

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
APRIL SESSION, 1997

FILED

July 10, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

ALBERT LEWIS,)
)
Appellant)
)
vs.)
)
STATE OF TENNESSEE,)
)
Appellee)
)
)

No. 02C01-9512-CR-00394

SHELBY COUNTY

Hon. BERNIE WEINMAN, Judge

(Post-Conviction)

(Three counts of Aggravated
Rape; One Count Aggravated
Robbery)

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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Albert Lewis, appeals from the dismissal of his petition for post-conviction relief. On December 17, 1991, the appellant pled guilty in the Shelby County Criminal Court to three counts of aggravated rape, and, on January 10, 1992, to one count of aggravated robbery. He received a sentence of twenty years for each aggravated rape conviction and a sentence of eight years for the aggravated robbery conviction. All sentences were ordered to run concurrently. On March 2, 1994, the appellant filed a petition for post-conviction relief alleging that his guilty pleas were not entered knowingly and voluntarily and that he received the ineffective assistance of counsel. Specifically, he contends that his pleas were not voluntary because neither counsel nor the trial court advised him of his Fifth Amendment right against self-incrimination. In reference to his ineffective assistance of counsel claim, he alleges that trial counsel failed to file pre-trial motions, failed to interview potential witnesses, and misinformed him of his release date. The post-conviction court conducted an evidentiary hearing and denied relief. The appellant now appeals this denial.

At the post-conviction hearing, the appellant's trial counsel testified that she filed motions for discovery, investigated the charges against her client, and interviewed potential witnesses. Moreover, counsel testified that she reviewed with the appellant the implications of waiving his right to a jury trial, including his right that he could not be compelled to incriminate himself. Trial counsel denied making any promise to the appellant concerning the length of time he would serve. The transcript of the December 17, 1991, guilty plea hearing reflects that the appellant was specifically advised by the trial judge of his right against self-incrimination. The State concedes, however, that the transcript of the January 10, 1992, plea hearing does not indicate that the appellant, on that occasion,

was advised of his right against self-incrimination by the trial judge.

In denying relief, the post-conviction court accredited the testimony of the appellant's trial counsel and concluded that "at the time the [appellant] entered his guilty plea he understood his right against self-incrimination and he entered his guilty plea freely and voluntarily." The court further found that trial counsel "appropriately investigated the case" and did not misinform the appellant as to his period of incarceration.

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 that 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). Although the record reflects that the appellant was not advised of his right against self-incrimination at the January 10, 1992, guilty plea hearing, the record is clear that the appellant was informed of and had acknowledged this same right twenty-four days earlier. Moreover, the proof establishes that trial counsel explained to the appellant his right against self-incrimination in addition to other constitutional rights he was relinquishing by entering a plea of guilty. In Johnson v. State, 834 S.W.2d 922, 924 (Tenn. 1992), our supreme court reiterated the principal that "for a plea to be knowing and intelligent the accused must have certain knowledge regarding . . .the [constitutional] protections afforded the accused." The court distinguished the fact that a defendant may be aware of his constitutional rights even though not advised thereon. Id. at 925. Additionally, if an allegation that the defendant was not advised of his right against self-incrimination is supported by the evidence, the burden of proving a knowing plea shifts to the State. Id. However, "it does not, *ipso facto*, entitle the [defendant] to relief." Id. The State may rebut the allegation with proof that "the [defendant]

was aware of his constitutional rights and that therefore the trial court's failure to give the mandated advice was harmless error." Id. If, as in the case at bar, the record shows by clear and convincing evidence that the plea was knowing and voluntary, then the appellant is not entitled to relief. Id. The record indicates that the appellant understood his right against self-incrimination and that his guilty pleas were entered knowingly and voluntarily. After reviewing the record, we cannot conclude that the evidence preponderates against the post-conviction court's findings. Accordingly, we find no error of law mandating reversal of the court's judgment. The post-conviction court's denial of the appellant's petition for post-conviction relief is affirmed.

DAVID G. HAYES, Judge

CONCUR:

JOSEPH M. TIPTON, Judge

WILLIAM M. BARKER, Judge