IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MARCH 1996 SESSION

JOHN WESLEY GOSS,	)	
	)	
Appellant,	)	No. 03C01-9508-CR-00222
	)	
	)	Knox County
v.	)	
	)	Hon. Mary Beth Leibowitz, Judge
	)	
STATE OF TENNESSEE,	)	(Post-Conviction)
	)	
Appellee.	)	

For the Appellant:

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The petitioner, John Wesley Goss, appeals as of right from the denial of his petition for post-conviction relief by the Criminal Court for Knox County. He was originally convicted in February 1994, upon his guilty pleas pursuant to an agreement, of three counts of simple possession of controlled substances, and he received three consecutive eleven months and twenty-nine days sentences to be served on probation.[1] His post-conviction petition, filed in January 1995, arose from his basic claim that a 1993 state in rem civil forfeiture of one hundred eighty-seven dollars and a pager, based upon his unlawful possession of the same controlled substances, constitutes such punishment as to bar his subsequent convictions and sentences as violations of his right against double jeopardy. The petitioner also asserts that, given the double jeopardy bar, (1) his guilty pleas did not waive his double jeopardy protections, (2) his pleas resulted from the ineffective assistance of counsel relative to the double jeopardy claim, and (3) his plea agreement is voidable by him because of lack of consideration. The trial court essentially held that although the petitioner may not have waived his right to claim double jeopardy by his guilty pleas, Tennessee had not recognized a double jeopardy violation arising from civil forfeiture/criminal conviction cases. Also, it concluded that the petitioner's attorney's advice to plead guilty under the agreement did not result in the ineffective assistance of counsel. We affirm the denial of relief.

The petitioner's underlying claim was based primarily upon the reasoning in United States v. Ursery, 59 F.3d 568, 576 (6th Cir. 1995), in which the Sixth Circuit Court of Appeals concluded that a civil forfeiture judgment against a defendant followed by his criminal conviction for the same drug-related events constituted double jeopardy. See also United States v. $405,089.23 U.S. Currency, 33 F.3d 1210 (9th Cir. 1994).

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[1] The petitioner also received a six-month, concurrent sentence with probation for driving on a revoked license, but that case is not before us.

The petitioner asserts that the Tennessee in rem forfeiture laws are identical in all material respects to the federal laws and should, likewise, be viewed as punitive for double jeopardy purposes under both the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Constitution of Tennessee.

As a predicate to relief, the petitioner asserts that his guilty pleas do not constitute a waiver of his right to void his convictions through post-conviction procedures by now asserting his protection against double jeopardy. He relies upon Menna v. New York, 423 U.S. 61, 62, 96 S. Ct. 241, 242 (1975), in which the Supreme Court stated that a conviction in violation of the Double Jeopardy Clause could be set aside even if the conviction was entered pursuant to a counseled guilty plea. He acknowledges that the Supreme Court placed some limitations on its Menna holding in United States v. Broce, 488 U.S. 563, 575-76, 109 S. Ct. 757, 765-66 (1989), but he claims that he falls within those limits under the analysis of Broce provided in Oakes v. United States, 872 F. Supp. 817, 822-823 (E.D. Wash. 1994) (Under Broce, a counseled guilty plea would not bar a collateral attack on a conviction if a Double Jeopardy Clause violation were evident from the indictment and the record.).

Also, the petitioner argues that, as a practical matter, he could not have knowingly and understandingly waived his double jeopardy claim because none of the relevant federal cases had been decided at the time of his guilty pleas. In this sense, the petitioner raises the ineffective assistance of counsel as an alternative. That is, he asserts that if the double jeopardy right in issue did exist at the time of his guilty pleas, competent counsel would not have advised him to enter the guilty pleas in a case where he had an absolute bar to further criminal liability.[2]

[2] The petitioner's present counsel also represented him in the criminal cases.

Finally, the petitioner contends that the fact of the double jeopardy bar renders his plea agreement voidable because of lack of consideration. He reasons that although on its face the state's offer to reduce felony charges to misdemeanors if he would plead guilty appears to be of valuable consideration, the fact that all the charges should have been barred under the Double Jeopardy Clause made the state's offer of no value.

As the petitioner's various arguments suggest, the foundation for his relief rests solely upon his double jeopardy claim. However, after the present case was submitted for decision, the United States Supreme Court reversed the appellate courts in Ursery and $405,089.23 U.S. Currency, holding that the in rem civil forfeitures in issue were "neither 'punishment' nor criminal for purposes of the Double Jeopardy Clause." United States v. Ursery, 116 S. Ct. 2135, 2149 (1996). Subsequently, our court has analyzed our state in rem civil forfeiture laws and concluded that they are similar in purpose to the federal forfeiture laws at issue in Ursery and that the Double Jeopardy Clause of neither the state nor the federal constitution is implicated. See State v. Grapel Simpson and Linda Sue Simpson Horton, No. 02C01-9508-CC-00240, McNairy County (Tenn. Crim. App. Sept. 30, 1996); see also State v. Charles David Wagner, No. 03C01-9511-CC-00346, Sullivan County (Tenn. Crim. App. Sept. 18, 1996); State v. Charles Don Vance, No. 03C01-9601-CC-00026, Sevier County (Tenn. Crim. App. Sept. 9, 1996), applic. filed (Tenn. Sept. 19, 1996); State v. James C. Bradley and Mickey Eller, No. 03C01-9510-CC-00318, Monroe County (Tenn. Crim. App. Sept. 4, 1996), applic. filed as to Eller (Tenn. Nov. 4, 1996); State v. Grapel Simpson, No. 02C01-9508-CC-00239, McNairy County (Tenn. Crim. App. Aug. 2, 1996), applic. filed (Sept. 30, 1996). Without elaboration, we agree with the analyses presented in these cases. Thus, we conclude that neither the Double Jeopardy Clause of the state nor that of the federal constitution bars the defendant's drug related convictions after his property was subjected to in rem civil forfeiture.

It necessarily follows that any benefit that the petitioner seeks to obtain from Menna and Broce relative to limits upon the application of waiver to a guilty plea in a prosecution barred by the Double Jeopardy Clause is not available. Likewise, we can find no indication of ineffective assistance of counsel in the record before us. In fact, even if the double jeopardy claim were now viable, it is important to note that all of the decisions upon which the petitioner relies to prove the claim were rendered anywhere from four to eighteen months, with the earlier ones not directly on point, after his guilty pleas were entered. To hold counsel accountable under these circumstances would require counsel to be omniscient, if not actually prescient. We conclude that the petitioner was not denied the effective assistance of counsel.

Also, as for the petitioner's claim of lack of consideration for his guilty plea, it too has no merit because there was no double jeopardy bar to the prosecution. Moreover, we note that the mere fact that a constitutional claim was potentially viable does not negate the value of the state's offer when it is considered in context. That is, at the time of the pleas, the double jeopardy issue was, at best, a growing one in certain isolated cases, neither commonly known to the general bar nor well-developed as a recognized right. Moreover, plea bargaining may be viewed favorably by a defendant because of its reduction of stress on himself and his family, its removal of uncertain consequences arising from a trial, and its reduction of actual exposure. See, e.g., McMann v. Richardson, 397 U.S. 759, 768-69, 90 S. Ct. 1441, 1447 (1970). In this fashion, we cannot say that there was not consideration existing under the state of the law at the time of the guilty pleas.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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Joseph M. Tipton, Judge

CONCUR:

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Paul G. Summers, Judge

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Charles Lee, Special Judge