

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
JUNE SESSION, 1999

FILED

August 6, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

ERIC DEWAYNE SHAW,)
)
 Appellant)
)
 vs.)
)
 STATE OF TENNESSEE,)
)
 Appellee)

No. 02C01-9812-CC-00366

DYER COUNTY

Hon. R. Lee Moore, Judge

(Post-Conviction)

For the Appellant:

John W. Palmer
116 W. Court Street
Post Office Box 746
Dyersburg, TN 38025-0746

For the Appellee:

Paul G. Summers
Attorney General and Reporter

Patricia C. Kussmann
Assistant Attorney General
Criminal Justice Division
425 Fifth Avenue North
2d Floor, Cordell Hull Building
Nashville, TN 37243-0493

C. Phillip Bivens
District Attorney General
P. O. Box E
Dyersburg, TN 38024

OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Eric Dewayne Shaw, appeals from the denial of his petition for post-conviction relief. On appeal, he collaterally challenges his convictions upon grounds (1) that his pleas were involuntarily entered and (2) that he received ineffective assistance of counsel.

On March 21, 1997, the appellant entered guilty pleas pursuant to a negotiated plea agreement to one count of facilitation of aggravated robbery and one count of theft over \$1,000. These pleas stemmed from the appellant's indictments for aggravated robbery, ten counts of burglary of vehicles and two counts of theft. Under the terms of the plea agreement, the appellant was sentenced to four years and six months for facilitating robbery and three years for theft. Previously that same day, the appellant had entered a guilty plea to aggravated robbery in Obion County Circuit Court and had received a sentence of eight years. As further provided by the Dyer County plea agreement, the appellant's Dyer County facilitating sentence of four years and six months was ordered to run concurrently with the eight year Obion County sentence; however, the Dyer County three year sentence for theft was ordered to run consecutively to "all other sentences," for an effective sentence from Obion and Dyer Counties of eleven years.

On appeal, the appellant contends that he was advised by counsel that his sentences in Obion and Dyer County would run concurrently, resulting in an effective sentence of eight years. Accordingly, the appellant argues that his attorney was ineffective for persuading him to plead guilty to "promises which were not kept" and that his attorney failed to adequately communicate with him prior to trial, all of which resulted in unknowing and involuntary guilty pleas.

First, the proof at the guilty plea hearing established that the appellant's theft conviction occurred while the appellant was on bond for the robbery charges in Obion and Dyer Counties. Thus, the three year sentence for theft was required to be served consecutively and any agreement to the contrary would have been void. See Tenn. R. Crim. P. 32(c)(3)(C).

The proof at the post-conviction hearing reflects that the appellant signed the "Plea of Guilty and Waivers of Jury Trial and Appeal" form which provided:

Sentence in C97-44 [facilitating] to run concurrent with Obion County Circuit No. 7-469. Sentence in C97-49 [theft] to run consecutive to all other sentences.

Moreover, the proof established that appellant's trial counsel fully informed the appellant, prior to the guilty plea hearing, of the consequences of his pleas and of the fact that the theft sentence would run consecutively. At the plea submission hearing, the appellant was again thoroughly advised by the trial judge that the sentence for theft would run consecutive for an effective sentence of eleven years.

Finally, in this regard, the post-conviction court entered the following findings:

The hearing on Defendant's guilty plea reflects that Defendant was advised of his constitutional and appellate rights and the fact that he was waiving those rights by pleading guilty. The Defendant indicated at the guilty plea hearing that he understood his rights and that he was not being forced or threatened into waiving said rights. The Defendant's testimony at the post-conviction hearing is simply not credible when weighed with the transcript of the guilty plea hearing and the testimony of trial counsel.

Sixth Amendment claims of ineffective assistance of counsel are evaluated according to the two-part test set forth in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) of (1) deficient performance and (2) prejudice. In cases concluded by a plea of guilt, a variation of this test exists in that the defendant must establish "a reasonable probability that, but for counsel's error, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 370 (1985).

The record reflects that the appellant gave a taped confession to all of his thirteen indicted crimes in Dyer County. Fortunately for him, his trial counsel negotiated a plea which, in effect, produced a sentence of three years. The post-conviction court found this constituted effective assistance and that appellant's pleas were entered intelligently and knowingly. We agree. The proof in the record does not preponderate against these findings. Because deficient performance was not established, the test of Hill v. Lockhart was not met.

The judgment of the post-conviction court in dismissing the appellant's petition is affirmed.

DAVID G. HAYES, Judge

CONCUR:

DAVID H. WELLES, Judge

NORMA MCGEE OGLE, Judge