hearings "are conclusive on appeal unless the evidence preponderates against the judgment." State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983).

The court below found that "[t]he proof offered by Petitioner is void of any evidence to support a claim that his guilty plea was coerced. At the hearing for post-conviction relief, Petitioner himself admitted his guilty plea was made of his own free will."

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[1]Apparently, Mr. Roach had a copy of the guilty plea/sentencing hearing transcript with him while he testified at the post-conviction hearing. This testimony, containing the quotation, was admitted into evidence without objection.

[2]Emphasis added.

Accordingly, the court below found that the petitioner's guilty plea was constitutionally valid. However, we perceive the petitioner's grounds for relief as being that he did not knowingly enter his guilty plea rather than that he did not enter his plea voluntarily. The court below did not make a specific finding as to whether the petitioner knew prior to pleading guilty of the necessity of the certification and completion of the sex offenders program. Such a finding was not, however, necessary.

Relief is available on post-conviction only where the petitioner's constitutional rights have been violated. T.C.A. § 40-30-105. A guilty plea must pass constitutional muster in order to be valid. E.g., Blankenship v. State, 858 S.W.2d 897 (Tenn. 1993). However, a guilty plea is not rendered constitutionally infirm because a criminal defendant is not informed about "the details of his parole eligibility, including the possibility of being ineligible for parole." King v. Dutton, 17 F.3d 151, 154 (6th Cir. 1994). Thus, that the trial court did not inform the petitioner more specifically about the parole eligibility requirements for a sex offender does not afford the petitioner a claim for relief cognizable in this proceeding. See also Wilson v. State, 899 S.W.2d 648, 652 (Tenn. Crim. App. 1994), in which we held that, in the context of a similar post-conviction attack on a sex offender's guilty plea, the trial court was not required to advise the offender about the requirements he must meet in order to be released on parole. This issue is therefore without merit.

In his second issue, the petitioner contends that he received ineffective assistance of counsel in conjunction with his guilty plea. In reviewing the petitioner's Sixth Amendment claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930,

936 (Tenn. 1975). To prevail on a claim of ineffective counsel, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. There must be a reasonable probability that but for counsel's error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985). To satisfy the requirement of prejudice, the petitioner must demonstrate a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. See Hill v. Lockart, 474 U.S. 52, 59 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991).

The court below found that the petitioner's lawyer "met the standard required for effective assistance of counsel." We agree with this assessment. Mr. Roach correctly advised the petitioner about his release eligibility date and further informed him of the necessity of attending a sex offenders program. Even if Mr. Roach had not so informed the petitioner, this Court has previously held that defense counsel's failure to advise a sex offender that the program must be completed prior to parole release eligibility is not ineffective assistance of counsel. Wade v. State, 914 S.W.2d 97, 104 (Tenn. Crim. App. 1995). Defense counsel's failure to inform a sex offender that he must be certified in order to be eligible for parole is, likewise, not ineffective assistance. Id. This issue is without merit.

The petitioner also contends in his brief that he "was not informed that he would have to serve his entire twenty-year sentence to expiration." The petitioner is correct that he was not so informed, but we fail to see how the petitioner was thereby misinformed. It is impossible to predict what the parole board will do each time it

considers the petitioner for release. If the petitioner meets the statutory criteria for release, it is possible he will be released prior to the expiration of his sentence. And while we are intrigued by the evidence adduced at the post-petition hearing relative to sex offenders not being granted parole whether they complete the sex offenders program or not, the petitioner does not have standing to raise this issue. He has chosen not to apply for admission into the program. To the extent his choice makes parole impossible, the petitioner must look to himself as the cause of his continued incarceration.

For the reasons set forth above, the judgment below is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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DAVID G. HAYES, Judge

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WILLIAM M. BARKER, Judge