IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER SESSION, 1997

JEFFERY SMITH,	)	**C.C.A. NO. 03C01-9612-CR-00483**
	)	
Appellant,	)	
	)	
	)	**KNOX COUNTY**
VS.	)	
	)	**HON. RAY L. JENKINS**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-Conviction)

ON APPEAL FROM THE JUDGMENT OF THE CRIMINAL COURT OF KNOX COUNTY

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OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Petitioner appeals the trial court's denial of his petition for post-conviction relief. In this appeal, he challenges the validity of his conviction as an habitual criminal on several grounds: (1) That the guilty pleas he entered for the underlying convictions were not voluntary; (2) that counsel was ineffective for not properly informing him of the consequences of his guilty pleas; and (3) that the now repealed habitual criminal statute and his resultant life sentence violates his rights to equal protection and against cruel and unusual punishment. After due consideration, we affirm the judgment of the trial court dismissing the post-conviction petition.

All of the Petitioner's convictions which relate to this case were received in Knox County. The Petitioner was convicted of simple robbery in case number C848 and sentenced on October 24, 1975, to not less than five years nor more than five years imprisonment. The Petitioner was convicted of robbery in case number C940 and sentenced on December 12, 1975, to not less than nor more than five years imprisonment to be served consecutively to the sentence in case number C848. On October 31, 1977, the Petitioner pleaded guilty to the temporary use of an automobile in case number C3326 and was sentenced to not less than one year nor more than one year incarceration to be served concurrently with the sentences in cases C848 and C940. On March 5, 1982, the Petitioner pleaded guilty to one count of grand larceny in case number 11131 and was sentenced to not less than four nor more than six years imprisonment. He also pleaded guilty to one count of simple robbery in case number 12961 and

was sentenced to not less than five nor more than ten years imprisonment to be served consecutively to the sentence in case number 11131. In 1986, the Petitioner was convicted by a jury of grand larceny in case number 27487, and in a bifurcated proceeding, was found to be an habitual criminal and sentenced to life imprisonment. His conviction and sentence was affirmed by this Court in an opinion released on May 27, 1987. State v. Jeffrey Olden Smith, C.C.A. No. 1104, Knox County (Tenn. Crim. App., Knoxville, May 27, 1987). Our supreme court denied permission to appeal on September 8, 1987.

On July 3, 1989, the Petitioner filed a *pro se* petition for post-conviction relief, case number 37819, alleging that the guilty pleas he entered were not submitted voluntarily because he was not apprised of his constitutional rights. Counsel was appointed on September 6, 1989. On October 5, 1990, the State filed an answer to the petition. On December 27, 1990, the Petitioner filed a second *pro se* petition, case number 42885, alleging that his habitual criminal conviction was rendered in violation of his constitutional rights of equal protection, against cruel and unusual punishment and due process because of the repeal of the statute under which he was sentenced after the enactment of the Criminal Sentencing Reform Act of 1989. On April 15, 1993, the State filed an answer to the second petition, raising the statute of limitations as a defense. On July 19, 1995, with the assistance of counsel, the Petitioner filed an amended petition for post-conviction relief in cases 37819 and 42885. In the amended petition, the Petitioner alleged that counsel in case number 27487, the grand larceny and habitual criminal convictions, was ineffective for failing to challenge the underlying convictions. He also alleged that trial counsel in case numbers C3326, 11131

and 12961 were ineffective for failing to advise the Petitioner of his rights and the consequences of his guilty pleas.

The trial court conducted a hearing on the consolidated petitions in post-conviction case numbers 37819 and 42885 on July 26, 1996. The only proof presented was the testimony of the Petitioner. He testified that he was represented by an unlicensed law student from the University of Tennessee Legal Clinic in the robbery trials in 1975. On cross-examination, the Petitioner denied that the law student, then an attorney, testified at the habitual criminal proceedings that he was supervised by a licensed attorney during the 1975 proceedings. The Petitioner stated that he pleaded guilty to the later offenses because his attorney recommended it. He denied that he was told about his right to go to trial and said that he would have chosen to take those cases to trial. The Petitioner did recall the trial judge informing him of his rights at the guilty plea hearings.

The trial court denied the petitions, noting that the Petitioner's claim of involuntary guilty pleas was without merit. The trial judge also considered that the issue had been previously determined by this Court.

The Petitioner filed his first post-conviction petition attacking the voluntariness of guilty pleas he submitted in the cases in 1977 and 1982 and alleging that this invalidated his habitual criminal conviction. The post-conviction act applicable to this case was amended, effective July 1, 1986, to institute a three-year statute on limitations on post-conviction claims commencing from the final action of the highest state appellate court. See Tenn. Code Ann. § 40-30-

102 (repealed). Subsequently, this Court has held that for convictions that occurred before July 1, 1986, the limitations period of three years would begin to run on that date. Abston v. State, 749 S.W.2d 487, 488 (Tenn. Crim. App. 1988); State v. Masucci, 754 S.W.2d 90 (Tenn. Crim. App. 1988). Thus, the Petitioner had until July 1, 1989, in which to file his post-conviction petition. The petition was filed on July 3, 1989, beyond the time period provided for the convictions he incurred before the amendment. However, this Court has also held that because July 1, 1989, occurred on a Saturday, petitioners could file on the following Monday, July 3 without being barred by the statute. Watt v. State, 894 S.W.2d 307, 309 (Tenn. Crim. App. 1994). Therefore, we address on the merits both his claim that the guilty pleas in cases C3326, 11131 and 12961 were involuntary and his claim of ineffective assistance at those proceedings.

Also, it was appropriate that the Petitioner consolidate his claims regarding the underlying convictions and the habitual criminal conviction for presentation in one petition. See State v. Prince, 781 S.W.2d 846, 852 (Tenn. 1989). The final action on the habitual criminal case occurred when the supreme court denied his application to appeal on September 8, 1987. Thus, the petitioner had until September 8, 1990, in which to file his petition regarding his habitual criminal conviction and he filed on July 3, 1989, well within the limitations period for that action.

We first address the issues raised in the first petition. The Petitioner claims that the guilty pleas he entered in 1977 and 1982 were not knowingly, intelligently and voluntarily given. The Petitioner testified at the post-conviction hearing that trial counsel did not inform him of his right to trial, but that he only

discussed "copping out." The Petitioner stated that he was not informed about the evidence that would be presented at trial and that he would have gone to trial if he had known about the rights he was relinquishing. He admitted that trial counsel told him about the maximum sentences possible for the offenses in question. On cross-examination, the Petitioner admitted that he had been involved in two jury trials before he entered guilty pleas on the later offenses. The Petitioner testified that he did not know he had a right to trial but that he was acting on the advice of his attorney. The Petitioner admitted that the trial judge informed him of his rights when he took the pleas.

A voluntary plea cannot be found from a silent record. Boykin, 395 U.S. at 242. Pursuant to its supervisory power, our supreme court has imposed more stringent standards for trial courts to employ when advising defendants during guilty pleas to provide an adequate record that will insure constitutional compliance. State v. Mackey, 553 S.W.2d 337 (Tenn.1977). However, post-conviction relief may be granted only if a conviction or sentence is void or voidable because of a violation of a constitutional right. Tenn. Code Ann. § 40-30-105 (repealed 1995). As was pointed out in State v. Neal, 810 S.W.2d 131 (Tenn. 1991), violation of the advice litany required by either Mackey or Tennessee Rule of Criminal Procedure 11 which is not linked to a specified constitutional right is not cognizable in a suit for post-conviction relief. See State v. Prince, 781 S.W.2d 846 (Tenn.1989). Moreover, it is the result, not the process, that is essential to a valid plea. Johnson v. State, 834 S.W.2d 922, 923-24 (Tenn. 1992). The critical inquiry is whether the Petitioner had knowledge of certain rights and waived those rights knowingly and voluntarily, not whether the trial court was the source of that knowledge.

The transcripts of both guilty plea hearings reveal that the trial court presented the full litany explaining the rights the Petitioner was waiving. The Petitioner denied that anyone coerced him and stated that he was satisfied with the services of his attorney Mr. Helm, and later, Mr. Moore.

In a post-conviction proceeding under the Act applicable to this case, the Petitioner must prove the allegations in the petition by a preponderance of the evidence. Davis v. State, 912 S.W.2d 689 (Tenn. 1995); Adkins v. State, 911 S.W.2d 334, 341 (Tenn. Crim. App. 1994). In reviewing post-conviction proceedings, "the factual findings of the trial court are conclusive unless the evidence preponderates against such findings." Cooper v. State, 849 S.W.2d 744, 746 (Tenn.1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn.1990). We cannot conclude that the evidence preponderates against the findings of the trial court that the guilty pleas were entered voluntarily.

The Petitioner also argues that attorneys Helm and Moore rendered ineffective assistance during the plea process. In determining whether counsel provided effective assistance at trial, the court must decide whether counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To succeed on a claim that his counsel was ineffective at trial, a petitioner bears the burden of showing that his counsel made errors so serious that he was not functioning as counsel as guaranteed under the Sixth Amendment and that the deficient representation prejudiced the petitioner resulting in a failure to produce a reliable result. Strickland v. Washington, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984); Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993); Butler v. State, 789

S.W.2d 898, 899 (Tenn. 1990). To satisfy the second prong the petitioner must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding petitioner's guilt. Strickland, 466 U.S. at 695. This reasonable probability must be "sufficient to undermine confidence in the outcome." Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

When reviewing trial counsel's actions, this court should not use the benefit of hindsight to second-guess trial strategy and criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel's alleged errors should be judged at the time they were made in light of all facts and circumstances. Strickland, 466 U.S. at 690; see Cooper 849 S.W.2d at 746.

This two part standard of measuring ineffective assistance of counsel also applies to claims arising out of the plea process. Hill v. Lockhart, 474 U.S. 52 (1985). The prejudice requirement is modified so that the petitioner "must show that there is a reasonable probability that, but for counsel's errors he would not have pleaded guilty and would have insisted on going to trial." Id. at 59.

The Petitioner testified that trial counsel did not inform him of his right to go to trial. However, he admitted that counsel informed him about the maximum sentence for his crimes. The record reflects that the trial court questioned the Petitioner at both hearings regarding whether he was satisfied with his attorneys' representation. Although not specifically addressed in the trial court's findings, we cannot conclude that the Petitioner has proven by a preponderance of the evidence that counsel's performance fell below the standard of competence expected for criminal defense attorneys. The Petitioner testified that he pleaded

guilty on the advice of his attorneys, however, he has not demonstrated how that advice was erroneous. He also indicated to the trial court that he was satisfied with the representation he received. Therefore, this issue is without merit.

The Petitioner filed a second petition on December 27, 1990, challenging the constitutionality of the habitual criminal provisions under which he was sentenced to life imprisonment. He suggested that the repeal of the provision that occurred with the enactment of the Criminal Sentencing Reform Act of 1989 violated his constitutional rights because those convicted of the same crimes now receive lesser sentences. In this appeal, he renews his argument that his right to equal protection guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 8 and Article XI, section 8 of the Tennessee Constitution has been violated and that his sentence constitutes cruel and unusual punishment violative of the Eighth Amendment to the United States Constitution.

We first note that it appears that the Petitioner raised the issue after the expiration of the three-year statute of limitations which expired on September 8, 1990. He argues that his claim only arose with the new Act which took effect on November 1, 1989. He claims that the effective statute of limitations should run from November 1, 1989 and cites Burford v. State, 845 S.W.2d 204 (Tenn. 1992). Ultimately, we must conclude that the claim is barred by the statute of limitations, but even if we address the issues on their merits, they provide no relief. It is well-established that the effect of the repeal of the habitual criminal statute with the enactment of the new sentencing code on those who received life sentences under the old provision does not constitute cruel and unusual punishment. State

v. Russell, 866 S.W.2d 578, 581 (Tenn. Crim. App. 1991); see generally Pearson v. State, 521 S.W.2d 225, 229 (Tenn. 1975). Furthermore, "the fact that 'a penalty is reduced by legislation does not mean the sentence under the old law was disproportionate.'" Russell, 866 S.W.2d at 582 (citation omitted); See Burris v. State, C.C.A. No. 03C01-9106-CR-00167, Knox County (Tenn. Crim. App., Knoxville, Dec. 2, 1991), perm. to appeal denied (Tenn. 1992).

When a statute provides a lesser penalty for one criminal offender than it does for another criminal offender, the "rational basis test" is used to determine whether the challenged statute violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The same test applies when one challenges the statute as violative of the Equal Protection Clause set forth in Article XI, section 8 of the Tennessee Constitution. State v. Correll, 626 S.W.2d 699, 701 (Tenn. 1982). There clearly was a rational basis for the legislature to change the penalties for offenses as they did for various offenses in 1989 without affecting the sentences of those who were already incarcerated for offenses committed long before the statute was enacted or even proposed. This principle also applies when the entire statutory scheme was repealed as the habitual criminal provisions were. The issue of equal protection has previously been addressed by this Court and it has been determined that the effect of providing more lenient sentencing to prisoners under the 1989 Act did not invoke an equal protection violation. See State ex rel. Stewart v. McWherter, 857 S.W.2d 875, 877 (Tenn. Crim. App. 1992). In addition, this Court has held that the habitual criminal statute in particular does not violate equal protection. Russell, 866 S.W.2d at 580. The legislature has the exclusive right and authority to pass, amend, and repeal criminal statutes. All criminal statutes create

classifications. A statute is not unconstitutional on the basis that it creates an unreasonable classification unless it applies to some groups within a class and excludes others. State v. Teasley, 653 S.W.2d 761, 762 (Tenn. Crim. App. 1983); see Harrison v. Schrader, 569 S.W.2d 822 (Tenn. 1978). The repeal of the habitual criminal statute and the institution of the new sentencing provisions in 1989 created two distinct classes: those who committed qualifying habitual criminal offenses prior to the repeal and those who committed those same offenses and were sentenced according to a different scheme after the repeal. All persons within each class are treated similarly. Consequently, no equal protection violation is present. Teasley, 653 S.W.2d at 762. Furthermore, with the enactment of the Sentencing Act in 1989, the legislature created the Parole Eligibility Review Board to examine the records of inmates sentenced under the habitual criminal statute, and to determine which of these should have their parole eligibility dates recalculated in accordance with the 1989 Sentencing Act. Smith v. Parole Eligibility Review Bd., 891 S.W.2d 226, 227 (Tenn. App. 1994).

Thus, we can only conclude that the Petitioner presents no constitutional claim that would serve to void his conviction as an habitual criminal. The Petitioner remains free to pursue a release date commensurate with the current sentencing guidelines through the parole system.

The Petitioner presented one final issue in his amended petition that was filed on July 19, 1995. He asserted that counsel provided ineffective assistance at the habitual criminal proceedings by failing to challenge the validity of his underlying convictions. We are provided only with this Court's opinion regarding the appeal of the grand larceny and habitual criminal convictions and do not have

before us the record of that trial. As a result, we cannot fully evaluate the Petitioner's claim of ineffective assistance. From the record we have been provided, it appears that this Court upheld the sufficiency of the evidence of the finding of habitual criminal status. There is evidence that trial counsel challenged the validity of the two robbery convictions on the basis that the Petitioner was not provided licensed counsel. This was refuted by the State. There are no specific findings regarding the guilty pleas. At the post-conviction hearing, the Petitioner testified primarily about the robbery trials and about his guilty pleas. There was only a passing reference to the habitual criminal trial. Trial counsel did not testify at the hearing. The trial court concluded that the claim of involuntary guilty pleas was without merit. We cannot conclude that the evidence preponderates against the trial court's finding. The evidence presented does not demonstrate that counsel's performance fell below the appropriate standard of competence in criminal trials. Therefore, we find that the Petitioner's claim of ineffective assistance is without merit.

Accordingly, we affirm the judgment of the trial court.

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DAVID H. WELLES, JUDGE

CONCUR:

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DAVID G. HAYES, JUDGE

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THOMAS T. WOODALL, JUDGE