IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1997 SESSION

FILED

April 2, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

WILLIE C. TAYLOR,	)	
	)	**C.C.A. NO. 02C01-9602-CC-00047**
Appellant,	)	
	)	**DYER COUNTY**
VS.	)	
	)	**HON. JOE G. RILEY,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-conviction)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The petitioner pled guilty on October 6, 1994, to one count of selling less than .5 grams of cocaine on April 21, 1994. He was sentenced to ten years as a Range III persistent offender for this crime. On March 21, 1995, the petitioner pled guilty to another count of selling less than .5 grams of cocaine; this offense occurred on September 10, 1994. In exchange for his plea, he received a ten year sentence as a Range III persistent offender, to be served concurrently with the prior sentence. On April 17, 1995, the petitioner filed the instant petition for post-conviction relief, alleging that he received ineffective assistance of counsel such that his guilty pleas should be set aside. He also alleges that his second guilty plea was in exchange for an illegal sentence and should therefore be set aside. After an evidentiary hearing, the court below denied the petition. We affirm the court below.

"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).

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 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, the petitioner must 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).

With respect to the petitioner's claim that he received ineffective assistance of counsel in conjunction with both of his guilty pleas, the court below found as follows:

> Petitioner contends he was denied effective assistance of counsel. He complains that counsel was ineffective in investigating his cases. All of these factual allegations are totally without merit. His contentions that he misunderstood the nature of the pleas and sentences are likewise without factual merit. The Court, therefore, concludes that petitioner was not denied effective assistance of counsel. The Court further concludes that petitioner knowingly and voluntarily entered both guilty pleas.

The evidence does not preponderate against the lower court's factual findings. Nor do we disagree with the lower court's conclusions of law. This issue is without merit.

With respect to the petitioner's allegations about his sentences, he contends that he had been on bail for the first offense at the time he committed the second offense, and that his sentence for the second offense was therefore required to have been run consecutively to his sentence for the prior offense. He argues that, because his sentences were run concurrently, they are illegal and he should therefore be allowed to set aside his guilty pleas and proceed to trial.

The petitioner is correct that his concurrent sentence for the second offense is illegal if, indeed, he had been on bail at the time he committed it. Our Sentencing Act provides,

> In any case in which a defendant commits a felony while such defendant was released on bail in accordance with the provisions of chapter 11, part 1 of this title, and the defendant is convicted of both such offenses, the trial judge shall not have discretion as to whether the sentences shall run concurrently or cumulatively, but shall order that such sentences be served cumulatively.

T.C.A. § 40-20-111(b) (1990 Repl).[1] However, there is no proof in the record before us that the petitioner's sentence is, in fact, illegal. Apparently, one of the lawyers at the post-conviction hearing made some "announcement" off the record concerning the "problem about bail." And while the court below stated in its order denying post-conviction relief that, "At the time of the [petitioner's second guilty] plea all parties were unaware that the [petitioner] was on bail on [the prior offense] at the time the [subsequent] offense was committed," the evidence in the record before us offers absolutely no support for this conclusion.[2] We decline, therefore, to consider it a "finding of fact" and accordingly do not allow it any weight as such.

This Court will not set aside a sentence on the grounds that it is illegal when it has not been so proven. We recognize, of course, that this Court has previously granted post-conviction relief on a plea-bargained sentence on the basis that, "because he was unaware that the agreed sentence was illegal, the petitioner could not have

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[1]This statute presumes that the trial judge has knowledge of the defendant's bail status at the time he or she sentences the defendant. If the State negotiates a plea bargain with the defendant without informing itself or the court that the defendant had been on bail when he or she committed the offense, the trial court would have no basis under this statute on which to order the sentences to run cumulatively. If such information becomes available later, as it has apparently done in the instant case, the State may make some effort to "correct" the sentence. At that point, however, the defendant would be entitled to withdraw his guilty plea and proceed to trial. See State v. Burkhart, 566 S.W.2d 871, 873 (Tenn. 1978).

[2]Indeed, the petitioner's third amended petition for post-conviction relief states that the later offense "allegedly" occurred while he was on bail for the prior offense.

knowingly and voluntarily plead guilty." Woods v. State, 928 S.W.2d 52, 55 (Tenn. Crim. App. 1996). In that case, however, the sentence was illegal upon the face of the judgment because it exceeded the statutory range. Here, no such illegality is apparent. Accordingly, we affirm the lower court's denial of post-conviction relief.

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JOHN H. PEAY, Judge

CONCUR:

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JOE B. JONES, Judge

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DAVID H. WELLES, Judge