IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH 1999 SESSION

FILED

April 29, 1999

Cecil W. Crowson
Appellate Court Clerk

JAMES A. SLAUGHTER,	)	
	)	**NO. 01C01-9803-CR-00121**
Appellant,	)	
	)	**DAVIDSON COUNTY**
VS.	)	
	)	**HON. WALTER C. KURTZ,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-Conviction)

FOR THE APPELLANT:

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OPINION FILED: ________________________

AFFIRMED

JOE G. RILEY,
JUDGE

OPINION

Petitioner, James A. Slaughter, appeals as of right the denial of his petition for post-conviction relief. A Davidson County jury convicted the petitioner of four counts of selling more than twenty-six grams of cocaine, Class B felonies, and one count of conspiracy to sell or deliver over 300 grams of cocaine, a Class A felony.[1] The trial court sentenced petitioner to ten years on each of the drug sale convictions, and twenty-five years on the conspiracy. Petitioner received an effective forty-five year term in prison: twenty years on the cocaine sales, consecutive to the twenty-five year conspiracy sentence. All convictions and sentences were affirmed on direct appeal. State v. Troy Carney and James Andrew Slaughter, Jr., C.C.A. No. 01C01-9412-CR-00425, Davidson County (Tenn. Crim. App. filed February 23, 1996, at Nashville). Petitioner subsequently filed for post-conviction relief alleging ineffective assistance of counsel and an unconstitutional sentence. The court below denied relief, and this appeal followed. Upon our review of the record, we AFFIRM the judgment below.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner initially contends that the post-conviction court should have found his trial counsel ineffective in advising him about the state's plea offers. This Court reviews a claim of ineffective assistance of counsel under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The petitioner has the burden to prove that (1) the attorney's performance was deficient, and (2) the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

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[1] These convictions arose out of a police "sting" operation conducted over a number of weeks. *See* State v. Troy Carney and James Andrew Slaughter, Jr., C.C.A. No. 01C01-9412-CR-00425, Davidson County (Tenn. Crim. App. filed February 23, 1996, at Nashville).

The test in Tennessee in determining whether counsel provided effective assistance is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. Baxter, 523 S.W.2d at 936. The petitioner must overcome the presumption that counsel's conduct falls within the wide range of acceptable professional assistance. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; Alley v. State, 958 S.W.2d 138, 149 (Tenn. Crim. App. 1997); State v. Williams, 929 S.W.2d 385, 389 (Tenn. Crim. App. 1996). Therefore, in order to prove a deficiency, a petitioner must show that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms. Strickland, 466 U.S. at 688, 104 S.Ct. at 2065; Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997); Goad, 938 S.W.2d at 369.

In reviewing counsel's conduct, a "fair assessment . . . requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

A. Plea Offers

The proof at the post-conviction hearing established that the state made three plea offers, each significantly less than forty-five years. Petitioner testified that he rejected each of these offers on advice of counsel: "[h]e told me that I -- don't even think about taking them, that I -- that they didn't have a case against me, that I wouldn't be found guilty at all." Trial counsel's recollection was different: "Mr. Slaughter insistently said, I'm not guilty, I will not do -- I will not -- I will only take probation. That's all he wanted." Trial counsel denied making any guarantees to petitioner that he would get an acquittal or that he would not spend any time in jail. The prosecuting attorney also testified that petitioner "would not take any offers" and wanted an apology from the state for prosecuting him. The court below found as follows:

> I credit [trial counsel's] testimony that he communicated these plea offers to the Petitioner, that the Petitioner rejected these offers. [Trial counsel] denied that he made these kind of reckless statements that he, you

> know, would guarantee that the case would be won or that he wanted to fight it out. He explained why the defendant said he wouldn't take the plea offer, and they sound reasonable to me. So I don't find any violation of the 6th Amendment[2] in the plea bargaining process under the facts and circumstances of this case.

The trial judge's findings of fact on post-conviction hearings are conclusive on appeal unless the evidence preponderates otherwise. Butler, 789 S.W.2d at 899; Adkins v. State, 911 S.W.2d 334, 341 (Tenn. Crim. App. 1995). The trial court's findings of fact are afforded the weight of a jury verdict, and this Court is bound by the trial court's findings unless the evidence in the record preponderates against those findings. Henley, 960 S.W.2d at 578; Alley 958 S.W.2d at 147; Dixon v. State, 934 S.W.2d 69, 72 (Tenn. Crim. App. 1996). This Court may not reweigh or reevaluate the evidence, nor substitute its inferences for those drawn by the trial judge. Henley, 960 S.W.2d at 578-79; Massey v. State, 929 S.W.2d 399, 403 (Tenn. Crim. App. 1996); Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). Questions concerning the credibility of witnesses and the weight and value to be given to their testimony are resolved by the trial court, not this court. Henley, 960 S.W.2d at 579; Black, 794 S.W.2d at 755. The burden of establishing that the evidence preponderates otherwise is on petitioner. Henley, 960 S.W.2d at 579; Black, 794 S.W.2d at 755.

The evidence does not preponderate against the post-conviction judge's findings of fact with respect to trial counsel's performance regarding plea negotiations between petitioner and the state. Accordingly, this issue is without merit.

B. Sentencing Hearing

The petitioner also contends that the court below erred in not finding his trial counsel ineffective with regard to the sentencing hearing. The record establishes that trial counsel advised petitioner not to testify at the hearing (which advice petitioner followed) and further decided not to call any of petitioner's family members to testify. At the post-conviction hearing, petitioner offered proof that the

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[2]"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI.

missing testimony would establish his character as a good family man, who was employed and went to church regularly. He argues that, had this mitigating proof been offered at the sentencing hearing, he would have received a lesser sentence. The court below found as follows:

> I think [trial counsel] articulated good reasons why he didn't offer proof. Those reasons seemed rational to me and I don't find any violation of the 6th Amendment standards of making those decisions.
>
> Going a step further, however, even if he should have presented some live witnesses to testify consistent with what I heard from the Petitioner's mother, that -- first of all, that information was provided to the sentencing judge, which happened to be me, in the pre-sentence report. And I would point out that the facts sort of belie this notion that Petitioner was a person of good character and a good family man.
>
> A good family man I suppose doesn't have a girlfriend on the side,[3] a good family man who's been on parole for a drug offense for which he received 20 years and back selling drugs and – you know, anybody who sells drugs while on parole for a 20-year sentence for selling drugs can probably expect nothing but fairly harsh treatment in the sentencing process.[4]
>
> Nothing I've heard today, if it were heard back when the sentencing hearing was held, would have changed my sentence; nor do I believe it would have changed the sentence of any trial judge setting the sentence.

Again, the proof does not preponderate against the post-conviction court's findings. This issue is, therefore, without merit.

C. Length of Sentence

Petitioner further contends that his trial counsel was ineffective at sentencing, and his appellate counsel on direct appeal, because they did not advocate "the fundamental unfairness" that his multiple convictions arose out of a decision by the police to continue the sting operation until a large amount of cocaine was involved.

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[3]Petitioner admitted during the post-conviction hearing that, in addition to being married with children, he had a mistress.

[4]Petitioner's presentence report reveals that petitioner was convicted in 1987 of dealing over thirty grams of cocaine and received a twenty-year sentence. He was on parole from that sentence when he committed the present offenses.

Petitioner relies on an opinion in which this Court examined whether an effective forty-year sentence for four convictions of cocaine dealing was reasonably related to the severity of the crimes. This Court held that it was not, and reduced the sentence to an effective term of twenty years, explaining:

> Because these were controlled buys, the officers dictated the number of counts. As such, the severity of the crimes could vary significantly depending upon the specific number of buys the officers chose to conduct and the amounts purchased in each buy. For this reason, we are of the opinion that a total sentence of twenty years for the drug cases is appropriate.

State v. John Derrick Martin, C.C.A. No. 01C01-9502-CR-00043, Davidson County (Tenn. Crim. App. filed December 19, 1995, at Nashville), *affirmed on other grounds*, 940 S.W.2d 567 (Tenn. 1997).

We first note that the sentencing hearing transcript is not a part of this proceeding's record. Thus, we cannot confirm that counsel did not make this argument. Regardless, this issue was previously determined[5] in the direct appeal of this case. This Court specifically held that "[t]he aggregate length of the sentence reasonably relates to the crimes committed." State v. Troy Carney and James Andrew Slaughter, Jr., C.C.A. No. 01C01-9412-CR-00425, Davidson County (Tenn. Crim. App. filed February 23, 1996, at Nashville). This conclusion followed a *de novo* review without the presumption of correctness.[6]

D. Equal Protection

Finally, petitioner argues that his sentence violates equal protection principles because another felon was granted relief on direct appeal from an "excessive aggregate sentence" for "conduct of essentially the same nature and gravity." Again, he points to the Martin case cited above in which this Court halved a forty-

[5] *See* Tenn. Code Ann. 40-30-206(h).

[6] This Court's opinion on the direct appeal states that the trial court failed to place on the record the statutorily required findings of fact.

year sentence for four cocaine dealing convictions. Because this issue of equal protection was not raised below, it is waived for the purposes of this appeal. Tenn. Code Ann. § 40-30-206(g); Tenn. R. App. P. 36(a). Moreover, we see no "equal protection" problem. Petitioner received an additional twenty-five years because he, unlike Mr. Martin, was also convicted of conspiracy to sell or deliver over 300 grams of cocaine, a Class A felony.

The consecutive service of this sentence was reviewed on direct appeal and found "appropriate." Therefore, this issue has been previously determined and is without merit.

CONCLUSION

Based upon the foregoing, the judgment below is affirmed in all respects.

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JOE G. RILEY, JUDGE

CONCUR:

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DAVID H. WELLES, JUDGE

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THOMAS T. WOODALL, JUDGE