

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 14, 2007

MICHAEL S. SMITH v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Davidson County
No. 2004-C-1835 Monte Watkins, Judge**

No. M2006-02757-CCA-R3-PC - Filed April 4, 2008

Petitioner, Michael S. Smith, appeals the post-conviction court's denial of his petition for post-conviction relief in which he claimed that he received ineffective assistance of counsel and that his guilty pleas were unknowingly and involuntarily entered into. Because we determine that Petitioner has failed to demonstrate through clear and convincing evidence that he received ineffective assistance of counsel or that his guilty pleas were unknowingly or involuntarily entered, we affirm the judgment of the post-conviction court.

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

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES, and JOHN EVERETT WILLIAMS, JJ., joined.

Richard D. Dumas, Jr., Nashville, Tennessee, for the appellant, Michael S. Smith.

Robert E. Cooper, Jr., Attorney General & Reporter; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson, District Attorney General, and Roger Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

Petitioner was indicted in July of 2004 by the Davidson County Grand Jury with four counts of aggravated sexual battery. On May 26, 2005, Petitioner pled guilty to Counts One and Three in exchange for concurrent sentences of twelve years to be served at 100%.

At the plea hearing, the attorney for the State informed the trial court that if the case had gone to trial, the State would have proven that two of Petitioner's minor grandchildren would "occasionally visit" Petitioner at his residence. During these visits, the children claimed that they would remove their clothing and "touch [Petitioner's] penis." One of the children "described ejaculate coming from [Petitioner's] penis during those time periods of touching." According to the State, Petitioner was interviewed by the police department and "admitted that both children had touched his penis, and that during the time period that that occurred that he had an erection and he described that there was pre-ejaculate coming from his penis on one of those occasions." Petitioner agreed to the characterization of the facts as presented by the State.

Petitioner filed a pro se petition for post-conviction relief on May 19, 2006, in which he argued that he received ineffective assistance of counsel, that the indictments were insufficient and that there was a "failure to prove intent or corpus delicti." Counsel was appointed and an amended petition was filed. In the amended petition, Petitioner claimed that trial counsel was ineffective for: (1) failing to request a mental evaluation; (2) failing to withdraw from the case when he believed that Petitioner should go to jail for the crimes to which he admitted; (3) failing to adequately inform Petitioner of the nature and consequences of his plea agreement; and (4) failing to reserve the right to certify a dispositive question of law concerning the trial court's denial of a motion to suppress.

Post-conviction Hearing

The post-conviction court held a hearing on the petition on December 6, 2006. At that hearing, trial counsel testified that he had been practicing law for thirty years and had more than twenty years of experience in criminal law. Trial counsel represented Petitioner from the discussion phase of the case through the entry of the plea. Trial counsel remembered discussing Petitioner's mental problems with Petitioner and with the individuals that were treating Petitioner. In particular, trial counsel was aware that Petitioner was diagnosed with Graves' disease and that Petitioner had attempted suicide in 2002. Trial counsel also recalled that Petitioner had been hospitalized for cutting his wrists a "couple of" weeks prior to the guilty plea. After speaking with Petitioner and his therapist, trial counsel determined that there were no special mental health concerns that would lead him to seek a mental evaluation of Petitioner prior to the plea. Additionally, trial counsel did not think that the hospitalization that occurred in close proximity to the plea colloquy was an issue.

Trial counsel recalled discussions with Petitioner regarding potential plea offers. Trial counsel stated that he told Petitioner he would not be shocked if Petitioner had to serve time on the convictions and remembered telling Petitioner that he faced a possibility of forty-eight years in incarceration if he went to trial and were convicted on all four counts and the sentences were ordered to run consecutively to each other.

Trial counsel informed the post-conviction court that he successfully suppressed one of Petitioner's statements to the police prior to trial. On cross-examination, trial counsel stated that he did not think that there was a dispositive issue that would have been successful if preserved as a certified issue on appeal.

Petitioner testified at the hearing. According to Petitioner, trial counsel did not request any further mental health evaluation in addition to the treatment Petitioner was already receiving from his therapist. Petitioner stated that he was admitted to the psychiatric unit at Centennial Medical Center after the suicide attempt that occurred prior to the guilty plea. At the time of the hearing, Petitioner was taking Prozac. He admitted that since his incarceration, he had not been housed in a psychiatric or special needs facility.

According to Petitioner, he was in a “fugue” state when he entered his plea. Despite this assertion, Petitioner admitted that he remembered the plea discussion and stated he answered the trial court’s questions truthfully. The post-conviction court took the matter under advisement and issued an order at a later date in which the post-conviction court determined that Petitioner failed to carry his burden of proof. Specifically, the post-conviction court determined:

[P]etitioner has failed to demonstrate by clear and convincing evidence that his plea was not entered knowingly and voluntarily in violation of a constitutional right to render his conviction and sentence void or voidable under the Post Conviction Relief Act. A close review of the record and testimony presented reveals that the petitioner pled guilty after numerous conversations with his attorney regarding possible consequences of going to trial. Further, the Court is of the opinion that the defendant is of average intelligence and understood the charges and the nature of the charges. The defendant was able to review several possibilities and outcomes of the case with his attorney. It was during these discussions that the defendant was informed of the likelihood of conviction at trial and the possible sentences if found guilty. The defendant attempted to commit suicide days after these discussions but days before the plea was entered. Petitioner was informed and counseled on his options. Petitioner was of average intelligence and was able to comprehend and appreciated the nature and consequences of the plea and his actions.

Therefore, Petitioner has failed to demonstrate by clear and convincing evidence ineffective assistance of counsel and that the plea was in violation of due process rights in violation of a constitutional right to render his conviction and sentence void or voidable under the Post Conviction Relief Act. The Court does not find the petitioner’s testimony to be credible. Accordingly, the Court finds that Petitioner has failed to show that he was prejudice[d] by counsel’s allegedly deficient conduct.

Petitioner filed a timely notice of appeal, seeking our review of the post-conviction court’s dismissal of his petition for post-conviction relief.

Analysis
Post-conviction Standard of Review

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issue raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not reweigh or re-evaluate the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

On appeal, Petitioner argues that the post-conviction court erred in denying his petition because his guilty pleas were not entered knowingly, voluntarily and intelligently because he was afforded ineffective assistance of counsel. When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing by clear and convincing evidence that (a) the services rendered by trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996); *see also* T.C.A. § 40-30-110(f). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley*, 960 S.W.2d at 580.

As noted above, this Court will afford the post-conviction court's factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court's findings. *See id.* at 578. However, our supreme court has "determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact . . . ; thus, [appellate] review of [these issues] is de novo " with no presumption of correctness. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999).

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This Court may not second-guess a reasonably-based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate the principle that guilty pleas be voluntarily and intelligently made. *See Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citing *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). As stated above, in order to successfully challenge the effectiveness of counsel, the petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *See Baxter*, 523 S.W.2d at 936. Under *Strickland v. Washington*, 466 U.S. 668, 694 (1984), the petitioner must establish: (1) deficient representation; and (2) prejudice resulting from the deficiency. However, in the context of a guilty plea, to satisfy the second prong of *Strickland*, the petitioner must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59; *see also Walton v. State*, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997).

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 in 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. *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.

The post-conviction court herein found that Petitioner did not prove his allegations by clear and convincing evidence. This conclusion is supported by the great preponderance of the evidence. Petitioner argues that his counsel failed to inform him as to the nature and consequences of his guilty plea. However, Petitioner's guilty plea colloquy, which is included in the record, demonstrates that he agreed that he himself had read the plea agreement, counsel had fully explained his guilty plea and that the trial court again explained both the charges and the corresponding sentences. During the plea colloquy, Petitioner admitted that trial counsel had gone over the plea agreement and the elements of the charges with him. He agreed that trial counsel had discussed his options with him. However, at the post-conviction hearing, Petitioner claimed that he was in a "fugue" state at the plea hearing and not competent to enter a plea. Petitioner did not present any proof at the post-conviction hearing to corroborate his mental state at the time of the plea.

Petitioner also argues that trial counsel did not withdraw from the case after indicating that he believed Petitioner should go to jail for the crimes he was accused of committing. However, this assertion is not borne out by the record. Trial counsel testified that he told Petitioner he could expect

to serve some time in confinement for the crimes to which he was pleading guilty. Further, trial counsel stated that it would have been possible for Petitioner to receive as much as a forty-eight year sentence if convicted at a trial of all four counts of the indictment and ordered to serve consecutive sentences. This is simply advising Appellant of the very real potential consequences of going to trial as opposed to entering a guilty plea. This issue is without merit.

Petitioner also argues that trial counsel should have reserved the right to appeal a certified question on law pursuant to Tennessee Rule of Criminal Procedure 37 in regard to the trial court's denial of a motion to suppress his statement to police. At the post-conviction hearing, trial counsel explained that Petitioner had given two statements to the police and that he moved to suppress both of the statements. According to trial counsel, one of the statements was successfully suppressed. On appeal, Petitioner has failed to show that the appeal of the denial of the motion to suppress the second statement would have been a dispositive issue, as required by Rule 37, or that such an issue even existed.

Petitioner's final argument is that his trial counsel was ineffective because he failed to have Petitioner undergo a mental health evaluation before pleading guilty. Trial counsel testified that he was aware of Petitioner's diagnosis with Graves' disease and was aware that Petitioner saw a therapist for mental health issues. Trial counsel discussed these issues with both Petitioner and the mental health professional in charge of Petitioner's treatment. He believed Petitioner to be competent throughout his representation of Petitioner, even after his suicide attempt prior to the guilty plea. Petitioner claimed that he was incompetent at the time of the plea hearing but did not bring to the post-conviction hearing any sort of medical expert to testify as to a mental health diagnosis, or any other proof regarding his mental state at the time he entered his plea.

Petitioner did not prove any of his allegations by clear and convincing evidence. Petitioner has not proven that services rendered by his counsel were insufficient. He has likewise not proven that he would have gone to trial instead of pleading guilty, as required for him to be successful on his petition. The record amply demonstrates that Petitioner received the effective assistance of counsel.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the post-conviction court.

JERRY L. SMITH, JUDGE