IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JANUARY SESSION, 1996

STATE OF TENNESSEE,	]	**C.C.A. #02C01-9503-CC-00256**
	]	
Appellee,	]	
	]	
	]	**CROCKETT CRIMINAL**
VS.	]	
	]	**HON. DICK JERMAN, JR.**
RICHARD REDMOND,	]	**JUDGE**
	]	
Appellant.	]	**(Post Conviction Relief)**
		AFFIRMED

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OPINION FILED _____

AFFIRMED

LYNN W. BROWN, SPECIAL JUDGE

OPINION

The appellant, Richard Redmond, indicted for two counts of aggravated assault, entered a plea of guilty in the Circuit Court for Crockett County to a single offense of felony reckless endangerment, receiving a sentence of two years with thirty days to be served in custody. Subsequently he filed a petition for post-conviction relief alleging that his guilty plea was not entered knowingly, voluntarily and intelligently. The petition also alleged that he received ineffective assistance from his counsel at the guilty plea. The trial court denied relief, from which judgment the appellant has appealed by right to this court. We affirm the judgment of the trial court.

"In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his petition by a preponderance of the evidence." McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). The findings of fact and conclusions of law of the trial court in post-conviction case are afforded the weight of a jury verdict. See, e.g., Caruthers v. State, 814 S.W.2d 64, 67 (Tenn. Crim. App. 1991). Furthermore, the factual

findings of the trial court are conclusive on appeal unless the appellate court finds that the evidence preponderates against the findings. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

I. Constitutional Validity of the Guilty Plea.

The appellant contends that his plea of guilty was not entered knowingly, intelligently and voluntarily. Specifically he alleges that he did not understand his right against self-incrimination as well as his right to confront and cross-examine the state's witnesses at jury trial.

The due process clause of the federal constitution requires that a plea of guilty to any criminal offense be knowing and voluntary. Boykin v. Alabama, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712, 23 L.Ed.2d 274 (1969). The entry of a guilty plea effectively constitutes a waiver of the constitutional rights against compulsory self-incrimination, the right to confront one's accusers, and the right to trial by jury. Id. A knowing and voluntary plea requires the intentional relinquishment or abandonment of known rights. State v. Mackey, 553 S.W.2d 337, 340 (Tenn. 1977). The relinquishment of these constitutional rights will not be presumed from a silent record. Boykin, 395 U.S. at 243, 89 S. Ct. at 1712. Therefore, unless there is an affirmative showing that the plea was knowing and voluntary, a guilty plea may be vacated upon collateral attack. See id.; Mackey, 553 S.W.2d at 339 to 342.

However, the failure of the trial court to advise a defendant in the guilty plea process of his Boykin rights may not result in the overturning of a conviction if the record reflects that the petitioner entered a voluntary and knowing plea. Johnson v. State 834 S.W. 2d 922, 926 (Tenn. 1992). The critical inquiry is whether the appellant had knowledge of certain rights and waived those rights knowingly and voluntarily, not whether the trial court was the source of that knowledge. Id.

A petitioner's claim that he was not advised of his Boykin rights does not constitute sufficient proof that the plea was not knowing and voluntary. Id. If the petitioner makes a prima facie case by showing that the trial court failed to give the mandated advice, the burden shifts to the State to prove by clear and convincing evidence that the plea was knowing and voluntary, "in which event the plea will not be disturbed." Id.

If the record reflects that the petitioner was aware of his constitutional rights, the petitioner is not entitled to relief on the ground that the trial court failed to give mandated advice. Johnson, 834 S.W.2d at 926. However, if the State does not meet the burden of showing that the plea was entered knowingly and voluntarily, the petitioner will be entitled to relief. Id.

In this case the appellant testified that at the time of his guilty plea he did not understand that he could elect to go to trial and not take the witness stand, and also did not know that

he could choose to not testify against himself. He also testified that the right to confront witnesses against him was not explained to him.

The transcript of the guilty plea of the petitioner includes the following exchange:

THE COURT: I am sure she [counsel for petitioner] has explained them to you, but let me explain them to you, that you have certain constitutional rights, and by pleading guilty today you are giving up certain rights. You have the right to remain silent; the right against self-incrimination by answering my questions. By pleading guilty today you are giving up the right to a trial by jury to determine the question of your guilt or innocence. You have a jury case set for Friday and you have the right to go through that jury trial where your lawyer can cross-examine all witnesses who testify against you; you have the right to subpoena witnesses to testify in your own behalf. You have the right to testify before the jury if you chose [sic] to do so, and let the jury determine the question of your guilty [sic] or innocence. There will be no jury trial if you plead guilty, do you understand that?

REDMOND: Yes, sir.

THE COURT: You also have the right to appeal any decision made by the court or made by the jury pursuant to a jury trial. Likewise, those rights are waived by pleading guilty. Do you understand that:

REDMOND: Yes, sir.

We are of the opinion that the trial court thereby sufficiently advised the appellant of his right to confrontation. Additionally, there can be no doubt that the appellant understood this right. The petitioner was at the time of his guilty plea twenty-six years old. He was a high school graduate, capable of reading and writing. The public defender described the petitioner as being very intelligent compared to most of her clients. His testimony in the post-conviction hearing was that he had previously been charged with another offense which was tried on two separate occasions to a jury. The first trial resulted in a mistrial as a result of a hung jury; the appellant was found not guilty in second trial. He had observed and confronted witnesses who testified against him in these trials.

At the hearing on his post-conviction writ the petitioner testified as follows: "On the self incrimination deal actually I was under the impression that self incrimination meant that I had to answer their questions. I didn't know I could elect to go to trial and not take the stand -- not to have to testify against my own self."

We are of the opinion that part of the advice to the petitioner by the trial court regarding self-incrimination is at least somewhat confusing. The statement by the court that "[y]ou have the right to remain silent; the right against self-incrimination by answering my questions," does not inform the

petitioner whether his right to remain silent applies at jury trial or during the plea process. However, the court's later advice that the petitioner has the right to choose to testify clearly implies a right not to testify. Taken in its entirety, we are of the opinion that the statements of the trial court were sufficient to inform the appellant of his constitutional right against self-incrimination.

Furthermore, the proof in the writ hearing shows that prior to his guilty plea the petitioner had been mailed a letter by the public defender who was appointed to represent him. Included in the letter is the advice in reference to a trial as opposed to a plea of guilty: "You have the following rights: . . . The right not to incriminate yourself; that is, you don't have to give evidence against yourself." The petitioner admitted that he had seen such a letter, but complained that no one ever sat down and explained it to him. We are of the opinion that to a person of the appellant's intelligence, this statement needs no explanation. The assistant public defender who represented the appellant at his guilty plea had a firm recollection of the facts and certain problems with the case, but no distinct recollection of explaining constitutional rights to the appellant. Counsel did testify that "[w]e always go over what his rights are before he entered the plea." The trial court at the conclusion of the writ hearing found the appellant's statements that he did not understand these constitutional rights to be untruthful. We have examined the record of appellant's testimony and find repeated evasiveness and

testimony in contradiction to other proof in the case. We accept this finding of the trial court as we would a jury verdict.

The trial court found that the appellant's guilty plea was entered knowingly and voluntarily. We conclude that the trial court's acceptance of the appellant's guilty plea complied with the requirements of Boykin v. Alabama, 395 U.S. 238, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969), and State v. Mackey, 553 S.W.2d 337 (Tenn. 1977). The evidence does not preponderate against the trial court's finding that the appellant's plea was knowing and voluntary.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

The petitioner alleges that the assistance of his appointed counsel was so defective as to require reversal of his conviction. In order for the petitioner to be granted relief on the grounds of ineffective assistance of counsel, he must establish that the advice given or the services rendered were not within the range of competence demanded of attorneys in criminal cases and that, but for his counsel's deficient performance, the result of his trial would have been different. Strickland v. Washington, 466 U.S. 668, 693, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). 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 pled guilty

and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52, 53, 88 L. Ed. 2d 203, 106 S. Ct. 366 (1985).

Much of appellant's argument regarding this issue is a reiteration of the constitutionality of his guilty plea, with which we dealt above. The record indicates that the appellant was informed of his constitutional rights by the public defender, both by letter and by consultation. The appellant also alleges that his appointed counsel did not inform him of the elements of the offense of reckless endangerment to which he pleaded guilty, a lesser offense than aggravated assault for which he was indicted. Appellant's appointed counsel testified that she consulted with him on three different dates as well as on the date of guilty plea. Counsel testified that the appellant was very aware of his constitutional rights, was informed of the elements of the offense with which he was charged, and appeared to be very intelligent and able to assist in his defense. The appellant was not informed of the elements of reckless endangerment. Appellant’s counsel did, however, advise him in detail regarding the consequences of a guilty plea. A particular problem with the case was that the district attorney was attempting to withdraw his offer of a plea to the lesser offense before the plea was entered. The record does not contain any information regarding the circumstances of the offense other than the affidavits for the issuance of the arrest warrants. There is no indication that the affidavits were considered by the trial court in the writ hearing. Also, the appellant does not complain about the preparation done by his

appointed counsel in investigating the case.

The trial court concluded that the proof did not support the allegation of ineffective assistance of counsel. On this record we are unable to say that the proof in this case preponderates against that conclusion.

We find the issues presented for our review to be without merit. The judgment of the trial court is affirmed.

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Lynn W. Brown, Special Judge

CONCUR:

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David G. Hayes, Judge

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Jerry L. Smith, Judge