IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

MAY 1996 SESSION

FILED

August 28, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

JACQUES B. BENNETT,	)	
	)	**C.C.A. NO. 03C01-9512-CR-00391**
Appellant,	)	
	)	**HAMILTON COUNTY**
VS.	)	
	)	**HON. RUSSELL C. HINSON,**
STATE OF TENNESSEE,	)	**JUDGE**
	)	
Appellee.	)	(Post-conviction)

FOR THE APPELLANT:

A. CHRISTIAN LANIER, III
Suite 150, 615 Lindsay St.
Chattanooga, TN 37403

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

TIMOTHY F. BEHAN
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

WILLIAM H. COX, III
District Attorney General

DAVID DENNY
Asst. District Attorney General
Courts Bldg., 600 Market St.
Chattanooga, TN 37402

OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The petitioner was indicted for first-degree murder and conspiracy to commit first-degree murder. The State filed a notice of intent to seek the death penalty. The petitioner pled guilty to first-degree murder and received a sentence of life imprisonment. He took no appeal as of right but filed a petition for post-conviction relief. After a hearing, the lower court denied the petition.

The petitioner now appeals, alleging four grounds for relief:

1. His guilty plea was not made voluntarily and knowingly;

2. He received ineffective assistance of counsel in conjunction with his guilty plea;

3. The trial court violated his constitutional rights when it denied his "petition to withdraw guilty plea" and his "motion to vacate or set aside plea agreement;" and

4. The trial court lacked jurisdiction to accept his guilty plea because the indictment was not signed by the grand jury foreman.

After reviewing the record, we find no merit in any of the petitioner's grounds and affirm the lower court.

With respect to his first issue, the petitioner alleges that he did not understand his rights or what the trial court explained to him at the time he entered his guilty plea. He also complains that he pled guilty as a result of pressure and coercion by his counsel, the prosecution and law enforcement authorities. As part of his contention that he was coerced and pressured into pleading guilty, the petitioner alleges that he was coerced into giving a confession. He testified at his hearing that the police had continued to interrogate him after he had stated that he had nothing to say and wanted an attorney and that they had harassed him into giving a statement in which he confessed to the murder, again before he had a lawyer. He claimed that he would not have given this

statement had he had a lawyer with him.

He also testified that the police had given him some pills before he gave his statement and that these pills caused him to feel nauseated and "not himself." He said that he had been given these pills after he had complained about "a lot of pressure in my head and . . . a lot of tension." The petitioner testified that he did not know what these pills were. No expert testified as to the identity of this medication or any possible effects. He also testified that one of the prosecuting attorneys told him while he was without counsel that if he didn't plead, additional charges would be added and that he could receive the death penalty. The petitioner further testified that his own defense counsel had pressured him into pleading guilty. He admitted during cross-examination that he had signed a waiver of rights prior to giving his statement to the police.

Hiram G. Hill, one of two public defenders that acted as the petitioner's defense counsel, testified that the petitioner had "never complained to [him] about any coercion or anything else regarding [his] statement." He also testified that the petitioner had not previously complained that the police had continued to question him after he had asked for an attorney. In response to a question of whether the prosecution had made any threats, Hill responded, "None at all." Hill also testified that the petitioner had never said anything to him about the police having given him any medication prior to his giving his statement. He testified that he had advised his client to plead guilty because of the significant risk of the death penalty being imposed if he went to trial.

Myron McClary, the petitioner's other defense lawyer, also testified that he did not recall the petitioner ever complaining about the circumstances surrounding his statement, nor was he aware of any threats by the State incidental to the guilty plea. He stated that the petitioner had mentioned to him that he had taken some pills during his interrogation after he had complained about a headache. He also testified that he had

advised his client that, if he went to trial, the best they could hope for was what was being offered by the State in the plea bargain. McClary also testified that the petitioner had not expressed any reservations about or problems with the plea on the day he entered it and for the few days preceding the plea. The petitioner's "primary concern," according to McClary, was "getting out of Hamilton County [jail] as quickly as possible so he would be able to build time to get the privileges to be with his children, . . . and also to get these other benefits that you get in the penitentiary that you can't get in the jail."

Gary Allen Legg, of the district attorney's office, testified that he and two other attorneys from the office had met with the petitioner at McClary's request. At this meeting, at which McClary was present, the petitioner told them that he had committed the murder. Legg testified that the purpose of the meeting had been to determine if there was evidence to be used against another suspect and that the petitioner had not indicated that he wanted a trial. Legg further testified that he had no recollection of any of the prosecuting attorneys threatening the petitioner with additional charges or an enhanced penalty if he did not cooperate.

William H. Cox, III, the lead prosecuting attorney, testified that the State had "overwhelming" evidence against the petitioner, including substantial evidence which independently corroborated the petitioner's confession. Cox also testified that he had felt the case was "a strong death penalty case" because "[i]t was apparent that it was a contract killing." Cox further testified that he had not threatened the petitioner with additional charges or with anything other than prosecution of the case.

"In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his [or her] 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).

With respect to whether the petitioner understood his rights and the statements of the trial court in conjunction with entering his guilty plea, the court below found that "the [petitioner's] understanding of those rights that he was asking to give up was very good" and that "the plea of guilty was voluntary and understanding and knowing, in other words, that it was an effective waiver." Upon our review of the record, it is clear that the trial court fully advised the defendant of his rights and the significance and ramifications of pleading guilty. It is equally clear that the defendant listened to the trial court and understood what he was being told. Therefore, the evidence does not preponderate against the lower court's finding that the defendant effectively waived his rights.

With respect to whether the plea was entered because of a coerced confession and other improper pressures, the court below found that "[a]ll the evidence around the taking of the confession indicates and the Court finds that it was voluntary and that the defendant was adequately advised of his rights before the statements were taken." These findings will not be disturbed on review unless the evidence preponderates against them. State v. Kelly, 603 S.W.2d 726, 728-29 (Tenn. 1980). The evidence does not preponderate against these findings. Accordingly, we find the petitioner's first issue to be without merit.

In his second issue, the petitioner complains that his defense lawyers were ineffective. Specifically, he complains that they did not fully advise him of various constitutional rights prior to his guilty plea; they did not try to suppress his confession; they did not attempt to dismiss the indictment against him; they did not object to alleged threats by the prosecution; and they did not try to suppress evidence arising from the

victim's body which the petitioner claims was moved and then returned to the murder scene.

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).

With respect to the first of the petitioner's claims of ineffective assistance, the trial court adequately advised the petitioner of his rights and the significance of his waiver of those rights at the time the guilty plea was entered. Therefore, the petitioner suffered no prejudice even if, as alleged, his attorneys did not fully advise him of these rights at an earlier time. The petitioner's contention that his lawyers should have moved to suppress his confession is likewise without merit. As set forth above, both of the petitioner's lawyers testified that he had not complained to them about the circumstances surrounding his interrogation and confession. Accordingly, they had been given no information on which to base a motion to suppress. The petitioner's allegations with respect to his indictment are addressed below. As to his lawyers' "failure" to object to

alleged threats by the prosecution, again, both lawyers testified that they were unaware of any such threats. Therefore, no motion on such a basis was possible. The petitioner's contention that his lawyers were ineffective because they failed to suppress certain evidence concerning the victim's body and its movement is also without merit. The petitioner has made no showing that such a motion, if made, would have been successful and that he would not have pled guilty had such a motion been made. Thus, the petitioner has shown no prejudice resulting from this "failure."

The court below found that "Mr. Hill made adequate preparation and would have been ready for trial or was ready for trial and had done everything that was necessary at that time." The evidence does not preponderate against this finding by the court below. This issue is without merit.

The defendant next complains that the trial court erred when it denied his "petition to withdraw guilty plea and proceed to trial" and subsequent "motion to vacate or set aside plea agreement." Both of these pleadings were filed more than thirty days after judgment became final.

The petitioner raises this issue for the first time on this appeal. Accordingly, it is waived. T.C.A. § 40-30-112 (1990). Furthermore, because the petitioner's motions were filed more than thirty days after his judgment became final, the trial court was without jurisdiction to set aside the petitioner's plea. See State v. Lock, 839 S.W.2d 436, 440 (Tenn. Crim. App. 1992) ("Once the judgment is final, the trial court generally loses jurisdiction to amend it.")

In his final issue, the defendant contends that the trial court was without jurisdiction to impose judgment upon him because the grand jury foreman did not sign the indictment. Like the immediately preceding issue, the petitioner raises this concern

for the first time on this appeal. Accordingly, it is waived. T.C.A. § 40-30-112. See also Applewhite v. State, 597 S.W.2d 328 (Tenn. Crim. App. 1979). Moreover, the defect complained of by the petitioner did not deprive the trial court of jurisdiction. Applewhite, 597 S.W.2d at 330. The petitioner's conviction is therefore valid.

Since the petitioner did not raise this issue below, the record contains no evidence on which the lower court could have found ineffective assistance of counsel in this respect. We are likewise disabled from making any such finding. The petitioner's contention that his lawyers were ineffective for failing to attack his indictment is therefore without merit.

The ruling of the court below is affirmed.

_____
JOHN H. PEAY, Judge

CONCUR:

_____
JERRY L. SMITH, Judge

_____
JOHN K. BYERS, Senior Judge