IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

DECEMBER 1995 SESSION

FILED

February 29, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

DAVID J. DABNEY,	)	
	)	**C.C.A. NO. 02C01-9505-CR-00135**
Appellant,	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. BERNIE WEINMAN ,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-conviction)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The petitioner Dabney pled guilty to especially aggravated robbery and was sentenced to twenty years as a Range I standard offender. No direct appeal was taken. The petitioner filed a petition for post-conviction relief, alleging that his guilty plea was involuntary because unintelligently made and that he received ineffective assistance of counsel. After a hearing at which the petitioner and his trial counsel testified, the lower court denied relief. We affirm.

The petitioner and another person burglarized the residence of the elderly female victim, beat and stabbed her with a garden fork and stole money and property worth under five hundred dollars ($500). The State's evidence against the petitioner included the victim's identification of him; his clothes stained by the victim's blood; his fingerprints at the victim's residence; and his confession to the burglary and to physically attacking (but not stabbing) the victim.

Elbert Edwards was appointed to represent the petitioner. Mr. Edwards testified that he had met with Dabney two or three times in jail, and additionally at the courthouse. They discussed the options of a trial or a guilty plea. He testified that the petitioner had never given him the names or addresses of any witnesses,[1] but that he had thoroughly reviewed the State's file and discussed the matter with the State. He conveyed a plea bargain offer of twenty-five years to the petitioner, which was rejected. He sent a letter and documents to the petitioner concerning the State's evidence in the case. He testified that Dabney had appeared to understand their discussions. Mr. Edwards did not file any pretrial motions or conduct any pretrial investigation other than

[1]The petitioner testified that he had given his lawyer eight names. He did not testify about what these witnesses knew or how their testimony would have helped him.

discussing the case with his client and the State. The case was set for trial.

When the State reduced its offer to twenty years, the petitioner accepted it. The trial judge thoroughly informed Dabney about his rights and the significance of the guilty plea. The petitioner responded to all questions in a manner that indicated he understood what he was doing and that he wanted to enter a guilty plea. At no time did the petitioner indicate to the judge that he did not understand the questions or anything else regarding the plea. When asked by the judge if he had any complaints about the way he had been represented, the petitioner said "No, sir." The only question Dabney asked was whether he would get credit for time already served.

The petitioner now claims that he did not understand the rights he was waiving or the consequences he was accepting by entering a guilty plea. He testified that he could not read or write at the time, although he never informed the court or his lawyer of this disability. He testified that he had responded to the judge in the manner that he did because his lawyer "said the judge was going to ask me some stuff and to say, yes, sir and no, sir. That's what he told me to say."

The lower court found "that the defendant freely and voluntarily entered his guilty plea and he understood the consequences of entering the plea. The defendant entered a plea after he received what he felt was the State's best offer."

"In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his 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. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983). After reviewing the record in this cause, including the transcript of the guilty plea, we find that the evidence does not preponderate against the lower court's finding that the petitioner pled guilty "freely and voluntarily." The petitioner's claim that his guilty plea was not voluntarily made is without merit.

We also find the petitioner's contention that he received ineffective assistance of counsel without merit. In reviewing the petitioner'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 counsel, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. There must be a reasonable probability that but for counsel's error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985).

To satisfy the requirement of prejudice, the petitioner must demonstrate a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial. See Hill v. Lockart, 474 U.S. 52, 59 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991).

In this case, the petitioner testified that he had pled guilty because his lawyer wasn't prepared to go to trial. He also testified that he had asked his attorney to subpoena a medical report on the victim and to investigate the evidence linking him to

the weapon used in the crime, but that Mr. Edwards told him there were no funds for investigation. Mr. Edwards did not recall these requests, denied telling his client that there were no funds, and testified that he had been prepared to go to trial, but that, given the State's evidence, "it would have been a difficult case to try." He had advised his client that, if the plea bargain wasn't made, the State intended to resubmit the matter to the grand jury and seek additional indictments for especially aggravated burglary and assault to commit murder in the first degree.[2] He had advised his client to accept the State's offer.

The petitioner also complains that his lawyer didn't seek to have a mental evaluation done. Mr. Edwards testified that he hadn't "see[n] any purpose to be served" by such an evaluation. The petitioner presented no evidence at the post-conviction hearing that such an evaluation would have been helpful. Whether or not Mr. Edwards should have requested a mental evaluation, then, the petitioner has failed to show that he was prejudiced because no evaluation was done.

The lower court found "that Mr. Edwards discussed the case with the defendant/petitioner on several occasions and thoroughly went over the defendant's options. The Court finds from the record that the attorney had extensive discussions with the prosecutors and had received discovery. The Court further finds that the attorney had prepared the case for trial as much as he could under the circumstances. . . . This Court finds nothing in the record that would indicate the defendant needed to have a mental evaluation."

The record does not preponderate against the lower court's findings and

[2]The State also announced this intention in open court immediately before the petitioner entered his plea.

holding. Accordingly, we affirm the judgment of the lower court denying the petitioner relief.

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JOHN H. PEAY, Judge

CONCUR:

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GARY R. WADE, Judge

_____
DAVID H. WELLES, Judge