

In the Supreme Court of Georgia

Decided: June 20, 2011

S11A0253. TYNER v. THE STATE.

NAHMIAS, Justice.

This is Curtis Tyner's much delayed direct appeal of his 1984 malice murder conviction based on his guilty plea. Because the case is here on direct appeal and the record does not show that Tyner was advised of his right against self-incrimination as required by Boykin v. Alabama, 395 U.S. 238 (89 SC 1709, 23 LE2d 274) (1969), his guilty plea was invalid and we must reverse his conviction.

1. According to the factual basis offered in support of the guilty plea, in April 1984, IBM executive Martha Anne Mickel hired Tyner to paint her apartment. On April 15, Tyner forced Ms. Mickel into a car, tied her up, sexually assaulted her, and then dumped her, unconscious, in a creek. The autopsy showed that the victim was still alive and breathing when she was put into the water and that the cause of death was drowning. The police identified Tyner as a suspect from evidence found in the victim's apartment. He confessed

to the police a few days later after being advised of his rights, even telling them where to find the victim's purse. Tyner denied, however, knowing that the victim was still breathing when he threw her in the creek. On April 27, 1984, Tyner was indicted for malice murder, and Carl Greenberg from the Fulton County Public Defender Office was appointed to represent him.

On September 25, 1984, Tyner pled guilty to malice murder. He later said that he pled guilty because the State had indicated that it would seek the death penalty if the case went to trial. The transcript of the plea hearing shows that Tyner was advised of and waived two of his three Boykin rights – the right to a jury trial and the right to confront the witnesses against him. However, he was not advised of his third Boykin right, the right against self-incrimination.

The trial court accepted the guilty plea and sentenced Tyner to life in prison. At the close of the hearing, the prosecutor suggested that the court should “[a]dvice him of his rights I think,” apparently referring to Tyner’s limited right to appeal his conviction and sentence based on a guilty plea. The court responded, “I don’t think there’s any need,” and the hearing ended.

Within three months of the guilty plea, Tyner began filing pro se pleadings seeking review of his sentence and documents related to his case so

that he could “get it back in court” and prepare “his attack on the erroneous issue in his case.” Tyner noted in a 1987 filing that “[a]n indigent defendant is entitled to obtain free of charge a transcript of his trial for purposes of a direct appeal of his conviction,” and in another filing he complained that his letters to Greenberg had all come back marked “Return to Sender.”

In 1986, 1987, and 1990, Tyner filed pro se petitions for habeas corpus, and the habeas court conducted an evidentiary hearing on each petition before denying relief. In 2008, Tyner filed a fourth habeas petition, which was dismissed as successive and procedurally barred. In 2009, Tyner filed a pro se motion for out-of-time appeal of his conviction, which the trial court summarily dismissed, and a pro se motion for new trial, which the court dismissed as untimely.

In April 2010, Tyner filed a pro se notice of appeal of the order denying an out-of-time appeal, and the following month he filed a motion for appointment of counsel. The trial court granted the motion, and Tyner, now represented by counsel apparently for the first time since 1984, withdrew his notice of appeal and filed a second motion for out-of-time appeal on June 30, 2010. Tyner alleged that he was not told that he had a right to appeal his

conviction, that the court's remarks at the plea hearing gave him the impression that he could not appeal, and that his failure to file a timely appeal could not be attributed to any error or desire on his part. See Birt v. Hopper, 245 Ga. 221, 221 n.1 (265 SE2d 276) (1980) (explaining that “[o]ut-of-time appeals are granted where a defendant in a criminal case is not advised of his right of appeal or his counsel fails to appeal” as directed). The State did not file a response to the motion or request a hearing, and on July 12, 2010, the trial court granted Tyner an out-of-time appeal. Tyner filed a timely notice of appeal of his conviction a week later.

2. Tyner's sole enumeration of error is that his guilty plea is invalid under Boykin because the State failed to meet its burden of showing that he knowingly and voluntarily waived his right against self-incrimination. With limited exceptions, the entry of a guilty plea waives all defenses *except* those that relate to the knowing and voluntary nature of the plea. See Moore v. State, 285 Ga. 855, 858 (684 SE2d 605) (2009). Once a defendant raises a question about the validity of a guilty plea, the State bears the burden to establish that the plea was knowingly and voluntarily entered. See King v. State, 270 Ga. 367, 369 (509 SE2d 32) (1998) (on direct appeal); Bazemore v. State, 273 Ga. 160,

161 (535 SE2d 760) (2000) (in habeas corpus). In reviewing a direct appeal from a guilty plea, this Court must evaluate the enumerated errors based solely on “the trial court record, including the record of the guilty plea and sentencing as well as any subsequent evidence that was properly presented to the reviewing court, assuming all of that is also properly included in the record on appeal.” Smith v. State, 287 Ga. 391, 403 (697 SE2d 177) (2010).

The State concedes the existing record does not show that Tyner was advised of his right against self-incrimination and acknowledges that our usual course where we find a Boykin violation on direct appeal is to reverse the invalid conviction and remand the case for further proceedings. The State nevertheless asks us not to decide the Boykin issue but first to remand the case to the trial court, where Tyner should be required to file a motion to withdraw the guilty plea, which would give the State the opportunity to try to show that Tyner’s attorney informed him of his right against self-incrimination before he pled guilty. See Bazemore, 273 Ga. at 161 (noting that the State may carry its burden of showing that the defendant was advised of and waived his Boykin rights not only with the plea hearing record but with extrinsic evidence properly in the record, including evidence from plea counsel). However, the State cites

no authority supporting such a procedure, and we have explained that “a defendant who hopes to appeal successfully from a guilty plea is not required to first file a motion to withdraw the plea.” Smith, 287 Ga. at 403 n.7.

3. Shortly before oral argument, the State filed a motion to dismiss Tyner’s appeal. The State argued that the trial court erred in granting an out-of-time appeal and that Tyner’s unsuccessful habeas petitions should bar us from reversing his conviction. However, we see no basis for the State to appeal the order granting the out-of-time appeal or to file a cross-appeal in this criminal case, and it did neither. See OCGA § 5-7-1 (limiting the matters the State may appeal in criminal cases and not authorizing the State to cross-appeal).¹ Likewise, the State has conceded that Tyner’s Boykin claim was dismissed for procedural default when he raised it for the first time in his fourth habeas petition, which was not an adjudication on the merits and thus is not res judicata as to his current claim. See Wiggins v. State, 288 Ga. 169, 170 (702 SE2d 865)

¹Accordingly, the merits of the order granting this out-of-time appeal – including whether the trial court should have held a hearing to determine whether Tyner was at fault for the failure to timely appeal and the effect of the court’s order dismissing Tyner’s first motion for out-of-time appeal – are not before us for decision.

(2010) (holding that claims raised on direct appeal are not barred by denial of a prior habeas petition raising the identical claims where the habeas court ruled that the claims were procedurally defaulted instead of denying the claims on the merits).

4. We recognize that reversal of Tyner's 27-year-old murder conviction may make it difficult for the State to try him or negotiate another plea. We do not know if Tyner would have refused to go through with his guilty plea if during the plea hearing the prosecutor had added the words "and the right against self-incrimination" after advising Tyner of his "right to cross-examine witnesses called by the State or call witnesses in your own defense." However, this Court has interpreted advice and waiver of the three Boykin rights as a strict constitutional requirement. See Wilson v. Kemp, 288 Ga. 779, 780-781 (707 SE2d 336) (Case No. S10A1465, decided Jan. 24, 2011). But see id. at ___ (Carley, P.J., joined by Nahmias, J., dissenting) (arguing that the Court has interpreted Boykin too formalistically and more strictly than the majority of other courts in the country). And Boykin violations are among the rare set of trial court errors that cannot be held harmless on appeal. See United States v. Dominguez Benitez, 542 U.S. 74, 84 n.10 (124 SC 2333, 159 LE2d 157) (2004).

We must also recognize that the State did not fulfill its duty to ensure that Tyner's guilty plea was constitutionally valid; it apparently did not ensure that he was advised of and had effective representation regarding his right to appeal his conviction; and it did not litigate the merits of Tyner's guilty plea in his habeas corpus hearings, where the record might have been expanded. Consequently, Curtis Tyner's conviction must be reversed and the case remanded for further proceedings.

Judgment reversed and case remanded. All the Justices concur, except Hunstein, C.J., Hines and Melton, JJ., who concur in Divisions 1, 2, and 3, and in the judgment.