IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER 1995 SESSION

BOBBY ASHMORE,	)	NO. 02C01-9410-CR-00219
	)	
Appellant	)	HARDEMAN COUNTY
	)	
V.	)	HON. JOSEPH H. WALKER
	)	JUDGE
STATE OF TENNESSEE,	)	
	)	(Post-Conviction - Attempted
Appellee	)	Rape of a Child - One Count;
	)	Sexual Battery - 2 Counts)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

Following an evidentiary hearing, the Circuit Court of Hardeman County dismissed the appellant's petition seeking post-conviction relief. In his appeal as of right, the appellant contends that the evidence adduced at the post-conviction evidentiary hearing preponderated in favor of his position that his pleas of nolo contendere were not knowingly and voluntarily entered. Specifically, the appellant contends that his trial counsel placed undue pressure upon him to enter pleas resulting in his convictions, and further, that the trial court did not correctly advise him of his rights at his plea submission hearing.

Following a review of the record in this case, the briefs and arguments of counsel, we affirm the trial court.

The appellant was originally charged in a thirteen-count indictment with six counts of rape of a child, six counts of aggravated sexual battery, and one count of attempted rape of a child. The victims in the cases were three female children, all under the age of thirteen years.

The appellant proceeded to trial on the thirteen-count indictment, but after several days into the trial, for reasons not apparent in this record, a mistrial was declared during the presentation of the State's evidence. Following the mistrial, plea negotiations between the prosecution and counsel for the appellant resulted in an agreement whereby the underlying thirteen-count indictment against the appellant would be dismissed upon his plea of guilty to an agreed-upon criminal information charging the appellant with one count of attempted rape of a child and two counts of sexual battery. The agreement provided that the appellant would be sentenced to eight years upon his conviction for attempted rape and one year for each conviction of sexual battery, all sentences to be served concurrently by the appellant as a Range I standard offender.

Eventually the negotiations for a plea agreement resulted in the appellant entering pleas of nolo contendere to the three-count criminal information described

above and a dismissal of the original thirteen-count indictment. As agreed, the trial court sentenced the appellant to an effective sentence of eight years.

At his post-conviction hearing, the appellant testified that he agreed to the plea bargain only because his attorney was abusive toward him and his parents, advised him that he could receive a maximum penalty of ninety years on the thirteen counts of the indictment if convicted, and that his trial counsel told the appellant that he was not prepared for trial. The appellant admitted that one of his reasons for entering his pleas was to receive a lighter sentence.

The appellant also testified that his trial counsel told his parents that he would get one hundred and ninety years in the penitentiary if he did not plead guilty and that his counsel cursed him and his family and told him that if he did not agree to the plea, he would be worth nothing the rest of his life. Further, the appellant testified that his trial counsel advised the appellant that if he agreed to the plea bargain, the appellant would be "guaranteed" probation or house arrest and treatment. The appellant testified that since his incarceration he has received no treatment.

The appellant further testified that at his plea submission hearing, he was afraid to tell the judge that he was unhappy with the representation afforded to him by his trial counsel. Likewise, he testified that he was afraid to advise the trial court that he had been coerced into entering the negotiated pleas.

Thomas Ashmore, father of the appellant, testified that his son's appointed counsel advised him that the appellant could get fifteen years for each count if convicted as charged, and that no parole was possible. Mr. Ashmore further testified that his son's trial counsel "acted like a man that wants to be in charge."

The appellant's mother testified that the appellant's trial counsel did not treat her "very good," and that he admitted to her that he had a reputation for harassing women. Mrs. Ashmore said that counsel advised her that her son could get fifteen years for each of the thirteen counts against him. However, she did not remember any pressure placed upon her to advise her son to plead guilty, and she did not sit in

on any talks between her son and his attorney. Further, Mrs. Ashmore testified that she did not recall either her son or his lawyer mentioning the possibility of probation or house arrest before her son pled nolo contendere.

Testifying on behalf of the State at the post-conviction hearing was the appellant's trial counsel. He testified that he was an assistant public defender for the Twenty-fifth Judicial District and had been appointed by the trial court to represent the appellant at trial. In addition to meeting with the appellant and his parents on numerous occasions in effort to obtain background information, names of potential witnesses, and evidence which might prove favorable to the appellant in the event of criminal sentencing, appellant's trial counsel arranged for the appellant to be seen and examined by a Dr. Nichols. Following an examination of the appellant, Dr. Nichols, apparently a psychiatrist or psychologist, testified in a hearing on a pretrial motion that the appellant, although nineteen years of age, had the personality of an immature thirteen-year old. The appellant's trial counsel also testified that in his dealings with the appellant, the appellant exhibited a great amount of immaturity and had difficulty understanding and appreciating the seriousness of his situation. Nevertheless, trial counsel was confident that the appellant did finally understand the precarious nature of the situation he faced and the possibility of a long term in the penitentiary.

Appellant's trial counsel testified that prior to and during the aborted trial, several motions were heard and ruled upon by the trial court. Chief among these was a defense motion to be permitted to present evidence of the victims' consent to the sexual conduct of the appellant. The trial court ruled that the appellant would not be permitted to introduce evidence of consent by any of the young victims.

Appellant's trial counsel testified that once the defense of consent was disallowed by the trial court, he advised the appellant and his parents that, in his judgment, in all probability the jury would return verdicts of guilty on at least some of the Class A child rape offenses, and that in all likelihood the jury would also find the appellant guilty on at least some of the Class B aggravated sexual battery charges.

Appellant's trial counsel denied that he was unprepared for trial, and to the contrary, testified that he was eager for a trial. However, appellant's trial counsel was convinced that the appellant would not be acquitted of all charges by the jury, and that the appellant would then be faced with an uncertain and lengthy appellate process. He testified that he advised the appellant and his parents that the appellate process would consume approximately three years, and, if successful on appeal, the appellant's only relief would be a new trial.

Further, trial counsel advised the appellant and his parents that if convicted of a Class A felony and sentenced as a standard Range I offender, the appellant's minimum sentence for each conviction would be fifteen years. Likewise, if convicted of a Class B felony and sentenced as a Range I offender, the minimum sentence would be eight years. Counsel further advised the appellant and his parents that if convicted of the sex crimes charged, he would not be eligible for probation or any form of alternative sentencing.

Appellant's trial counsel denied that he cursed the appellant or his family, but he did admit that he probably used profanity for emphasis in order to convince the appellant that the proposed plea bargain agreement was in his best interest. Likewise, counsel for the appellant denied that he advised either the appellant or his parents that the appellant would be granted probation, house arrest or any form of alternative sentencing if he accepted the plea bargain agreement. He admitted that he did probably advise the appellant that he would serve approximately twenty-eight months if he accepted the plea bargain agreement for an effective sentence of eight years. He calculated that thirty percent of eight years was approximately twenty-eight months.

Following the evidentiary hearing, the trial court concluded that the appellant had been adequately defended and represented by his trial counsel, that his trial counsel had advised the appellant of the possible punishment that he might receive if

found guilty of any of the sex offenses charged in the underlying indictment, and that the appellant voluntarily and knowingly entered his pleas of nolo contendere to avoid the possibility of a greater sentence. The trial court further concluded that there was no evidence of coercion, fraud, duress or mistake.

"In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his [or her] petition by a preponderance of the evidence." McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the factual findings of the trial court in hearings "are conclusive on appeal unless the evidence preponderates against the judgment." State v. Burford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983).

In reviewing the appellant's sixth-amendment claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To prevail on a claim of ineffective assistance of counsel, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. Id. To satisfy the requirement of prejudice, the appellant must demonstrate a reasonable probability that, but for counsel's errors, he would not have entered pleas of nolo contendere and would have insisted on going to trial. See Hill v. Lockart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991).

Based upon the foregoing, we conclude that the evidence does not preponderate against the trial court's finding that the appellant failed to establish that he received the ineffective assistance of counsel.

As his second ground for post-conviction relief, the appellant complains that the trial court, at the plea submission hearing, failed to properly advise him regarding his right to a jury trial. In the judge's inquiry during the appellant's plea hearing, he initially advised the appellant that he had a right to a jury trial on the three-count

information to which he was pleading. However, later in the colloquy between the trial court and the appellant, the trial court corrected itself during the following exchange:

> Q But the Court --- But let me explain further: that if you pursue a jury trial on these charges that the Court will allow the State to withdraw this information, but as part of this agreement to be prosecuted only on these three charges, the State is dismissing the indictment, which charges you in 13 counts?
>
> A Yes, sir.
>
> Q So, you really have your choice. You can proceed to be tried on the 13-count indictment, or agree to be prosecuted on this charge. Do you understand that?
>
> A Yes, sir.
>
> Q But, regardless, which one you chose to do, you have a right to a jury trial. Do you understand that?
>
> A Yes, sir.
>
> Q You have a right not to incriminate yourself. Do you understand that?
>
> A Yes, sir.
>
> Q Do you voluntarily waive or give up your right to a trial by jury?
>
> A (Hesitating.) No, sir, I want to go with this, the three charges.
>
> Q The three charges?
>
> A Yes, sir.
>
> Q Therefore, do you understand that in order to go with, or to be prosecuted on these three charges, you must give up your right to a trial by jury?
>
> A Yes, sir.

Following the evidentiary hearing on the appellant's post-conviction petition, the trial court found that there was no evidence indicating that the appellant was misinformed regarding his right to trial versus his decision to accept the plea bargain, or any evidence supporting his position that the plea was not voluntarily entered.

Having reviewed the entire record of the plea submission hearing, we conclude that despite some confusion, the transcript of the plea submission hearing fully supports the trial court's finding that the appellant clearly understood that he had the option of proceeding to trial upon the original thirteen-count presentment or entering pleas of guilty or nolo contendere to the proposed three-count information. Thus, the appellant has failed to prove by a preponderance of the evidence that his pleas were involuntarily or not knowingly entered based upon any comments or action of the trial court.

Based upon the foregoing, we affirm the judgment of the trial court.

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WILLIAM M. BARKER, JUDGE

CONCUR:

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PAUL G. SUMMERS, JUDGE

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DAVID H. WELLES, JUDGE