

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MAY 1996 SESSION

**FILED**  
January 16, 1997  
Cecil W. Crowson  
Appellate Court Clerk

THOMAS KEITH BATTLE, )  
 )  
Appellant, )  
 )  
v. )  
 )  
STATE OF TENNESSEE, )  
 )  
Appellee. )

No. 01C01-9510-CR-00335  
Davidson County  
Hon. Thomas H. Shriver, Judge  
(Post-Conviction)

For the Appellant:

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

AFFIRMED

Joseph M. Tipton  
Judge

## OPINION

\_\_\_\_\_The petitioner, Thomas Keith Battle, appeals as of right from the judgment of the Criminal Court of Davidson County denying his petition for post-conviction relief. Pursuant to an agreement, the petitioner entered guilty pleas on June 20, 1989, to (1) possession of a Schedule II controlled substance, cocaine, for resale on March 12, 1987, (2) possession of less than one-half ounce of a Schedule VI controlled substance, marijuana, for resale on December 21, 1987, and (3) possession of thirty grams or more of a substance containing cocaine for resale on October 19, 1988. The trial court imposed concurrent sentences of four, one and twelve years, respectively. The petitioner is currently serving his sentences in the Department of Correction. He asserts on appeal that because he received the ineffective assistance of counsel, he did not knowingly and voluntarily enter his guilty pleas.

On November 26, 1991, the petitioner filed a petition for post-conviction relief, alleging that trial counsel (1) incorrectly advised him to plead guilty to a felony rather than a misdemeanor charge of possession of marijuana for resale, (2) inadequately prepared for a suppression hearing relating to the charge of possession of cocaine for resale, and (3) jointly represented the petitioner and a codefendant despite a conflict of interest in trial counsel's representation against the charge of possession of thirty grams or more of cocaine for resale.

Two post-conviction evidentiary hearings were conducted in this case. The petitioner's trial counsel did not testify at either post-conviction evidentiary hearing. The record reflects that trial counsel suffered from a terminal illness during his representation of the petitioner and died before the hearings took place.

The first post-conviction evidentiary hearing took place on September 3, 1993. Two witnesses testified for the state. Mark Beveridge, an assistant district

attorney who prosecuted the petitioner, testified that the petitioner committed the crimes of possession of one-half ounce of marijuana and thirty grams or more of cocaine for resale while on bond and thus faced a minimum sentence of thirty-five years and a two-hundred-thousand-dollar fine if convicted of possession of cocaine for resale. He stated that he and the petitioner's trial counsel engaged in informal discovery transactions and ultimately agreed to a reduced sentence of twelve years for the conviction of possession of thirty grams or more of cocaine for resale. In his opinion, the petitioner understood the guilty plea proceedings, and no conflict of interest existed because the petitioner was guilty. Beveridge also asserted that trial counsel's ill health did not detrimentally affect his representation of the petitioner. Assistant District Attorney Cheryl Blackburn also testified that trial counsel adequately represented the petitioner.

At the second evidentiary hearing, Assistant United States District Attorney Van Vincent, who prosecuted the petitioner for drug violations under federal law, testified that he initially filed a notice of sentence enhancement in the federal case based on the petitioner's three convictions in state court. He detailed his research of these convictions and explained his reasons for believing them to be invalid for enhancement purposes. He stated that he moved to withdraw the notice of sentence enhancement after conducting his own research. Instead of granting the motion to withdraw the notice of sentence enhancement, the district court ruled that the convictions were invalid to enhance the petitioner's sentence. Vincent also testified that he had heard from others that trial counsel's illness had affected his representation.

Vincent first testified about counsel's errors relating to the petitioner's conviction for possession of marijuana for resell. He explained that T.C.A. § 39-6-417(a)(1)(F)(iii), (b)(1) and (b)(2) provided that the offense was classified as a misdemeanor, absent any enhancement for prior convictions, where one-half ounce or

less of marijuana was involved. He said that his search of the petitioner's record revealed that the three state convictions were his first drug convictions. Although the maximum penalty for a first offense simple possession conviction was a Class A misdemeanor, the petitioner pled guilty to a Class E felony. Vincent also testified that he believed that the petitioner entered guilty pleas in order to avoid a greater punishment on the possession of marijuana for resale charge due to the fact that the petitioner previously committed the crime of possession of cocaine for resale and thus, enhancement would apply if he had not entered his guilty pleas at the same time.

With respect to the petitioner's conviction for possession of cocaine for resale on March 12, 1987, Vincent stated that after a suppression hearing the petitioner's counsel filed a petition to rehear. In the petition, trial counsel asserted that he was not prepared due to pressing business and that a material witness was not available when the hearing was conducted.

Vincent also testified regarding the petitioner's conviction of felonious possession of thirty grams or more of a substance containing cocaine. He stated that the petitioner and his codefendant, Diane Johnson, were both represented by trial counsel in the cocaine cases and that Johnson had made a statement to the police that the cocaine found in the apartment where she and the petitioner lived belonged to her. Vincent stated that trial counsel did not request any discovery regarding the codefendant's statement and that in his opinion these circumstances presented a conflict of interest. In his search of the petitioner's records, Vincent noticed that the trial court merely asked counsel at the guilty plea hearing whether he had a conflict of interest and that counsel responded that he did not. Vincent testified that the trial court should have advised each defendant of their right to separate representation pursuant to State v. Ray Edward Polk, No. 1194, Hamilton County (Tenn. Crim. App. Sept 26, 1991), app. denied, (Tenn. Mar. 16, 1992) (publication not recommended) and Tenn. R.

Crim. P. 44(c). He stated that he did not recall finding a waiver of conflict of interest signed by the petitioner when he reviewed the state records.

The petitioner introduced several exhibits at the post-conviction evidentiary hearing. A transcript of the guilty plea hearing showed that the petitioner entered guilty pleas pursuant to a plea agreement. Before entering the pleas, the petitioner stated that he understood the nature of his pleas and that his counsel had explained the plea agreement to him. The trial court informed the petitioner that a sentence for a conviction of possession of marijuana for resale ranged from one to five years in the penitentiary and a fine up to five thousand dollars. At the plea hearing, the state said that it would have presented evidence at trial that the offense involved five grams of marijuana and that the petitioner had eight hundred dollars in his possession. The trial court also advised the petitioner that his convictions could later be used to enhance subsequent convictions. Pursuant to the plea agreement, two additional counts of simple possession of cocaine and marijuana against the petitioner and a count for possession of thirty grams or more of cocaine against the petitioner's codefendant were dismissed. The trial court accepted the petitioner's guilty pleas and set a sentencing hearing for June 30.

The petitioner also introduced as an exhibit a petition to enter plea of guilty that was signed by the petitioner, acknowledging his waiver of his constitutional rights. The petition also stated that trial counsel advised the petitioner that the law provided a range of punishment of one to five years and one to three years for a Range I offender if convicted of possession of marijuana for resale.

The transcript of a preliminary hearing relating to the charge of possession of marijuana for resale reflects that trial counsel was successful in having the charge of possession of cocaine for resale dismissed at an earlier preliminary

hearing due to a lack of probable cause but that the petitioner was subsequently indicted through the grand jury process. It also shows that three witnesses in addition to the petitioner testified that the marijuana did not belong to the petitioner. At the preliminary hearing, the petitioner also conceded that he had been caught four times in the last two years with marijuana. He claimed, however, that his brother was arrested several times while using his driver's license and that he had no convictions other than those for which he entered guilty pleas.

At the conclusion of the post-conviction evidentiary hearing, the trial court found that the petitioner was given correct advice regarding the charge of possession of marijuana for resale conviction. It found that the petitioner's sentence was properly enhanced to a felony because enhancement due to prior convictions was "based on the date of the offense, not the date of the convictions." The trial court further decided that the convictions resulted from a plea bargain that did not treat the petitioner as a second or third offender because his guilty pleas to the three offenses were entered at the same time. It also stated that even if the petitioner's allegations were accurate, the petitioner was not required to serve any additional time because the sentences were to be served concurrently, and thus, any error was harmless.

Regarding the conviction for possession of cocaine for resale, the trial court found that the petitioner did not receive the ineffective assistance of counsel because several requests for discovery, both formally and informally, were made by trial counsel, implying that trial counsel had sufficient information at the suppression hearing. It decided that trial counsel was thoroughly prepared and effectively represented the petitioner at the suppression hearing.

The trial court also concluded that trial counsel properly represented both the petitioner and his codefendant against the charges of possession of thirty grams or

more of cocaine. The trial court stated that although it arguably should have inquired further into the possible conflict of interest, trial counsel's statement that no conflict existed and that he had discussed the matter with the petitioner was sufficient. It specifically mentioned as factors in its decision the fact that the charges against the petitioner's codefendant were dismissed and the exceptional representation of trial counsel in other cases before the court. The trial court also decided that the codefendant's claim that the cocaine was hers was clearly a lie because the cocaine was found in a safe containing materials belonging to the petitioner. In its opinion, any possible conflict was best termed a "reverse conflict" in that the codefendant was trying to exonerate the petitioner, not implicate him. For these reasons, the trial court decided that the petitioner's claims of ineffective assistance of counsel and involuntary guilty plea were without merit.

On appeal, the petitioner challenges each conviction based on claims of ineffective assistance of counsel that caused him to enter guilty pleas unknowingly and involuntarily.<sup>1</sup> Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is upon the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). The Strickland standard has been applied, as well, to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

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<sup>1</sup> We note that the petitioner failed to set forth the relevant facts in the Statement of the Facts portion of his brief. Instead, he discusses the relevant facts in the Argument section. This procedure does not comply with the T.R.A.P. 27(a)(6).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. at 689, 104 S. Ct. at 2065; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982) (counsel's conduct will not be measured by "20-20 hindsight"). Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. See Hellard, 629 S.W.2d at 9; DeCoster, 487 F.2d at 1201.

Also, we note that the approach to the issue of the ineffective assistance of counsel does not have to start with an analysis of an attorney's conduct. If prejudice is not shown, we need not seek to determine the validity of the allegations about deficient performance. Strickland v. Washington, 466 U.S. at 697, 104 S. Ct. at 2069.

The burden was on the petitioner in the trial court to prove his allegations that would entitle him to relief by a preponderance of the evidence.<sup>2</sup> Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988). On appeal, we are bound by the trial court's findings unless we conclude that the evidence preponderates against those findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). In this respect,

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<sup>2</sup> For post-conviction petitions filed on or after May 10, 1995, petitioners have the burden of proving factual allegations by clear and convincing evidence. T.C.A. § 40-30-210(f).



the petitioner has the burden of illustrating how the evidence preponderates against the judgment entered. Id.

### **I. Possession of Marijuana for Resale**

In his first claim, the petitioner argues that his conviction for possession of marijuana for resale should be overturned or modified to a misdemeanor because his trial counsel incorrectly advised him to plead guilty to a felony when the offense was appropriately classified as a misdemeanor. On appeal, he claims that his only prior offense was the possession of cocaine for resale for which he simultaneously entered a guilty plea. The petitioner further asserts that the prior offense does not qualify as a prior conviction for enhancement purposes because the guilty pleas were entered at the same time. The state counters that the petitioner has failed to show that but for trial counsel's errors, he would not have pled guilty and would have insisted on going to trial. We agree that the petitioner has failed to meet his burden.

If a petitioner seeks to vacate convictions based upon his guilty pleas on the ground that the pleas resulted from improper legal advice, the petitioner must show (1) that the advice given was deficient and (2) "that there is a reasonable probability that, but for counsel's error's, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985). Also, the findings of fact of the trial court on post-conviction hearings are conclusive on appeal unless the evidence preponderates against the judgment. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

Initially, we note that the record on appeal does not contain the indictment and the judgment of conviction relating to the offense of possession of marijuana for resale. It is difficult, therefore, to analyze fully the validity of the petitioner's claims.

We are able to determine from the record before us that the petitioner was indicted for possession of marijuana for resale, but the record does not indicate whether the indictment alleged that the amount of marijuana involved was one-half ounce or less or that the offense was the petitioner's first offense. However, the transcript of the guilty plea hearing reveals that the state's proof would have shown that the petitioner possessed five grams of marijuana at the time of his arrest. Further, a copy of the defendant's prior record as supplied by the state pursuant to a discovery request shows that the petitioner had at least one conviction for possession of a controlled substance on October 13, 1987. Once again, the judgment of conviction is not included in the record. During the guilty plea proceedings, the petitioner's trial counsel advised the petitioner that the sentence for a conviction of possession of marijuana for resale ranged from one to five years. See T.C.A. § 39-6-417(a)(1)(F)(i) (Supp. 1987). Trial counsel also told the petitioner that he could be sentenced to one to three years as a Range I offender.

If the indictment alleged a felony offense of possession of marijuana for resale, the advice given the petitioner was not deficient. See T.C.A. § 39-6-417(a)(1)(F)(i) (Supp. 1987). Although five grams of marijuana would not have supported a felony conviction, the petitioner could have entered a guilty plea to possession of not less than one-half ounce nor more than ten pounds of marijuana, thus waiving any objections to the sentence he received. See State v. Mahler, 735 S.W.2d 226, 228 (Tenn. 1987). Thus, advice of trial counsel that the sentence for felonious possession of marijuana ranged from one to five years would not have been deficient.

On the other hand, because the petitioner possessed only five grams of marijuana, the provisions dealing with the distribution of marijuana not in excess of one-half ounce would have applied. See T.C.A. § 39-6-417(a)(1)(F)(iii), -417(b)(1)-(2)

(Supp. 1987). Pursuant to T.C.A. § 39-6-417(b)(1) (Supp. 1987), the sentence for a first conviction of possession of one-half ounce or less of marijuana was eleven months and twenty-nine days, a misdemeanor. Had the petitioner's violation been his second, the conviction would have been classified as a misdemeanor with a sentence ranging from one to two years. See T.C.A. § 39-6-417(b)(2) (Supp. 1987). A third or subsequent offense was classified as a felony with a sentencing range of two to three years. See T.C.A. § 39-6-417(b)(2) (Supp. 1987). From the record before us, though, we are unable to ascertain whether the advice given by trial counsel was in fact deficient. It is the burden of the petitioner, however, to demonstrate how the evidence preponderates against the judgment entered. Black v. State, 794 S.W.2d at 755. The petitioner has failed to meet that burden.

Assuming that the petitioner received deficient advice, the petitioner must also establish that he was prejudiced. He alleges that he was prejudiced because he received an additional one-day period of incarceration by receiving a felony as opposed to a misdemeanor sentence and because greater weight is placed on felony convictions for sentencing enhancement purposes when subsequently convicted of other crimes. The state counters that the petitioner failed to demonstrate any prejudice because he was not incarcerated for a longer period due to the fact that the sentences were to be served concurrently. The state also asserts that the petitioner would be classified as a Range II offender if subsequently convicted of other crimes despite the felony conviction for possession of marijuana for resale due to the two other felony convictions to which he entered guilty pleas.

We agree with the petitioner that the difference between a felony and misdemeanor conviction is significant. However, he has not established that he would not have pled guilty and would have insisted on a trial. The petitioner did not testify at the post-conviction evidentiary hearing. Further, the petitioner entered his guilty plea to

a felony offense of possession of marijuana for resale pursuant to a plea agreement. The amount of marijuana possessed is a factual determination similar to sentencing ranges, and thus, a defendant may waive the right to challenge the sentence by knowingly and voluntarily entering a guilty plea. See State v. Mahler, 735 S.W.2d at 228. Also, the plea agreement provided a sentence of two years above the minimum for his conviction of possession of thirty grams or more of cocaine although the sentencing range was ten to thirty-five years. Two counts of simple possession were also dismissed pursuant to the plea agreement. These circumstances do not support a showing of prejudice. Regardless of whether the petitioner received deficient advice from trial counsel, the petitioner has failed to show that but for trial counsel's erroneous advice he would not have pled guilty and would have insisted on going to trial. The petitioner is not entitled to relief on this ground.

## **II. Possession of Cocaine for Resale**

The petitioner also alleges that his trial counsel was ineffective by failing to be prepared for a key suppression hearing. He relies solely on trial counsel's petition to rehear in which trial counsel stated that he was not prepared for the hearing and that a material witness was not available. The state asserts that the petitioner has failed to show how he was prejudiced because he did not identify the material witness or describe how his or her testimony would have changed the result. We conclude that the petitioner has failed to establish that he suffered any prejudice.

The trial court found that trial counsel was thoroughly prepared and was an extremely effective lawyer. The evidence does not preponderate against the trial court's findings. In fact, trial counsel was able to obtain a dismissal of the possession of cocaine charges at an earlier preliminary hearing. The petitioner presented no evidence to establish that the testimony of the witness who was not called would have changed the decision of the trial court. Therefore, his bald assertion that trial counsel's

admission of inadequate preparation is insufficient to mandate post-conviction relief.

### **III. Possession of Thirty Grams or More of Cocaine for Resale**

\_\_\_\_\_ The petitioner claims that his trial counsel was ineffective by failing to inform the petitioner of the potential for conflicts of interest when simultaneously representing himself and a codefendant. He also asserts that an actual conflict of interest arose following his codefendant's admission of ownership of the cocaine and the dismissal of charges against the codefendant. The state argues that the petitioner has failed to demonstrate how the alleged deficient performance by counsel caused him to be prejudiced. We agree that no prejudice has been shown.

The trial court decided that the mandates of Tenn. R. Crim. P. 44(c) and State v. Ray Edward Polk were not complied with completely because it relied solely on trial counsel's assertion that there was no conflict of interest and that he had discussed the matter with the petitioner. However, the trial court found that the petitioner was not prejudiced by the error. Finding the codefendant's assertion of ownership to be a lie, the trial court concluded that a conflict of interest did not exist because the codefendant was attempting to take the blame for the charges rather than implicate the petitioner.

The evidence does not preponderate against the findings made by the trial court. The record establishes that although the trial court did not specifically inquire about joint representation or advise the petitioner of his right of separate representation, trial counsel discussed these matters with the petitioner. In addition, the codefendant was claiming that the cocaine belonged to her in an attempt to extricate the petitioner. The petitioner ultimately pled guilty to possession of thirty grams or more of cocaine, a Class X felony with a possible Range I sentence of ten to thirty-five years, see T.C.A. § 40-35-109(a) (Supp. 1987), and received a sentence of twelve years. Likewise, two

counts of simple possession against the petitioner were dismissed pursuant to the guilty plea. No additional evidence was presented to establish prejudice to the petitioner. For these reasons, the petitioner has failed to meet his burden.

The trial court's findings of fact and conclusions that the petitioner's trial counsel performed competently and that the petitioner knowingly and voluntarily entered his guilty pleas are amply supported by the record. Therefore, the judgment of the trial court is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

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Gary R. Wade, Judge

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William M. Barker, Judge