

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1994 SESSION

FILED

September 18, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

TOMMY DEWAYNE HIPPS, * C.C.A. # 03C01-9408-CR-00270
APPELLANT, * HAMILTON COUNTY
VS. * Hon. Joseph F. DiRisio, Judge
STATE OF TENNESSEE, * (Post-Conviction)
APPELLEE. *

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OPINION FILED: _____

AFFIRMED

Gary R. Wade, Judge

OPINION

The petitioner, Tommy DeWayne Hipps, appeals the trial court's denial of his petition for post-conviction relief. Two issues have been presented for review:

(1) whether the trial court properly determined that the defendant had been fully advised of his rights prior to the entry of each of his two guilty pleas; and

(2) whether the trial court properly determined that the petitioner had received the effective assistance of counsel before entering his pleas.

We affirm the judgment of the trial court.

On January 30, 1990, the petitioner, who was serving a seventeen-year sentence at the Chattanooga Work Release Center, was charged with felonious escape and theft of property (a truck) valued at more than \$1,000.00. On July 10, 1990, the petitioner entered guilty pleas to each charge. The trial court imposed a Range I, one-year sentence for the escape, to be served consecutively to his previous seventeen-year sentence. The second charge was reduced to theft of property over \$500, for which a Range II, two-year sentence was imposed to be served concurrently with the sentence for escape, but consecutive to the seventeen-year sentence. Sometime after he was returned to the custody of the Department of Correction, the petitioner learned that the newer offenses had resulted in a 20% increase in the release eligibility date for the earlier convictions.

The petitioner makes no challenge to the crime or

crimes resulting in his seventeen-year sentence. He attacks only the two subsequent convictions, asserting that he had not been advised of his right against self-incrimination and contending that his counsel was ineffective because the petitioner had "a problem understanding."

The petitioner and his trial counsel testified at the evidentiary hearing. A transcript of the 1990 proceeding during which the petitioner entered his guilty pleas is a part of this record. The petitioner and three other codefendants were present when the trial judge advised, among other things, as follows:

And, of course, if you had a jury trial you could into court like every defendant does with a presumption ... [of] not guilty so [that] the State has to prove otherwise, and you would have a right to testify on your own behalf or you wouldn't have to testify[.] [S]o unless you testified, the fact that you had a previous record couldn't be brought out under most circumstances and that is what you're giving up....

At the conclusion of the evidentiary hearing, the trial court held that the petitioner had been "apprised of all of his rights, including the ... privilege against self-incrimination." It ruled that the petitioner had been afforded the "effective assistance of counsel" and that his pleas were voluntary and knowing "with full knowledge of what the facts and consequences would be."

In Boykin v. Alabama, 395 U.S. 238 (1969), the United States Supreme Court established that the admonition of

certain rights are required by the Constitution. Included among these rights is the right of self-incrimination, the right to confront witnesses, and the right to be tried by a jury. The relinquishment of those rights cannot be presumed from a silent record. See State v. Mackey, 553 S.W.2d 337 (Tenn. 1977). In State v. Neal, 810 S.W.2d 131 (Tenn. 1991), our supreme court established guidelines for the review of guilty pleas. While the overriding determination of the validity of the guilty plea rests upon whether it was knowingly and voluntarily entered, proof of the failure to warn of a recognized right under Boykin shifts the burden of proof to the state. On the other hand, if the trial court has substantially complied with the litany of constitutional rights mandated, there is no error. In Johnson v. State, 834 S.W.2d 922, 926 (Tenn. 1992), our supreme court held as follows:

[I]f the transcript shows that the petitioner was aware of his constitutional rights, he is not entitled to relief on the ground that the mandated advice was not given. Also, if all the proof presented at the post-conviction hearing, including the transcript of the guilty plea hearing, shows that the petitioner was aware of his constitutional rights, he is not entitled to relief.

For a petitioner to prove that his counsel was ineffective, he must show that the advice given or the services rendered by counsel were not within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). He must also show that, but for his counsel's deficient performance, the result of the trial would have been different. Strickland v. Washington,

466 U.S. 668 (1984). This two-part standard, as it applies to guilty pleas, is met when the petitioner establishes that, but for his counsel's errors, he would not have pleaded guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985).

The burden is on the petitioner to show that the evidence preponderated against the findings of the trial judge. Clenny v. State, 576 S.W.2d 12 (Tenn. Crim. App. 1978). Otherwise, the findings of fact made by the trial court are conclusive. Graves v. State, 512 S.W.2d 603 (Tenn. Crim. App. 1973).

After a careful review of the record, we have determined that the evidence does not preponderate against the finding of the trial court that the defendant had, in fact, been warned of his right against self-incrimination. The trial court substantially complied with its obligation to warn the petitioner of his right not to incriminate himself. That the trial judge did so in lay terminology is no basis for relief.

Further, the record contains no evidence to support the petitioner's general allegation that his trial counsel was ineffective. There was really no proof that the petitioner did not adequately comprehend the consequences of his guilty pleas, nor was there any basis for his complaint that his trial counsel failed to adequately explain to the petitioner his rights and options before the entry of the pleas.

Accordingly, the judgment is affirmed.

Gary R. Wade, Judge

CONCUR:

Joseph M. Tipton, Judge

Robert E. Burch, Special Judge