IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JUNE 1996 SESSION

CALVIN SHAZEL, Appellant,	*	C.C.A. # 03C01-9508-CC-00232
VS.	*	ANDERSON COUNTY
STATE OF TENNESSEE, Appellee.	*	Hon. James B. Scott, Jr., Judge
	*	(Post-Conviction Relief)

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OPINION FILED: _____

REVERSED AND REMANDED

GARY R. WADE, Judge

OPINION

The petitioner, Calvin Shazel, appeals the trial court's denial of post-conviction relief. Two issues are presented for review: (1) whether the petitioner received the effective assistance of counsel, and (2) whether the petitioner waived his right to seek post-conviction relief.

On February 8, 1991, the petitioner pled guilty to one count of aggravated robbery of a Sonic Restaurant. According to the terms of the plea agreement, the petitioner was to serve eight years in the state penitentiary as a Range I standard offender; the petitioner was to be granted a hearing on the question of probation.

At the time of the plea, the trial court asked the petitioner about the potential punishment:

> COURT: Usually when someone like yourself comes up here and pleads to an eight-year sentence, while you go down to the penitentiary and some jailhouse lawyer down there files a post conviction writ saying that the attorney is incompetent, that you didn't know what you were doing, so I want to make sure you understand this morning what you are doing here. Do you understand that?
>
> A: Yes, sir.
>
> COURT: Has anyone threatened you or promised you anything in order to get you to give up your rights as an accused?
>
> A: No, sir.
>
> * * *
>
> COURT: This is one of the most serious crimes that we have. Just a few years ago you could be put to death for this. Do you understand that?
>
> A: Yeah.
>
> * * *

COURT: The minimum and maximum penalty?

MS. HICKS: He's getting the minimum which is eight years. He would be a Range One.

* * *

COURT: The Court further finds that you have knowingly entered into a minimum sentence to aggravated robbery and that in this regard-- let me make sure that you understand what that consequence means in this plea agreement. You will have a probation hearing, but I can assure you that you will probably not get probation. You understand that?

A: Yes, sir.

COURT: You are gone is what it amounts to. You understand that?

A: Yes, sir.

COURT: Knowing that, it is my understanding you want to enter this plea?

A: Yes, sir.

* * *

MR. SAMS: We had previously tried to work out a plea bargain where Mr. Shazel was going to provide restitution but was unable to borrow the money from relatives because of the tenuousness of probation . . . . He understands he made a big mistake.

At the probation hearing, I think we can bring in some good character witnesses and show you some recent reform.

COURT: A big mistake. . . . I don't know what restitution plan they would have given you. But you are still going to the penitentiary even though-- because taking a weapon and sticking up a public place as far as I'm concerned is subject to a penitentiary sentence regardless.

(Emphasis added).

Within two weeks of the plea, the petitioner's attorney learned that the petitioner, who would have ordinarily qualified for probationary consideration with a sentence of eight years or less, was ineligible under the specific terms of Tenn. Code Ann. § 40-35-303:

> (a) A defendant shall be eligible for probation under the provisions of this chapter if the sentence actually imposed upon such defendant is eight (8) years or less; provided, that a defendant shall not be eligible for probation under the provision of this chapter if he is convicted of a violation of . . . § 39-13-402 [aggravated robbery] . . . .

When his trial counsel notified the petitioner of his discovery, he asked if he could withdraw his plea. Counsel immediately filed a timely motion to set aside the guilty plea and advised the petitioner of the date of the hearing. Before the motion could be heard, the petitioner fled this jurisdiction without permission and secretly resided with his aunt in south Georgia. On April 9, 1991, upon learning that the petitioner had absconded without notification to his counsel, the trial court appropriately denied the motion to set aside the guilty plea. When the petitioner was returned to custody in January of 1993, the trial court entered judgment and ordered service of the eight-year sentence.

In February 1994, the petitioner filed this petition for post-conviction relief. Appointed counsel amended the petition four months later. At the evidentiary hearing, the petitioner testified that he understood his plea agreement might result in a probationary sentence and that he would never have entered the plea had he known he would not get that opportunity. His trial counsel testified that probation was very important to the petitioner; he related that the petitioner wanted a chance to admit his mistake and request a sentence that would be comparable to the sentence imposed upon his codefendant. While acknowledging that the petitioner had been promised a hearing on probation, the trial court concluded that the law in effect at the time of the offense precluded probation consideration; the trial court determined that as soon as trial counsel discovered his mistake, he acted as prudently as possible by filing a timely motion to set aside the plea. The trial court ruled that because the petitioner left the jurisdiction before the hearing date, the

motion to set aside the plea had been abandoned and that probation had properly been denied.

Implicit in the trial judge's findings is that the petitioner knew at the time of the plea that he had very little chance, even if the law had allowed it, for a grant of probation. Consequently, the hearing might have been little more than a formality. Thus, the trial court ruled that any mistaken advice by trial counsel did not result in any prejudice.

There is well-established case law governing this issue. In order to be granted relief on the grounds of ineffective assistance of counsel, the petitioner must establish that the advice given or the services rendered were not within the range of competence demanded of attorneys in criminal cases and that, but for his counsel's deficient performance, the result of his trial would have been different. Strickland v. Washington, 466 U.S. 668, 693 (1984); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). This two-part standard, as it applies to guilty pleas, is met when the petitioner establishes that, but for his counsel's error or errors, he would not have pled guilty and would have insisted on his right to trial. Hill v. Lockhart, 474 U.S. 52, 53 (1985).

The burden, of course, is on the post-conviction petitioner to show that the evidence preponderates against the findings made at the conclusion of the hearing by the trial judge. Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978), cert. denied, 441 U.S. 947 (1979). Otherwise, findings of fact made by the trial court are binding on this court. Graves v. State, 512 S.W.2d 603, 604 (Tenn. Crim. App. 1973).

On first impression, it would appear that the petitioner, because he fled the jurisdiction, got exactly what he deserved. Frankly, that is the sentiment of this court. Moreover, the trial court found that the performance of counsel was not below the standards guaranteed by the state and federal constitutions. On the other hand, the record clearly demonstrates that the petitioner entered his plea based upon his hope for probation. His trial counsel was simply unaware that an aggravated robbery conviction precluded that possibility. Neither the state nor the trial court were aware of the statutory preclusion for the offense of aggravated robbery. Certainly the petitioner did not know that. Had his trial counsel taken the time to review both the aggravated robbery and probation statutes, he would have learned that the petitioner was not even entitled to a hearing on the claim. The record establishes that the plea was based primarily upon his opportunity to plead for probation. Based upon that, our inevitable conclusion is that the evidence preponderates against the findings of the trial court; that is, trial counsel was deficient for having failed to accurately research the applicable law.

That is not, however, a determination on the question of whether this conviction must be set aside. Once it has been established that there was a deficiency in performance, the petitioner must then demonstrate that he would not have entered his guilty plea absent that omission in duty. Hill v. Lockhart, 474 U.S. at 53. Both the petitioner and his trial counsel testified at the evidentiary hearing that the petitioner would not have entered the plea had they known the law absolutely precluded the grant of probation. No witness refuted that. Thus there is simply no evidence in this record to indicate that he would have entered his plea anyway.

The ruling of the trial court is perfectly understandable. Before the plea was entered, the trial court warned the petitioner that he would not likely receive probation. The transcript of the submission hearing made it clear that the hearing would be little more than a mere formality. The petitioner even acknowledged his slim chance for relief.

A trial is a precious right to waive even in the worst of circumstances. Here, the petitioner had acknowledged that he had a problem finding witnesses to testify in his behalf. A motion to suppress his confession and other incriminating statements had been overruled. Physical evidence linked him to the crime. The codefendant implicated the petitioner. Trial counsel testified that his client understood that "he couldn't do better than that [plea agreement] at trial and that . . . it would be an aberrant jury that came back with a not guilty verdict under those circumstances . . . ." While these facts may make it clear that the petitioner's best choice may have been to enter the guilty plea and secure the minimum sentence within the range, it is equally clear that the petitioner had been advised that probation was a possibility. The record demonstrates that he would not have entered his plea absent the misadvice of his trial counsel. The rule in Hill must prevail.

The trial court found that the petitioner waived his rights to post-conviction relief by absconding. That is true as it applies to a delayed appeal; that remedy is not available to a convicted felon who, by his escape, has abandoned his right to direct appeal. Brown v. State, 537 S.W.2d 719 (Tenn. Crim. App. 1975). We think the Brown rule would apply to the motion to withdraw the guilty plea; in our assessment, the trial court properly ruled that the motion had been abandoned.

Thus, Brown would have prevented the petitioner from pursuing any direct appeal, delayed or otherwise.

Because a petitioner escaped while his direct appeal was pending does not mean that he has forever waived his entitlement to review his conviction. Under our current law, one who flees the jurisdiction and is later captured does not waive "all rights to solicit post-conviction relief." French v. State, 824 S.W.2d 161, 162 (Tenn. 1992). Only those convicted felons still on escape status are barred from seeking relief; the post-conviction procedure is available to those who have been returned to custody. Anderson v. State, 835 S.W.2d 40, 42 (Tenn. Crim. App. 1992).

The rationale of French and Anderson thus entitle the petitioner to post-conviction review. Once the procedural remedy has been established as available, the substantive law on the claim of ineffective counsel applies. When and if convicted of this offense, the petitioner may ultimately warrant a sentence greater than the eight years. His opportunity for a plea agreement may be forever lost. He may later regret that he sought post-conviction relief. Yet the judgment must be reversed and the conviction must be set aside. The cause is remanded for trial on the original indictment.

_____
Gary R. Wade, Judge

CONCUR:

_____
Joe B. Jones, Presiding Judge

_____
Paul G. Summers, Judge

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DISSENTING OPINION

I respectfully dissent from the majority. I would affirm the trial court's denial of post-conviction relief.

When the appellant's trial lawyer found out that he had made a mistake regarding probationary consideration, he timely filed a motion to set aside the guilty plea and advised the appellant of the hearing date. The appellant then fled the jurisdiction and was gone for over a year and a half until he was returned to custody. When the trial court learned that the appellant had absconded without notification to his lawyer, the judge appropriately denied the motion to set aside the guilty plea. Those facts are important to the way I would decide this case.

I do not believe that the trial court held that the appellant could not pursue post-conviction relief because he had absconded. The appellant's voluntary failure to appear and pursue the remedy of having his guilty plea set aside means to me that the appellant's claims were either waived or previously determined. The trial court was precluded from hearing those claims pursuant to the Post-Conviction Procedure Act. Tenn. Code Ann. § 40-30-111 & 112 (1990

Repl.). The trial court never held that the appellant could not pursue post-conviction relief because he had absconded. The court held that he was not entitled to the relief requested because he had absconded, and his motion to set aside the plea was denied. This denial amounted to a waiver of the remedy that the appellant had a right to pursue but did not because he was in a fugitive status.

The bottom line is that the appellant wants to have his guilty plea set aside. The post-conviction court correctly determined, in my view, that any prejudice that might have resulted from the lawyer's alleged defective performance could have been cured at the hearing on the motion to set aside the plea. It is not the fault of counsel, the trial court, or this Court that the appellant chose to flee. That was the appellant's problem. When the appellant fled, he waived his ground for relief because he failed to present a claim in a "proceeding before a court of competent jurisdiction in which the ground could have been presented." Tenn. Code Ann. § 40-30-112(b)(1).

If the appellant suffered prejudice, it was because he did not stay around to hear the motion. Maybe if instead of fleeing to his aunt's home in south Georgia, he should have come to court to see whether the trial judge would have allowed him to withdraw his plea. But he chose not to do so. That was his prerogative.

For these reasons, I respectfully dissent and would deny relief for the appellant.

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PAUL G. SUMMERS, Judge