

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1997 SESSION

**FILED**

March 13, 1997

Cecil W. Crowson  
Appellate Court Clerk

HENRY HOGAN,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

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C.C.A. NO. 01C01-9604-CC-00161

DICKSON COUNTY

HON. ALLEN WALLACE,  
JUDGE

(Post-Conviction)

FOR THE APPELLANT:

FOR THE APPELLEE:

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

**AFFIRMED**

JOHN H. PEAY,  
Judge

## OPINION

The petitioner was indicted for the first-degree murder of his wife. On May 20, 1993, he pled guilty to second-degree murder and received a sentence of seventeen years. In March of 1995, he filed a pro se petition for post-conviction relief. Counsel was appointed and an amended petition was filed. After a hearing, the court denied the petition.

In this appeal, the petitioner claims that the post-conviction court erred by not requiring the State to produce the transcript from the petitioner's guilty plea. He also claims that the court erred when it determined that the petitioner understood the terms of his plea and that the petitioner's counsel was not ineffective in her representation. After reviewing the record, we find no merit to any of these claims and affirm the court below.

As to his first issue, the petitioner contends that without a transcript of his guilty plea, it is impossible to determine whether his constitutional rights were violated when the plea was entered. Tennessee Code Annotated § 40-30-208(b) provides that "[i]f the petition does not include the records or transcripts, or parts of records or transcripts that are material to the questions raised therein, the district attorney general is empowered to obtain them at the expense of the state and may file them with the responsive pleading or within a reasonable time thereafter." In this case, the petitioner asked that his guilty plea transcript be provided, but the State was unable to locate the court reporter who was present when the petitioner entered his plea.<sup>1</sup>

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<sup>1</sup>The State informed the court, "Your honor, for the record, I would like to state that we had checked every known court reporter that has come into Dickson County, [the official court reporter] has checked with her people, we've checked with [the Administrative Office of the Courts] and nobody has turned in a claim for reporting that day . . . we've searched high and low."

While a guilty plea transcript is generally necessary, we conclude that in this case, failure to provide the transcript was at most harmless. This is because the petitioner's testimony in the post-conviction hearing provides the necessary information.

The petitioner claims that at the time he entered his guilty plea, he had planned to plead nolo contendere to second-degree murder but that on the day when the plea was to be entered, he was told he would have to plead guilty. At his post-conviction hearing, he testified that he did not understand the difference between the two pleas. However, he also testified that before he entered his plea, the judge explained his rights and that he understood some of these rights and asked his lawyer for clarification as to those he did not understand. Later, while being cross-examined, the petitioner testified that he remembered the list of rights the judge read to him. He further testified that he had understood all his rights and that he felt the plea was in his best interest because he had been told he would likely get a longer sentence if he had gone to trial. He testified that he was "happy" with the length of his sentence.

"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).

As to whether his constitutional rights were violated at the entry of his guilty plea, the post-conviction court found that the petitioner's "Mackey Rights and all rights under Rule 11 of the Tennessee Rules of Criminal Procedure were given to him and that

extra time and attention was given in explaining said rights at the time of [the] plea.”<sup>2</sup> The record of the hearing reveals nothing to the contrary. The petitioner testified that he did not understand the difference between pleading nolo contendere and pleading guilty but that he did understand all his rights as they were read to him before he entered the plea. He even testified that he felt the plea was in his best interest. From his own testimony, we cannot conclude that his plea in any way violated his constitutional rights. As the evidence does not preponderate against the trial court’s finding, this finding will not be disturbed. State v. Kelly, 603 S.W.2d 726, 728-29 (Tenn. 1980).

Because the petitioner’s testimony at the post-conviction hearing leads us to conclude that his constitutional rights were not violated, it is harmless error, if any error at all, that the transcript was not located. Even without the transcript, it is evident that the petitioner’s rights were not violated.

As to his next issue, the defendant complains that he received ineffective assistance of counsel. He contends that his court-appointed attorney, Lisa Donegan, did not meet the standard of competency demanded of attorneys in criminal cases. The petitioner claims that his attorney did not spend sufficient time investigating and preparing his case. Specifically, he claims she did not investigate possible defenses and mitigating factors.

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

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<sup>2</sup>The post-conviction judge was also the presiding judge when the petitioner entered his guilty plea. In denying the post-conviction petition, the judge said he particularly remembered this case and that in explaining the petitioner’s rights, he “went beyond the regular Mackie rights . . . because [he] was very cautious with [the petitioner].” While we are confident that the judge’s memory is accurate, he should not have used his memory as an aid in making his decision because his memory cannot be reviewed on appeal. However, these statements by the judge are inconsequential because the petitioner himself provides the necessary information from which we may conclude that he received and understood his rights prior to entering his plea.

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, he would have had to 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).

In his post-conviction petition, the petitioner contends that his defense counsel was ineffective because she did not explore using “Battered Spouse Syndrome” as a defense or as a mitigating factor. However, at his post-conviction hearing, the petitioner testified that his relationship with his wife had not been violent, but rather that he felt that the syndrome might apply to him because his wife had been going out with other men and had been abusing alcohol. The petitioner admitted that he too had dated other people. He further admitted that he and his wife had been separated for four years and that they did not reside in the same household. Ms. Donegan testified that she did discuss the syndrome with the petitioner, but that she could find no evidence to support such a claim. Clearly, her decision not to further explore this topic is not ineffective assistance of counsel. This claim has no merit.

The petitioner also claims that Ms. Donegan failed to explore the defense of “heat of passion.” Again, there was no evidence to support such a defense. The petitioner failed to show that he was prejudiced by his counsel’s decision not to further investigate this defense.

The petitioner next contends that his counsel was ineffective because she did not have any direct contact with him for six months after she was appointed to his case. He further contends that because the caseload at the public defender's office was very heavy at the time, his counsel did not spend a sufficient amount of time investigating and preparing his case. The petitioner had written a letter to the court complaining about Ms. Donegan's alleged inattentiveness. This topic was fully explored at the post-conviction hearing where the petitioner testified that Ms. Donegan had met with him six or seven times prior to his entering a guilty plea. He further testified that Ms. Donegan had not kept him updated as to the progress in his case and that he did not know whether she had even interviewed any witnesses. As to his counsel's overall performance, the petitioner testified, "Well, I feel like, you know, that she didn't, you know, didn't do her best job, you know, on helping me, you know, in having a trial . . . ." He testified that he had not gotten "a fair shake."

Ms. Donegan testified at the hearing that she had fully investigated the petitioner's case. She testified that she had visited the petitioner in jail but that he seemed uncomfortable with her. Because of this, Ms. Donegan asked two male attorneys from her office to assist her in the petitioner's case. She testified that she had visited the petitioner at least eight times while he was in jail and that she corresponded with him on a regular basis. Carey Thompson, also an attorney in the public defender's office, testified that he had met with the petitioner at least three times. As for interviewing witnesses, Ms. Donegan testified that the State had allowed her to see the witness statements and that these statements had been shared with the petitioner. She further testified that at the time she was representing the petitioner, her caseload was lighter than ever before.

The post-conviction court found that Ms. Donegan "explored all defenses and investigated the case thoroughly and was not ineffective." We find nothing in the

record that indicates Ms. Donegan's representation fell below an objective standard of reasonableness. Nor do we find any indication that had Ms. Donegan performed differently the defendant would have chosen to go to trial. We simply can find no evidence that Ms. Donegan's performance prejudiced the petitioner in any way.

Thus, we find that the petitioner's claims are without merit and we affirm the judgment of the court below.

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JOHN H. PEAY, Judge

CONCUR:

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DAVID H. WELLES, Judge

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JOE G. RILEY, Judge