

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JANUARY 1998 SESSION

FILED
March 18, 1998
Cecil Crowson, Jr.
Appellate Court Clerk

VITO ANTHONY LICARI,)
)
 APPELLANT,)
)
 v.)
)
 STATE OF TENNESSEE,)
)
 APPELLEE.)

No. 02-C-01-9703-CR-00127
Benton County
Honorable Julian P. Guinn, Judge
(Post-Conviction Relief)

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OPINION FILED: _____

AFFIRMED PURSUANT TO RULE 20

Joe B. Jones, Presiding Judge

OPINION

The appellant, Vito Anthony Licari (petitioner), appeals as of right from a judgment of the trial court dismissing his post-conviction action. In this court, the petitioner contends his plea of guilty failed to pass constitutional muster because the trial court's explanation regarding the right to confront the State of Tennessee's witnesses was inaccurate. He argues his plea is infirm due to a misstatement made by the trial court during the submission hearing, and this same error rendered the guilty plea involuntary. The petitioner also contends the trial court failed to determine that his guilty plea was freely and voluntarily given. The petitioner raises a third issue that "the court fail[ed] to follow the directions of Rule 11 to the extent that the defendant is entitled to post-conviction relief." After a thorough review of the record, the briefs submitted by the parties, and the law governing the issues presented for review, it is the opinion of this court that the judgment of the trial court should be affirmed pursuant to Rule 20, Tennessee Court of Criminal Appeals. The evidence contained in the record does not preponderate against the findings of fact made by the trial court. Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978), cert. denied, 441 U.S. 947, 99 S.Ct. 2170, 60 L.Ed.2d 1050 (1979).

The petitioner entered a plea of guilty to murder first degree and was sentenced to life in the Department of Correction. He executed a "Request for Acceptance of Plea of Guilty" and "Petition to Waive Trial by Jury and Waive an Appeal." The form, which the petitioner signed, states in part:

I have discussed with my attorney and fully understand:

* * * *

3. That at a trial I have the right to the assistance of counsel, the right to confront and cross-examine witnesses testifying against me and the right to compel witnesses to appear and testify on my behalf.

During the submission hearing, the following colloquy occurred:

THE COURT: Have you had the occasion to discuss [the offense and penalty] with your attorney?

MR. LICARI: Yes, I have, Your Honor.

* * * *

THE COURT: That you could compel witnesses to appear and testify under oath in the open courtroom, in your presence, and then subject them to cross examination by your lawyer on your behalf?

MR. LICARI: Yes, Your Honor.

Neither the petitioner nor his counsel questioned this statement or indicated the petitioner did not understand his right to confront the state's witnesses. Moreover, the petitioner had a lengthy record of prior convictions. He told the trial court: "The majority of them [the prior convictions] were what we call in New York City cop-outs, plea bargain."

The petitioner testified during the trial of a co-defendant:

Q. All right; and did we have an agreement upon your testifying?

A. Yes, we did.

Q. And what is that agreement?

A. I am going to plead guilty to first degree murder and be sentenced to a life sentence.

In short, the petitioner entered into a plea agreement in exchange for his testimony in the co-defendant's case. He admitted on direct examination he was guilty of first degree murder.

There is no transcript of an evidentiary hearing for the post-conviction petition. Consequently, it is unknown to this court whether the petitioner did or did not understand the right to confront the state's witnesses. Given the fact the petitioner had entered numerous pleas of guilty in the past and had signed a form which said he understood this right, the misstatement made by the trial court does not render the plea unconstitutional, infirm, or involuntary. See State v. Neal, 810 S.W.2d 131 (Tenn. 1991)(overruled in part on other grounds).

The petitioner's first issue is without merit.

The petitioner also contends that "the trial court fail[ed] to determine that the guilty plea of the defendant was free and voluntary." He contends that the record of the guilty

plea is silent as to the inquiry required by Tenn. R. Crim. P. 11 when a plea is offered. The petitioner argues that the trial court should have followed the format described in Rule 11 to determine if the guilty plea was freely and voluntarily given.

This issue was raised in the petitioner's petition for post-conviction relief. The trial court, finding the petitioner had a colorable claim, ordered the state to respond to the petition. After the state filed a motion to dismiss the petition, the trial court issued written findings concluding that the petitioner was advised of all appropriate rights. The trial court dismissed the petition. It is not clear if an evidentiary hearing was held; as noted above there is no transcript of an evidentiary hearing in the record.

The transcript of the petitioner's guilty plea, which was included in the record transmitted to this court, demonstrates the trial court inquired into the voluntary nature of the plea. The petitioner told the court that he was thinking clearly at the time of the plea. He was not being forced or coerced into making the plea. The petitioner told the trial court he understood he had an absolute right to plead not guilty and demand a trial by jury.

This court finds that the petitioner's plea was voluntarily, knowingly, and intelligently entered. Thus, his second issue is without merit.

The petitioner also lists a third issue in his statement of issues but failed to brief that issue. As a result, that issue is waived. Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b).

JOE B. JONES, PRESIDING JUDGE

CONCUR:

PAUL G. SUMMERS, JUDGE

DAVID G. HAYES, JUDGE