IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1995 SESSION

LARRY T. YOUNG,	)	
	)	
Appellant,	)	No. 03C01-9501-CR-00009
	)	
	)	Knox County
v.	)	
	)	Hon. Ray L. Jenkins, Judge
	)	
STATE OF TENNESSEE,	)	(Post-Conviction)
	)	
Appellee.	)	

CONCURRING OPINION

I concur in the results and most of the rationale of Judge Wade's opinion. Contrary to the view expressed in that opinion, though, I believe that the juvenile court orders in the record do not have substantive blank spaces, but contain language that could easily be interpreted as findings of delinquency. However, I find the orders to be so facially contradictory that I cannot discern from them alone their legal effect. Under these circumstances, the burden was on the petitioner to prove that jeopardy attached at the juvenile proceeding so as to bar his further prosecution. No such evidence exists in the record before us. In fact, some of the juvenile court records admitted

into evidence tend to dispel any notion that the juvenile proceeding was anything other than a transfer hearing.[1] In this respect, this case is somewhat similar to Proctor v. State, 868 S.W.2d 669, 671-72 (Tenn. Crim. App. 1992), app. denied (Tenn. 1993), in which this court relied upon evidence showing that the juvenile proceeding was, in fact, a transfer hearing even though the record reflected that a "finding" of delinquency was initially entered.

As significantly, given such a record, I believe that by pleading guilty pursuant to a plea bargain and with the assistance of counsel, the petitioner is presumed for post-conviction relief purposes to have waived the double jeopardy issue he now seeks to raise. See T.C.A. § 40-30-112(b) [repealed 1995]; House v. State, 911 S.W.2d 705, 714 (Tenn. 1995). In response, the petitioner relies upon Menna v. New York, 423 U.S. 61, 62, 96 S. Ct. 241, 242 (1975) and United States v. Broce, 488 U.S. 563, 574-76, 109 S. Ct. 757, 765-66 (1989), in which the United States Supreme Court stated that a counseled guilty plea, by itself, does not necessarily waive a double jeopardy claim where the record, on its face, shows the double jeopardy violation. However, as previously noted, I do not believe that the existing records for the juvenile proceedings and the guilty pleas show on their face the existence of a double jeopardy violation. Therefore, Menna and Broce are not bars to the statutory presumption of waiver.

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[1]The record contains a letter to the petitioner's parents by the case work supervisor notifying them that the hearing was to be a transfer hearing. Also, the "Court Testimony Notes" regarding the petitioner's hearing in juvenile court, identified by the then juvenile court clerk to have been taken by her in court, state the disposition of the charges to be, "Found guilty of probable guilt & turned over to the Knox County Sheriff to be tried as an adult."

Also, given the fact that the petitioner's attorney for the juvenile proceedings and guilty pleas did not testify and that the petitioner presented no other proof about the circumstances surrounding his guilty pleas, the record does not contain any substantive indication that his attorney rendered ineffective assistance so as to rebut the presumption of waiver. Therefore, I would hold that the double jeopardy claim was waived by the petitioner's entry of valid guilty pleas.

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Joseph M. Tipton, Judge