IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1997 SESSION

FILED

April 1, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

JIMMY E. SPRAGUE,	)	
	)	
Appellant,	)	No. 03C01-9512-CC-00393
	)	
vs.	)	Loudon County
	)	
STATE OF TENNESSEE,	)	Honorable E. Eugene Eblen, Judge
	)	
Appellee.	)	(Post-Conviction Relief)
	)	

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

CURWOOD WITT
JUDGE

OPINION

Appellant, Jimmy E. Sprague, appeals the dismissal of his petition for post-conviction relief. Appellant pleaded guilty to sexual exploitation of a minor and was sentenced to a one year prison term on January 10, 1992. This conviction was not appealed. Thereafter, appellant filed this post-conviction petition on January 19, 1995, contending he received ineffective assistance of counsel in the prior proceeding and his guilty plea was not made knowingly and voluntarily. In his petition, appellant alleged his attorneys did not conduct a thorough investigation and gave him erroneous legal advice which rendered his subsequent guilty plea unknowing and involuntary. After an evidentiary hearing, the court below found appellant failed to prove his allegations by a preponderance of the evidence and dismissed the petition. Appellant has presented this court with the ineffective assistance of counsel issue but not the voluntariness of the plea issue. However, we elect to address both issues. See Tenn. R. App. P. 13(b). Upon review of the record, we affirm the judgment below.

Appellant was charged in Loudon County General Sessions Court with aggravated sexual battery based upon sexual relations with a 14 year old girl. The court appointed Alfred Hathcock and Bernard Sargent, members of the Public Defender's Office, to represent appellant in this proceeding.

On the morning of the preliminary hearing, appellant conferred with Mr. Hathcock, who informed appellant of the evidence the state had against him, including a photograph of the victim performing oral sex on appellant. Mr. Hathcock further informed appellant he did not believe the state could obtain a conviction on the aggravated sexual battery charge, although he did believe the

state's evidence was sufficient to convict appellant on a statutory rape charge. Mr. Hathcock discussed a possible defense to statutory rape of promiscuity of the victim,[1] which he testified appellant rejected. Mr. Hathcock likewise testified appellant informed him of his desire not to put the victim through the ordeal of court appearances. With appellant's consent, Mr. Hathcock worked out an agreement with the district attorney whereby the state would drop the aggravated sexual battery charge and appellant would agree to be indicted on a charge of sexual exploitation of a minor, a charge which carried a shorter sentencing range than the original charge. The factual basis for the lesser charge was appellant's possession in Loudon County between March and May 1991 of the explicit photograph of the victim performing oral sex on him. Appellant eventually pleaded guilty to this charge.

At the post-conviction hearing, appellant testified both he and the victim were residents of Knox County, not Loudon County, at the time of the charged offense. Appellant also testified the sexually explicit photograph of the victim and him was found in his wife's purse in their home in Knox County the day after appellant's arrest. Appellant testified he inquired of both Mr. Hathcock and Mr. Sargent whether these facts might form the basis for dismissal of the charge against him in Loudon County. Mr. Hathcock testified he told appellant about the state's evidence against him, which Mr. Hathcock believed could support several alternative felony charges. Appellant admitted his attorneys informed him of the likelihood he would be convicted on some charge and recommended he plead guilty to the sexual exploitation of a minor charge rather than challenging venue. Appellant took his attorneys' advice and waived the venue question by pleading

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[1]At the time of these proceedings, promiscuity of the victim was an affirmative defense to a charge of statutory rape. See Tenn. Code Ann. § 39-13-506(b) (repealed 1994).

guilty to sexual exploitation of a minor in Loudon County Criminal Court. The plea agreement, which is part of the record, included a waiver of further prosecution of appellant on any offenses involving the same victim.

I

Against this backdrop, appellant contends he was denied the effective assistance of counsel. When a petition challenges the effective assistance of counsel, the petitioner has the burden of establishing (1) deficient representation and (2) prejudice resulting from that deficiency. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 2066-67, reh'g denied, 467 U.S. 1267, 104 S. Ct. 3562 (1984); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Deficient representation occurs when counsel provides assistance that falls below the range of competence demanded of criminal defense attorneys. Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991). Prejudice is the reasonable likelihood that, but for deficient representation, the outcome of the proceeding would have been different. Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994). In the context of ineffective assistance of counsel claims arising out of the plea process, the Supreme Court has said the Strickland prejudice prong requires the petitioner to demonstrate "a reasonable probability that, but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985); see also Bankston, 815 S.W.2d at 215. On post-conviction review, there is a strong presumption of satisfactory representation. Barr v. State, 910 S.W.2d 462, 464 (Tenn. Crim. App. 1995).

When this court undertakes review of a lower court's decision on a petition for post-conviction relief, the lower court's findings of fact are given the weight of a jury verdict and are conclusive on appeal absent a finding the evidence

preponderates against the judgment. Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978), cert. denied, 441 U.S. 947, 99 S. Ct. 2170 (1979). In its order denying post-conviction relief, the lower court found

> It appears that Mr. Sprague was originally charged with a higher level crime at General Sessions Court level but that he was indicted on a lesser crime after negotiations between Mr. Hathcock and the Attorney General's office. Mr. Sprague was then apparently indicted as per the agreement between his attorney and the State. Mr. Hathcock testified Mr. Sargent saw a photograph of Mr. Sprague in the process of having this child [the victim] perform oral sex upon him. Mr. Hathcock was aware of the evidence against his client, and he sucessfully [sic] negotiated a plea bargain/charge bargain which was to the defendant's benefit.

The lower court based its findings on the testimony of Attorney Hathcock and handwritten instructions Hathcock testified appellant gave him at the preliminary hearing and concluded appellant's trial counsel had represented him effectively. After a careful review of the record, we conclude appellant has failed to meet his burden of showing that the evidence preponderates against the lower court's findings.

The record reflects Attorneys Hathcock and Sargent provided effective assistance of counsel. Attorney Hathcock testified he and Attorney Sargent reviewed the photograph that was part of the state's evidence, and he personally talked with the victim, who confirmed she had engaged in sexual relations with the appellant, and the state's investigator, who told Hathcock about a specific, witnessed act of intercourse between appellant and the victim. Attorney Hathcock likewise learned of an on-going investigation of appellant in Knox County. He testified he discussed this evidence with appellant, who offered no contrary proof. Appellant complains that he was not shown certain items of the state's evidence; however, the fact that appellant's attorneys did not arrange for appellant to personally inspect each item of evidence against him does not give rise to a finding

of ineffective assistance of counsel, particularly in view of the fact appellant's attorneys reviewed these items and discussed them with him.

Likewise, counsel's failure to challenge venue is not grounds for a finding of ineffective assistance of counsel. Appellant admits he was advised of the substantial probability he would be unable to avoid prosecution altogether through a mere challenge of venue. The best result for which appellant could hope in such a challenge would be that the charge would be dismissed in Loudon County and filed in the appropriate venue. There is ample evidence of record to support the lower court's conclusion appellant knowingly waived his right to challenge venue by pleading guilty to sexual exploitation of a minor,[2] a charge which carried a lesser sentencing range than the original aggravated sexual battery charge, in exchange for the state's agreement there would be no further charges brought against appellant based on activities with this victim. Both Attorney Hathcock and appellant testified that appellant would prefer the victim not have to testify. Handwritten instructions were introduced at the hearing in which appellant expressed this concern to his attorneys. Appellant testified he waived the venue argument by pleading guilty because his attorneys advised him it was the best course of action given the facts of his case. Mr. Hathcock testified the public defender's office did not challenge the venue of the prosecution on direct instructions from appellant. All of this evidence supports the trial court's conclusion on this issue.

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[2]A criminal defendant waives his right to challenge venue upon pleading guilty. Recor v. State, 489 S.W.2d 64, 69 (Tenn. Crim. App.), cert. denied (Tenn. 1972), cert. denied, 411 U.S. 920, 93 S. Ct. 1560 (1973); Weaver v. State, 4 Tenn. Crim. App. 435, 444, 472 S.W.2d 898, 902 (1971), cert. denied; see State v. Hodges, 815 S.W.2d 151 (Tenn. 1991) ("Once a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel did not meet appropriate standards.").

In further support of our conclusion on this issue, we note that appellant has offered no evidence other than his own testimony in support of his contention his attorneys did not provide effective assistance of counsel. A petitioner's uncorroborated testimony is insufficient to carry the necessary burden of proof in a post-conviction proceeding. See, e.g., State v. Kerley, 820 S.W.2d 753, 757 (Tenn. Crim. App. 1991); Shaw v. State, 457 S.W.2d 875, 876 (Tenn. Crim. App. 1970).

Having found appellant's trial counsel provided effective assistance, it is not necessary for us to address whether appellant has demonstrated prejudice under the second prong of the Strickland test. See Strickland, 466 U.S. at 694, 104 S. Ct. at 2068; Hill, 474 U.S. at 59, 106 S. Ct. at 370.

II

Appellant's petition also challenged the voluntariness of his guilty plea. Appellant's post-conviction counsel elicited testimony from appellant on this issue in the proceedings below, and the lower court ruled against appellant on this question. The matter has not been presented to us for review in appellant's statement of the issues; however, we elect to address it pursuant to our discretionary authority under Tenn. R. App. P. 13(b).

When reviewing the entry of a guilty plea, the overriding concern is whether the plea was knowingly and voluntarily made. Woods v. State, 928 S.W.2d 52, 55 (Tenn. Crim. App. 1996). The lower court's findings of fact are conclusive on appeal unless the evidence preponderates against those findings. Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993). The court below ruled against appellant on this issue, finding the evidence of record (including the transcript of the hearing

at which the plea was taken, the written plea agreement, and the testimony of appellant and Mr. Hathcock) failed to preponderate in favor of appellant's contention that the plea was involuntary or unknowing. Upon review of the record, we conclude the evidence does not preponderate against the post-conviction court's conclusion. To be sure, the record reflects appellant knew and understood the options available to him prior to the entry of his guilty plea, including the right not to plead guilty and demand a jury trial, and he freely made an informed decision of that course which was most palatable to him at the time. He will not be heard now to complain of his choice.

For these reasons, the decision of the court below is AFFIRMED.

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CURWOOD WITT, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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JOSEPH M. TIPTON, JUDGE