

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs January 5, 2016

CHARLES JOINER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 11-00368 Lee V. Coffee, Judge

No. W2015-00810-CCA-R3-PC - Filed February 9, 2016

The petitioner, Charles Joiner, appeals the denial of post-conviction relief from his 2013 Shelby County Criminal Court guilty-pleaded convictions of possession with intent to sell and deliver 0.5 grams or more of cocaine, possession with intent to sell and deliver 4,356 grams or more of marijuana, possession of a firearm during the commission of a dangerous felony, and being a felon in possession of a firearm, for which he received an effective sentence of 16 years. In this appeal, the petitioner contends that his guilty pleas were not knowingly and voluntarily entered and that he was denied the effective assistance of counsel. Discerning no error, we affirm.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

James E. Thomas, Memphis, Tennessee (on appeal); and Eugene Belenitsky, Memphis, Tennessee (at hearing), for the appellant, Charles Joiner.

Herbert H. Slatery III, Attorney General and Reporter; David H. Findley, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Kenya Smith, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On November 19, 2013, the petitioner entered pleas of guilty to one count each of possession with intent to sell 0.5 grams or more of cocaine, possession with intent to deliver 0.5 grams or more of cocaine, possession with intent to sell 4,356 grams or more of marijuana, possession with intent to deliver 4,536 grams or more of marijuana, possession of a firearm during the commission of a dangerous felony, and being a felon in possession of a firearm. Following a sentencing hearing, the trial court merged the two

cocaine possession convictions and the two marijuana possession convictions, and the court imposed an effective sentence of 16 years' incarceration. The transcript of the guilty plea colloquy contains the following factual summary of the offense:

Had the matter gone to trial, the State submits the proof would have shown on May 26, 2010, officers with the OCU of the Memphis Police Department did execute a search warrant at the home of [the petitioner], 44 West Peebles here in Memphis, Shelby County. They did execute that search warrant. He was the only one present at the house, the only one living at the house. They – he was named in the search warrant.

When they forced entry, they found him alone inside the residence. They conducted a search. They did recover a plastic tub in the living room containing loose marijuana; also, a bag in the den containing eleven individual gallon-size Ziploc bags of what appeared to be marijuana. They also found marijuana in other places throughout the residence.

They found a .22 caliber rifle in the case in the office room that the [petitioner] directed them to. They also found over a thousand dollars (\$1,000) in cash. They found scales, they found a large – or a glass jar with what appeared to be crack cocaine on the kitchen counter. They also found caliber rounds for the rifle; also, what appeared to be powder cocaine residue and a large amount of packs of Viagra in his van.

They also found in the back of the residence in a shed what appeared to be a lot of stolen property, several pages worth of receipts.

And the marijuana did test positive. It did weigh over fourteen grams total. The crack cocaine and powder together did weigh well over point five (.5) grams, for the record.

The defense stipulated to the facts as presented. The guilty plea hearing transcript evinces that the trial court conducted a thorough Tennessee Rule of Criminal Procedure 11(b) colloquy with the petitioner. In the colloquy, the trial judge informed the petitioner of the nature and sentencing range of each charge, and the petitioner indicated his understanding of the potential sentencing. The petitioner also confirmed that he had

consulted with trial counsel about his decision to plead guilty and that he had freely and voluntarily made the decision to accept the plea agreement.

Following the entry of the plea, the petitioner filed, pro se, a timely petition for post-conviction relief, alleging that he was deprived of the effective assistance of counsel. Following the appointment of counsel and the amendment of the petition, the post-conviction court conducted an evidentiary hearing.

At the evidentiary hearing, trial counsel testified that he had discussed potential defenses with the petitioner, particularly with respect to the firearms charges, but “after [the petitioner] told [trial counsel] about his knowledge and possession of the gun and his knowledge of whose gun it was,” counsel concluded that no further investigation into that defense was necessary. Trial counsel stated that, initially, the petitioner had rejected all plea offers. Although counsel did not recall the State’s extending an offer of 13 years on May 25, 2012, he acknowledged that the State’s case file indicated that such an offer had been revoked by the State. Trial counsel did recall that the State had made an offer of 20 years on May 31, 2012, which offer was rejected by the petitioner. Trial counsel testified that the petitioner “would not enter a plea before the trial date.”

When the petitioner finally agreed to enter an open guilty plea, trial counsel discussed potential sentencing with him, explaining that the effective minimum sentence would be 16 years. Although the petitioner had expressed an interest in alternative sentencing, trial counsel had explained to him that such sentencing would be unlikely given the petitioner’s prior robbery conviction.

On cross-examination, trial counsel testified that the petitioner decided to plead guilty on the day his trial was scheduled to begin because the then-50-year-old petitioner was facing a potential sentence of 40 years and counsel had advised him that he was ““very unlikely to get the minimum.”” Trial counsel stated that the petitioner was “very involved” in his case and testified that he had explained to the petitioner that a conviction for the possession of a firearm during the commission of a dangerous felony would result in the sentence for that conviction running consecutively to any sentences for the drug convictions. Although the petitioner “didn’t like it,” trial counsel was confident that the petitioner understood the nature of the consecutive sentencing potential. Trial counsel testified that the petitioner made the decision to plead guilty “with [trial counsel’s] advice.”

On redirect examination, trial counsel, in response to questioning about the petitioner’s interest in withdrawing his guilty plea, testified that he “seem[ed] to

remember [the petitioner] asked about it at one time” but that he believed the inquiry was made “more than thirty days” after the entry of the plea.

Denver Leigh Davis, the petitioner’s daughter, testified that, following the petitioner’s guilty plea, she participated in a telephone call with both the petitioner and trial counsel in which counsel indicated that the petitioner’s sentence was “twelve years and it was at thirty percent.” According to Ms. Davis, the petitioner began sending letters to her “about a week” after sentencing indicating that he wished to withdraw his guilty plea. Ms. Davis conceded that she did not have any of the letters and did not forward those letters to anyone, but she testified that she had attempted to contact trial counsel on both his office telephone and his cellular telephone. Ms. Davis testified that she was unaware of the petitioner’s reason for attempting to withdraw his plea.

The petitioner testified that trial counsel had informed him that counsel “could beat the thirteen years” he was initially offered. The petitioner denied that the trial court had informed him of the minimum sentence he could receive, and the petitioner testified that trial counsel “coerced and led [him] into believing [that he] was going to get less than thirteen years.” After the sentencing hearing, the petitioner asked Ms. Davis to contact trial counsel about withdrawing his guilty plea, but trial counsel never “answered the phone.”

In the post-conviction court’s comprehensive, 24-page order denying post-conviction relief, the court found that the petitioner failed to prove that he was deprived of the effective assistance of counsel or that his guilty pleas were not knowingly and voluntarily made. With respect to the voluntariness of his plea, the court made the following findings:

A review of the transcript of the plea hearing reflects that the trial court thoroughly reviewed and explained [to] the petitioner his rights, the offense to which he was pleading guilty, and that the petitioner was entering an open plea to the court without a negotiated sentence. This guilty plea colloquy was 27 pages. The [p]etitioner *repeatedly* assured the trial court that he understood his rights and the consequences of his guilty plea. The [p]etitioner assured the trial court that the [p]etitioner was satisfied with representation of counsel and that he had no complaints whatsoever about trial counsel’s representation.

....

This [c]ourt finds that the petitioner's guilty plea was knowingly, voluntarily, and intelligently made. This [p]etitioner had entered guilty pleas to other felony offenses before the [p]etitioner pled guilty to this offense. The transcript of the plea colloquy confirms that the trial court scrupulously followed the mandates of Rule 11 of the Tennessee Rules of Criminal Procedure and applicable state and federal law. During the plea colloquy, the petitioner answered each of the trial court's questions affirmatively. [The p]etitioner assured the trial court that he wanted to enter this guilty plea. The [p]etitioner further acknowledged that he was entering the plea freely and voluntarily. The [p]etitioner asked relevant questions primarily about the maximum and minimum sentences and program eligibility. In fact, the record reflects that, contrary to petitioner's assertions, he was thinking clearly in court and did not complain of any coercion. The [p]etitioner assured the trial court that he had no complaints or objections about [trial counsel's] representation

. . . .

. . . . In this case, the post-conviction [c]ourt credits the petitioner's testimony during the guilty plea hearing over his testimony at the post-conviction hearing. It appears the petitioner is suffering from a classic case of "Buyer's Remorse," in that he is no longer satisfied with the plea for which he bargained.

With respect to the petitioner's claim that trial counsel was ineffective by failing to assist him in withdrawing his guilty plea, the court found as follows:

The trial court ensured through questioning that the [petitioner] understood his rights and that he was waiving those rights. The [petitioner] entered this plea voluntarily and freely admitted his guilt to these crimes. This [c]ourt conducted a thorough examination of the [petitioner] to determine that the [petitioner] was freely and voluntarily entering a knowing and an intelligent guilty plea. The [petitioner] has not shown such manifest injustice as would permit withdrawal of the plea. Therefore, this [petitioner's]

motion to withdraw his guilty pleas is not authorized under Tenn. R. Crim. P. 32(f).

In this appeal, the petitioner reiterates his claims of ineffective assistance of counsel and involuntary guilty pleas, claiming that trial counsel performed deficiently by failing to assist him in withdrawing his guilty pleas. The State contends that the post-conviction court did not err by denying relief.

We view the petitioner's claim with a few well-settled principles in mind. Post-conviction relief is available only "when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. A post-conviction petitioner bears the burden of proving his or her factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f). On appeal, the appellate court accords to the post-conviction court's findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). By contrast, the post-conviction court's conclusions of law receive no deference or presumption of correctness on appeal. *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).

Before a petitioner will be granted post-conviction relief based upon a claim of ineffective assistance of counsel, the record must affirmatively establish, via facts clearly and convincingly established by the petitioner, that "the advice given, or the services rendered by the attorney, are [not] within the range of competence demanded of attorneys in criminal cases," *see Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975), and that counsel's deficient performance "actually had an adverse effect on the defense," *Strickland v. Washington*, 466 U.S. 668, 693 (1984). In other words, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. Should the petitioner fail to establish either deficient performance or prejudice, he is not entitled to relief. *Id.* at 697; *Goard v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Indeed, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697.

When considering a claim of ineffective assistance of counsel, a reviewing court "begins with the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all significant decisions," *Kendrick v. State*, 454 S.W.3d 450, 458 (Tenn. 2015) (citing *Strickland*, 466 U.S. at 689), and "[t]he petitioner bears the burden of overcoming this presumption," *id.* (citations omitted). We

will not grant the petitioner the benefit of hindsight, second-guess a reasonably based trial strategy, or provide relief on the basis of a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Apart from whether a guilty plea is the product of ineffective assistance of counsel, it is invalid if otherwise made unknowingly or involuntarily. “Whether a plea was knowing and voluntary is an issue of constitutional dimension because ‘[t]he due process provision of the federal constitution requires that pleas of guilty be knowing and voluntary.’” *State v. Wilson*, 31 S.W.3d 189, 194 (Tenn. 2000) (quoting *Johnson v. State*, 834 S.W.2d 922, 923 (Tenn. 1992)). A plea “may not be the product of ‘[i]gnorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats.’” *Wilson*, 31 S.W.3d at 195 (quoting *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969)); see also *State v. Mellon*, 118 S.W.3d 340, 345 (Tenn. 2003) (citing *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993)).

Rule 32(f) of the Tennessee Rules of Criminal Procedure provides that “[a]fter a sentence is imposed but before the judgment becomes final, the court may set aside the judgment of conviction and permit the defendant to withdraw his plea to correct a manifest injustice.” Tenn. R. Crim. P. 32(f)(2). The defendant has the burden of establishing that a plea of guilty should be withdrawn to prevent manifest injustice. *State v. Turner*, 919 S.W.2d 346, 355 (Tenn. Crim. App. 1995).

A claim of ineffective assistance of counsel is a mixed question of law and fact, see *Kendrick*, 454 S.W.3d at 457, as is a claim of involuntary guilty plea, see *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010); *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). When reviewing the application of law to the post-conviction court’s factual findings, our review is de novo, and the post-conviction court’s conclusions of law are given no presumption of correctness. *Kendrick*, 454 S.W.3d at 457; *Fields*, 40 S.W.3d at 457-58; see also *State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000).

In our view, the record fully supports the ruling of the post-conviction court. The record of the guilty-plea submission hearing and the explicitly accredited testimony of the petitioner’s trial counsel, as well as the explicitly discredited testimony of the petitioner, evince the petitioner’s understanding of the proceedings and his willingness to enter into the plea agreement, which resulted in a lesser sentence than the 20 years which had most recently been offered by the State. Moreover, the record amply demonstrates that trial counsel rendered effective assistance in representing the petitioner,

and the petitioner failed to establish a “manifest injustice” that would have justified the withdrawal of his guilty pleas.

Accordingly, the judgment of the post-conviction court is affirmed.

JAMES CURWOOD WITT, JR., JUDGE