

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

NOVEMBER 1997 SESSION

FILED
December 12, 1997
Cecil W. Crowson
Appellate Court Clerk

DERRICK M. CAREY,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

)
)
)
)
)
)
)
)
)
)

C.C.A. NO. 01C01-9612-CR-00528

DAVIDSON COUNTY

**HON. SETH NORMAN,
JUDGE**

(Post-conviction)

FOR THE APPELLANT:

FOR THE APPELLEE:

MARIAN C. FORDYCE
129 Second Ave., North
Nashville, TN 37201

JOHN KNOX WALKUP
Attorney General & Reporter

DARYL J. BRAND
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

VICTOR S. JOHNSON, III
District Attorney General

KYMBERLY HAAS
Asst. District Attorney General
Washington Square, Suite 500
222 Second Ave., North
Nashville, TN 37201

OPINION FILED: _____

AFFIRMED

JOHN H. PEAY,
Judge

OPINION

The petitioner was charged with first-degree murder, felony murder, especially aggravated robbery, and two counts of theft. In September 1993, he pled guilty to felony murder and especially aggravated robbery. He received a sentence of life imprisonment for the felony murder conviction and a consecutive twenty year sentence for the remaining conviction. On July 18, 1994, he filed a petition for post-conviction relief alleging that his plea was not entered freely and voluntarily and that he was denied the effective assistance of counsel. Counsel was appointed for the petitioner and after some time, the petitioner agreed to accept the aid of appointed counsel. Following an evidentiary hearing on March 20, 1996, the post-conviction court dismissed his petition. It is from this dismissal that the petitioner now appeals.

After a review of the record and applicable law, we find no merit to the petitioner's appeal and thus affirm the judgment of the court below.

The petitioner's convictions stem from his involvement in a robbery of Las Palmas Mexican Restaurant in Antioch, Tennessee, on January 7, 1993. The petitioner entered the restaurant carrying a sawed-off shotgun and demanding that employees open the safe. When one employee said the safe could not be opened, the petitioner shot him in the chest. The petitioner and three other men then took an undetermined amount of money from the restaurant and fled. The victim was pronounced dead upon his arrival at the hospital. The petitioner attempted to escape by fleeing the scene in a stolen vehicle. When he was apprehended a short time later, he was still in possession of the murder weapon and an amount of cash. The petitioner later gave police a complete statement as to his involvement. The three other men involved were also

apprehended. Two of these men gave statements to the police and in their statements, they named the petitioner as the trigger man.

At the post-conviction hearing, the petitioner's trial counsel, Tommy Overton, testified that he had been retained by the petitioner's family to represent the petitioner. He further testified that at the entry of the guilty plea, the petitioner had been fully informed about his case. He stated that he had read the guilty plea form to the petitioner and had explained all legal terms. He further told the petitioner that pleading guilty was a decision for the petitioner to make.

Mr. Overton stated that he had thought it would be a mistake to go to trial and that he had conveyed his opinion to the petitioner. He further stated that he had gone over the evidence with the petitioner and the petitioner's family on several occasions. Mr. Overton told the court that the evidence against the petitioner was overwhelming and that in his opinion, the petitioner had an excellent chance of receiving the death penalty. He testified that the petitioner had no real defense and that the petitioner had made other incriminating admissions to him. He further testified that had the district attorney become aware of these admissions, the State would have certainly pursued the death penalty. Mr. Overton noted that the man who had been the lookout during the robbery had gone to trial and had received the same sentence the defendant had been offered in the plea agreement.

Mr. Overton testified that he and the petitioner had discussed a possible release date for the petitioner if he were to be granted parole. However, he said that he had explicitly stated that the date was only a possibility and not a guarantee. He further testified that he had told the petitioner that he would likely have to serve between

nineteen and twenty-three years before even becoming eligible for parole. Mr. Overton also stated that he had made it quite clear to the petitioner that his sentences would be consecutive and not concurrent.

The petitioner then testified that he had signed the plea agreement only after his attorney had convinced him to do so. He testified that Mr. Overton had told him that he would likely be sentenced to death and that he would have no chance on appeal. The petitioner, who completed only the ninth grade, stated that he can “read a little” and that he had read some of the plea agreement. He further stated that it had been his understanding that his sentences were to run concurrently rather than consecutively. The petitioner further complained that his guilty plea had not been entered into voluntarily because he had not known “what was going on completely.”

On cross-examination, the petitioner stated that he had not discussed the facts of his case with Mr. Overton. He said he had some knowledge of the evidence against him but that he was not fully informed. He then refused to answer any questions from the State that were aimed at discovering exactly what knowledge he had of the evidence against him. He refused to answer any questions about the facts surrounding his case, calling the questions irrelevant to the proceeding.

As to any discussion of the death penalty, the petitioner testified that Mr. Overton had told him he would likely be sentenced to death because he was a black man and that he would not get a fair trial. He further testified that Mr. Overton had intimidated him in various ways and had used “scare tactics” to convince him to plead guilty. He further testified that he had been led to believe that his sentences would run concurrently rather than consecutively. However, at the time he entered the plea, he agreed to accept

consecutive sentences. He testified that the reason he had accepted the plea without question was because he was being manipulated by his attorney.

The petitioner testified that he had discussed with his mother his pleading guilty. He further testified that his mother had thought it best that he accept the plea agreement and that he then told his attorney he would plead guilty. The petitioner also stated that Mr. Overton had told him he would be eligible for parole in seventeen years but that he did explain the role of the parole board.

The transcript from the entry of the guilty plea, which was attached as an exhibit to this proceeding, revealed that the petitioner stated he understood the proceeding and that he had been satisfied with Mr. Overton's representation. He further stated that he had entered the plea freely and voluntarily. He then pled guilty to felony murder and especially aggravated robbery. He received a life sentence for the felony murder conviction and a consecutive sentence of twenty years for the remaining conviction.

"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).

The post-conviction court found that Mr. Overton was not ineffective in his representation of the petitioner. The court further found that the petitioner understood his plea and that his contention that Mr. Overton was ineffective for not advising him of

his exact release date was without merit. We agree with the conclusions of the trial court.

The petitioner entered his plea freely and voluntarily. He was given the opportunity at the entry of the plea to ask any questions or to voice his displeasure with his attorney. He took neither opportunity. Mr. Overton had clearly advised the defendant of the consequences of pleading guilty, and we find absolutely nothing in the record to support the petitioner's contention that his plea was not voluntarily entered.

The petitioner next complains that his trial counsel was ineffective. In reviewing this claim, 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, 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).

Again, we find nothing in the record to support the petitioner's claim that his counsel was ineffective. Mr. Overton testified that he had carefully studied the evidence and had determined that the petitioner would be in danger of being sentenced to death.

He further testified that he had kept the petitioner fully informed about the overwhelming evidence against him. As to the petitioner's release date, Mr. Overton testified that he never guaranteed the petitioner he would be released by a certain date. He only told the petitioner when it might be possible for him to go before the parole board. We find no merit to the petitioner's contention that his trial counsel was ineffective. To the contrary, Mr. Overton represented the petitioner quite adequately and secured a favorable plea agreement. We affirm the trial court's dismissal of this petition for post-conviction relief.

JOHN H. PEAY, Judge

CONCUR:

JOSEPH M. TIPTON, Judge

DAVID H. WELLES, Judge