

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JANUARY 1996 SESSION

PATRICK WILLIAMS,

APPELLANT,

VS.

STATE OF TENNESSEE,

APPELLEE.

* C.C.A. NO. 01C01-9506-CR-00190

* DAVIDSON COUNTY

* Hon. J. Randall Wyatt, Jr., Judge

* (Post-Conviction)

*

FILED

May 9, 1996

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OPINION FILED: _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The petitioner, Patrick Williams, appeals the trial court's denial of his petition for post-conviction relief.

The issues presented for our review are as follows:

- (1) whether the petitioner received the effective assistance of counsel;
- (2) whether the petitioner entered his guilty pleas knowingly and voluntarily; and
- (3) whether the petitioner agreed to serve an illegal sentence which should be set aside.

We find no error and affirm the trial court's judgment.

The petitioner was indicted on three counts of aggravated robbery and two counts of aggravated assault. On October 7, 1993, he pled guilty to the three counts of aggravated robbery and one of the aggravated assault counts and agreed to a Range I, twenty-year sentence: three eight-year sentences for the aggravated robbery counts, one of which is to be consecutive, and a consecutive four-year sentence for the aggravated assault count. The state dismissed the second count of aggravated assault.

A little more than a year later, the petitioner, through counsel, filed an amended petition for post-conviction relief. Following an evidentiary hearing, the trial court denied relief, finding that the petitioner received the effective assistance of counsel and that he had entered his

guilty pleas knowingly and voluntarily. The trial court also found that the sentences were not illegal.

I

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 (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 (1985).

At the hearing, the petitioner claimed his trial counsel was ineffective for the following reasons:

- (1) she failed to fully explain to the petitioner that one of the eight-year sentences for aggravated robbery was consecutive to the other two, leading him to believe his effective sentence was twelve years instead of the twenty years actually agreed upon;
- (2) she failed to explain to the petitioner or to consider in advising the petitioner the law concerning when consecutive sentences may be imposed;
- (3) she failed to advise him of his right to appeal the consecutive sentences or the time frame within which an appeal must be filed; and
- (4) she failed to object when the defendant entered his guilty pleas in

violation of the mandates of Boykin v. Alabama, 395 U.S. 238 (1969); State v. Mackey, 553 S.W.2d 337 (Tenn. 1977); and Rule 11 of the Tennessee Rules of Criminal Procedure.

On cross-examination, the petitioner conceded that trial counsel had successfully negotiated a dismissal of one of the aggravated assault charges and that she had persuaded the state to reduce its original offer of thirty years to twenty years. Although the petitioner insisted that he did not read the document beforehand, he also admitted having signed the petition to enter guilty pleas.

Trial counsel testified that she had worked at the public defender's office for six years and had represented about "a thousand" criminal defendants. She stated that she read the petition to enter the guilty pleas "word for word" to the petitioner and that he appeared to fully understand that he would have to serve a sentence of twenty years. While acknowledging that she did not "take [the] T.C.A. ... and sit down to explain to Mr. Williams" the statutory grounds for consecutive sentencing, trial counsel claimed that she had also informed the petitioner of the "potential punishment he faced ... includ[ing the risk of] consecutive sentencing" before he accepted the state's offer. Trial counsel conceded that she did not discuss with the petitioner the option of entering an open guilty plea thereby authorizing the trial court to impose a sentence.

The trial court found no merit to the first two

claims of ineffective counsel. We agree. The burden is on the petitioner to show that the evidence preponderates against the findings of the trial judge. Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978), cert. denied, 441 U.S. 947 (1979). Otherwise, findings of fact made by the trial court are conclusive. Graves v. State, 512 S.W.2d 603, 604 (Tenn. Crim. App. 1973). The trial court accredited the testimony of trial counsel. The petitioner failed to demonstrate that he would not have entered his plea even if he had known that the trial judge might not have imposed consecutive sentences. In short, the evidence simply does not preponderate against the findings of the trial court.

We reject outright the third claim, i.e., that trial counsel failed to timely inform the petitioner of his right to appeal the sentence. That is a privilege the petitioner expressly waived, after warnings from the trial judge, as a part of the plea agreement. A defendant's right to appeal after a guilty plea is limited. An appeal may occur only when there is no agreement as to the sentence. Tenn. R. Crim. P. 37(b) and Committee Comments; Tenn. R. App. P. 3(b); Eric Williamson v. State, No. 02C01-9305-CR-00096 (Tenn. Crim. App., at Jackson, May 11, 1994), perm. to appeal denied, (Tenn. 1994). Because the petitioner accepted a specific sentence in this case, trial counsel could not properly advise him that he had any right to appeal.

As pointed out in the next section of this opinion, we also hold that the petitioner was adequately warned of his

constitutional rights before entering his pleas. Thus trial counsel could not have been in error for failing to require more or otherwise object to the admonitions made. In our view, the petitioner received the effective assistance of counsel.

II

The petitioner's second issue is that his pleas were neither knowingly nor voluntarily entered. 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 before the acceptance of a guilty plea. Included among those rights is the privilege against self-incrimination, the right to confront witnesses, and the right to a trial by jury. An intentional relinquishment of these 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 shifts the burden of proof to the state. Id. at 139-40. If the trial court substantially complies 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 the petitioner was aware of his constitutional rights, he is not entitled to relief.

The petitioner contends his guilty pleas were not knowingly and voluntarily entered because the trial court failed to address the following factors:¹

- (1) that the guilty pleas could be used to enhance punishment for future crimes;
- (2) the nature of the charges upon which the plea is based;
- (3) whether the plea was voluntary;
- (4) that if the defendant failed to respond truthfully to questions asked about the crimes during the submission hearing, he could be prosecuted for perjury or false statement; and
- (5) that punishment for the present crime to which he is pleading guilty could be enhanced if prior convictions or certain other factors are established at the sentencing hearing.

The transcript of the submission hearing clearly establishes that the trial court adequately addressed the first three factors.

Initially, the trial court warned the petitioner, "If you are convicted again in the future, then these four convictions here today could possibly be used to enhance some future penaltyAnd do you understand that...?" The defendant responded, "Yes, sir." Moreover, this warning is

¹Some of these factors were complained of both in the evidentiary hearing and in petitioner's brief on appeal, while others were only mentioned either in petitioner's brief or in the hearing but not in both. We have addressed all of these assertions.

not constitutionally based and would not, even if omitted, qualify as a ground for post-conviction relief. State v. Neal, 810 S.W.2d 131, 138 (Tenn. 1988).

Secondly, the trial court advised the petitioner that he was pleading guilty to three counts of aggravated robbery and one count of aggravated assault. The state announced by stipulation the factual basis for the pleas. Thus the petitioner was sufficiently advised of the nature of the charges.

As to the third factor, the petitioner claims he only pled guilty because his counsel had said that the state would otherwise withdraw its plea offer; however, the petitioner answered the questions of the trial judge during the submission hearing as follows:

Q: [A]re you entering this plea of guilty here, even though it's not one of your best days, I understand that, but is it what you've chosen to do under all of the circumstances?

A: Yes.

Q: Okay. And are you doing this of your own voluntary decision?

A: Yes.

This dialogue establishes the trial court examined the petitioner about the voluntariness of the guilty plea. Certainly, the proof in this record does not preponderate against the trial court's finding that the plea was knowingly and voluntarily made.

As to the claims that the petitioner was not warned

of the possibility of a perjury charge or any likelihood of a sentence enhancement, the transcript establishes that the trial court did not address these issues during the submission hearing. See Tenn. R. Crim. P. 11(c)(5). Neither of these warnings of the advice litany are, however, constitutionally mandated and therefore are not cognizable as a basis for relief in a post-conviction proceeding. Teague v. State, 789 S.W.2d 916, 917 (Tenn. Crim. App. 1990) and Tenn. Code Ann. § 40-30-105. Furthermore, the issue of advising the petitioner that if he pleads guilty, prior convictions or other factors may be established that enhance his sentence for the crime to which he is pleading guilty, is clearly inapplicable under the facts of this case. The petitioner agreed to a specific sentence, which the trial court could either approve or reject but could not alter. See Tenn. R. Crim. P. 11(e). Here, there was no risk that factors could be established which would enhance his sentence. The Mackey court stated this advice should be given only "if applicable" to the defendant under consideration. See State v. Mackey, 553 S.W.2d at 341.

III

The petitioner's final contention is that the sentence was illegal because he did not meet any of the statutory classifications for consecutive sentencing. See Tenn. Code Ann. § 40-35-115. We disagree.

In State v. Mahler, 735 S.W.2d 226 (Tenn. 1987), our supreme court held that a defendant who had entered a knowing

and voluntary plea of guilt to a sentence within the statutory range could accept classification as a Range II offender, even though he did not technically qualify above Range I. See Tenn. Code Ann. § 40-35-105 through -109. The sentence was affirmed on the basis that the defendant could legitimately enter a plea agreement within the range of punishment provided by law, even if he did not have a sufficient prior record to warrant the higher classification within the range. State v. Mahler, 735 S.W.2d at 227-28. Because the range classification is based upon fact (prior criminal history of the defendant) and therefore subject to plea negotiation, an arrangement as that made in Mahler is permissible.

The reasoning in Mahler controls here. The applicability of consecutive sentencing is also based on fact and is therefore subject to plea negotiation. We hold that the petitioner's plea agreement to serve consecutive sentences, where statutory factors suggesting consecutive sentencing may not exist, is not illegal and cannot be set aside.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Judge

CONCUR:

Paul G. Summers, Judge

Joseph M. Tipton, Judge