

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 20, 2016 Session

WILLIAM PHILLIPS, JR. v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Knox County
Nos. 102417, 100337, 106249 Scott Green, Judge**

No. E2016-00103-CCA-R3-HC – Filed December 1, 2016

The petitioner, William Phillips, Jr., appeals the dismissal of his petition for writ of habeas corpus/motion for Rule 36.1 correction of an illegal sentence, arguing that the trial court imposed an illegal sentence in violation of Tennessee Rule of Criminal Procedure 11(c)(1)(C) by altering the sentence in his negotiated plea agreement, which the trial court accepted prior to the sentencing hearing. Following our review, we affirm the judgment of the habeas court dismissing the petition.

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

ALAN E. GLENN, J., delivered the opinion of the court, in which THOMAS T. WOODALL, P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

Gena Lewis and T. Scott Jones, Maryville, Tennessee, for the appellant, William Phillips, Jr.

Herbert H. Slatery III, Attorney General and Reporter; Benjamin A. Ball, Senior Counsel; Charme P. Allen, District Attorney General; and Willie R. Lane, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS and PROCEDURAL HISTORY

On October 7, 2013, the petitioner pled guilty in the Knox County Criminal Court as a Range I offender to aggravated assault, aggravated stalking, and attempted acquisition of a controlled substance by fraud or forgery in exchange for the dismissal of his charges in a separate case and an effective ten-year sentence, with 340 days in jail followed by supervised probation. That same day, the trial court entered a preprinted

“Waiver of Trial by Jury and Acceptance of Plea of Guilty Order,” in which relevant blank portions setting forth the petitioner’s charges and the plea agreement had been filled in by hand.

Because the petitioner had already served 340 days at the time of the entry of his pleas, he was released on his own recognizance pending the preparation of a presentence report and a sentencing hearing. At the February 7, 2014 sentencing hearing, at which a number of law enforcement and civilian witnesses testified about the petitioner’s continued stalking of the victim, the trial court found that the petitioner had violated his conditional release and ordered that he serve the remainder of his ten-year sentence in confinement.

Other than arguing that he should be granted probation, the petitioner raised no challenge to the sentence at the sentencing hearing and did not question the authority of the trial court to impose the sentence. The petitioner also filed no direct appeal of sentencing to this court. He later, however, filed in the trial court a Tennessee Rule of Criminal Procedure 35 motion for reduction of sentence, which was denied following a hearing on November 21, 2014.

On August 31, 2015, the petitioner filed a petition for writ of habeas corpus in the Knox County Criminal Court in which he alleged that his sentence was illegal under Rule 11 of the Tennessee Rules of Criminal Procedure because it did not comply with his plea agreement. The petitioner also alleged that the trial court’s failure to sentence him in accordance with the negotiated plea rendered the plea agreement void because it was not “entered intelligently and knowingly.” On October 6, 2015, the petitioner filed an amended petition in which he alleged that the trial court had jurisdiction over the case pursuant to Rule 36.1 of the Tennessee Rules of Criminal Procedure, “which provides a procedural right of habeas corpus to correct illegal sentences[.]”

The State responded with a motion to dismiss in which it asserted that the petitioner failed to comply with the procedural requirements of a petition for writ of habeas corpus and failed to establish on the face of the record that the convicting court was without jurisdiction or the sentence expired. Among other things, the State argued that the petitioner failed to show that the trial court was without authority to impose the ten-year sentence because “[t]rial courts are empowered to revoke suspended sentences.”

In an October 7, 2015 response to the State’s motion to dismiss, the petitioner, among other things: refuted the State’s suggestion that the sentencing hearing had been a probation revocation hearing; asserted that his petition was governed by Rule 36.1 of the Tennessee Rules of Criminal Procedure, which “dispenses with the requirements of the habeas statute and requires only that the Petitioner show a ‘colorable claim’”; and argued

that “the infirmity” of the sentence was “apparent on the face of the record[,]” which showed that the trial court accepted the plea agreement, including the sentence of split confinement, and yet failed to enter a judgment in accordance with the plea.

On October 27, 2015, the petitioner filed another amended petition superseding his previous petitions but incorporating by reference the attachments to those previous petitions and attaching as exhibits the relevant judgments. The petitioner again argued that the trial court illegally sentenced him in violation of Tennessee Rule of Criminal Procedure 11(c)(1)(C) by altering his agreed-upon sentence. The petitioner asserted that because the trial court illegally sentenced him to serve his ten-year sentence in confinement and a sentence of split confinement was a material part of his accepted plea, he was entitled to either withdraw his guilty plea or for specific performance of the plea agreement.

Finally, on December 16, 2015, the State filed a response to the petitions in which it agreed that the petitioner had never been placed on probation but argued that the petitioner had “in no way established that the sentence [he] received was illegal[.]” The State noted the petitioner’s violations of the conditions of his release and the fact that he was, as a result, taken back into custody before the “full sentencing hearing.” Although the State did not explicitly address the petitioner’s claim that the trial court lacked jurisdiction to sentence the petitioner differently from the plea agreement, it implied that the split confinement portion of the petitioner’s plea agreement was a recommended sentence that the court declined to follow based on the petitioner’s actions during his release from custody.

On December 16, 2015, following a hearing, the habeas court denied the petition on the basis that it did not state a cognizable claim for habeas corpus relief. Specifically, the court found that the sentences were all “within the statutory range of punishment” and did not “contravene an applicable statute.” Thereafter, the petitioner appealed to this court, arguing that the habeas court erred by finding that the sentence imposed by the trial court did not contravene an applicable statute, *i.e.* Tennessee Rule of Criminal Procedure 11(c)(1)(C), under which the trial court could either accept the plea agreement, reject the plea agreement, or defer ruling on the agreement until a later time.

ANALYSIS

The petitioner cites State v. Soller, 181 S.W.3d 645 (Tenn. 2005), and State v. Leath, 977 S.W.2d 132 (Tenn. Crim. App. 1998), to argue that once the trial court accepted the negotiated plea agreement, it lacked jurisdiction to alter the agreed-upon sentence, rendering illegal the ten-year sentence of incarceration. The State responds by citing language in the guilty plea form and statements of the parties and the court at the

guilty plea hearing to argue that the record reveals that the plea agreement left the manner of service of sentence for the trial court to determine at the sentencing hearing, pursuant to Tennessee Rule of Criminal Procedure 11(c)(1)(B). The State further argues that even if the plea agreement called for a sentence of split confinement, this would render the petitioner's judgment voidable rather than void.

Prior to the creation of Rule 36.1 of the Tennessee Rules of Criminal Procedure, a petition for writ of habeas corpus was the only means to challenge an alleged illegal sentence. Since July 1, 2013, however, either the State or the defendant may file a motion pursuant to Rule 36.1, which provides in pertinent part:

(a) Either the defendant or the state may, at any time, seek the correction of an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered. For purposes of this rule, an illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.

(b) Notice of any motion filed pursuant to this rule shall be promptly provided to the adverse party. If the motion states a colorable claim that the sentence is illegal, and if the defendant is indigent and is not already represented by counsel, the trial court shall appoint counsel to represent the defendant. The adverse party shall have thirty days within which to file a written response to the motion, after which the court shall hold a hearing on the motion, unless all parties waive the hearing.

(c)(1) If the court determines that the sentence is not an illegal sentence, the court shall file an order denying the motion.

(2) If the court determines that the sentence is an illegal sentence, the court shall then determine whether the illegal sentence was entered pursuant to a plea agreement. If not, the court shall enter an amended uniform judgment document, see Tenn. Sup. Ct. R. 17, setting forth the correct sentence.

(3) If the illegal sentence was entered pursuant to a plea agreement, the court shall determine whether the illegal provision was a material component of the plea agreement. If so, the court shall give the defendant an opportunity to withdraw his or her plea. If the defendant chooses to withdraw his or her plea, the court shall file an order stating its finding that the illegal provision was a material component of the plea agreement, stating that the defendant withdraws his or her plea, and reinstating the

original charge against the defendant. If the defendant does not withdraw his or her plea, the court shall enter an amended uniform judgment document setting forth the correct sentence.

(4) If the illegal sentence was entered pursuant to a plea agreement, and if the court finds that the illegal provision was not a material component of the plea agreement, then the court shall enter an amended uniform judgment document setting forth the correct sentence.

(d) Upon the filing of an amended uniform judgment document or order otherwise disposing of a motion filed pursuant to this rule, the defendant or the state may initiate an appeal as of right pursuant to Rule 3, Tennessee Rules of Appellate Procedure.

Tenn. R. Crim. P. 36.1.

Neither the written plea agreement, nor the statements of the parties at the guilty plea or sentencing hearings, referenced the specific type of agreement the parties contemplated under Tennessee Rule of Criminal Procedure 11. The petitioner argues on appeal that the agreement fell under Tennessee Rule of Criminal Procedure 11(c)(1)(C), while the State argues that it was, instead, an 11(c)(1)(B) agreement. Tennessee Rule of Criminal Procedure 11(c) provides in pertinent part:

(c) Plea Agreement Procedure.

(1) In General. The district attorney general and the defendant's attorney, or the defendant when acting pro se, may discuss and reach a plea agreement. The court shall not participate in these discussions. If the defendant pleads guilty or nolo contendere to a charged offense or a lesser or related offense, the plea agreement may specify that the district attorney general will:

(A) move for dismissal of other charges;

(B) recommend, or agree not to oppose the defendant's request for, a particular sentence, with the understanding that such recommendation or request is not binding on the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

....

(3) Judicial Consideration of a Plea Agreement.

(A) Rule 11(c)(1)(A) or (C) Agreement. If the agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept or reject the agreement pursuant to Rule 11(c)(4) or (5), or may defer its decision until it has had an opportunity to consider the presentence report.

(B) Rule 11(c)(1)(B) Agreement. If the agreement is of the type specified in Rule 11(c)(1)(B), the court shall advise the defendant that the defendant has no right to withdraw the plea if the court does not accept the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, the court shall advise the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement.

(5) Rejecting a Plea Agreement. If the court rejects the plea agreement, the court shall do the following on the record and in open court (or, for good cause, in camera):

(A) advise the defendant personally that the court is not bound by the plea agreement;

(B) inform the parties that the court rejects the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than provided in the plea agreement.

Tenn. R. Crim. P. 11(c)(1), (3), (4), (5).

We agree with the State that the statements of the parties indicate that they contemplated that the manner of service of the sentence was to be left to the trial court's discretion following a sentencing hearing. From the record, it appears that the trial court conditionally accepted the plea agreement with its sentence of split confinement, reserving its ultimate decision for a subsequent sentencing hearing. The transcript of the guilty plea hearing reveals that the court referred to its reserving judgment in the case until the presentence report could be completed and a sentencing hearing held. The court

also referred to the petitioner's being released on his own recognizance pending the sentencing hearing and repeatedly admonished the petitioner that he had to follow the rules of his conditional release, including the prohibition against any contact with the victim:

THE COURT: And do you understand, sir, that you'll be RORed to apply for probation . . . and it's agreed that you're going to be on probation with these conditions. But we're going to do a presentence report, and obviously you can't get in any problems. Will there be a GPS monitor upon release?

[PROSECUTOR]: Yes.

[THE COURT]: Is that part of it?

[PROSECUTOR]: Yes.

[THE COURT]: Okay.

[PROSECUTOR]: Before he is released today he is to have that monitor in place.

[THE COURT]: You understand all that, sir?

[THE PETITIONER]: Um, yes.

[THE COURT]: Okay. And you understand, sir, that . . . the biggest part of the conditions is that you are to have no contact with [the victim]? And that means no contact of any kind in any form in any way. Do you understand that?

[THE PETITIONER]: Yes, Your Honor.

. . . .

[THE COURT]: Okay. Now, we're going to be setting another date to come back, and I haven't done that yet because I'm still going through this with you.

After continuing with the plea colloquy, the court made the following statement: "Okay. I'm going to accept [the petitioner's] plea as given freely, voluntarily and

knowingly, and I'll incorporate the plea agreement in the judgment." The court went on, however, to again refer to its reserving judgment in the case until the sentencing hearing:

[THE COURT]: And after all that complication [discussion of GPS monitoring,] is there anything you would like to say before I fix punishment and reserve judgment so we can get everything arranged?

[THE PETITIONER]: No, ma'am.

[THE COURT]: Sir, in case number 100337 on your plea of guilty to attempt to acquire a controlled substance by fraud, I find you guilty of that offense and fix your punishment at two years in the state penitentiary as a Range I, standard offender.

Count -- case number 100336 is dismissed.

Case number 102417 on your plea of guilty to aggravated assault I find you guilty of that offense and . . . fix your punishment at six years consecutive.

In the second count on your plea to aggravated stalking, I find you guilty of that offense and fix your punishment at two years consecutive to that for a total effective sentence of ten years as a Range I, standard offender to be served as a split confinement of one year which you will have completed today.

So I'm going to be RORing you for your application for State probation, and I'm going to reserve judgment. We're going to resolve the GPS issue.

You are to have no contact with [the victim] or allow anybody else to do that on your behalf in any form, electronic or otherwise – okay – none.

As previously mentioned, at the sentencing hearing the petitioner's counsel did not question the authority of the trial court to impose a sentence of incarceration rather than the sentence of split confinement outlined in the guilty plea agreement. Counsel, in fact, agreed with the trial court's statement that the "whole issue [at the sentencing hearing] is in what manner [the sentence] is to be served," indicating that what the parties contemplated was a "hybrid" type plea, as explained in the advisory commission comments to the rule:

The type of plea agreements have greatly expanded in recent years because judges now impose non-capital sentences. Consequently, it is important for the lawyers to have a clear understanding as to those aspects of the agreement which are plea contingent and those that are not. The defendant must also have a clear understanding so that the plea is knowing.

A simple example should illustrate the type of contingent and noncontingent agreements contemplated. The state may agree that in exchange for a plea to burglary the state will recommend four years and that at the time of the sentencing hearing the state will recommend probation but the latter is a nonbinding recommendation. Two separate agreements have thus been made. The first, the four years, is a (c)(1)(C) agreement. The defendant's plea is wholly contingent on getting exactly four years. The sentence is not binding on the court but the alternative to rejection of the sentence agreement is a potential withdrawal of the plea. The second agreement, the recommendation of probation, is, under this example, a (c)(1)(B) agreement. The plea is contingent only on the state's recommendation of probation and not on probation actually being granted. If the court denies probation the defendant cannot withdraw the plea.

Tenn. R. Crim. P. 11, Advisory Comm'n Cmts.

The case at bar differs in key aspects from the case on which the petitioner heavily relies for the proposition that the court lacked jurisdiction to sentence him differently from the plea agreement. The issue in Soller was "whether a trial court may alter a plea agreement entered into pursuant to Tennessee Rule of Criminal Procedure 11(e)(1)(C) [now codified as 11(c)(1)(C)], by granting judicial diversion, even though the agreement did not mention such an option." 181 S.W.3d at 648. On the day he entered his guilty pleas, the defendant in Soller requested judicial diversion. Id. at 647. The trial court responded that it would allow the defendant to file a motion for diversion, which it would consider at a later hearing. In the meantime, the trial court accepted the defendant's pleas and entered judgments in the case that reflected the sentences outlined in the negotiated plea agreement. Id. The defendant subsequently filed a motion for correction of judgments in which he again requested judicial diversion. The trial court denied the request, and the defendant appealed. Id.

In affirming the judgment, our supreme court concluded that after accepting the negotiated plea agreement, the trial court lacked the authority to alter its terms to include judicial diversion:

Once the Court decides to accept a plea agreement reached pursuant to Rule 11(e)(1)(C), it must accept the agreement in its entirety, including the agreed upon sentence. See State v. Leath, 977 S.W.2d 132, 135-36 (Tenn. Crim. App. 1998). Rule 11 does not contain a provision that would allow a trial court to alter the terms of a plea agreement entered pursuant to subsection (e)(1)(C). Id. at 135. Thus, based on the plain language of the statute, we conclude that the trial court does not have authority to alter the terms of a plea agreement accepted pursuant to Rule 11(e)(1)(C). Rather, the trial court's choices are either to accept or reject the agreement in its entirety, including the agreed upon sentence.

Id. at 648 (footnote omitted).

The court went on to conclude that “[r]egardless of the form of the guilty plea agreement, once the judgment has been entered, the trial court is precluded from granting judicial diversion.” Id. at 649. Notably, in its final conclusionary paragraph, the court limited its holding to the specific situation presented in the case, writing: “We conclude that when a trial court accepts a plea agreement pursuant to Tennessee Rule of Criminal Procedure 11(e)(1)(C), such agreement represents the full and complete agreement between the parties and cannot be altered by the trial court to include judicial diversion. Thus, the trial court may entertain the issue of judicial diversion only when the court rejects the agreement or when such an option is reflected in the 11(e)(1)(C) plea agreement.” Id. at 650.

The case at bar does not deal with a trial court's unilateral decision to reduce a negotiated plea sentence, as in Leath, 977 S.W.2d at 136, or whether a trial court, after acceptance of a plea agreement and entry of judgments in accordance with the plea, may consider a request for judicial diversion. Instead, it appears that the parties in this case contemplated a “hybrid” plea in which the length of the sentence was a Rule 11(c)(1)(C) agreement and the manner of service of the sentence was a Rule 11(c)(1)(B) agreement. The petitioner did not object at sentencing to the trial court's consideration of evidence of the petitioner's violation of the conditions of his provisional release and never questioned the court's ability to impose the sentence of incarceration, which indicates that the parties understood that the court retained that option.

In sum, we conclude that the petitioner's judgment is not void and his sentence is not illegal. Thus, he is not entitled to habeas corpus or Rule 36.1 relief.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgment of the habeas court.

ALAN E. GLENN, JUDGE