

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1996

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| <p>FILED</p> <p>April 1, 1997</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p> |
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LARRY C. CORUM,)
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 Appellant,)
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 VS.)
)
 STATE OF TENNESSEE,)
)
 Appellee.)

C.C.A. NO. 03C01-9512-CR-00411
 KNOX COUNTY
 HON. RAY L. JENKINS
 JUDGE
 (Post-Conviction Relief)

FOR THE APPELLANT:

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FOR THE APPELLEE:

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OPINION FILED _____

AFFIRMED

JERRY L. SMITH, JUDGE

OPINION

Appellant Larry C. Corum appeals from the dismissal of his petition for post-conviction relief. On October 7, 1993, Appellant pled guilty to two counts of burglary and one count of robbery. Appellant received a sentence of four years imprisonment for each count of burglary and eight years imprisonment for robbery. The sentences were ordered to be served consecutively for an effective sentence of sixteen years. On July 12, 1994, Appellant filed a petition for post-conviction relief, alleging ineffective assistance of counsel and that he involuntarily entered his guilty plea. The post-conviction court dismissed his petition, finding it meritless. For the reasons discussed below, we reject Appellant's claims and affirm the decision of the post-conviction court.

Ineffective Assistance of Counsel Claim

Appellant claims that counsel was ineffective in investigating his case. He claims that counsel met with him only once, for ten minutes. Appellant further maintains that counsel never discussed the State's evidence against him, his alleged confessions, or his possible defenses. Finally, he claims that counsel failed to conduct discovery.

When an appeal challenges the Sixth Amendment right to effective assistance of counsel, the appellant has the burden of establishing that the advice given or services rendered by the attorney fell below the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). Under Strickland v. Washington, 466 U.S. 668, 687

(1984), there is a two-prong test which places the burden on the appellant to show that (1) the representation was deficient, requiring a showing that counsel made errors so serious that he or she was not functioning as “counsel” as guaranteed a defendant by the Sixth Amendment, and (2) the deficient representation prejudiced the defense to the point of depriving the appellant of a fair trial with a reliable result. Prejudice is shown by demonstrating a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. Id. at 694. Under the Strickland test, a reviewing court’s scrutiny “must be highly deferential. It is all too tempting for a defendant to second-guess counsel’s assistance after conviction or adverse sentence. . . .” Id. at 689. In fact, a petitioner challenging his counsel’s representation faces a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. . . .” Id. at 689.

Before addressing the substance of Appellant’s claims, we recognize that our scope of review is limited. In a petition for post-conviction relief, the petitioner must establish his or her allegations by a preponderance of the evidence. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983) (citing Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978)). Furthermore, the findings of fact made by a trial judge in post-conviction hearings are conclusive on appeal unless the appellate court finds that the evidence preponderates against the judgment. Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

Counsel testified at the hearing on Appellant’s petition for post-conviction relief that he met with Appellant two or three times at the Knox County Penal Farm, and several times before court appearances. While admitting that he filed

no discovery motions, counsel testified that he did meet with the prosecutor and obtained a copy of Appellant's confession, a copy of the fingerprint evidence from the burglaries, and copies of the police reports. There is no evidence in the record that counsel did not receive any important information that could have been obtained had a discovery motion been filed. Counsel showed all of these documents to Appellant and discussed them with Appellant. Appellant never gave counsel any information which would lead counsel to believe that a viable defense to the charges brought against him could be constructed. Appellant has failed to carry his burden of showing that counsel's representation was defective and in any way prejudiced him.

Involuntary Plea Claim

Next, Appellant maintains that his plea of guilty was not voluntarily, intelligently, or knowingly made. Specifically, he claims that he was not told of his right against self-incrimination or his right to confront and cross-examine the witnesses against him. He also faults the trial court for not fully complying with Rule 11 of the Tennessee Rules of Criminal Procedure which outlines information required to be given to a defendant pleading guilty. Finally, he claims that counsel coerced him into pleading guilty by telling him that he would likely be sentenced as a career criminal if his case went to trial and he was convicted.

In Boykin v. Alabama the United State Supreme Court held that an accused's guilty plea must be voluntarily, knowingly, and understandingly entered before a conviction resting upon a guilty plea may comply with due process. 395 U.S. 238 (1969). In Boykin, the Supreme Court stated that a guilty plea

constituted a waiver of various rights and that it would not presume a waiver of the following federal constitutional rights from a silent record:

- (1) The privilege against compulsory self-incrimination;
- (2) The right to trial by jury; and
- (3) The right to confront one's accusers.

Id. at 242. Thus, Boykin placed a premium on the record showing sufficient waiver of specified rights.

Exercising its supervisory power to ensure that the courts of this State afford fairness and justice to defendants in criminal cases, the Tennessee Supreme Court in State v. Mackey, 553 S.W.2d 337, 341 (Tenn. 1977), required stricter standards than those mandated by the Boykin decision. Mackey requires that trial judges, in accepting pleas of guilty in criminal cases to substantially adhere to the following procedure:

The court must address the defendant in open court and inform him of, and determine that he understands:

- (a) The nature of the charges brought against him and the mandatory minimum penalty provided by law, if any, and the maximum possible penalty; and that a different or additional punishment may result by reason of prior convictions or other factors;
- (b) If he is not represented by counsel, that he has a right to be so represented and that if cannot afford counsel, counsel will be appointed;
- (c) That he has the right to plead not guilty, the right to be tried by a jury, the right to the assistance of counsel at trial, the right to confront and cross-examine witnesses, and the right not to incriminate himself;
- (d) That if he pleads guilty, that there will be no trial except to determine his sentence; and
- (e) That if he pleads guilty, the court or the state may ask him questions about the offense to which he pleaded, and that if he answers under oath his answers may later be used against him in a prosecution for false statement or perjury, and that prior convictions may be used to set the sentence.
- (f) The court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the

result of force of threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty results from prior discussions between the District Attorney General and the defendant or his attorney.

Id. at 341.

The Mackey requirements have been adopted into Rule 11 of the Tennessee Rules of Criminal Procedure. In State v. McClintock, 732 S.W.2d 268, 273 (Tenn. 1987), the Supreme Court of Tennessee pronounced the additional advice requirement that it must be made clear to the defendant who is pleading guilty that the resulting judgment of conviction may be used in a subsequent proceeding to enhance his or her punishment for subsequent offenses. Thus, Boykin, Mackey, McClintock, and Rule 11 of Tennessee Rules of Criminal Procedure govern the validity of guilty plea proceedings.

As the Supreme Court of Tennessee noted in State v. Prince, 781 S.W.2d 846, 853 (Tenn. 1989), some of the mandated Mackey advice is not required by Boykin but represents a supervisory pronouncement of the court. The Court stated "any other requirement of Mackey in excess of Boykin is not based upon any constitutional provision, federal or state. It follows, that any omissions, not required in Boykin may be relied upon on direct appeal in appropriate cases but such omissions have no validity on the first or any subsequent post-conviction proceeding." Id. at 853.

From the evidence submitted at the evidentiary hearing, it is not clear whether counsel informed Appellant of his rights. However, the trial court, when accepting Appellant's plea, did advise Appellant of his right to trial by jury, his

right to confront and cross-examine the witnesses against him, and his right against self-incrimination. Appellant indicated that he understood these rights which he was waiving. While it does appear that the trial court failed to give some of the supervisory, non-constitutionally based instructions required by Mackey, relief may be given in a post-conviction hearing only if a conviction is void or voidable because of a violation of a constitutional right. See Tenn. Code Ann. § 40-30-203 (Supp. 1996); Prince, 781 S.W.2d at 853. Therefore, this issue has no merit.

In addition, Appellant's plea was not coerced. At the hearing on Appellant's petition for post-conviction relief, counsel explained that Appellant was on probation, under the Community Alternative to Prison Program (CAPP) when he committed the current offenses. Appellant was placed under the CAPP program after pleading guilty to three counts of felony theft, burglary, and two counts of aggravated burglary. Counsel testified that he talked to Appellant about the possibility of being sentenced as a career offender and how that would affect his sentence. Appellant argues that this information was coercive. It was not coercive for counsel to explain to Appellant the likely sentencing repercussions of his decision to go to trial. These possible sentencing repercussions are

supported by the record and Appellant makes no argument counsel's advice on this point was incorrect. While this information may have led Appellant to decide to take the plea offered by the State, that does not mean that counsel coerced him into accepting the plea.

We conclude that Appellant was not deprived of effective assistance of counsel and that the evidence produced by Appellant does not preponderate against the findings of the post-conviction court. Accordingly, the judgment of the post-conviction court is affirmed.

JERRY L. SMITH, JUDGE

CONCUR:

GARY R. WADE, JUDGE

DAVID H. WELLES, JUDGE