

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1995 SESSION

FILED
May 3, 1996
Cecil Crowson, Jr.
Appellate Court Clerk

LARRY T. YOUNG,

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

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C.C.A. # 03C01-9501-CP-00008

KNOX COUNTY

Hon. Ray L. Jenkins, Judge

(Post-Conviction)

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OPINION FILED _____

AFFIRMED

GARY R. WADE, JUDGE

OPINION

The petitioner, Larry T. Young, appeals the trial court's denial of post-conviction relief. The issues presented for review are as follows:

(1) whether petitioner's four prior convictions used in finding the petitioner to be a habitual criminal violated double jeopardy principles, thus requiring his habitual criminal conviction to be set aside;

(2) whether the Knox County Juvenile Court was required to conduct a hearing under Tenn. Code Ann. § 37-234(a)(4) (Supp. 1973) to determine the mental status of the petitioner prior to transferring the charges to Knox County Criminal Court;

(3) whether the petitioner was denied the effective assistance of counsel at the guilty plea hearing and at the habitual criminal trial; and

(4) whether the petitioner's mental retardation and low level of education barred application of the waiver defense.

We affirm the judgment of the trial court.

The petitioner was convicted of second degree burglary. Because he had been convicted previously of other crimes, he was adjudged to be a habitual criminal and the sentence was enhanced to a term of life. This court affirmed on direct appeal. State v. Larry Thomas Young, No. 757 (Tenn. Crim. App., at Knoxville, July 31, 1981), perm. to app. denied, (Tenn. 1981).

On June 26, 1989, the petitioner filed a pro se petition challenging convictions in two separate counties.

Counsel was appointed and amendments to the petition were made. The petitioner then retained Douglas Trant, who was substituted as counsel and who filed additional amendments. At the evidentiary hearing, the petitioner did not address any of the claims set forth in the initial, amended petition but relied solely on the final amendments filed by his current counsel.

The trial court found that the petitioner had waived any issues concerning the underlying convictions because they were procedural in nature. As to the double jeopardy claim the trial court ruled as follows:

The language of the transfer was ambiguous but indicated an intent to remove the cases to Criminal Court. This was the only power of the Court on such a removal petition.

The trial court also held that the evidence was insufficient to establish that trial counsel had been ineffective by failing to investigate the mental condition of the petitioner:

Neither the circumstances, the actions of petitioner or the statements of his family would have alerted petitioner's trial counsel to examine petitioner's mental history and abilities.

In this appeal, the petitioner claims that he had been placed in jeopardy when the juvenile court initially adjudged him to be a delinquent and that his subsequent guilty pleas in the trial court should be set aside. He also asserts that the juvenile court should have first conducted a hearing to determine whether the petitioner was committable due to mental retardation or mental illness. The petitioner argues

that his trial counsel's failure to present these issues deprived him of the effective assistance of counsel. Finally, the petitioner contends that he could not have knowingly and voluntarily waived the issues because of his mental condition.

I

The petitioner challenges four of the five convictions used to prove he was a habitual criminal. He was a juvenile at the time of each of the four offenses and appeared first in the juvenile court. Former Knox County Juvenile Judge Richard F. Douglass signed an order on a printed form used for issuing citations in juvenile court. The printed material included these words, "It is, therefore, CONSIDERED, ORDERED, ADJUDGED AND DECREED as follows...." Three of the four citation forms were followed by handwritten notations: "Found guilty of probable guilt. See Order # C-2300 of even date." The handwriting on the form for the fourth offense stated, "[f]ound guilty of probable guilt and turned over to the Knox County Sheriff to be tried as an adult." Printed material appeared after each of the handwritten notations:

It is further ORDERED that this Court shall retain jurisdiction of this cause for the purpose of making such further or other orders herein for the welfare of any child named herein as may be from time to time found necessary.

The spaces contained in the provisions for holding a juvenile to be a "dependent, delinquent, or unruly child" were left blank on the forms for each offense. An order, also signed by Judge Douglass, provided, "[i]t is therefore ordered, adjudged and decreed that said child is found guilty of probable guilt and t[ur]ned over [to] the Knox County Sheriff to be tried as

an adult" on each of the charges. Judge Douglass issued separate transfer orders for trial as an adult.

The petitioner did not testify at the post-conviction hearing. Jackie Tipton Kitts, Knox County Juvenile Court clerk at the time of the transfers, testified that she had no personal recollection of the events that took place in the cases but confirmed that her handwriting appeared on each of the printed citation forms and the order. United States Congressman John J. Duncan, who, as an attorney, represented the petitioner at the juvenile hearing and at the guilty plea hearing in the underlying convictions, was not called as a witness by either the petitioner or the state. The record on appeal does not include a transcript of the testimony presented at the juvenile hearing.

The petitioner entered pleas of guilt in the Knox County Criminal Court "as a juvenile, being certified as such from juvenile court." His four felony convictions included grand larceny, burglary of an automobile, receiving stolen property exceeding \$100 in value, and taking an automobile of another for temporary use without consent of the owner. He claims that each of the underlying convictions relied upon for the finding of habitual criminality should be set aside on double jeopardy grounds because the juvenile court had, perhaps inadvertently, previously found him to be a delinquent. He argues that such a finding by the juvenile court was an adjudication on the merits and any subsequent convictions on the same charges should be ruled void. In

response, the state asserts a procedural defense. It contends that the petitioner cannot collaterally attack habitual criminal status without first challenging, in a separate proceeding, the underlying convictions.

The ruling of our supreme court in State v. McClintock, 732 S.W.2d 268, 272 (Tenn. 1987), requires petitioners to attack a facially valid, final judgment of a prior conviction through post-conviction procedures. See State v. Cottrell, 868 S.W.2d 673, 678 (Tenn. Crim. App. 1992); see also State v. John W. Buchanan, No. 01C01-9411-CC-00388, slip op. at 11 (Tenn. Crim. App., at Nashville, November 16, 1995). The proper procedure is for the petitioner to first attack the prior conviction and, if successful, then challenge the enhanced sentence. State v. McClintock, 732 S.W.2d at 274. There is a "presumption of regularity that attaches to facially sufficient, final judgments." Id. at 270.

In State v. Prince, 781 S.W.2d 846, 851 (Tenn. 1989), our supreme court held that a "defendant cannot maintain a collateral attack by post-conviction on his status of habitual criminality by attacking the validity of his predicate convictions." The court ruled as follows:

With certain exceptions ..., it is incumbent upon a defendant to establish the invalidity of prior guilty pleas before he can procedurally launch a collateral attack on a subsequent habitual criminal sentence on that basis.... The petition must be filed in the court where the earlier conviction took place to attack the constitutional validity of the prior conviction. A defendant successful

in such a proceeding may then expose the enhanced sentence on the subsequent conviction to a collateral attack as well.

Id. at 852. "[W]here the guilty plea convictions and the [finding of] habitual criminal ... took place in the same forum, judicial economy is best served by requiring petitions to be filed, consolidated and heard in the same court, at the same time." Id.; see also State v. McClintock, 732 S.W.2d at 274.

In our view, all of the prior judgments entered by the trial court were facially valid. The criminal court had jurisdiction over the petitioner "as a juvenile being certified as such from juvenile court." See Sawyers v. State, 814 S.W.2d 725, 729 (Tenn. 1991) (failure to follow proper transfer procedure by the absence of a transfer order does not affect subject matter jurisdiction). Thus the convictions would be voidable in the light most favorable to the petitioner, not void. The four convictions at issue here and the eventual finding of habitual criminality, however, occurred in Knox County. As suggested in Prince, judicial economy may be best served by allowing the petitioner to address his underlying convictions and his status as a habitual criminal in the same proceeding. See State v. McClintock, 732 S.W.2d at 274; Tenn. Code Ann. § 40-30-101, et seq.

The petitioner relies on the ruling in State v. Davis, 637 S.W.2d 471 (Tenn. Crim. App. 1982), as the basis for his claim of double jeopardy. In Davis, this court held

that the constitutional safeguard against double jeopardy was violated when the juvenile court "blended a transfer hearing with a hearing on the merits of the petition...." Id. at 474 (citing Breed v. Jones, 421 U.S. 519 (1975)). In Davis, the juvenile court held that "the child [was] a delinquent child ... [because the] child admitted [his guilt] to the charge in the petition during the prehearing conference." Id. at 473 (emphasis in original). The order in Davis was contradictory in that it also provided that the juvenile be transferred to the circuit court "to be dealt with as an adult." Id. at 473.

In State v. Jackson, 503 S.W.2d 185, 188 (Tenn. 1973), our supreme court ruled that a juvenile court trial for delinquency places the defendant in jeopardy; therefore, a subsequent trial as an adult would violate double jeopardy principles. See Tenn. Const. art. 1, § 10. Initially, we believe that the trial court correctly ruled that the claim had been waived. In State v. Hale, 833 S.W.2d 65, 67-68 (Tenn. 1992), our supreme court ruled that "defenses and objections based on defects in the institution of prosecution or in the indictment" are waived if they are not raised prior to trial. Further, a "knowledgeable and voluntary guilty plea constitutes a waiver of the right to claim double jeopardy." State v. Steve D. Anderson, No. 79, slip op. at 4 (Tenn. Crim. App., at Knoxville, July 13, 1989) (quoting Donaldson v. Rose, 525 S.W.2d 853, 856 (Tenn. Crim. App. 1975) (Oliver J., concurring)). Despite the waiver, we will address the merits of the petitioner's claim.

In short, the evidence in this regard supports the notion that the original proceeding was nothing more than a transfer hearing. While conceding that a more precise choice of language could have been utilized by the juvenile court to order the transfer, each order expressly provides that the petitioner be "turned over to the Knox County Sheriff to be tried as an adult." As in Davis, the juvenile court issued an order to transfer the petitioner to be tried as an adult. The primary confusion here resulted when the trial court added to the citation form the words "found guilty of probable guilt." It is our view, however, that this language establishes probable cause determination rather than an adjudication of guilt. See Tenn. Code Ann. § 37-234 (Supp. 1973); see also McGaha v. State, 461 F. Supp. 360, 361 (E.D. Tenn. 1978) (stating that a judge has limited statutory authority in a juvenile transfer hearing). Unlike Davis, the evidence here does not support a finding that the juvenile court ruled the petitioner to be a delinquent child.

The fact that the citation form retains jurisdiction does imply some duality. Written words, however, prevail on a printed form when the written and printed parts appear inconsistent. See West v. Laminite Plastics Mfg. Co., 674 S.W.2d 310, 313 (Tenn. App. 1984). Because there is some incongruity in this instance, the written language transferring the petitioner to be tried as an adult controls. Thus, the eventual convictions to the criminal charges did not violate double jeopardy principles.

II

The petitioner next claims that he should have been granted relief because the procedure used to transfer his juvenile charges violated his right to the due process of law. He specifically argues that his underlying convictions are void because Tenn. Code Ann. § 37-234(a) (4) (Supp. 1973) required the juvenile court to first conduct a hearing to determine whether the petitioner was committable due to mental retardation or illness. The petitioner alleges that if the hearing had taken place, the evidence would have established that he was committed due to his mental retardation. The state asserts that (1) the statute does not mandate a hearing; (2) the evidence failed to establish the petitioner's mental retardation; and (3) the petitioner has waived the issue by pleading guilty in criminal court.

Dr. William J. Kenney, a licensed psychologist, testified at the post-conviction hearing as an expert in the areas of school and clinical psychology. While he had never spoken to the petitioner, he had reviewed the petitioner's elementary school records and the transcript of the guilty plea hearing. Dr. Kenney testified that the petitioner's elementary school records indicated a fifth-grade education and an I.Q. of 66 on the Wechsler Intelligence Scale in 1965; that placed the petitioner in the lower one (1) percentile of intellectual functioning. The petitioner also scored a 74 on the Otis Quick Score in 1965. Dr. Kenney stated that I.Q. scores of 66 and 74 would place the petitioner in the category of mentally retarded. He believed that the I.Q. scores alone

"would ... call into question" his competency to stand trial and that a mental evaluation should have been conducted. He testified that the issue of whether the petitioner was committable to an institution for the mentally retarded was "something that would have to be considered and looked at very closely" and questioned the petitioner's ability to understand a waiver of his constitutional rights at the time of the guilty pleas. Dr. Kenney testified that it would be very difficult for a person within the mentally retarded range to understand the complexity of the issues and that more procedures would be required in order to determine whether the petitioner had effectively waived his various constitutional rights.

The record of the guilty plea proceeding does establish that the petitioner could not read or write at the time of the transfer hearing. The trial court, however, took several precautions to insure that the petitioner understood his constitutional rights. It permitted the petitioner's mother to sit with him throughout the hearing because it "want[ed] to be sure that [the petitioner] understood" the effects of his guilty plea. The trial court asked the petitioner several times whether he understood the nature of the proceeding to which he responded, "I understand." The petitioner was asked several times whether he had any questions and was given time with his counsel to review the documents necessary for the acceptance of the pleas.

Under the law in effect at the time of this case, a

juvenile could be transferred to be tried as an adult upon petition, notice, and hearing. Tenn. Code Ann. § 37-234 (Supp. 1973). The statute provided, in part, as follows:

[T]he court before hearing the petition on its merits may transfer the child ... to be dealt with as an adult ... if:

* * *

(4) the court finds that there are reasonable ground to believe that

* * *

(ii) the child is not amenable to treatment or rehabilitation as a juvenile through available facilities;

(iii) the child is not committable to an institution for the mentally retarded or mentally ill....

Tenn. Code Ann. § 37-234(a)(4)(ii) & (iii) (Supp. 1973).

The state relies on State v. Hale, 833 S.W.2d 65 (Tenn. 1992), for its position that the petitioner has waived any claim for relief. In Hale, our supreme court held that procedural defects in a transfer hearing are waived by a juvenile if not raised prior to trial. Id.; Tenn. R. Crim. P. 12(b)(1) & (2). We agree, therefore, that the issue was waived upon the entry of the guilty pleas in the trial court.

Notwithstanding the waiver issue, we find no merit to petitioner's argument. The petitioner cites no authority which would require the trial court to conduct a hearing to determine the petitioner's mental status prior to his transfer to trial court. Our own search failed to find any such authority. The statute merely provided that the trial court,

among other things, find that the child was not amenable to treatment or rehabilitation as a juvenile and that the child was not committable to an institution for the mentally retarded or mentally ill. Tenn. Code Ann. § 37-234(a)(4). Because the transcript from the juvenile hearing was not provided, we are unable to determine whether the trial court made such a finding. The petitioner has the burden to establish a record adequate to support his claims. See Clenny v. State, 576 S.W.2d at 14. Moreover, the petitioner did not prove that he was committable to an institution for the mentally retarded at the time of the transfer; Dr. Kenney merely testified that due to the petitioner's low I.Q. scores the issue needed to be "considered and looked at very closely." The burden is always on the petitioner to show that the evidence preponderates against the findings of the trial judge. Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990); Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978). Here, he simply failed to prove his assertions.

III

The petitioner next argues that he received ineffective assistance of counsel at both the guilty plea hearing and the habitual criminal trial because his trial counsel failed to raise the double jeopardy issue and the procedural defect in transferring the petitioner to be tried as an adult. We disagree.

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, he must first

establish that the services rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Second, he must show that the deficiencies "actually had an adverse effect on the defense." Strickland v. Washington, 466 U.S. 668, 693 (1984). Should the petitioner fail to establish either factor, he is not entitled to relief.

Moreover, on appeal, the findings of fact made by the trial court are conclusive and will not be disturbed unless the evidence contained in the record preponderates against them. Rhoden v. State, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991); Brooks v. State, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988). The burden is on the petitioner to show that the evidence preponderated against those findings. Clenny v. State, 576 S.W.2d at 14.

At the evidentiary hearing, George Penn, counsel for the petitioner at the habitual criminal trial, testified that he recalled nothing from his interviews with the petitioner or his family that would have indicated that the petitioner was mentally retarded or incompetent. He did not remember reviewing petitioner's school or juvenile records but stated that petitioner's I.Q. scores would have been only one factor to consider. He also did not believe that any double jeopardy violation had occurred in the underlying convictions.

First, no double jeopardy violation occurred. Thus, the petitioner suffered no prejudice by his counsel's failure

to raise the meritless issue at the submission hearing or at the trial on habitual criminality. Secondly, the evidence does not preponderate against the trial court's conclusion that the circumstances would not have warranted an examination of the petitioner's mental state. The scope of review is limited on appeal. When there is evidence to support a factual determination, this court is bound to the conclusions of the trial court. Because neither ground served as a basis for relief, no prejudice resulted from any claimed deficiency on the part of counsel.

IV

As his final claim, the petitioner argues that his mental retardation at the time of the transfer hearings and the guilty pleas precluded any application of the waiver defense. Because, however, we have determined that there was no double jeopardy violation, waiver is irrelevant. Further, we need not address waiver since a juvenile court is not required to conduct a separate hearing to determine whether there are reasonable grounds to believe that the juvenile is committable.

Accordingly, the judgment of the trial court is affirmed.

Gary R. Wade, Judge

CONCUR:

Joseph M. Tipton, Judge

(NOT PARTICIPATING)
Joe D. Duncan, Special Judge