

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1996 SESSION

<p>FILED</p> <p>March 4, 1997</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

<p>HOWARD CLIFTON KIRBY, Appellant, V. STATE OF TENNESSEE, Appellee.</p>	<p>)) C.C.A. No. 03C01-9606-CR-00209)) Knox County)) Honorable Mary Beth Leibowitz, Judge)) (Post-Conviction))</p>
--	--

FOR THE APPELLANT:

David M. Eldridge
 Attorney at Law
 606 W Main Avenue
 Knoxville, TN 37901

FOR THE APPELLEE:

Charles W. Burson
 Attorney General & Reporter

Elizabeth T. Ryan
 Assistant Attorney General
 Criminal Justice Division
 450 James Robertson Parkway
 Nashville, TN 37243-0493

Randall E. Nichols
 District Attorney General

Robert L. Jolley, Jr.
 Asst. Dist. Attorney General
 City-County Building
 Knoxville, TN 37902

OPINION FILED: _____

AFFIRMED

PAUL G. SUMMERS,
 Judge

OPINION

In 1976 the appellant, Howard Clifton Kirby, pled guilty to nine counts of armed robbery and burglary. In 1989 he pled guilty to a single count of third degree burglary and to being a habitual criminal. Based upon his prior convictions, he received a life sentence. He subsequently filed a petition for post-conviction relief challenging his 1976 guilty pleas and his 1989 conviction as a habitual criminal. His petition contended that his 1976 trial counsel had a conflict of interest that adversely affected his decision to plead guilty. The conflict arose from his trial counsel's representation of two of the appellant's co-defendants. The petition was denied. This Court, however, reversed the decision and vacated five of the nine pleas.¹ Kirby v. State, No. 03C01-9303-CR-00074, Knox County (Tenn. Crim. App., September 28, 1994, at Knoxville). We remanded this case for consideration of the impact, if any, that the multiple representation had on the remaining four pleas and the validity of the 1989 habitual criminal conviction.

At the hearing on remand, the trial court determined that the four remaining pleas were valid and were not affected by trial counsel's multiple representation. The trial court found the requisite number of prior convictions to support a habitual criminal conviction. Appellant now appeals alleging that the four remaining 1976 convictions were tainted with an irreconcilable conflict of interest. He contends that the plea agreement negotiated by his trial counsel was a "package deal." Specifically, he alleges that he was given the choice of pleading to all nine charges or none at all. Therefore, he claims the remaining four convictions should be vacated and the habitual criminal conviction set aside. We respectfully disagree.

¹The appellant's trial counsel did not represent any codefendants on three of the four remaining charges.

The record reveals that the appellant's trial counsel did not represent any codefendants on the prosecution's lead case. At the remand hearing, the appellant admitted that he did not want to go to trial on the four charges in question.² He admitted that he understood the plea agreement. Moreover, he admitted that he understood he could have possibly faced more incarceration if he rejected the plea and was convicted by a jury.

He received a 30 year sentence on the lead case. The remaining sentences on the other three charges were ordered to run concurrently to that case. The record reveals that the appellant made a knowing and voluntary choice to plead guilty to the lead charge. This Court finds that the four convictions are valid and untainted. Therefore, the habitual criminal adjudication remains valid.

The evidence does not preponderate against the trial court's findings. The appellant has not carried his burden. We find his issues without merit and affirm the trial court's denial of relief.

PAUL G. SUMMERS, Judge

CONCUR:

²The appellant invoked his right against self-incrimination at the hearing thereby limiting his testimony on the pleas.

JOSEPH M. TIPTON, Judge

JOHN K. BYERS, Senior Judge