IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1999 SESSION

FILED

December 16, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

WILLIAM FREDRICK LUTTRELL,	)	
	)	
Appellant,	)	No. 03C01-9901-CR-00004
	)	
	)	Hamblen County
v.	)	
	)	Honorable Ben K. Wexler, Judge
	)	
STATE OF TENNESSEE,	)	(Post-conviction)
	)	
Appellee.	)	

For the Appellant:

W. Douglas Collins
Post Office Box 1754
Morristown, TN 37816

For the Appellee:

Paul G. Summers
Attorney General of Tennessee
and
Clinton J. Morgan
Assistant Attorney General of Tennessee
425 Fifth Avenue North
Nashville, TN 37243

C. Berkeley Bell, Jr.
District Attorney General
and
John F. Dugger, Jr.
Assistant District Attorney General
109 South Main Street, Suite 501
Greeneville, TN 37743

OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The petitioner, William Frederick Luttrell, appeals as of right from the Hamblen County Criminal Court's denial of his petition for post-conviction relief. He seeks relief from his 1997 guilty pleas to three counts of delivery of less than one-half gram of cocaine, a Class C felony; one count of possession of cocaine; and two counts of passing worthless checks. He was sentenced as a Range I, standard offender to four years for each of the three delivery counts and to eleven months and twenty-nine days for each of the possession and worthless check counts. All six counts were concurrent for an effective four-year sentence to be served in the Department of Correction. The petitioner contends that he received the ineffective assistance of counsel because his attorney (1) failed to advise him properly about the consequences of his restructured plea agreement, (2) misinformed him about the amount of time he would serve before becoming eligible for release, and (3) failed to review the judgments for their accuracy. We affirm the trial court's denial of the petition.

The petitioner was originally charged with three counts of delivering less than one-half gram of crack cocaine, one count of possession of cocaine in a penal institution, and four counts of passing worthless checks. By a plea agreement, the state reduced the possession of cocaine in a penal institution to possession of cocaine, a misdemeanor. The state also dismissed two of the worthless check counts.

At the post-conviction evidentiary hearing, the petitioner testified that he had been incarcerated for thirteen or fourteen months. He said that in December 1997, he entered guilty pleas in three cases: three counts of delivery of a controlled substance, introduction of a controlled substance into a penal institution, and passing worthless checks. He stated that before the trial court appointed the attorney who represented him on these charges, he was represented by two other attorneys who had

withdrawn because of a conflict. He said he told his attorney that he wanted to go to trial, and he believed he had a good defense. He said that he changed his mind because he was having problems in the county jail and because of the change in attorneys. He said that he decided to try for a plea to enter the penitentiary.

The petitioner testified that his attorney negotiated his sentences down to three years for the delivery charges and a consecutive eleven months and twenty-nine days on the contraband charge. He said that someone at the jail told him that he needed a four-year sentence to get into the penitentiary. He said that on that same day, he asked his attorney to get one more day added to his sentence, but instead, she got him an extra year. He said that before he went to court, his attorney calculated the amount of time that he would actually spend incarcerated as fourteen months, including time served. He said that he never discussed parole with his attorney.

The petitioner stated that when he got to the penitentiary, he learned that his release eligibility date was in January 1999. He said that it should have been in September 1998. He said that his printout from the Department of Correction listed a sentence effective date of July 26, 1997 and an ending date of November 21, 2001, which was more than four years. He said that he wrote a letter to his attorney asking her to correct errors in the judgments but that his sentence stayed the same until June 1998. He said that as a result, he was not considered for parole at the proper time. He said he also applied to the Department of Correction requesting that the errors be corrected. He said that once it received the amended judgments, the Department of Correction did not correct his sentences until September 1998. He said that by this time, his early release date and his release eligibility date had passed.

The petitioner testified that his attorney was ineffective because she got him another year rather than the day he requested, and this increased the time that he

would spend incarcerated. He said he thought that he was going to the penitentiary with a sentence of three years and one day. He admitted that at the guilty plea hearing, he agreed that he understood he could serve one hundred percent of his sentence, but he said that his attorney had never discussed his serving more than thirty percent. He said he believed that he would not serve more than thirty percent of his sentence. He said that he would not have pled guilty if he had known that this was not true. The petitioner admitted that he had agreed to a four-year sentence at the guilty plea hearing. He said that he did not tell the trial court that this was not the sentence he was expecting because he was relying on the advice of his attorney.

Clifton Barnes testified that he was a public defender and that he represented the petitioner until he determined that a conflict existed because his office also represented a codefendant. He said that the petitioner wanted his case tried and that the petitioner felt he had a good defense. He said that if he had continued to represent the petitioner, he would have taken the case to trial because this was the petitioner's decision. He said that he did not recall speaking with the petitioner's attorney about the petitioner's case or generally about how to calculate release eligibility dates. He stated that a defendant needs a four-year sentence to be eligible for the Department of Correction, but a four-year sentence does not guarantee admittance due to overcrowding.

Josephine Garrett, the petitioner's mother, testified that she spoke with the petitioner's attorney about the amount of time the petitioner would serve in prison if he accepted the plea offer. She said that the attorney told her that the petitioner would serve seven to nine months, which represented thirty percent of the sentence less time served. Sandra Luttrell, the petitioner's wife, testified that the petitioner's attorney told her that if the petitioner accepted the plea, he would get no more than nine months in incarceration, including time served.

The petitioner's attorney testified that the state initially offered the petitioner a combined six or eight-year sentence. She said she convinced the state that some of the worthless check counts no longer had witnesses willing to give testimony. She said that as a result, the state dismissed two counts of passing worthless checks. She said that the lowest offer she received was three years for each count of delivery of a controlled substance. She said the state also offered to reduce the petitioner's charge of possession of a controlled substance in a penal institution to simple possession. She said that the state offered sentences of eleven months and twenty-nine days for the possession count and the two worthless check counts. She said that the three-year sentences for the felonies were to be served at thirty percent and were to be consecutive to the eleven-month, twenty-nine-day sentences, which would be served at fifty percent.

The attorney testified that she discussed this offer with the petitioner. She said he told her that he was extremely unhappy in the Hamblen County jail and believed that the conditions were better in the penitentiary. She said the petitioner told her, and she confirmed, that the petitioner needed a four-year sentence in order to be eligible for transfer to the penitentiary. She said the petitioner asked her to negotiate the addition of an extra day to the effective three-year, twenty-nine-day offer. She said she advised the petitioner against this several times because she did not know how the penitentiary would handle his charges. She said that the petitioner insisted and that she asked the state to add an additional day to the offer.

The attorney testified that the petitioner received an offer of four years for the felony counts to run concurrently with the eleven-month, twenty-nine-day sentences and for the entire sentence to be served at thirty percent. She stated that she did not realize at the time that the petitioner benefitted from the restructured offer because he would reach his release eligibility date on the eleven-month, twenty-nine-day sentences

after serving thirty percent rather than fifty percent of the sentence. She said she did not tell the petitioner that he would only have to serve eight or nine months of the four-year sentence. She said she did not use a calendar or a calculator to determine the amount of incarceration the petitioner would face under the offer before becoming eligible for release. She said she told the petitioner the percentage that he would receive under the plea bargain and that this percentage was not guaranteed. She said that she told him that his only guaranteed release date would be at the end of four years.

The attorney testified that she discussed her concerns about a possible trial with the petitioner's mother and ex-wife. She said she did not tell them that the petitioner would serve eight or nine months in jail before being eligible for release. She said she talked to them in general terms about possible sentences, but she would not have guaranteed a time for release. She said she was prepared to go to trial on all counts, but the petitioner discovered that the testimony of his ex-wife and another witness was not going to be helpful. She stated that she believed that the petitioner accepted the plea due to the combination of this discovery and the state's offer becoming increasingly better as the trial approached. She said that she was present when the petitioner entered his guilty pleas and that he understood the pleas. The attorney said she believed that she negotiated a good deal for the defendant.

The attorney testified that she did not look at the judgments after the petitioner entered his guilty pleas on November 21, 1997. She said she received a letter with a postmark of April 22, 1998 from the petitioner. The attorney read this letter into evidence. It stated that the trial court had entered the dates for pretrial jail credit on the judgment for count one but not on the judgments for counts two and three of the delivery convictions. In the letter, the petitioner stated that if the pretrial jail credit was not entered for all three counts, then he would have to serve a greater percentage of

his four-year sentence before being eligible for release. The petitioner acknowledged in the letter that he was not guaranteed to serve only thirty percent of his four-year sentence before becoming eligible for release. The petitioner asked the attorney to have the clerk's office send the information on the pretrial jail credit for counts two and three to the Department of Correction.

The attorney testified that the better practice would have been to review the judgments after they were initially entered to make sure they were complete. She said that when she did review the original judgments, they appeared accurate because count one contained the pretrial jail credit dates. She said that it took two months of working with the probation office and the trial court to get the judgments on counts two and three amended to include the dates for the pretrial jail credits. She said the amended judgments were entered nunc pro tunc in order that they would be effective from the time the petitioner entered his plea. She said she did not see any functional difference between the original and the amended judgments, but apparently the amendment was necessary for the Department of Correction. The attorney testified that she was not aware that the Department of Correction would have considered the petitioner for release around the time that she received the petitioner's letter.

The transcript of the guilty plea hearing on November 21, 1997, reflects that the petitioner affirmed that he wanted the court to approve a four-year sentence on each of the three counts of delivering cocaine. The petitioner agreed that as a Range I, standard offender, he had a release eligibility date of thirty percent. The petitioner said that he understood that this did not mean that he would be automatically released after serving thirty percent of his sentence and that he could be required to serve the entire sentence. The petitioner confirmed that his attorney had explained the waiver of rights and guilty plea form that he signed and that he understood them. He agreed that he was satisfied with the representation his attorney provided.

The trial court found that the petitioner pled guilty to a four-year sentence on the delivery charges with the misdemeanor sentences to run concurrently. The trial court stated that it had no doubt that the petitioner understood the sentence to which he pled guilty. It found that the original judgments contained no errors and that the petitioner's true complaint was with the Department of Correction. It stated that the amended judgments removed any doubt with regard to the petitioner's entitlement to credit for time served. The trial court found that the petitioner's attorney effectively represented him, and it denied the petition for post-conviction relief.

In a post-conviction case, the burden is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f). On appeal, we are bound by the trial court's findings unless we conclude that the evidence preponderates against those findings. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). The petitioner has the burden of illustrating how the evidence preponderates against the judgment entered. Id. This court may not reweigh or reevaluate the evidence, nor substitute its inferences for those drawn by the trial court. Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). 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. Id.

INEFFECTIVE ASSISTANCE OF COUNSEL

The petitioner contends that he received the ineffective assistance of counsel which caused him to plead guilty to a four-year sentence and deprived him of consideration for release on his release eligibility date. The state contends that we should affirm the trial court's denial of the petition because the petitioner has provided an incomplete record. The state also argues that the petitioner's attorney effectively represented him.

When a claim of ineffective assistance of counsel is made under the Sixth Amendment, the burden is upon the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings fundamentally unfair. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44 (1993). The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). When a petitioner claims that ineffective assistance of counsel resulted in a guilty plea, the petitioner must prove that counsel performed deficiently and that but for counsel's errors, the petitioner would not have pled guilty and would have insisted upon going to trial. Hill v. Lockhart, 464 U.S. 52, 59, 106 S. Ct. 366, 370 (1985).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court held that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases. Further, the court stated that the range of competence was to be measured by the duties and criteria set forth in Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974) and United States v. DeCoster, 487 F.2d 1197, 1202-04 (D.C. Cir. 1973). Also, in reviewing counsel's conduct, a "fair assessment of attorney performance 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; see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

We also note that the approach to the issue of the ineffective assistance of counsel does not have to start with an analysis of an attorney's conduct. If prejudice

is not shown, we need not seek to determine the validity of the allegations about deficient performance. Strickland, 466 U.S. at 697, 104 S. Ct. at 2069.

A. INCOMPLETE RECORD

The state contends that the petitioner has failed to provide this court with a complete record for review because he has not included a copy of the waiver of rights and the guilty plea form in the record. The state argues that these documents were acknowledged at the guilty plea hearing and can be reasonably presumed to refute portions of the petitioner's testimony at the evidentiary hearing, citing State v. Boling, 840 S.W.2d 944, 951 (Tenn. Crim. App. 1992) ("Absent an essential part of the record, this court must presume that the trial court's determination is correct"). The state contends that the incomplete record warrants our affirming the trial court.

The appealing party has a "duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal." State v. Ballard, 855 S.W.2d 557, 560 (Tenn. 1993). In the present case, the waiver of rights and the guilty plea form were never entered into evidence. During its argument to the court, the state requested that the case file on the delivery convictions be made an exhibit because it contained the guilty plea form. The petitioner objected that the state could not put evidence into the record after it had rested its case. The trial court made no ruling on this matter, and the file was not made an exhibit. Because the rights waiver and the guilty plea form were never a part of the record, their absence does not make the record on appeal incomplete.

Nevertheless, the trial court examined the file and read the pertinent portion of the forms into the record:

> The waiver of rights and plea of guilty which [the petitioner] signed has a statement in here: I am pleading guilty to simple possession, . . . possession of a Schedule II [substance] with the intent to deliver it, three counts, and worthless checks to

> Walmart, Food City, two counts. The sentence I will receive is four years all concurrent. And which he signed.

Although the documents were not entered into evidence, the essence of their relevance to this appeal is before us through the trial court's statements and the transcript of the guilty plea hearing. See Lane v. State, 968 S.W.2d 912, 915 (Tenn. Crim. App. 1997) (holding the absence of the guilty plea hearing transcript to be harmless error because the petitioner's testimony at the evidentiary hearing indicated that his plea was voluntary). We decline to determine the outcome of the appeal based upon the absence of these documents.

B. RESTRUCTURED PLEA AGREEMENT

The petitioner contends that his attorney rendered ineffective assistance by failing to advise him properly of the nature and consequences of the restructured plea offer. He states that the original offer called for a three-year sentence at thirty percent for the delivery charges and a consecutive eleven-month, twenty-nine-day sentence at fifty percent for the misdemeanors. He states that prior to his plea, he had served one hundred twenty-two days in jail and was close to retiring the misdemeanor sentence. He states that instead of getting one day added to the three-year sentence, his attorney negotiated a four-year sentence on the delivery charges with the misdemeanor sentences running concurrently. He argues that this restructured offer resulted in the addition of just over one-hundred and nine days to the time he would have to serve before becoming eligible for release. He claims that his attorney never advised him of this consequence of the restructured offer and that if he had been properly advised, he would have insisted on going to trial. The state argues that the increase in the offer was at the petitioner's request, was understood by the petitioner, and fulfilled his desire to serve his sentence in the Department of Correction. It contends that the trial court properly denied the petitioner relief on this ground.

Tenn. Code Ann. § 40-35-211(1) requires that felony sentences "shall be for a term of years or months or life, if the defendant is sentenced to the department of correction . . . ." Thus, the petitioner's request that his attorney get one day added to the state's offer of three years for the delivery counts in order for him to qualify for the Department of Correction was impossible to fulfill. The petitioner's attorney advised against seeking additional time, but the petitioner insisted because he did not want to serve his sentence in the local jail. His attorney secured the four-year sentence he needed to qualify for the Department of Correction. The transcript of the guilty plea hearing shows that the petitioner knew that he was agreeing to a four-year sentence on the delivery counts. We do not believe the petitioner's attorney was deficient when the petitioner insisted upon extra time against her advice. See, e.g., James Gordon Coons, III v. State, No. 01C01-9801-CR-00014, Davidson County (Tenn. Crim. App. May 6, 1999) (holding that counsel was not ineffective for arranging a plea agreement for six years and one day despite a prior offer of three years when the petitioner insisted upon the increase against the attorney's advice in order to qualify for the Department of Correction).

The petitioner argues that he would not have pled guilty if his attorney had advised him that a sentence of four years at thirty percent would require him to serve more time before arriving at his release eligibility date than a sentence of three years and one day also at thirty percent. The evidence does not support this argument. The petitioner testified that he decided to seek a guilty plea because he had changed attorneys and he was having problems in the local jail. He explained that he wanted to enter into a plea agreement in order to move to the Department of Correction. The plea negotiated by the petitioner's attorney allowed the petitioner to achieve this goal. The evidence does not preponderate against the trial court's finding that the petitioner's attorney effectively represented him.

C. ADVICE ON THE LENGTH OF POTENTIAL INCARCERATION

The petitioner claims that his attorney misinformed him about the amount of time that he would spend incarcerated. He says his attorney advised him that if he accepted the state's offer, he would be incarcerated for fourteen months, which included his pretrial jail credit. He contends that if he had known that this advice was inaccurate, he would have declined the offer and gone to trial. The state contends that the evidence supports the trial court's finding that the petitioner understood that his thirty percent release eligibility date was not guaranteed at the time he entered his plea.

The petitioner's attorney testified that she told the petitioner that his release eligibility date was not guaranteed and that his only guaranteed release date would be at the end of the four-year sentence. Relying upon the guilty plea hearing transcript and the petitioner's letter to his attorney, the trial court found that the petitioner understood the plea agreement. We note that the petitioner's testimony at the guilty plea hearing "constitutes a formidable barrier" to his claim that he was coerced into pleading guilty in that "[s]olemn declarations in open court carry a strong presumption of verity." Blackledge v. Allison, 431 U.S. 63, 75, 97 S. Ct. 1621, 1629 (1977). The guilty plea hearing transcript reveals that the petitioner knew that he could serve more than thirty percent of his sentence. His subsequent letter reaffirms that he knew his release eligibility date was not guaranteed. The trial court is entitled to accredit the petitioner's guilty plea hearing testimony over his testimony at the evidentiary hearing. The record does not preponderate against the trial court's finding that the petitioner's attorney did not misadvise the petitioner about the length of his sentence.

D. ERRORS IN JUDGMENTS

The petitioner contends that his attorney was ineffective for not discovering errors in the judgments in counts two and three of his delivery convictions.

He argues that the errors in these judgments were not corrected until June 1998, and by this time, his release eligibility date had passed. The state argues that the petitioner's attorney is not responsible for the Department of Correction's unreasonable interpretation of the original judgments.

We agree with the trial court's finding that the original judgments contained no errors. The judgments for counts two and three were concurrent to count one. The judgment for count one listed the dates for the pretrial jail credit. All three judgments specifically stated that the petitioner was to get credit for time served. Even if the petitioner's attorney had reviewed the judgments as soon as they were entered, she could not have known that the Department of Correction would interpret them as it did. The petitioner has failed to show that he was prejudiced by his attorney's failure to review the judgments immediately after their entry.

Based on the foregoing and the record as a whole, we affirm the trial court's denial of the petition for post-conviction relief.

_____
Joseph M. Tipton, Judge

CONCUR:

_____
Jerry L. Smith, Judge

_____
Thomas T. Woodall, Judge