

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs June 24, 2014 at Knoxville

JOHNVONTA SAIN v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Hardeman County
No. 12CR54 J. Weber McCraw, Judge**

No. W2013-00214-CCA-R3-PC - Filed July 18, 2014

The Petitioner, Johnvonta Sain, pleaded *nolo contendere* to aggravated assault with an agreed upon sentence of four years, suspended upon time served. The Petitioner filed a petition seeking post-conviction relief on the basis that his plea was involuntary and that he had received the ineffective assistance of counsel. After a hearing, the post-conviction court denied the Petitioner relief. The Petitioner now appeals, maintaining that his guilty plea was involuntary and asserting that the post-conviction court should have recused itself in this matter. After a thorough review of the record, the briefs, and relevant authorities, we affirm the post-conviction court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the Court, in which JOSEPH M. TIPTON, P.J., and D. KELLY THOMAS, JR., J., joined.

Terita Hewlett Riley, Memphis, Tennessee, for the Appellant, Johnvonta M. Sain.

Robert E. Cooper, Jr., Attorney General and Reporter; Jeffrey D. Zentner, Assistant Attorney General; D. Michael Dunavant, District Attorney General; and Joe Van Dyke, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A Hardeman County grand jury indicted the Petitioner, charging him with the rape of a fifteen-year-old girl. On March 9, 2012, the Petitioner pleaded *nolo contendere* to aggravated assault. The parties agreed upon a four-year sentence to be suspended upon time served.

A. Guilty Plea Submission Hearing

At the guilty plea submission hearing, the State informed the trial court that on July 10, 2011, the Bolivar Police Department received a call related to an incident involving sexual contact with a fifteen-year-old. The Petitioner was arrested on this matter and, after negotiations involving the Petitioner and the parents of the juvenile, he agreed to enter a *nolo contendere* plea to aggravated assault. The Petitioner stipulated to the factual basis submitted by the State.

The trial court explained to the Petitioner the agreed upon charge and the potential penalty for an aggravated assault conviction. The Petitioner confirmed his understanding of the plea agreement and the rights he was waiving by entering a plea. The Petitioner confirmed that he had “thoroughly” discussed his case with his attorney (“Counsel”) and that he believed Counsel had properly investigated the case. The Petitioner stated that he did not have any concerns or complaints with regard to his legal representation. The Petitioner testified that he was not being forced to enter the plea. The trial court found the Petitioner competent to enter the plea. It further noted that the Petitioner understood “the direct and collateral consequences” of the plea, and the trial court found that the Petitioner entered the plea “freely, voluntarily and intelligently.” The trial court accepted the Petitioner’s *nolo contendere* plea to aggravated assault, and the Petitioner was sentenced to serve four years at 30% pursuant to the parties’ negotiated agreement.

B. Post-Conviction Hearing

The Petitioner filed a post-conviction petition claiming that he had received the ineffective assistance of counsel and that there was not a sufficient factual basis for the entry of his guilty plea, rendering his *nolo contendere* plea involuntary. At the hearing on the petition, the Petitioner made an oral request that the post-conviction court recuse itself because the Petitioner was alleging that there was no factual basis for the plea, and the post-conviction court had found a factual basis at the guilty plea submission hearing. The post-conviction court took the matter under advisement, noting that the Petitioner had stipulated to the factual basis of the plea.

Counsel testified that he represented the Petitioner on the rape charge. As part of his investigation for the case, Counsel spoke with the prosecutor assigned to the case, the Petitioner, and the Petitioner’s family. Counsel met with the Petitioner’s family in their home and viewed the crime scene where the alleged rape occurred. Counsel recalled that in his discussions with the Petitioner and the Petitioner’s family, they were “always adamant” that the events as the victim claimed did not happen. Given the Petitioner’s position on the

case, he worked toward a trial on the matter. As Counsel was preparing for the preliminary hearing, the State offered for the Petitioner to plead guilty to aggravated assault. Counsel said that this resolution was appealing because the Petitioner would not be placed on the sex offender registry, and the Petitioner “wanted out of jail real bad.”

Counsel testified that he conveyed the offer to the Petitioner and that he believed the Petitioner understood the offer. The Petitioner signed the plea offer showing his acceptance. Counsel said that he also discussed the offer with the Petitioner’s family. Counsel referenced a drawing he created to help the Petitioner and his family understand the consequences of the State’s offer to plead guilty to aggravated assault as opposed to proceeding to trial on the rape charge. After discussing the options with the Petitioner and his family, “everyone” agreed that the Petitioner should accept the State’s offer and plead *nolo contendere* to aggravated assault and serve a four-year probation sentence.

Counsel testified that, on the day of the plea submission hearing, he was detained, so he asked a colleague, “Ms. Fuchs,” to handle the hearing for him.

On cross-examination, Counsel testified that he reviewed the State’s file with the Boliver Police Department investigator assigned to the case. The file included the victim’s statement, which included specific identifications of the Petitioner’s bedroom and tattoos on the Petitioner’s body. Counsel agreed that the State’s first offer was for the Petitioner to plead guilty to “a sexual battery type of offense.” He said that the Petitioner was reluctant to accept this offer because a sexual battery conviction would require the Petitioner to be on the sex offender registry. Counsel identified the plea agreement and the Petitioner’s signature on the agreement indicating his acceptance of the State’s offer.

Counsel agreed that, at the time of the negotiations on the rape charge, the Petitioner also had two probation violations. As part of the plea agreement, the two probation violations would run concurrently with the four-year sentence for the aggravated assault conviction. Counsel identified a guilty plea form containing the plea agreement. The guilty plea form was also signed by the Petitioner. Finally, Counsel identified a judgment form signed by the Petitioner acknowledging his conviction and sentence.

Counsel testified that he spoke with the Petitioner about the victim’s injuries, which would have been a basis for a plea to aggravated assault. Counsel agreed that the State’s offer was “a time-served plea,” so the Petitioner was released following his plea. Counsel agreed that, had the Petitioner declined the State’s offer, he would have remained in jail pending the disposition of the case.

Lauren Fuchs testified that she stood in for Counsel at the Petitioner’s plea submission

hearing. Ms. Fuchs stated that the Petitioner entered a plea of *nolo contendere* to aggravated assault for a four-year probation sentence with the reinstatement of two probation sentences to be served concurrently. She stated that she reviewed the plea agreement with the Petitioner before he entered his plea. About her review with the Petitioner of the plea paperwork, she stated that she “talked about [the plea agreement] for a long time and went over exactly what the no contest was and what it meant and that it wasn’t him admitting guilt, it was reserving that, which would also create protection civilly because his parents were affiliated with the daycare.” Ms. Fuchs said that she reviewed the paperwork with the Petitioner in front of his family, “so anybody who had a question could ask their question.”

On cross-examination, Ms. Fuchs identified the guilty plea form and the judgment form. She confirmed that she had reviewed the guilty plea form with the Petitioner and that the Petitioner understood it.

Georgia Whitehorn testified that she was an employee at the daycare center where the alleged rape occurred. Ms. Whitehorn stated that she was there on that particular day but “nothing happened.” She stated that she never directly spoke to the Petitioner’s attorney but that she “overheard” the attorney talking. On cross-examination, Ms. Whitehorn clarified that she was present while the attorney spoke with family members about the case against the Petitioner. She agreed that she never “interjected at any point” to share any information on the matter.

Berth Sain, the Petitioner’s mother, testified that she owned the daycare where the alleged crime occurred. Ms. Sain stated that she and her husband hired Counsel to represent the Petitioner. She said that she met with Counsel and provided him with information about the allegation. Ms. Sain said that she was present at the daycare on the day of the alleged offense and that she told Counsel she was present. She recalled that Counsel walked through her home and the daycare facility. Ms. Sain said that she advised Counsel of potential witnesses that included Ms. Whitehorn but that Counsel never spoke with Ms. Whitehorn. About the sufficiency of Counsel’s investigation, Ms. Sain stated, “I think [Counsel] should have investigated what he’s supposed to investigate because we hired him to get deep involved into that investigation.”

Ms. Sain testified that she did not agree with the Petitioner’s accepting the State’s offer of aggravated assault because the Petitioner “hadn’t aggravated nobody or beat nobody and he did not rape nobody.” She said that Ms. Fuchs told her that the Petitioner “didn’t have really another choice” but to either plead to rape or aggravated assault. Ms. Sain maintained that she “did not agree with neither one of them.”

On cross-examination, Ms. Sain testified that an agreement for the case was reached

in General Sessions court rather than conducting a preliminary hearing. Ms. Sain agreed that at the guilty plea submission hearing the trial court “thoroughly” reviewed the plea agreement with the Petitioner. She agreed that the Petitioner was under oath at the hearing, and she stated that the Petitioner would not lie under oath. She agreed that, while under oath, the Petitioner told the trial court that he understood the guilty plea agreement.

The Petitioner testified that Ms. Fuchs reviewed the plea paperwork with him on March 9, 2012, at the plea submission hearing. When asked if he understood the four-year sentence he would receive, he stated, “I really wasn’t paying no attention. I was just ready to get out. The only thing I heard was I ‘was getting released today.’” The Petitioner explained that when he signed the documents he believed he would “still be coming to court . . . to like fight the case.” He stated that he believed the case was ongoing and did not end at the plea submission hearing. The Petitioner denied that Counsel or Ms. Fuchs discussed with him his right to proceed to trial. He agreed that the trial court may have informed him of such but that he did not know what it meant. He explained that he did not tell the trial court he did not understand what it meant to go to trial because he “was just ready to go home and get it over with.”

The Petitioner testified that Counsel explained to him about an *Alford* plea but that he was not “paying attention.” He stated that he did not think that Counsel investigated his case “like [he was] supposed to.” The Petitioner stated that he was confused about “the whole situation.” He stated that he did not understand “what was going on” because Counsel never “just came and sat and spoke to me about [the] case.” The Petitioner stated that he met Ms. Fuchs on the day of the guilty plea submission hearing. He stated that he asked her many questions such as, “what [do] you want me to do?” He said that Ms. Fuchs told him to “just agree with it,” so he entered a plea.

On cross-examination, the Petitioner maintained that Counsel never explained to him that he was accepting a plea offer to aggravated assault rather than having a trial on the rape charge. The Petitioner identified the December plea offer and his signature accepting the offer but stated that he “read none of that.” The Petitioner agreed that by accepting the plea offer, he was released from jail. The Petitioner next viewed the guilty plea paperwork and identified his signature indicating that he understood the plea agreement and the rights he was waiving by entering a plea.

The State then reviewed the transcript of the plea colloquy from the guilty plea submission hearing, and the Petitioner acknowledged his responses to the trial court that he understood the plea agreement. The Petitioner explained his confirmation of his understanding of the plea to the trial court on the day of the guilty plea submission hearing by stating, “I was just hurrying. I was just answering, really. I really didn’t understand

nothing.”

After hearing the evidence, the post-conviction court issued an order denying relief. It is from this judgment that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner contends that his plea was involuntarily entered without understanding the nature and consequences of the plea. He also asserts that the post-conviction court erred when it failed to rule on the Petitioner’s request for the post-conviction judge’s recusal. The State responds that the Petitioner has not adequately demonstrated that his guilty plea was unknowing and involuntary and that the Petitioner fails to show any compromise of impartiality by the post-conviction court. We agree with the State.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2012). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2012). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999) (citing *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997)). A post-conviction court’s factual findings are subject to a *de novo* review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court’s factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court’s conclusions of law are subject to a purely *de novo* review by this Court, with no presumption of correctness. *Id.* at 457.

A. Involuntary Plea

The Petitioner contends that his plea was not knowingly and voluntarily entered. He asserts that he “did not understand the consequences of his decision” to plead and “did not understand how he was guilty of aggravated assault.” The State responds that the record shows that the plea was voluntary.

When evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that “[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). The court reviewing the

voluntariness of a guilty plea must look to the totality of the circumstances. *See State v. Turner*, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995); *see also Chamberlain v. State*, 815 S.W.2d 534, 542 (Tenn. Crim. App. 1990). A plea resulting from ignorance, misunderstanding, coercion, inducement, or threats is not “voluntary.” *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). A petitioner’s solemn declaration in open court that his plea is knowing and voluntary creates a formidable barrier in any subsequent collateral proceeding because these declarations “carry a strong presumption of verity.” *Blackledge v. Allison*, 431 U.S. 63, 74 (1977)

In an order, the post-conviction court made the following findings as to the Petitioner’s allegations:

Petitioner alleges that he did not enter his plea knowingly and voluntarily because Counsel did not properly investigate or advise him.

At the plea hearing the [Petitioner] testified under oath. He testified that he went over the plea form, the waiver of a trial and waiver of appeal forms with his attorney and signed them. He testified he understood what he was doing. The plea form indicated that he would be facing 4 years at 30% as a standard offender a Range I offender.

He was informed that his sentence would be eligible for probation.

The [Petitioner] was asked if he was satisfied with the representation of [Counsel] and Ms. Fuchs and he stated he was. He testified he had enough time to meet with his attorney and discuss this case. The [Petitioner] testified that no one had forced him to enter this plea of no contest, and that he did not have any questions about the proceeding.

Before the plea proceedings, Ms. Fuchs went over the same information with [P]etitioner several times.

....

The Court finds that the [Petitioner] actually understood the significance and consequences of the particular decision to ple[a]d no contest and the decision was not coerced. The [Petitioner] was fully aware of the direct consequences of the plea, including the possibility of the sentence actually received. He was informed at the plea hearing of the sentence.

The Court accredits the testimony of [Counsel], Ms. Fuchs and Ms. Whitehorn.

As noted above, the post-conviction court credited the testimony of Counsel and Ms. Fuchs. The post-conviction court found that the Petitioner willingly entered into the plea agreement. The record of the post-conviction hearing reveals the Petitioner indicated his willingness to reach a plea agreement prior to the date he entered his plea, took part in the process of reaching a plea agreement, and communicated specific terms of an acceptable plea agreement to his attorney prior to entering his plea. Moreover, the Petitioner stated that Ms. Fuchs explained to him his rights and the sentence prior to entering his plea. The Petitioner also acknowledged that the judge explained his rights and the plea agreement to him.

Based upon our review of the record, we conclude the Petitioner received the effective assistance of counsel and knowingly and voluntarily entered his *nolo contendere* plea. We affirm the judgment of the post-conviction court.

B. Recusal

The Petitioner contends that the post-conviction judge erred when he failed to rule on the Petitioner's oral motion for recusal. The Petitioner asserts that the post-conviction court's denial of relief for his allegation that there was not a sufficient basis for his plea is contrary to Tennessee Rule of Criminal Procedure, Rule 11(b)(3) that requires a factual basis "before accepting a Nolo Contendere Plea." The State responds that the Petitioner fails to show any compromise of impartiality by the post-conviction court and, therefore, the post-conviction properly exercised its discretion.

"The right to a fair trial before an impartial tribunal is a fundamental constitutional right." *State v. Austin*, 87 S.W.3d 447 at 470 (Tenn. 2002). "[T]he preservation of the public's confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial." *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998). Recusal is warranted "when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). "Hence, the test is ultimately an objective one since the appearance of bias is as injurious to the integrity of the judicial system as actual bias." *Davis v. Liberty Mut. Ins. Co.*, 38 S.W.3d 560, 565 (Tenn. 2001). "Whether recusal is necessary . . . rests within the discretion of the trial court." *State v. McCary*, 119 S.W.3d 226, 260 (Tenn. Crim. App. 2003) (citing *Caruthers v. State*, 814 S.W.2d 64, 67 (Tenn. Crim. App. 1991)). This Court will not interfere with the trial court's discretion unless clear abuse appears on the face of the record. *Caruthers*, 814 S.W.2d at 67.

In this case, the post-conviction court heard post-conviction counsel’s oral request for recusal and took the matter under advisement. No ruling, however, followed. Whereas the post-conviction court’s decision to proceed with the hearing implicitly overruled the motion, we cannot conclude that this was a knowing exercise of discretion. As such, we conduct a *de novo* review of the post-conviction’s decision to decline recusal.

In his post-conviction petition, the Petitioner argued that there was an insufficient factual basis for the Petitioner’s *nolo contendere* plea. In its written order denying post-conviction relief, the court addressed the Petitioner’s contention regarding the factual basis for the plea as follows:

First, this Court finds that the parties stipulated to sufficient facts in order to find the [Petitioner] guilty of aggravated assault and refers to the transcript of the plea proceeding. Although the facts presented are scant, the statement of the state and the defense create a factual basis for the plea. Further, the Court notes that the [P]etitioner entered a plea of *nolo contendere*. And as such, the trial judge need not require a factual basis before accepting a *nolo contendere* plea. *State v. Crowe*, 168 S.W.3d 731 (Tenn. 2005).

As the post-conviction court correctly notes, our Supreme Court addressed this issue in *State v. Crowe*, holding that Tennessee Rule of Criminal Procedure 11(f) applies to guilty pleas and “does not mandate the establishment of a factual basis for *nolo contendere* pleas.” 168 S.W.3d 731, 743 (Tenn. 2005). Because a factual basis is not required for the acceptance of a *nolo contendere* plea, the Petitioner has not shown a basis for recusal.

Having carefully reviewed the record, it does not appear that there was a reasonable basis to question the court’s impartiality; therefore, the Petitioner is not entitled relief.

II. Conclusion

After a thorough review of the record and relevant authorities, we conclude that the post-conviction court properly denied post-conviction relief. Accordingly, we affirm the judgment of the post-conviction court.

ROBERT W. WEDEMEYER, JUDGE