IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1998 SESSION

FILED

July 15, 1998

Cecil Crowson, Jr.

Appellate Court Clerk

DANNY E. ROGERS,	*	C.C.A. # 03C01-9704-CC-00146
Appellant,	*	BLEDSOE COUNTY
VS.	*	Hon. Buddy Perry, Judge
STATE OF TENNESSEE,	*	(Post-Conviction)
Appellee.	*	

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OPINION FILED:_____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The petitioner, Danny E. Rogers, appeals the trial court's denial of his petition for post-conviction relief. In this appeal of right, the single issue presented for review is whether the petitioner was denied his right to effective assistance of counsel.

We affirm the judgment of the trial court.

On July 22, 1990, the petitioner, a juvenile inmate at the Taft Youth Center, and several other juvenile inmates attempted to escape. In the course of events, Officer Donald Gifford was seriously injured and the petitioner was charged by criminal information with attempt to commit second degree murder, escape, theft of property, and conspiracy. During the escape, the petitioner and the other juvenile inmates stole a car and were able to drive to Bradley County before they were captured. During an altercation with law enforcement in Bradley County, the petitioner was shot.

The petitioner was appointed counsel, John Ben Pectol, and on April 8, 1991, the juvenile court transferred the case to the Bledsoe County Circuit Court. On September 10, 1991, the petitioner pled guilty to attempt to commit second degree murder, a Class B felony, for which he received a Range I, ten-year sentence. The state dropped the other charges in Bledsoe County. In Bradley County, the defendant had been indicted on several other charges and was appointed separate counsel. A negotiated plea was entered in Bradley County at the same time the petitioner entered the plea in Bledsoe County.

In his petition for post-conviction relief, the petitioner points out that he and four of his five codefendants entered guilty pleas. The other codefendants received between four and eight years. The petitioner contends that his guilty plea was neither knowingly nor voluntarily made and that his counsel was ineffective as follows:

> [C]oercion by defense legal counsel; [l]egal counsel's failure to conduct proper pre-trial discovery; [f]ailure of trial counsel to file proper pre-trial motions on behalf of the petitioner; [f]ailure to inform the petitioner of ... rights under both the state and United States Constitutions ....

The petitioner has specifically complained that his trial counsel provided information that if he did not accept a guilty plea, the state would ask for a twenty-year sentence. The petitioner has asserted that he was under extreme mental pressure at the time of his plea due to assaults and racist remarks by prison officials. He has submitted that he had "extremely limited consultation" with his trial counsel. Finally, he argues that because defense counsel was suspended from the practice of law soon after his guilty plea was entered, there is no "presumption in favor of proper representation of counsel."

At the evidentiary hearing, it was established that on November 26, 1991, trial counsel had been suspended from the practice of law for two years by the Board of Professional Responsibility for various ethical violations not directly related to this case:

> (a) Failure to adequately communicate with clients and keep them reasonably informed;
>
> (b) Failure to provide clients with files when requested;
>
> (c) Failure to zealously pursue the preparation and filing of documents;
>
> (d) Failure to appear at hearings and depositions;

(e) Making misrepresentations, false statements, and deceitful comments to clients; and

(f) Making misrepresentations in court.

On January 20, 1995, Attorney Pectol received an additional suspension from the board based upon income tax irregularities.

At the evidentiary hearing, Pectol testified that he spoke extensively to the petitioner prior to the juvenile transfer hearing. At the same time, two of the other attorneys involved in the case met with codefendants. Pectol claimed that he and the other attorneys asked the district attorney general to expedite the disposition of the case due to the defendants' claims that they were being mistreated at the Taft Youth Center. While Pectol could not recall whether he had written to the defendant about the state's offer of plea bargain, it was his recollection that he made the offer by telephone and talked in person to the petitioner before the plea was entered. Pectol insisted that he discussed with the petitioner the waiver of a jury trial and other of the petitioner's constitutional rights. He claimed that he advised the petitioner of the controlling case law at the time, the possibility of consecutive sentences, and the opportunities for parole. Pectol contended that he explained to the petitioner the right to a grand jury proceeding and the alternative of proceeding through criminal information. He testified that the petitioner was fully aware of the nature of the guilty plea and believed the plea bargain to be favorable, especially because the ten-year sentence in Bledsoe County was to be concurrently served with the Bradley County sentence. Pectol denied ever having coerced the petitioner to accept the offer.

Pectol claimed that he prepared for the case by reviewing the social history of the petitioner which was in the possession of the administration at the Taft

Youth Center. He claimed that he sought assistance from the petitioner's grandmother prior to the transfer hearing. Pectol investigated to the extent of learning that the state claimed to have a witness in addition to the victim who would testify to the petitioner's participation in the assault. Pectol described the petitioner as familiar with the criminal justice process and extraordinarily street-wise.

The petitioner, who had an eighth-grade education, testified that he had been denied parole on three prior occasions since his conviction. He claimed that he was under the impression that he would receive a three-year sentence under the plea agreement and has denied that his trial counsel had ever provided information on the possibilities of parole. The petitioner testified that his trial counsel never visited at the prison, never interviewed any of the witnesses provided, and never discussed the nature of an indictment, the statutory elements of the crime, or his right to a jury trial.

On cross-examination, the petitioner admitted planning his escape for several weeks, striking the prison guard, and causing a serious head injury. Upon questioning, he acknowledged that he understood his constitutional rights, the waiver of those rights, and the nature of the guilty plea. He conceded that he had an effective sentence of seven years for his Bradley County crimes and, at the time of this plea, realized that all of his remaining Bledsoe County charges would be reduced or dismissed. He admitted that he thought the plea bargain "was a pretty good deal." His release from prison had been delayed because of "trouble ... in the system."

At the conclusion of the hearing, the trial court determined that the petitioner had been provided the effective assistance of counsel and had knowingly

and voluntarily entered his plea of guilty:

> The transcript of the ... plea proceedings amply show[s] that the petitioner was fully aware of what he was doing, acknowledged that he was satisfied with his attorney's representation and was entering his plea voluntarily.
>
> The Petitioner now seeks to set aside his convictions basically because his attorney was subsequently suspended from the practice of law in this State. The suspension grew out of incidents not related to the Petitioner's case.
>
> At the Post-Conviction hearing in this matter, both the Petitioner and his counsel testified. It is clear from the proof that Mr. Pectol was fully aware of the state's case against his client and realized that his client's best avenue was to try to obtain the most favorable plea agreement that he could rather than risk a conviction of the Class A Felony of Attempted First Degree Murder.
>
> The petitioner himself acknowledged that he knew he was getting a good deal, but basically became dissatisfied when he was not granted parole.... As he stated, he "figured he could get a writ" if he didn't get paroled when he thought he should.
>
> While Mr. Pectol's suspension was unfortunate for him, it certainly did not affect his representation of the Petitioner ... [which] was well within the standard required....

In order for the petitioner to be granted relief on grounds of ineffective counsel, he must establish that the advice given or the services rendered were not within the range of competence demanded of attorneys in criminal cases and that, but for his counsel's deficient performance, the result of his trial would have been different. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975); Strickland v. Washington, 466 U.S. 668 (1984). This two-part standard, as it applies to guilty pleas, is met when the petitioner establishes that, but for his counsel's errors, he would not have pled guilty and would have insisted on trial. Hill v. Lockhart, 474 U.S. 52, 59 (1985).

The burden is on the petitioner to show that the evidence preponderated against the findings of the trial judge. Clenny v. State, 576 S.W.2d 12 (Tenn. Crim. App. 1978). Otherwise, the findings of fact made by the trial court are conclusive. Graves v. State, 512 S.W.2d 603 (Tenn. Crim. App. 1973). In Boykin v. Alabama, 395 U.S. 238 (1969), the United States Supreme Court ruled that the record must affirmatively show a knowing and voluntary guilty plea. In order to meet the constitutional mandate, the plea must represent "a voluntary and intelligent choice among the alternative courses open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31 (1970).

The performance of trial counsel may not have merited admiration. Despite that, however, no prejudice resulted. That is, the petitioner was unable to establish that but for any deficiencies on the part of his trial counsel's performance, he would not have pled guilty or would have insisted on a trial. The proof clearly establishes that the guilty plea was knowingly and voluntarily made. The plea bargain was favorable, perhaps better than the petitioner deserved. Because he already had a seven-year sentence, the effective sentence was extended by only three years even though the petitioner admitted that he had attempted to commit the murder of a prison guard. He was fortunate to have the charges of theft, escape, and conspiracy dismissed by the state. The transcript confirms the trial court's finding that the defendant was fully aware of his rights and had gladly accepted the offer by the state. It is unfortunate that the petitioner has failed in his attempts to gain parole but that appears to be of his own doing.

Accordingly, the judgment is affirmed.

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Gary R. Wade, Judge

CONCUR:

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Joseph M. Tipton, Judge

_____
Curwood Witt, Judge