IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1993

FILED

November 22, 1995

Cecil Crowson, Jr.
Appellate Court Clerk

RICKY J. HARRIS	)	
APPELLANT	)	NO. 03C01-9208-CR-00288
	)	CARTER COUNTY
V.	)	HON. JAMES C. WITT, JUDGE
	)	(Post-Conviction)
STATE OF TENNESSEE	)	
APPELLEE	)	

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AFFIRMED

OPINION FILED:____________________

JERRY SCOTT, PRESIDING JUDGE

OPINION

This is an appeal by Ricky J. Harris in which he contends that the dismissal of his post-conviction relief petition was error. He says that his plea of nolo contendere was not knowing and voluntary because the trial judge failed to advise him in accordance with Tenn.R.Crim.P. 44(c). The state concedes that Rule 44(c) procedures were not followed, but contends the omission is not constitutional in nature and thus cannot be raised through a post-conviction petition. See State v. Neal, 810 S.W.2d 131, 137 (Tenn. 1991); Tenn. Code Ann. § 40-30-105 [repealed]. The appellant has failed to establish that his plea was unknowing or involuntary. Therefore, we affirm.

According to testimony at the appellant's sentencing hearing, the appellant and his wife, Laverne Harris, represented themselves as president and vice-president, respectively, of "LJH, Inc." when in fact no such corporation existed. They retained joint counsel to defend them on charges arising from the misrepresentations. Defense counsel decided that, if the case was tried, the best defense for both would be that they did not know the corporation did not exist. The appellant entered into a plea agreement and was sentenced to three years for forgery, Tenn. Code Ann. § 39-3-802, et. seq. [repealed]. The prosecution of his wife ceased as part of the plea agreement.

Subsequently, the appellant was convicted of first degree murder for the killing of his mother-in-law. Evidence of his prior conviction was introduced at trial. On direct appeal the appellant unsuccessfully challenged the admission of the forgery conviction at the murder trial. State v. Ricky Jerome Harris, Tennessee Criminal Appeals, opinion filed at Knoxville, November 8, 1990.

In his post-conviction petition the appellant contended that his plea of nolo contendere was not knowing and voluntary because he was not advised that the forgery conviction could be used to enhance his sentence in future

cases. He also argued that his plea was not knowing and voluntary since the trial court failed to advise him of his rights under Tenn.R.Crim.P. 44(c).

The trial judge agreed that the failure to advise the appellant that the forgery conviction could be used to enhance future sentences violated the petitioner's rights under State v. Mackey, 553 S.W.2d 337, 341 (Tenn. 1977). However, this Court reversed, concluding the omission was not a constitutional violation. The cause was remanded for determination of whether the nolo contendere plea was otherwise knowing and voluntary. Ricky J. Harris v. State of Tennessee, Tennessee Criminal Appeals, opinion filed at Knoxville, March 21, 1991. On remand, the petition for post-conviction relief was dismissed.

After the expiration of thirty days, the appellant filed his notice of appeal. Although the state contends that this Court should not do so, we have, in the interest of justice, waived the notice of appeal filing requirement to determine whether the trial judge's failure to advise the appellant of his rights under Tenn.R.Crim.P. 44(c) was a violation of the appellant's constitutional right to the effective assistance of counsel. Tenn.R.App.P. 4(a), Tenn. Code Ann. § 27-1-123.

Tennessee Rules of Criminal Procedure 44(c) provides:

> Whether two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

This rule conforms to Federal Rules of Criminal Procedure 44(c). See 1984 Amendment Comments, Tenn.R.Crim.P. 44(c). According to the comments to the 1979 federal rule, "Rule 44(c) established a procedure for avoiding the occurrence of events which might otherwise give rise to a plausible post-conviction claim that because of joint representation the defendants in a criminal case were deprived of their Sixth Amendment right to the effective assistance of counsel." 1979 Amendment Comments, Fed.R.Crim.P. 44(c).

It is not enough for the appellant to show that the trial court did not follow the procedures required by Rule 44(c), Tenn.R.Crim.P., he must show the omission deprived him of his Sixth Amendment right to the effective assistance of counsel. Even if the trial court had followed the Rule 44(c) procedures in this case, that would not necessarily mean a conflict of interest would not have arisen. See 1979 Amendment Comments, Fed.R.Crim.P. 44(c). Moreover, the failure to give the Rule 44(c) instruction did not mean that a conflict of interest occurred. See Id. Rather, the particular facts and circumstances surrounding defense counsel's joint representation must be considered, in conjunction with whether or not Rule 44(c) procedures were followed, to determine whether joint representation deprived the appellant of the effective assistance of counsel.

"[I]n a post-conviction proceeding the burden is on the petitioner to prove by a preponderance of the evidence the allegations in his petition." Clenny v. State, 576 S.W.2d 12, 14 (Tenn.Crim.App. l978). When this Court reviews a petitioner's claim concerning his counsel's representation, we must determine whether the advice given or services rendered by the attorney were "within the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Also, there must be a reasonable probability but for counsel's error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694, 104 S.Ct. 2052, 2064, 2067-68, 80 L.ED.2d 674 (1984); Best v. State, 708 S.W.2d 421,

422 (Tenn.Crim.App. 1985). Because both a showing of deficient representation and prejudice are required when a petitioner alleges ineffective assistance of counsel, we reject a per se rule that would mandate reversal if a trial court accepts a plea without giving the appropriate joint representation warnings.[1]

The appellant has not pointed to any evidence demonstrating that the joint representation fell below the acceptable level of competence or that the joint representation created a prejudicial conflict. The appellant was informed at the plea proceedings in accordance with Mackey, 553 S.W.2d at 341, that he had a right to an attorney and that, if he could not afford an attorney, one would be appointed. Moreover, the appellant has not shown how his defense or his wife's defense would have differed had the case been tried, or that he would not have entered his nolo contendere plea had he been represented by separate counsel. The mere fact that the plea agreement which the appellant accepted advantaged his wife does not establish a prejudicial conflict of interest. To the contrary, the appellant's acceptance of the settlement tends to indicate an absence of conflicting interests, in that it is obvious that he entered the plea in exchange for the dismissal of the charge against his spouse - not an uncommon occurrence when husbands and wives are jointly charged.

Accordingly, because the appellant has not established that counsel's joint representation was outside the range of competence demanded of attorneys in criminal cases or that there was a prejudicial conflict, the issue has no merit.

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[1]Some showing of prejudice is necessary pursuant to the Supreme Court's holding in Strickland v. Washington. Requiring a showing of prejudice is consistent as well with earlier precedent in the Sixth Circuit. See Ray v. Rose, 535 F.2d 966, 974 (Sixth Cir. l976).

The judgment is affirmed.

JERRY SCOTT, PRESIDING JUDGE

CONCUR:

(Not Participating)
ROBERT K. DWYER, JUDGE

GARY R. WADE, JUDGE