IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

FEBRUARY 1997 SESSION

FILED

March 27, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

TERRY WARE,	)	
	)	**C.C.A. NO. 02C01-9603-CC-00090**
Appellant,	)	
	)	**MADISON COUNTY**
VS.	)	
	)	**HON. FRANKLIN MURCHISON,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-Conviction)

FOR THE APPELLANT:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The petitioner pled guilty in September 1994 to aggravated burglary and aggravated rape. He received an effective sentence of fifteen years which is to run consecutively to the remainder of a previous sentence in which his probation status was revoked. He filed a petition for post-conviction relief in October 1994 and counsel was appointed. After a hearing, his petition was denied. It is from this denial that he now appeals.

The petitioner claims that he was denied effective assistance of counsel in that his counsel did not adequately advise him of the consequences of submitting to a DNA test. He further alleges that his counsel did not advise him that the facility in which he was to be incarcerated does not offer the sex offenders program which he must complete in order to be eligible for parole. As his second issue, the defendant claims that his guilty plea was not entered voluntarily and knowingly because he was hearing voices on the day he entered the plea. After a thorough review of the record, we find no merit to any of these allegations and, therefore, affirm the judgment of the court below.

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, he would have had to 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).

First, the petitioner alleges that his counsel did not adequately advise him of the consequences of submitting to a DNA test. At his post-conviction hearing, his trial counsel, Pamela Drewery, testified that the petitioner had wanted to have DNA testing done despite her efforts to advise him against it. She testified that she had advised the petitioner that if he submitted to the test and the results implicated him, it would then be difficult to overcome that evidence at trial. Nevertheless, the petitioner requested that the test be performed. Before providing a blood sample for the test, the petitioner signed a statement saying he acknowledged that the DNA results could prove him guilty and that he had been fully advised of his rights by his counsel.

The post-conviction judge found that "not only did [counsel] explain DNA, but she advised that it could work against him, as well as for him. He had the DNA test, which strongly indicated that he was guilty of the offense." 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). We find no evidence to suggest that the trial court's finding as to this matter is in any way faulty. This issue is without merit.

As to the remainder of his allegation of ineffective assistance, the petitioner claims he should have been informed of the absence of a sex offenders program at the facility where he is incarcerated. However, his counsel would not have known where he would be incarcerated and therefore could not have passed this information along to him.

That the petitioner was without this information does not indicate that his counsel was in any way ineffective. This issue is without merit.

The petitioner's remaining complaint is that his guilty plea was not entered knowingly and voluntarily because he was hearing voices on the day he entered the plea. At his post-conviction hearing, the petitioner testified that he had been hearing voices that told him to harm himself and do other "strange things." He testified that he remembered signing the guilty plea but that he thought he was consenting to a second mental evaluation rather than pleading guilty.

Ms. Drewery testified that the petitioner and his family had told her that he had a history of some mental problems. At the request of Ms. Drewery, a physician evaluated the petitioner and deemed him competent to stand trial and assist in his defense. No evidence existed to support an insanity defense. On the day the guilty plea was entered, the petitioner was read all his rights and questioned as to his understanding. The petitioner told the judge that he understood his plea and that he agreed with the facts presented by the State. He was given the opportunity to speak and even asked whether his sentences would run concurrently or consecutively. Apparently, he was aware that he was pleading guilty and not agreeing to be evaluated.

The post-conviction judge found that the petitioner understood his plea and knowingly accepted "the deal." Again, we find no reason to disturb the court's factual finding. Nothing in the record preponderates against the finding that the petitioner knowingly and voluntarily entered these pleas. This issue is without merit.

Therefore, after a thorough review, we find that the petitioner did not receive ineffective assistance of counsel and that his pleas were entered knowingly and

voluntarily. The judgment of the court below is affirmed.

JOHN H. PEAY, Judge

CONCUR:

JOE B. JONES, Judge

JOE G. RILEY, Judge