

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER SESSION, 1999

**FILED**  
December 13, 1999  
Cecil Crowson, Jr.  
Appellate Court Clerk

MICHAEL A. STAMM )  
 )  
 APPELLANT )  
 )  
 VS. )  
 )  
 STATE OF TENNESSEE )  
 )  
 APPELLEE )

C.C.A. NO. 03C01-9810-CR-00376  
BLOUNT COUNTY CRIMINAL NO.  
HON. D. KELLY THOMAS, JR., JUDGE

FOR THE APPELLANT:

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OPINION FILED: \_\_\_\_\_

AFFIRMED  
JOE H. WALKER, III, Sp. JUDGE

## OPINION

The petitioner, Michael A. Stamm, appeals the order of the Blount County Criminal Court denying his petition for post conviction relief.

The petitioner was convicted in 1995, and received a sentence of ten years for the B felony of sale of cocaine. He appealed to the Court of Criminal Appeals contending that the trial court erred in sentencing him to serve time in custody of the Department of Corrections, rather than ordering an alternate sentence. The Court of Criminal Appeals affirmed the sentence. State v. Stamm, April, 1997, No. 03C01-9602-CC-00068.

The trial court reviewed the post conviction petition and entered a preliminary order finding the petitioner to be indigent, and appointing counsel to represent petitioner. After a full hearing, the trial court found that the issues raised by petitioner were previously decided on direct appeal, and the petitioner was unable to show any prejudice.

Petitioner appeals the dismissal alleging as error that petitioner did not receive effective assistance of counsel, since counsel failed to argue, at both the trial court sentencing hearing and on appeal, that the trial court was wrong by assuming someone sentenced to ten years was not eligible to participate in the community corrections program.

The trial court dismissed the petition, finding petitioner was unable to show any prejudice. We affirm.

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, 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, 80 L. Ed. 2d 674 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72, 113 S. Ct. 838, 842-44, 122 L. Ed. 2d 180 (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).

In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), our supreme court decided 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, 159 U.S. App. D.C. 326, 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.

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.*

We conclude that the petitioner has not shown that the evidence preponderates against the trial court's finding that he received effective assistance of counsel. Although the petitioner claims that his attorney was ineffective for failing to argue that the trial court was in error in assuming that a ten year sentence could not be served in the Community Corrections Program, this court on appeal addressed that issue. Petitioner has not been prejudiced since the issue was considered. This court stated that not everyone convicted of a drug-related offense who meets the minimum criteria for participation in Community Corrections is entitled to be sentenced under the act. Both the trial court and this court found petitioner has had many brushes with the law, which have resulted in numerous convictions. He received probation for some of those convictions. He has had repeated opportunities to reform himself in an environment less restricted than confinement, and he has chosen not to do so. This court affirmed the sentence of ten years to be served in custody of the Tennessee Department of Corrections. Issues raised by the petitioner that were previously determined by this Court on direct appeal were properly dismissed. T.C.A. § 40-30-206. Carter v. State, 958 S.W.2d 620 (1997).

The trial court properly found that petitioner failed to show by clear and convincing

evidence that he was prejudiced by his counsel's failure to raise as an issue whether the trial court mistakenly believed that appellant was precluded from serving his sentence with Community Corrections if he received a sentence of more than eight years. The court concluded that appellant was otherwise ineligible for Community Corrections based on reasons other than the length of sentence.

The judgment of the trial court in dismissing the post conviction petition was correct, and is affirmed.

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JOE H. WALKER

CONCUR:

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<b>VS.</b>	)	<b>C.C.A. NO. 03C01-9810-CR-00376</b>
	)	<b>BLOUNT COUNTY CRIMINAL NO.</b>
<b>STATE OF TENNESSEE</b>	)	<b>HON. D. KELLY THOMAS, JR., JUDGE</b>
	)	
<b>APPELLEE</b>	)	

**JUDGMENT**

Came the appellant, Michael A. Stamm, by counsel, and the state, by the Attorney General, and this case was heard on the record on appeal from the Criminal Court of Blount County; and upon consideration thereof, this Court is of the opinion that there is no reversible error in the judgment of the trial court.

Our opinion is hereby incorporated in this judgment as if set out verbatim.

It is, therefore, ordered and adjudged by this Court that the judgment of the trial court is **AFFIRMED**, and the case is remanded to the Criminal Court of Blount County for execution of the judgment of that court and for collection of costs accrued below.

It appears that appellant is indigent. Costs of appeal will be paid by the State of Tennessee.

**PER CURIAM**

**DAVID G. HAYES, JUDGE**  
**ALAN E. GLENN, JUDGE**  
**JOE H. WALKER, III, Sp. JUDGE**

