IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

APRIL SESSION, 1995

JAMES EARNEST TAYLOR	)	
	)	
APPELLANT	)	
	)	NO. 02C01-9412-CC-00295
	)	
	)	DYER COUNTY
V.	)	
	)	HON. JOE G. RILEY
	)	JUDGE
	)	
	)	(Post-Conviction Relief)
STATE OF TENNESSEE	)	
	)	
APPELLEE	)	

FOR THE APPELLANT:

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AFFIRMED

OPINION FILED: _____

JERRY SCOTT, PRESIDING JUDGE

O P I N I O N

Following a jury trial, the appellant, James Ernest Taylor, was convicted of selling cocaine for which he received a sentence of eleven years with the Tennessee Department of Correction as a Range I standard offender. On direct appeal, this Court affirmed the trial court's decision. State v. Taylor, No. 02-C-01-9205-CC-00118, Dyer Co. (Tenn. Crim. App., Jackson, July 14,1993). The appellant then filed a petition for post-conviction relief. The trial court held an evidentiary hearing and the judge found that all issues raised were either previously determined or without merit. The appellant now appeals the denial of post-conviction relief, raising the following issues:

> (1) Whether his Sixth Amendment right to effective assistance of counsel was violated?
>
> (2) Whether the State erred in its failure to call the attorney who was initially appointed to represent the appellant to testify at the post-conviction hearing?
>
> (3) Whether the trial court as well as trial counsel erred in their failure to have the appellant mentally evaluated when he insisted on representing himself at trial?

In post-conviction relief proceedings the petitioner has the burden of proving the allegations in his or her petition by a preponderance of the evidence. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the factual findings by 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). In the first issue, the appellant alleges that his trial counsel was ineffective because of his failure to investigate properly and his failure to advise the appellant of his Fifth Amendment right as well as the maximum and minimum penalties which he might receive under the law. He claims that he did not understand the charges against him nor did he comprehend his Fifth Amendment rights.

The appellant omitted from his ineffective assistance of counsel argument the fact that he unequivocally expressed his desire to represent himself. On

December 10, 1991, in a pre-trial hearing, the appellant informed the trial judge that he wanted to proceed pro se. The judge questioned him thoroughly regarding his understanding of his situation. He explained that the appellant would be unable to investigate his case since he was incarcerated. He explained that an attorney would be provided to the appellant at no expense to him to which the appellant responded "[n]o, even if they [sic] free, I don't want him [sic]." The judge told the appellant that it was not advisable for him to represent himself; however, he adamantly insisted that he did not want an attorney. Though the appellant continually told the judge that he did not understand, it appears from the transcript that the appellant was obstinately refusing to cooperate, rather than expressing a sincere lack of understanding. Following the hearing, the trial judge permitted the appellant to waive his right to counsel.

An attorney, Bill Randolph, had been initially appointed to represent the appellant. At that pre-trial hearing, Mr. Randolph told the judge that the appellant had expressed from the outset that he did not want Mr. Randolph representing him and that he did not plan to cooperate with him. The appellant testified at the pre-trial hearing that Mr. Randolph had never discussed the case with him. At the post-conviction hearing, the appellant said "I'm quite sure at no time that Mr. Randolph was ever my counselor. Of course, Judge Riley might have appointed him to [sic] me, but I never did accept Mr. Randolph neither [sic] time as my counselor."

In ruling that an accused in a criminal prosecution has a constitutional right to represent himself, the United States Supreme Court said that "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant-- not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused,

against his considered wish, thus violates the logic of the Amendment." Faretta v. California, 422 U.S. 806, 820, 95 S.Ct. 2525, 2533-34, 45 L.Ed.2d 562 (1975). Our Supreme Court has indicated that the validity of a defendant's waiver of the right to counsel hinges upon whether he "is apprised of the dangers and disadvantages of self-representation so that 'he knows what he is doing and his choice is made with eyes open.' " State v. Northington, 667 S.W.2d 57, 61-62 (Tenn. 1984) (citation omitted). In Northington, the Supreme Court quoted with approval the guidelines laid down by the United States Supreme Court in Von Moltke v. Gillies, 332 U.S. 708, 723-24, 68 S.Ct.316, 323 92 L.Ed. 309 (1948), as those which should be observed by trial judges before a defendant is permitted to waive his right to counsel:

> A judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.

Northington, 667 S.W.2d at 60. However, it is significant to note that this Court recently held that a defendant's right to self-representation was violated when the trial court denied his request to proceed pro se on the ground that he did not possess sufficient knowledge to represent himself. State v. Herrod, 754 S.W.2d 627, 630 (Tenn. Crim. App. 1988).

As discussed above, the trial judge in this case thoroughly questioned the appellant before finding that he was voluntarily and intelligently waiving his right to counsel. Consequently, we find that the trial judge properly permitted this appellant to waive his right to trial counsel. In so doing, the appellant gave up any claim that he received the ineffective assistance of counsel. Our Supreme Court has stated that "[t]he right of a defendant to participate in his own defense

is an alternative one. That is, one has a right either to be represented by counsel or to represent himself, to conduct his own defense." State v. Melson, 638 S.W.2d 342, 359 (Tenn. 1982). The appellant chose to exercise his right of self representation, and he cannot now complain about the performance of the attorney whose counsel he declined.

II.

Next, the appellant urges that the state erred in its failure to call the attorney who was initially appointed to represent him to testify at the post-conviction hearing. This Court has held that when an ineffective assistance of counsel claim is made and a post-conviction hearing is held, the state should present the attacked counsel to show what occurred below. State v. Craven, 656 S.W.2d 872, 873 (Tenn. Crim. App. 1982). However, as heretofore set forth, the attorney who was initially appointed in this case was rejected by the appellant when the appellant asserted his right of self representation. There was, therefore, no error in not calling the attacked attorney to testify at the post-conviction hearing.

III.

In the final issue, the appellant claims that the trial judge as well as trial counsel erred when they failed to have him mentally evaluated after he insisted upon representing himself at trial. He submits that an evaluation would have shown not only that he was incompetent to defend himself at trial but also that he was incompetent to even stand trial. "It is a fundamental principle of our system of criminal justice that one who is charged with a crime cannot be required to plead to the offense, be put to trial, convicted, or sentenced while insane or otherwise mentally incompetent." Berndt v. State, 733 S.W.2d 119, 121 (Tenn. Crim. App. 1987). Because the conviction of a defendant who is mentally incompetent is a violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution, as well as our state constitution,

Berndt, 733 S.W.2d at 122, this issue is appropriately raised in a post-conviction case.

The applicable statute provides for the psychological evaluation of a criminal defendant as follows:

> When a person charged with a criminal offense is believed to be incompetent to stand trial . . . the criminal, circuit, or general sessions court judges may, upon their own motion or upon petition by the district attorney general or by the attorney for the defendant and after hearing, order the defendant to be evaluated . . .

Tenn. Code Ann. § 33-7-301 (1995 Supp.). This Court has maintained that mental evaluations are required only if the evidence warrants a belief that the defendant is incompetent to stand trial. State v. West, 728 S.W.2d 32, 34 (Tenn. Crim. App. 1986), State v. Lane, 689 S.W.2d 202, 204 (Tenn. Crim. App. 1984). Moreover, the statute gives the trial court the discretion whether to order a mental evaluation. State v. Rhoden, 739 S.W.2d 6, 16 (Tenn. Crim. App. 1987).

The standard for determining if a defendant is competent to stand trial, which is well entrenched in our law, was clearly articulated in the case of Dusky v. United States, 362 U.S. 402, 80 S.Ct.788, 789, 4 L.Ed.2d 824 (1960); (the "test must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding--and whether he has a rational as well as factual understanding of the proceedings against him.") See also State v. Benton, 759 S.W.2d 427, 429 (Tenn. Crim. App. 1988); Mackey v. State, 537 S.W.2d 704, 708 (Tenn. Crim. App. 1975). The evidence presented at the post-conviction hearing shows that the appellant's claim rests solely on allegations that he had a limited education. As part of his case, a social worker testified that he had only attended school through the third grade. There was testimony from the principal of the prison adult education program to the effect that test results showed the appellant performed at a fifth grade level.

Further, the principal said that he had progressed poorly in the adult education program and had dropped out twice.

The Assistant District Attorney General who had prosecuted the appellant also testified at the post-conviction hearing. He remembered that the appellant had expressed several times during the trial that he did not understand the trial judge; however, he was not certain that the appellant truly failed to understand. The attorney also recalled the appellant saying he could neither read nor write, though he did notice and point out to the jury that the appellant was taking notes during the trial. Indeed, the Assistant District Attorney General testified that he was impressed with the appellant's competent representation of himself. It appeared to the prosecutor that, though the appellant had not been educated in school, he had been educated by life. In light all of the evidence presented at the post-conviction hearing, we do not find that the proof shows that the appellant lacked the ability to consult with a lawyer or that he failed to rationally and factually understand the charges against him. Therefore, the trial judge did not abuse his discretion by his failure to order that the appellant be mentally evaluated prior to trial. This issue has no merit.

Finding no merit to any of the issues, the judgment denying post-conviction relief is affirmed.

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JERRY SCOTT, PRESIDING JUDGE

CONCUR:

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JOE B. JONES, JUDGE

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JOHN H. PEAY, JUDGE