

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 8, 2006 Session

ELLIOTT McCASTER v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Maury County
No. 14064 Robert L. Jones, Judge**

No. M2005-02195-CCA-R3-PC

The petitioner, Elliott McCaster, pled guilty to second-degree murder in exchange for a range two sentence of thirty-two years. The petitioner now appeals the post-conviction court's denial of his request for post-conviction relief and contends that (1) he received the ineffective assistance of counsel and (2) his guilty plea was unknowing and involuntary. Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

J.C. MCLIN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT and NORMA MCGEE OGLE, JJ., joined.

Robert C. Richardson, Jr., Columbia, Tennessee, for the petitioner, Elliott McCaster.

Paul G. Summers, Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General; Mike Bottoms, District Attorney General; and Christi Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

On September 22, 2003, the petitioner was indicted for first-degree felony murder arising out of the death of his three-year-old stepson. The record reflects that on August 16, 2003, the petitioner was watching his stepson, the victim, and when the victim soiled himself, the petitioner physically assaulted the victim until he was unresponsive. The petitioner contacted his wife, who rushed home to check on the victim, but the victim had to be taken by ambulance to the hospital where he was pronounced dead. The cause of death was determined to be blunt trauma to the abdomen which caused the victim to bleed to death. On April 22, 2004, the petitioner pled guilty to second-degree murder in exchange for a sentence of thirty-two years,

served at 100%.¹ Thereafter, the petitioner filed a timely petition for post-conviction relief, and following the appointment of counsel an amended petition was filed. The post-conviction court conducted an evidentiary hearing on August 5, 2005.

Post-Conviction Evidentiary Hearing

At the hearing, the petitioner's lead attorney, Counsel Robin Farber, testified that the public defender's office was appointed to represent the petitioner in his first-degree murder case.² Counsel Farber said that she attended most of the petitioner's preliminary hearing although she did not participate because two other public defenders were working on his case at that time. Counsel Farber admitted that prior to the petitioner's case she had never tried a first-degree murder case. Counsel Farber stated that the public defender's office typically got its cases the day of the preliminary hearing.

Counsel Farber recalled that she met with the petitioner before his February 2004 original trial date and told him that they were going to ask for a continuance. Counsel Farber remembered that her first visit with the petitioner lasted close to three hours. After her initial meeting with the petitioner, both Counsel Farber and Counsel Shipp Weems, another assistant public defender, had a lengthy meeting with the petitioner. Counsel Farber recalled that she had fairly regular meetings with the petitioner throughout the rest of her representation.

Counsel Farber testified that in preparation of trial, she looked over the preliminary hearing transcript and the discovery received from the state, as well as talked to the petitioner about filing a motion to suppress his statements to law enforcement. Counsel Farber conceded that a motion to suppress was not filed, but she said that the prosecutor knew there was going to be a hearing on the issue, and a subsequent court order referenced that a suppression hearing would be held at the same time Detective Nevin's deposition was taken.

Counsel Farber stated that the petitioner provided her with the names of potential witnesses. Counsel Farber interviewed Sundee, the petitioner's wife, but did not interview witnesses who would only testify as to how the petitioner generally took care of the victim. Counsel Farber explained that character witnesses did not come into play at that point and she did not feel that testimony would be admissible at trial because the statements concerned other events.

Counsel Farber admitted that she did not visit the crime scene. Counsel Farber also did not remember discussing a motion for change of venue with the petitioner; however, Counsel Farber recalled that the constant media coverage had ended several months earlier. Counsel Farber said that she did not request a mental evaluation of the petitioner because she felt that he

¹ Due to the parties' uncertainty at the time regarding lesser-included offenses of felony murder, the state prepared a criminal information for second-degree murder and *nolle prosequere* the first-degree murder indictment. The petitioner consented to proceed by information on the second-degree murder charge, and his plea agreement specifically stated that the "[petitioner] acknowledges that he is pleading out of range but agrees to this agreement in exchange for the plea bargain to second degree murder."

² Because there were three attorneys involved in this case, for clarity we refer to each as "Counsel" and his or her last name.

knew and understood everything that was going on, and his demeanor did not indicate that an evaluation was necessary.

At some point during her preparation for trial, Counsel Farber stated that the petitioner indicated that he was interested in pursuing a plea bargain which she then began to pursue with his cooperation. Counsel Farber said that she went over the “pros and cons” of taking the case to trial as opposed to accepting a plea. She explained that, in her opinion, the state’s case against the petitioner was very strong because the medical examiner would have testified that the victim died within 15 to 20 minutes of the injuries and there was no explanation for the injuries. Counsel Farber further explained that the petitioner faced a sentence of life with or without parole because a death penalty notice had not been served.

Counsel Farber stated that the petitioner understood his plea and understood that thirty-two years incarceration was outside the normal range for second-degree murder. Counsel Farber said she went over the office’s “fairly extensive plea form” with the petitioner, reading the plea with him and answering any questions that might arise. Counsel Farber said that the petitioner entered his plea on April 22, 2004, which was three months before the scheduled trial date. Counsel Farber also stated that had the petitioner chosen to go to trial, a lot of trial preparations would have taken place during the three months before trial.

Gena Layne, the manager of the apartment complex where the petitioner lived, testified that she was not on the property the day the victim died and everything she knew about the incident was based on what she had heard from third parties. Ms. Layne said that counsel for the petitioner never contacted her. Pam Marlow, who lived next door to the petitioner, testified that she never gave a statement to the police and no one from the public defender’s office contacted her. Ms. Marlow stated that she did talk to a news reporter.

Detective Ben Nevins with the Columbia Police Department testified that the first time he interviewed the petitioner was at the hospital before the petitioner was considered a suspect. Detective Nevins said that he did not administer *Miranda* warnings during the first interview. Detective Nevins stated that he did administer *Miranda* warnings prior to the interview when the petitioner gave a signed statement.

Counsel Claudia Jack, District Public Defender for the Twenty-Second Judicial District, testified that the petitioner’s case was unusual in that it settled fairly early. Counsel Jack said that her direct involvement in the case was limited to representing the petitioner at the preliminary hearing. Counsel Jack also said that in most cases the public defender meets his or her client for the first time when appearing with them in court for the preliminary hearing.

Counsel Jack stated that due to the seriousness of the case she was assisted by Counsel Weems at the preliminary hearing. After the preliminary hearing, Counsel Farber and Counsel Weems primarily handled the petitioner’s case, although Counsel Jack discussed the case with them. Counsel Jack testified that she interviewed the petitioner “on at least one occasion. Probably more.” Counsel Jack said that upon conducting her evaluation of the petitioner’s case, she determined that a settlement was appropriate.

The petitioner testified that he was represented at the preliminary hearing by Counsel Jack and Counsel Weems, but he had the most contact with Counsel Weems. The petitioner said that he discussed his case with his attorneys for about 15 to 20 minutes before the preliminary hearing. After the hearing, the petitioner said his primary attorneys were Counsel Weems and Counsel Farber, with Counsel Farber taking the lead.

The petitioner acknowledged that his attorneys talked to him about his case, just not in the time frame he preferred. He recalled that he met with Counsel Weems in October 2003 for approximately two hours and may have met with Counsel Farber at the same time. The petitioner said that he met with Counsel Farber alone in February 2004 and with the investigator in March 2004. The petitioner also met with Counsel Farber at an unspecified time when she brought him a motion for discovery and again with Counsel Weems on an unspecified date. The petitioner said that he talked about possible defenses in his case at every opportunity and wrote letters to his attorneys.

The petitioner stated that he only met Counsel Jack one time, at the preliminary hearing, otherwise his contact was with Counsel Farber. The petitioner said that he discussed a change of venue with Counsel Farber and submitted a list of potential witnesses. He further said that there was never any discussion about obtaining a mental examination on his behalf. The petitioner recalled that he made a time line of the events involving his statements to the police and discussed with Counsel Farber the possibility of suppressing those statements. The petitioner said that he “guess[ed]” he knew that once he entered a plea that a suppression hearing would not be held. The petitioner also admitted that counsel provided him with all available discovery for him to review.

The petitioner said that he met with counsel three times the day he entered his plea, and they talked about “a lot of stuff”; however, he ultimately “just went by what they said.” The petitioner said that he understood the terms of the plea to a point but not fully. The petitioner acknowledged that counsel went through the plea form paragraph by paragraph before he signed it, and he signed the plea voluntarily. The petitioner admitted that at the time of his plea he was confident that counsel was representing his best interest and had done the job they should have done.

When asked whether he would have proceeded to trial if counsel had done more investigation and met with him more times, the petitioner responded, “Yeah. I could say that” The petitioner claimed he was “willing to take that chance,” when asked if he understood he would have to go to trial and face the possible penalties for first-degree murder if granted post-conviction relief.

Counsel Weems testified that he got involved in the petitioner’s case at the preliminary hearing stage. Counsel Weems explained that in a high-profile case everyone in the public defender’s office brainstorms about how to handle it even though the case is actually assigned to one or two attorneys. Counsel Weems recalled that he talked to the petitioner on several occasions and helped with trial preparations. Counsel Weems stated that an earlier trial date had been set and they were not going to be ready so they requested a continuance to have more time to prepare. He further stated that the petitioner knew they were seeking a continuance.

Counsel Weems testified that there was a lot of discussion with the district attorney's office about suppression of the defendant's statements, and the defendant was aware of those discussions. Counsel Weems explained that the reason an actual motion to suppress was not filed was because Detective Nevins was getting sent to Iraq and the district attorney wanted to take his deposition before he left, and counsel thought it would be easier to attack the detective's testimony once it was "in stone."

Counsel Weems stated that the petitioner was involved in the preparation of his case and was advised of all the goings-on. Counsel Weems admitted that the petitioner was not pleased with the lack of attention he received from his attorneys early on in the matter. Counsel Weems said that the petitioner would have been advised of everything he needed to know in considering his plea, and he was sure that he and Counsel Farber talked to the petitioner prior to accepting the plea to make sure he understood everything. Counsel Weems said that the petitioner would have preferred a shorter period of incarceration but his plea was voluntary.

At the conclusion of the hearing, the post-conviction court made extensive findings in denying the petitioner's request for post-conviction relief. The court found that the petitioner knew the result of his plea and only had second thoughts once he started serving the time. The court also found that the petitioner had a good relationship with Counsel Farber and "failed to prove that the Public Defender's office was less than diligent in finding evidence that would have been helpful to him. . . [if] such evidence exists. And [the petitioner] certainly has failed to prove that he suffered any prejudice for their failure to talk to the witnesses."

STANDARD OF REVIEW

In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

ANALYSIS

On appeal, the petitioner contends that he received the ineffective assistance of counsel and that counsels' ineffectiveness resulted in him entering an unknowing and involuntary plea.

I. Ineffective Assistance of Counsel

The petitioner first argues that he received the ineffective assistance of counsel. Specifically, he asserts that counsel did not make a sufficient effort to suppress his statements to police, failed to interview potential witnesses, failed to file appropriate motions, did not discuss a

change in venue, failed to obtain a mental evaluation, did not physically investigate the crime scene, and had insufficient contact with him prior to his preliminary hearing.

In order to prevail on a claim of ineffective assistance of counsel, the petitioner bears the burden of proving (1) that counsel's performance was deficient, and (2) the deficiency was prejudicial in terms of rendering a reasonable probability that the result of the trial was unreliable or the proceedings were fundamentally unfair. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Id.* at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, the petitioner must prove that counsel performed deficiently, and, but for counsel's errors, the petitioner would not have pled guilty but, instead, would have insisted upon going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985). Should the petitioner fail to establish either element of ineffective assistance of counsel, the petitioner is not entitled to relief. Our supreme court described the standard of review for ineffective assistance of counsel as follows:

Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the defendant makes an insufficient showing of one component.

Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 697).

Upon review, we conclude the petitioner has failed to prove by clear and convincing evidence that counsels' representation fell below the range of competence demanded of attorneys in criminal cases, or that any deficiency caused him prejudice. Addressing the petitioner's contention that counsel did not make a sufficient effort to suppress his statements to police, testimony from the evidentiary hearing established that counsel discussed with the petitioner, as well as the district attorney's office, the possibility of suppressing his statements and had informally scheduled a suppression hearing. The reason the suppression hearing did not occur as planned was because the petitioner chose to plead guilty before the hearing date. Testimony at the evidentiary hearing indicated that the petitioner was aware of the fact a suppression hearing would not occur as a result of his decision to plead guilty. Moreover, counsel had a tactical reason for waiting to file the motion; Detective Nevins was going to be deposed and counsel determined it would be easier to challenge the detective's statement once it was set in stone.

In addressing the petitioner's contention that counsel did not interview potential witnesses, testimony from the evidentiary hearing revealed that Counsel Farber did interview a pertinent witness, Sundee McCaster, but failed to interview other potential witnesses only because those witnesses' statements did not pertain to the circumstances of the murder. Counsel Farber stated that she looked at the witnesses' statements and determined that their testimony

would not be admissible at trial. Additionally, we note that the trial date was three months away, allowing counsel an opportunity to interview those witnesses if necessary.

With regard to the petitioner's contention that counsel failed to file appropriate motions, the record likewise discounts his contention. We note that the petitioner failed to specify what motions he wanted filed. If he is referring to a motion to suppress, the record shows that counsel had a tactical reason for delaying its filing but would have filed the motion if the case had gone to trial. If the petitioner is referring to a motion to change venue, the record likewise shows that counsel considered the issue, but ultimately decided that it was not necessary.

The record also discounts three of the petitioner's other allegations of deficient performance. First, the petitioner admitted at the hearing that his attorneys discussed with him a change in venue, and the record indicates that a change of venue was not necessary because the media coverage had subsided several months before the scheduled trial date. Second, the record indicates that Counsel Farber made an informed decision not to request a mental evaluation of the petitioner because his demeanor did not indicate that an evaluation was necessary. As Counsel Farber explained, it appeared that he knew and understood everything that was going on. Additionally, the petitioner has failed to prove what a mental evaluation would have revealed. Third, although Counsel Farber admitted she had not inspected the crime scene at the time of the petitioner's plea, she noted that there were three months before trial during which much pretrial work could be accomplished.

In addressing the petitioner's complaint that counsel did not meet with him for a sufficient time prior to the preliminary hearing, we cannot conclude that the petitioner was prejudiced by any such deficiency. The record reveals that Counsel Jack and Counsel Weems met with the petitioner for the first time the day of the preliminary hearing, a visit lasting 15 to 20 minutes. Counsel Jack testified that a public defender typically does not meet his or her client until the day of the preliminary hearing. While arguably not the best approach, Counsel Farber and Counsel Weems subsequently met with the petitioner numerous times, some visits lasting three or more hours. By his own account, the petitioner met with an attorney from the public defender's office on at least nine occasions. Thus, even assuming counsel was deficient in failing to have a lengthy meeting with the petitioner prior to the preliminary hearing, the petitioner failed to prove how such deficiency caused him prejudice and we likewise fail to see any prejudice in light of the subsequent numerous meetings. Accordingly, the petitioner is not entitled to relief on this issue.

II. Guilty Plea

The petitioner next argues that his plea was not knowing and voluntary. Specifically, he asserts that counsels' inadequate investigation and deception prevented him from entering a knowing and voluntary plea.

When analyzing a guilty plea, we look to the federal standard announced in *Boykin v. Alabama*, 395 U.S. 238 (1969), and the state standard set out in *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977). *State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999). In *Boykin*, the United States Supreme Court held that there must be an affirmative showing by the trial court that a guilty plea was voluntarily and knowingly given before it can be accepted. *Boykin*, 395 U.S. at 242.

Similarly, our Tennessee Supreme Court in *Mackey* required an affirmative showing of a voluntary and knowing guilty plea; namely, that the defendant has been made aware of the significant consequences of such a plea. *Mackey*, 553 S.W.2d at 340; *see Pettus*, 986 S.W.2d at 542.

A plea is not “voluntary” if it results from ignorance, misunderstanding, coercion, inducements or threats. *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). The trial court must determine if the guilty plea is “knowing” by questioning the defendant to make sure he fully understands the plea and its consequences. *Pettus*, 986 S.W.2d at 542; *Blankenship*, 858 S.W.2d at 904. In determining whether a plea is voluntary and intelligent, the court must consider

the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship, 858 S.W.2d at 904 (citations omitted).

Here, the record fails to support the petitioner’s contention that his plea was unknowing and involuntary. Initially, we note that the petitioner did not prove that counsels’ investigation was prejudicially inadequate, or show that counsel deceived him in any way. To the contrary, the record shows that counsel thoroughly discussed the ramifications of accepting a plea versus going to trial based on counsels’ analysis of the petitioner’s case. In addition, the trial court extensively questioned the petitioner before accepting his plea, including questions regarding the petitioner’s satisfaction with counsels’ representation and the voluntariness of his plea.

Moreover, application of the *Blankenship* factors supports the finding that the petitioner’s plea was knowing and voluntary. The record indicates that the petitioner is relatively intelligent, he was represented by competent counsel whom he had the opportunity to confer with about his options, counsel advised him of the charges against him and the possible punishments, and the petitioner avoided a greater penalty by pleading guilty. The petitioner has failed to prove that his plea was unknowingly and involuntarily entered; thus, he is not entitled to relief on this issue.

CONCLUSION

Based on the aforementioned reasoning and authorities, we affirm the Maury County Circuit Court’s denial of post-conviction relief.

J.C. McLIN, JUDGE