IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1996 SESSION

MICHAEL A. FOURNIER,	)	
	)	
Appellant,	)	No. 01C01-9502-CC-00046
	)	
	)	Marshall County
v.	)	
	)	Hon. Charles Lee, Judge
	)	
STATE OF TENNESSEE,	)	(Post-Conviction)
	)	
Appellee.	)	

DISSENTING OPINION

I dissent. For post-conviction relief purposes, I believe that the petitioner neither alleged nor proved any violation of his constitutional rights that would justify vacating the judgment convicting him of reckless driving. The petition -- originally filed improperly in the general sessions court -- simply alleges that reckless driving is not a lesser included offense of DUI and "therefore the conviction entered in the 8th day of June, 1993 by the General Sessions Court of Marshall County is void." It contains no explanation of why a direct appeal was not pursued nor does it identify the specific constitutional right that has been violated.

At the beginning of the post-conviction evidentiary hearing, the petitioner again claimed that the reckless driving conviction was void. At the end of the hearing, the petitioner argued that he was not advised of his rights when the reckless driving conviction was entered and that he did not agree to such a conviction. The trial court found that the warrant was effectively amended to reckless driving with the agreement of the petitioner, through his counsel and with counsel's advice. It noted that the

petitioner made no claim of ineffective assistance of counsel and concluded that the conviction upon the amended warrant for reckless driving was valid.

I believe that the record before us shows, without question, that the determination of guilt for reckless driving in the original prosecution resulted from a deal reached with the consent of the petitioner and his counsel. It also shows that the result was obtained through a rough-hewn amendment to the DUI warrant, effectively changing it to a reckless driving warrant. Any disagreement, objection, or concern then existing in the petitioner's mind should have been addressed in an appeal of the conviction to the circuit court.

For the first time, the petitioner's brief on appeal states that the post-conviction petition was "on the primary grounds of ineffective assistance of counsel . . . ," a statement that is patently incorrect. Also, his brief asserts that the charging warrant could not be amended without his consent or after jeopardy attached. However, it ignores the trial court's finding that the petitioner agreed to the amendment. There simply exists no basis for granting any form of post-conviction relief.

In this respect, I cannot agree with the result reached in the majority opinion. As that opinion indicates, this case presents a disturbing picture of convenient justice that should not be condoned in a society governed by the rule of law. The result reached in the majority opinion constitutes fitting irony, indeed, in terms of granting the petitioner "relief" that actually places him back in the position of facing a charge of DUI, third or subsequent offense -- from the frying pan into the fire. But I fear, though, that it would take our ignoring the post-conviction law to do so. We should not give in to the

temptation. The fact that a "great road through the law"[1] was cut by the petitioner, his original counsel and the general sessions judge for some mutually convenient purpose should not mean that we ought to travel the same road -- no matter how poetic or apt the justice we see at road's end. Therefore, I dissent.

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Joseph M. Tipton, Judge

[1]In Robert Bolt's A Man for All Seasons, the following is attributed to Thomas Moore:

> "Would you cut a great road through the law to get after the devil? . . . and when the last law was down, and the devil turned round on you -- where would you hide . . . the laws all being flat?"
>
> "Yes, I'd give the devil benefit of law, for my own safety's sake."