IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
AUGUST SESSION, 1996

FILED

March 11, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

THOMAS W. HEATON,	)	
	)	No. 03C01-9511-CR-00353
Appellant	)	
	)	HAMILTON COUNTY
vs.	)	
	)	Hon. Douglas A. Meyer, Judge
STATE OF TENNESSEE,	)	
	)	(Post-Conviction)
Appellee	)	

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Thomas W. Heaton, appeals the trial court's denial of his petition for post-conviction relief. The appellant is currently serving a sentence of nine years in the Tennessee Department of Correction pursuant to his guilty plea to aggravated burglary. The appellant presents the following issues for our consideration: first, whether his plea of guilty was knowing and voluntary, i.e. "made with knowledge of the 'relevant circumstances and likely consequences,'" King v. Dutton, 17 F.3d 151, 153 (6th Cir.), cert. denied, __ U.S. __, 114 S.Ct. 2712 (1994)(citation omitted);[1] second, whether appointed counsel was ineffective in failing to ensure that the appellant understood the terms of the plea agreement.

The trial court concluded at both the sentencing hearing and at the post-conviction hearing that the appellant's plea was knowing and voluntary. Generally, on appeal, this court is bound by the post-conviction court's findings

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[1]On March 23, 1995, following the entry of his guilty plea, but prior to sentencing, the appellant filed a motion to withdraw his guilty plea on the ground that the plea was not knowing and voluntary. The trial court denied the appellant's motion, sentencing the appellant and entering the judgment of conviction. The trial court informed the appellant that he had thirty days to appeal the court's judgment. See Tenn. R. App. P. 3(b); Tenn. R. Crim. P. 37(b)(2)(iii). Instead, on May 15, 1995, the appellant filed a petition for post-conviction relief, alleging ineffective assistance of counsel. On May 31, 1995, the post-conviction court appointed counsel, who amended the appellant's petition, primarily alleging that appellant's trial counsel was ineffective in failing to adequately advise him of the consequences of his guilty plea.

Accordingly, the appellant has waived the issue of whether his plea was knowing and voluntary. Tenn. Code Ann. § 40-30-206(g) (1995 Supp.)("[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented ..."). The appellant, nevertheless, requests that this court review the trial court's denial, on March 23, 1995, of the appellant's motion to withdraw his guilty plea. The appellant concedes that his appeal of the court's denial is untimely. Additionally, the appellant did not petition the post-conviction court for a delayed appeal pursuant to Tenn. Code Ann. § 40-30-213(a) (1995 Supp.), nor did he allege that counsel was ineffective in failing to appeal the trial court's denial of his motion to withdraw his plea of guilty. Finally, the appellant fails to include any argument or cite any authority in his brief concerning our review of the trial court's denial. Tenn. R. App. P. 27(a)(7); Ct. of Crim. App. Rule 10(b).

In any case, we conclude that the trial court properly denied the appellant's motion. Pursuant to Tenn. R. Crim. P. 32(f), a trial court may allow the withdrawal of a guilty plea if the defendant establishes a "fair and just reason." However, a defendant does not have a unilateral right to withdraw a knowing and voluntary guilty plea. See State v. Anderson, 645 S.W.2d 251, 254 (Tenn. Crim. App. 1982). Accordingly, the decision to deny a withdrawal rests within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. State v. Lane, No. 111 (Tenn. Crim. App. at Knoxville, December 5, 1990). As we agree that the appellant's plea in the instant case was knowing and voluntary, we find no abuse of discretion.

of fact unless the evidence in the record preponderates against those findings. Davis v. State, 912 S.W.2d 689, 697 (Tenn. 1995). See also Johnson v. State, 834 S.W.2d 922, 927 (Tenn. 1992). Notwithstanding waiver, see supra n.1, we conclude that the record supports the trial court's determination.

In North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164 (1970), the United States Supreme Court held, "The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." In evaluating the knowing and voluntary nature of the appellant's pleas, this court must look to the totality of the circumstances. State v. Turner, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995), perm. to appeal denied, (Tenn. 1996). See also Chamberlain v. State, 815 S.W.2d 534, 542 (Tenn. Crim. App. 1990), perm. to appeal denied, (Tenn. 1991). We may consider any relevant evidence in the record of the proceedings, including post-conviction proceedings. Id.

> [A] court charged with determining whether ... pleas were "voluntary" and "intelligent" must look to various circumstantial factors, such as the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advise from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993).

The appellant contends that, at the time of his guilty plea, he erroneously believed that he would receive community corrections in exchange for his plea. In post-conviction proceedings, the appellant bears the burden of proving the allegations in his petition. Davis v. State, 912 S.W.2d 689, 697 (Tenn. 1995). The appellant's conclusory assertions are insufficient to meet his burden of proof. Brown v. State, No. 03C01-9107-CR-00233 (Tenn. Crim. App. at Knoxville, June 26, 1992)(citing McBee v. State, 655 S.W.2d 191, 195 (Tenn.

Crim. App. 1983)).

At the guilty plea or submission hearing, appellant's counsel, Mr. Bill Dobson, indicated that the plea agreement between the appellant and the State set forth the length of the sentence, nine years, but the appellant would be requesting community corrections. The State indicated that it would oppose any sentence involving community corrections, and asked for a pre-sentence investigation. In accepting the appellant's plea, the court referred the appellant to probation and community corrections personnel for evaluation.

Initially, the appellant does not contend that the trial court failed to comply with the mandates of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969), State v. Mackey, 553 S.W.2d 337 (Tenn. 1977), State v. McClintock, 732 S.W.2d 268, 273 (Tenn. 1987), and Tenn. R. Crim. P. 11(c).[2] Additionally, although the record reflects that the appellant possesses a seventh grade education, the record also establishes that the instant case is not the appellant's first encounter with the criminal justice system. The instant case is the appellant's fifth felony conviction. He was sentenced as a range II, multiple offender. Furthermore, during the plea colloquy, the appellant indicated that he was satisfied with Mr. Dobson's representation and understood the proceedings, including the State's opposition to a sentence involving community corrections.

Due to Mr. Dobson's ill health, the appellant was represented at the sentencing hearing by Ms. Mary Ann Green, who presented the appellant's motion to withdraw his guilty plea. Ms. Green explained to the trial court that the

[2]We note, however, that the trial court failed to advise the appellant pursuant to Mackey, 553 S.W.2d at 341, and Tenn. R. Crim. P. 11(c)(5) that, if he pled guilty, the court could question him concerning the offense to which he had pled, and his answers could subsequently be used against him in a prosecution for perjury or false statement. However, this omission does not rise to the level of constitutional error and cannot be addressed in post-conviction proceedings. State v. Neal, 810 S.W.2d 131, 137 (Tenn. 1991). Moreover, we conclude that, despite this omission, the appellant's plea was knowing and voluntary.

appellant was no longer eligible for community corrections, as he was unable to find a relative or acquaintance capable of housing the appellant during the service of his sentence. The appellant testified at the hearing that he had only pled guilty because he believed he would receive community corrections. He stated that Mr. Dobson had informed him that the community corrections program "would probably accept [him] if [he] had a place to stay."

At the post-conviction hearing, the appellant again asserted that he had pled guilty because he believed that he would receive community corrections. However, on cross-examination, he conceded that, at the time of his guilty plea, he was aware of the State's opposition to his placement in a community corrections program. Bill Dobson testified that, prior to the appellant's plea, the community corrections officer informed the appellant that he would probably be accepted into the program, because members of the appellant's family were able to provide housing for the appellant. However, by the date of the sentencing hearing, the family members could no longer accommodate the appellant.[3] Mr. Dobson concluded that the appellant was aware that he was not guaranteed placement in the community corrections program. The record supports the trial court's finding that the appellant's plea was knowing and voluntary.

With respect to his allegation of ineffective assistance of counsel, the appellant has waived this issue by failing to include any argument or citation to authority in his brief. Tenn. R. App. P. 27(a)(7); Ct. of Crim. App. Rule 10(b). Moreover, the record also supports the trial court's finding that appellant's counsel rendered effective assistance. As noted earlier, on appeal, this court is bound by the post-conviction court's findings of fact unless the evidence in the record preponderates against those findings. Davis, 912 S.W.2d at 697. See

[3]Ms. Mary Ann Green testified that she "tried very hard" to obtain placement for the appellant in the community corrections program.

also Black v. State, 794 S.W.2d 752, 755 (Tenn. 1990). In other words, in post-conviction proceedings, the appellant must prove the allegations in his petition by a preponderance of the evidence. Davis, 912 S.W.2d at 697. Specifically, when a claim of ineffective assistance of counsel is raised, the appellant bears the burden of showing that (a) the services rendered by trial counsel were deficient and (b) the deficient performance was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); Butler, 789 S.W.2d at 899. With respect to deficient performance, the court must decide whether or not 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 satisfy the prejudice prong of the Strickland test, the appellant must show a reasonable probability that, but for counsel's ineffective performance, the result of the proceeding would have been different. Strickland, 466 U.S. at 694, 104 S.Ct. at 2068. Accordingly, when the appellant seeks to set aside a guilty plea on the ground of ineffective assistance of counsel, he must demonstrate a reasonable probability that, but for counsel's deficiency, he would have insisted upon proceeding to trial. Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1991); Manning v. State, 883 S.W.2d 635, 637 (Tenn. Crim. App. 1994). We simply agree that the appellant has failed to establish that his attorney misrepresented to him or failed to advise him of the consequences of his guilty plea.

We affirm the judgment of the trial court.

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DAVID G. HAYES, Judge

CONCUR:

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JOE B. JONES, Presiding Judge

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PAUL G. SUMMERS, Judge