

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

NOVEMBER 1996 SESSION

<p>FILED</p> <p>March 27, 1997</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

LARRY HUNTER,)
)
 Appellant)
)
 V.)
)
 STATE OF TENNESSEE,)
)
 Appellee.)
)
)

No. 02C01-9512-CR-00386

SHELBY COUNTY

HON. CHRIS CRAFT,
JUDGE

(Post-Conviction)

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

OPINION

The appellant, Larry Hunter, appeals as of right the denial of his petition for post-conviction relief by the Shelby County Criminal Court. On appeal, appellant contends that the trial court erred in finding that he did receive the effective assistance of counsel, and that he entered his guilty plea knowingly and voluntarily. Finding no error in the trial court's ruling, we affirm the denial of post-conviction relief.

Appellant was indicted for first degree premeditated murder and felony murder following his involvement in a drug deal and/or robbery that went awry. After extensive negotiations with the district attorney, appellant agreed to plead guilty to second degree murder in exchange for a twenty-five (25) year sentence as a standard offender. On November 22, 1993, the trial court held a guilty plea hearing during which the appellant was questioned about the waiver of his constitutional rights in accepting the plea. After finding that the plea was voluntary and knowing and that appellant had received the effective assistance of counsel, the trial court accepted the plea and appellant began serving his sentence. On October 11, 1994, appellant filed this post-conviction petition alleging ineffective assistance of counsel and that his guilty plea was not entered voluntarily or knowingly. After the appointment of counsel, an amended petition was filed.

The trial court held an evidentiary hearing at which the appellant testified, as well as the retained attorney who represented him on the murder charges. After the evidence was presented, the trial court took the matter under advisement. Thereafter, it issued thorough written findings of fact and conclusions of law. The trial court found that the guilty plea entered by the appellant was freely and voluntarily made. It also found that appellant failed to demonstrate that his counsel's performance was deficient, or that he was prejudiced by the performance. Finally, the trial court found that appellant's testimony lacked credibility.

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 counsel, an appellant "must show that counsel's representation fell below an objective standard of reasonableness" and that this performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694, 104 S.Ct. 2052, 2064, 2067-68, 80 L.Ed.2d 674 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985). The most difficult burden on an appellant is demonstrating the prejudice he has suffered by the alleged error. In order to prevail on that ground, the appellant must show a reasonable probability that but for counsel's error the result of the proceeding would have been different. Id. In the context of a guilty plea, the appellant must show that but for counsel's errors he would not have pled guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 53, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). See also Wade v. State, 914 S.W.2d 97, 101 (Tenn. Crim. App. 1995); Wilson v. State, 899 S.W.2d 648, 653 (Tenn. Crim. App. 1994).

In order to sustain his post-conviction petition, the appellant must prove his allegations of constitutional violations by a preponderance of the evidence. See McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). In our review, this Court cannot re-weigh or re-evaluate the evidence. We give deference to questions about the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence as they are resolved by the trial court. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). Furthermore, the factual findings of the trial court are conclusive on appeal unless the evidence preponderates against the judgment. Id. See also Davis v. State, 912 S.W.2d 689, 697 (Tenn. 1995) (citations omitted); Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993) (citation omitted).

Appellant first contends that his attorney was ineffective because he failed to adequately conduct an independent investigation of the case. However, at the guilty plea hearing, appellant told the trial court that he was satisfied with counsel's investigation of the case. Furthermore, at the evidentiary hearing, the appellant testified that he did not know whether his attorney talked with any witnesses, obtained discovery, or visited the crime scene. He also stated that he never provided counsel with the names of any witnesses who might be helpful.

Appellant's attorney, Elbert Edwards, testified that in preparation for trial, he obtained discovery, including the statements of co-defendants, talked with homicide detectives, reviewed the autopsy report, and conducted a full suppression hearing. He also stated that he attempted to interview appellant's co-defendants, but was prevented from doing so by their attorneys. The trial court found that Edwards indeed conducted an investigation and that it was sufficient. This is fully supported by the record. Appellant has failed to demonstrate by a preponderance of the evidence that his counsel's performance fell below an objective standard of reasonableness and this claim must fail. Strickland, 466 U.S. at 687-88.

Appellant also argues that his counsel was ineffective in his activities relative to an exculpatory affidavit received from a co-defendant. He believes counsel failed to properly investigate the affidavit, use it to form a defense, or utilize it in plea negotiations. After co-defendant Eric Fair was convicted by a jury of first-degree murder, he executed an affidavit favorable to appellant. It stated that appellant was not present at the scene when the murder occurred and that his earlier statement implicating appellant was the result of police threats and coercion. This affidavit came to light prior to the entry of appellant's guilty plea.

At the evidentiary hearing, Edwards confirmed that he received the affidavit prior to the plea. He stated that he attempted to talk with co-defendant Fair, but Fair's attorney would not allow him to do so. Edwards testified that he did not remember whether he showed the affidavit to the district attorney. However, in plea discussions

with the district attorney, Edwards distinctly remembered the district attorney's attitude was that he did not care what Fair had to say. Furthermore, Edwards stated that he zealously pursued the plea agreement with the State, making numerous attempts at a lower sentence. Moreover, he stated that he viewed the affidavit to be of minimal significance in light of appellant's statement to police that he was present at the scene. He further stated his belief that the affidavit did little to exculpate appellant considering the theory of vicarious liability available in felony murder.

Counsel's decision that the affidavit was of little value to appellant was clearly a tactical decision. We note, as the trial court did, that the affidavit would have been inadmissible hearsay at a jury trial. Also, it is unlikely that the co-defendant would have testified at a jury trial when his counsel would not even permit Edwards to talk with him. Furthermore, Fair had given an earlier statement implicating appellant which could have been used to impeach his testimony. We must give deference to tactical decisions if they are informed ones that are the result of adequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982) (citations omitted). See also Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993). Edwards clearly considered all the possible avenues available for use of Fair's affidavit and made an informed decision that it was not helpful to appellant. This issue is without merit.

Appellant also contends that counsel encouraged him to plead guilty and promised him that his twenty-five (25) year sentence would later be reduced to fifteen (15) years. Apart from appellant's testimony on this issue, the claim is factually unsupported by the record. A letter from Edwards to appellant details the parameters of the plea agreement, explicitly setting forth the range of punishment and the exact sentence that appellant would receive. Appellant's acknowledgment of this letter is reflected by his signature on the document. At the hearing, Edwards testified that he hand-delivered the letter to appellant and discussed it with him at length. He denied making any promise of a reduced sentence to appellant. Edwards explained that he told appellant a fifteen (15) year sentence would be a good resolution of the case, but

testified that the State never made such an offer despite his repeated attempts. Finally, the trial court noted that appellant failed to provide any explanation for how this sentence reduction would occur. He admitted at the time of his guilty plea that he was aware that his sentence was twenty-five (25) years. The trial court resolved this conflicting testimony in favor of Edwards, specifically finding that appellant's testimony was not credible. Such a determination is within the exclusive purview of the trial court and we will not disturb such a finding. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990).

Next, appellant argues that his attorney coerced him into pleading guilty by telling him that he would receive a life sentence if he went to trial. He contends that he did not know he could be found not guilty. However, appellant's own testimony at the evidentiary hearing contradicted this claim. Likewise, the transcript from the guilty plea hearing reflects the appellant's testimony that he understood his right to a jury trial and that he could be found not guilty. It also reflects appellant's testimony that no one forced or coerced him into pleading guilty.

Additionally, Edwards denied ever telling appellant that he could "go to trial and get life or plead guilty and get twenty-five (25) years." He stated that he discussed the State's case against appellant and explained that it could result in a conviction of first degree murder. He further explained the trial process to appellant, including the fact that a jury could find him not guilty. Again, the trial court resolved this question of credibility against the appellant and we are bound thereby as it is supported by the record. Black, 794 S.W.2d at 755.

Finally, appellant contends that because of the ineffective assistance of counsel, his guilty plea was not free or voluntary, nor did he knowingly and understandingly waive his right against self-incrimination. The transcript from the guilty plea hearing is contrary to such a claim. It demonstrates that appellant was informed of and affirmatively waived his constitutional rights in exchange for the plea agreement. Furthermore, his testimony at the evidentiary hearing belies his

contention that he did not knowingly waive his right against self-incrimination. At the hearing, appellant stated that Edwards explained to him that he could be found innocent at trial “without ever opening his mouth.” Moreover, when questioned about the right against self-incrimination at the guilty plea hearing, appellant exhibited an understanding of this right and affirmatively waived it. Again, this factual issue was resolved by the trial court and we are bound by its findings. Black, 794 S.W.2d at 755. We find, as the trial court did, that appellant freely and voluntarily entered a guilty plea, which included a knowing and understanding waiver of his right against self-incrimination.

Appellant has failed to demonstrate that his attorney’s performance was deficient in any respect or that he would have proceeded to trial but for the advice of counsel. The trial court’s findings are well supported by the record. As a result, the denial of post-conviction relief is affirmed.

William M. Barker, Judge

Gary R. Wade, Judge

David G. Hayes, Judge