Cite as 2011 Ark. 358

SUPREME COURT OF ARKANSAS

No. CR 10-1045

SHAWNA BIDDLE APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** September 15, 2011 APPEAL FROM THE BOONE COUNTY CIRCUIT COURT [CR 2009-7], HON. JOHN PUTMAN, JUDGE AFFIRMED.

PER CURIAM

Appellant Shawna Biddle appeals from the circuit court's order denying her petition for reduction of sentence. In 2009, appellant pled guilty to ten counts of rape and was sentenced to 300 months' imprisonment. On October 8, 2009, appellant filed a petition for reduction of sentence, in which she alleged that her counsel was ineffective for failing to: (1) advise her that she would not receive good-time credit; (2) advise her that her sentence would not be reduced for taking certain classes; (3) advise her that she would have to serve seventy percent of her sentence; (4) obtain three offers of plea, rather than the one that she accepted. The circuit court properly treated the motion as one seeking postconviction relief pursuant to Arkansas Rule of Criminal Procedure 37.1 (2011), appointed counsel for appellant, and held a hearing on her petition. The circuit court then denied the petition, dismissing it with prejudice, and appellant has lodged the instant appeal. We affirm the circuit court's order.

This court does not reverse a denial of postconviction relief unless the circuit court's findings are clearly erroneous. *Kelley v. State*, 2011 Ark. 175 (per curiam). A finding is clearly

erroneous when, although there is evidence to support it, the appellate court, after reviewing the entire evidence, is left with the definite and firm conviction that a mistake has been committed. *Id.*

Biddle had the burden to prove her allegations for postconviction relief. *Hampton v. State*, 2010 Ark. 330 (per curiam). We assess the effectiveness of counsel under the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* A defendant making an ineffective-assistance-of-counsel claim must show that his or her counsel's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced the defense. *Id.* In order for a defendant to show that he or she was specifically prejudiced by counsel's deficient assistance prior to, or during, the entry of the defendant's guilty plea, the defendant must show that a reasonable probability exists that, but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. *Id.*

In its order, the circuit court found that appellant's trial counsel accurately and correctly advised her as to her parole eligibility and that, even if the advice he gave was not correct, appellant failed to show a reasonable probability that, but for the incorrect advice, she would not have pled guilty. It further found, with respect to appellant's claims that she did not understand the range of possible penalties for the crimes with which she was charged, that she did not understand what seventy percent meant, and that she was innocent of some of the charges, that Biddle's claims were clearly refuted by the record of her plea and sentencing. Regarding her claim that she should have received more than one plea offer, the circuit court found that her contention was simply without merit. Finally, the circuit court found that appellant freely,

voluntarily, and knowingly entered her plea of guilty and that the plea bargain was clearly in her best interest and was not rendered involuntary because of information she received after her plea. The circuit court concluded that appellant had not shown her trial counsel was ineffective under *Strickland* and denied her claim for relief, dismissing it with prejudice.

The circuit court did not clearly err in denying appellant's petition for postconviction relief. In an appeal from the denial of a Rule 37.1 petition following a plea of guilty, there are only two issues for review—one, whether the plea of guilty was intelligently and voluntarily entered and, two, whether the plea was made on the advice of competent counsel. *Polivka v. State*, 2010 Ark. 152, 362 S.W.3d 918. Biddle first asserts that her plea of guilty was not intelligently and voluntarily entered because she suffers from mental retardation.

Indeed, a forensic evaluation by Dr. Paul Deyoub confirms an axis II diagnosis of mild mental retardation and assessed appellant's IQ at 57. Notwithstanding that assessment, Dr. Deyoub also found that appellant's "adaptive functioning is good, she has always lived independently, she moved around to a lot of different apartments, she had a marriage, relationships with men, and has been able to function independently." In addition, Dr. Deyoub found that, while appellant suffered from a mental defect, "she had the capacity for purposeful and knowing conduct, an element of the charged offense;" "she had the capacity to appreciate the criminality of her conduct;" and "she had the capacity to conform her conduct to the requirements of the law." A defendant in a criminal proceeding is presumed to be mentally competent to stand trial, and the burden is on the defendant to prove incompetence. *Camacho v. State*, 2011 Ark. 235 (per curiam).

Rule 24.5 of the Arkansas Rules of Criminal Procedure requires the trial court to

determine that a plea is voluntary prior to accepting a guilty or nolo contendere plea. It is the duty and responsibility of the trial court to determine beyond doubt that a plea of guilty is voluntary, and, in order to do so, the court should inquire of the defendant personally, substantial compliance being sufficient. *Pardue v. State*, 363 Ark. 567, 215 S.W.3d 650 (2005) (per curiam). A review of the instant record reveals that, at the plea hearing, the circuit court inquired of appellant whether she was under the influence of any substance or medication that would cause her not to understand her plea, to which she responded that she was not. It further inquired as to whether she felt she understood what was "going on," to which she responded that she did. She stated that she was pleading guilty freely and voluntarily and that she had not been threatened or promised anything to change her plea to guilty. Shortly after her plea hearing, appellant filed a motion to withdraw her plea of guilty. However, at a hearing on that motion, appellant directed her counsel to withdraw it, and she acknowledged to the court that it was her decision, and hers alone, after talking with her attorney and receiving his advice.

In light of the forensic evaluation and appellant's statements on the record, we cannot say that the circuit court clearly erred in finding that appellant's plea was freely, voluntarily, and knowingly entered. The record before us simply does not demonstrate that she was mentally incapable of entering an intelligent and voluntary plea, nor did appellant's petition present any factual substantiation to support her claim.

Nor can we say that appellant has established a showing of ineffective assistance of counsel. While she claims that her counsel failed to adequately explain the plea and its consequences to her, it is clear from the record that her plea was entered upon advice of competent counsel. Trial counsel testified at the Rule 37.1 hearing that he had discussed with

appellant the advantages and disadvantages of taking her case to trial and of taking the plea offered by the State. He testified that it was appellant's choice to enter a guilty plea and that he discussed with her the minimum sentence of twenty-five years and explained that she would have to serve seventy percent of her sentence before becoming eligible for parole.

In addition, the plea hearing colloquy further demonstrates that appellant was fully informed as to the consequences of her plea. She acknowledged her understanding that she could receive up to life in prison for the charges against her and that the very minimum sentence she could receive was twenty-five years. She acknowledged that, if she received a sentence of twenty-five years, she understood that she would have to complete seventy percent of that sentence before becoming eligible to apply for parole. She stated that she understood that she would be eligible for parole in seventeen or eighteen years, and she stated that she was pleading guilty because she was in fact guilty.

Biddle further stated that she had discussed her case with trial counsel and that she was satisfied with his services. She stated that she understood that she could try the defense of mental capacity should she wish to go to trial, but that, again, she was pleading guilty because she was guilty. Likewise, at the hearing during which she withdrew her motion to withdraw her guilty plea, she answered "seventy percent" when asked by the circuit court as to how much time she would have to serve if sentenced to the minimum of twenty-five years. She further answered correctly when asked by her counsel how many years seventy percent of twenty-five years would be. Finally, when the court inquired of her whether she understood that she would be in her early to mid-fifties before she had a chance of parole, appellant responded that she did.

It is clear that appellant's claims lack factual substantiation to support a finding of

deficient performance. There is a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. *Shipman v. State*, 2010 Ark. 499 (per curiam). Appellant does not claim on appeal that any positive misrepresentation was made,[1] but makes much of the fact that trial counsel failed to explain that she would not receive good-time credit or credit for taking certain classes. However, we have held that an attorney has no constitutional duty to inform his client on the specifics of parole eligibility. *Buchheit v. State*, 339 Ark. 481, 6 S.W.3d 109 (1999) (per curiam). While she claims that trial counsel failed to advise her that she would have to serve seventy percent of her sentence, the foregoing clearly demonstrates that both the trial court and trial counsel made it abundantly clear to appellant that she was subject to the seventy-percent rule. In addition, Biddle has failed to point to any authority for her proposition that trial counsel was ineffective for failing to obtain three plea offers from the State.

Finally, with respect to her claim that trial counsel was ineffective for failing to use her mental defect to her advantage, the record again dispels any notion that counsel's performance was deficient. Appellant testified that at the time she signed her plea agreement, she did not want to go to trial. While she also testified that she did not remember discussing the defense of mental defect with trial counsel, trial counsel testified that he discussed the forensic evaluation with her. The record of the plea hearing further reflects trial counsel's statement that he had

[1]In fact, appellant admitted that trial counsel did not promise her that she would receive any "good behavior time," nor did he tell her that she would "get any time off" for taking a class. She testified that it was information that she received from inmates of the Boone County Jail on which she based her claims.

discussed the evaluation with some other defense attorneys, as well as with appellant, and it was his opinion that there was no defense that would be successful or benefit her, as she faced a potential sentence of life without parole, but would receive the minimum sentence of twenty-five years under the plea agreement. We defer to the trial court's determination of credibility on Rule 37.1 appeals. *Smith v. State*, 2010 Ark. 137 (per curiam). Moreover, where a decision by counsel was a matter of trial tactics or strategy, and that decision is supported by reasonable professional judgment, then such a decision is not a proper basis for relief under Rule 37.1. *Id.*

We cannot say that the circuit court's findings that appellant's guilty plea was voluntary and that trial counsel was not ineffective were clearly erroneous. We therefore affirm the circuit court's order.

Affirmed.