

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
August 19, 2008 Session

JONATHAN KEITH PRICE v. STATE OF TENNESSEE

Appeal from the Circuit Court for Rutherford County
No. F-57114 James K. Clayton, Jr., Judge

No. M2007-02434-CCA-R3-PC - Filed September 29, 2008

The defendant, Jonathan Keith Price, pleaded guilty in the Rutherford County Circuit Court to aggravated burglary, *see* T.C.A. § 39-14-403 (2003), solicitation of a minor, *see id.* § 39-13-528, and two counts of statutory rape, *see id.* § 39-13-506. The trial court sentenced the defendant to an effective sentence of six years, as agreed by the parties, and following a hearing to determine the manner of service, the trial court placed the defendant on probation. The defendant then moved the court for leave to withdraw his guilty pleas, and the defendant now appeals from the trial court's denial of that motion. Upon review, we affirm the judgments of the trial court.

Tenn. R. App. P. 3; Judgments of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and CAMILLE R. McMULLEN, J., joined.

Brian O. Bowhan, Antioch, Tennessee, for the appellant, Jonathan Keith Price.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Laural A. Nutt, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The conviction offenses in the present case occurred in May 2004. The defendant signed a plea agreement on July 10, 2006. The trial court conducted a hearing to determine the manner of service of the agreed six-year sentence on October 5, 2006, and entered the conviction judgments on October 10, 2006. On October 12, 2006, the State filed a probation revocation report that alleged that the defendant had violated his probation by failing to reside at the prescribed location, to report employment, and to report to the probation officer and by residing in a residence where two teenage children lived.

On October 31, 2006, the defendant filed a motion pursuant to Tennessee Rule of Criminal Procedure 32(f) to withdraw his guilty pleas. In the motion, the defendant claimed that (1) the facts underlying the aggravated burglary charge did not support a conviction of that offense for the reason that the minor victim consented to the defendant's entry into her residence; (2) the underlying facts supported only one charge of statutory rape; (3) the stated factual basis for the convictions failed to establish the victim's age; (4) he was inadequately advised about the potential defenses to the charges; and (5) he entered into the plea agreement without being informed about the conditions of probation, including the "Sex Offender Directives."

On March 1, 2007, the State amended the revocation report to allege that the defendant had been dismissed from sex offender therapy and that he married a woman who resided with her two minor children. On September 4, 2007, the trial court entered an order revoking the defendant's probation but reinstating him to probation following confinement for 115 days. The defendant received 115 days' credit for the time served prior to the revocation hearing.

On September 14, 2007, based upon the transcript of the guilty plea submission hearing and the argument of counsel, the trial court entered an order denying the Rule 32(f) motion to withdraw the guilty pleas. On October 12, 2007, the defendant filed his notice of appeal. The notice recited that the defendant appealed only the denial of the motion to withdraw the guilty pleas.

The transcript of the guilty plea submission hearing that was referenced by the trial court in its September 14, 2007 order contained the following recitation of a basis-in-fact for the guilty pleaded convictions:

[assistant district attorney general:] The facts of the case are that approximately 5/5 of '04, the minor victim, who was 17 years old at the time, was at the defendant's house. According to her, the Defendant asked her to have sex with him at that point on that day. That would be the facts for the solicitation. It was prior to the bringing of this indictment, and [the defendant] was more than ten years older than her at the time. His birthday is 11/3/73, and the victim was 17.

On the other incidents on 5/7 of '04, the victim, also 17 years of age, was at her home alone. Her parents were not there. The Defendant came into the residence without permission from the owners of the residence. And the victim had just taken a shower, was wrapped in a towel. There was [sic] differences between – she says that he took the towel off of her and had sex with her and mentioned something about if she wanted to have a quickie.

Initially, [the defendant] said that he was never in the residence and that nothing had happened. However, there was a DNA

sample taken pursuant to a search warrant, and he was found to be a match of the DNA that was found in her room on the bed where she said that the sex acts took place.

The victim has never denied the sexual acts. The Defendant had denied them but at this point is going to plead guilty to two counts of statutory rape. There was an evaluation done. The victim in this case had severe brain injury from an accident in 2000. There are a lot of medical records probably in her court file as well as our files documenting the injury. There is some discrepancy between doctors as far as whether or not she could have consented based on that injury. One doctor that the Defendant has contacted from Vanderbilt says in a report that he felt she was competent to consent, and then her doctors say that there are reasons to believe she was not competent to consent.

I've talked to the victim this morning, and what they would like to do – there were actually – I believe there were two instances, one of oral sex or digital sex and one of vaginal sex with the Defendant, constituting the two acts.

This recitation was followed by the prosecutor's description of the terms of the plea agreement.

In the plea submission hearing, the trial court then embarked upon a voir dire examination of the defendant concerning his comprehension of the plea agreement and the waiver of various constitutional rights. The defendant, who was sworn, responded that he participated in and approved the plea agreement and that he understood his rights to plead not guilty, to have the case tried by a jury, to have the assistance of counsel, to confront the prosecution's witnesses, to testify in his own behalf or to not testify, and to appeal an adverse result at trial. The defendant indicated that he voluntarily waived those rights. The trial court described the ten charges that were pending against him, and the defendant indicated that he understood the charges and the applicable minimum and maximum punishments for each charge. The defendant stated that he understood that the State bore the burden of proving the charges leveled against him. The defendant affirmed that he understood that the manner of service of his effective six-year sentence would be determined by the trial court following a sentencing hearing. When the trial judge asked whether the defendant was entering pleas of guilty, the defendant responded, "I believe it's in the best interest."

The defendant acknowledged that he had not been forced or coerced into entering the pleas, that he was not under the influence of any drug or intoxicant, that he fully understood what he was doing, that he wanted to accept the plea agreement and plead guilty, and that his pleas were freely made and voluntary. The defendant acknowledged his satisfaction with his counsel's representation. He further acknowledged his awareness that the imposition of the felony convictions via the plea agreement could enhance future criminal sanctions that might eventuate. The defendant

stated that he had not been promised probation or diversion. The defendant further acknowledged that, should he later seek to repudiate his pleas, a transcript of the recorded plea submission hearing could “be used against [him] in a prosecution either for perjury or for making a false statement.” The prosecutor then advised the defendant of a change in the law of statutory rape and obtained the defendant’s acknowledgment that he understood the change relative to the law applicable to his offenses requiring his listing on the “sexual registry.”

In its order denying the Rule 32(f) motion, the trial court held that the transcript showed that the defendant entered his pleas knowingly and voluntarily.

In his appellate brief, the defendant cites to the victim’s testimony memorialized in the transcript of the October 5, 2006 sentencing hearing to support his claim that the victim “invited” the defendant into her father’s house. The petitioner claims that her invitation would have precluded a finding of the aggravated burglary element of entry “without the effective consent” of the owner of the habitation. *See* T.C.A. § 39-14-402(a) (“A person commits burglary who [enters] without the effective consent of the property owner . . . ”); *id.* § 39-14-403(a) (“Aggravated burglary is burglary of a habitation as defined in §§ 39-14-401 and 39-14-402.”). He further posits that the sentencing hearing transcript showed that he and the victim had “only one encounter” and that two counts of statutory rape could not have been sustained. He claims that, therefore, his pleas to two counts of statutory rape were the results of ineffective assistance of counsel. Furthermore, he alleges that “there was no proof of the accuser’s . . . exact birth date.” Finally, the defendant posits in his brief that his convictions of statutory rape, on the one hand, and of solicitation, on the other, violate principles of double jeopardy.

The methodology for a trial court’s receiving a defendant’s guilty plea is prescribed by Tennessee Rule of Criminal Procedure 11. Subsection (b) of Rule 11 provides:

(1) Advising and Questioning the Defendant. Before accepting a guilty or nolo contendere plea, the court shall address the defendant personally in open court and inform the defendant of, and determine that he or she understands, the following:

- (A) The nature of the charge to which the plea is offered;
- (B) the maximum possible penalty and any mandatory minimum penalty;
- (C) if the defendant is not represented by an attorney, the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and every other stage of the proceeding;
- (D) the right to plead not guilty or, having already so pleaded, to persist in that plea;
- (E) the right to a jury trial;
- (F) the right to confront and cross-examine adverse witnesses;

(G) the right to be protected from compelled self-incrimination;

(H) if the defendant pleads guilty or nolo contendere, the defendant waives the right to a trial and there will not be a further trial of any kind except as to sentence; and

(I) if the defendant pleads guilty or nolo contendere, the court may ask the defendant questions about the offense to which he or she has pleaded. If the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against the defendant in a prosecution for perjury or aggravated perjury.

(2) Insuring That Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court shall address the defendant personally in open court and determine that the plea is voluntary and is not the result of force, threats, or promises (other than promises in a plea agreement). The court shall also inquire whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the district attorney general and the defendant or the defendant's attorney.

Tenn. R. Crim. P. 11(b). Additionally, Rule 11(b)(3) provides that “[b]efore entering judgment on a guilty plea, the court shall determine that there is a factual basis for the plea.” Tenn. R. Crim. P. 11(b)(3). “If the court accepts the plea agreement, the court shall advise the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement.” Tenn. R. Crim. P. 11(c)(4).

Concerning the trial court's Rule 11(b)(2) determination that the plea is entered voluntarily, principles of due process demand that a guilty plea be entered voluntarily, knowingly, and understandingly. See *Boykin v. Alabama*, 395 U.S. 238, 242-44, 89 S. Ct. 1709, 1711 (1969). “[T]he core requirement of *Boykin* is ‘that no guilty plea be accepted without an affirmative showing that it was intelligent and voluntary.’” *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993) (quoting *Fontaine v. United States*, 526 F.2d 514, 516 (6th Cir. 1975)). The plea must represent a “voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970). A plea is involuntary if the accused is incompetent or only “if it is the product of ‘ignorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats.’” *Blankenship*, 858 S.W.2d at 904 (quoting *Boykin*, 395 U.S. at 242-43, 89 S. Ct. 1709, 1712).

In *Alford*, the United States Supreme Court held that a criminal defendant may enter a guilty plea without admitting guilt if the defendant intelligently concludes his best interests would be served by a plea of guilty. *Alford*, 400 U.S. at 37, 91 S. Ct. at 167.

Generally, a defendant who submits a guilty plea is not entitled to withdraw the plea as a matter of right. *State v. Turner*, 919 S.W.2d 346, 355 (Tenn. Crim. App. 1995). The decision to allow the withdrawal of a guilty plea is within the discretion of the trial court and may not be overturned on appeal absent an abuse of discretion. *Henning v. State*, 184 Tenn. 508, 511, 201 S.W.2d 669, 670 (1947); *State v. Davis*, 823 S.W.2d 217, 220 (Tenn. Crim. App. 1991). However, the existence of discretion implies that there are limits to its exercise. *State v. Williams*, 851 S.W.2d 828, 832 (Tenn. Crim. App. 1992). The record must contain some substantial evidence to support the trial court's decision. *Goosby v. State*, 917 S.W.2d 700, 705 (Tenn. Crim. App. 1995).

Rule 32(f) of the Tennessee Rules of Criminal Procedure governs two situations in which a defendant wishes to withdraw a guilty plea before the judgment has become final. According to the rule, a trial court may permit the withdrawal of a guilty plea upon a showing "of any fair and just reason" before it sentences the defendant. Tenn. R. Crim. P. 32(f). Once the defendant is sentenced, however, the rule requires that defendants meet a different standard and also imposes a time constraint. According to the rule, a trial court may permit the withdrawal of a guilty plea after sentencing and before the judgment becomes final only "to correct manifest injustice." *Id.* The rationale for raising the hurdle over which a defendant must jump once sentence is imposed "is based 'upon practical considerations important to the proper administration of justice.'" *State v. Crowe*, 168 S.W.3d 731, 741 (Tenn. 2005) (quoting *Kadwell v. United States*, 315 F.2d 667, 670 (9th Cir. 1963)).

Before sentencing, the inconvenience to court and prosecution resulting from a change of plea is ordinarily slight as compared with the public interest in protecting the right of the accused to trial by jury. But if a plea of guilty could be retracted with ease after sentence, the accused might be encouraged to test the weight of potential punishment, and withdraw the plea if the sentence were unexpectedly severe. The result would be to undermine respect for the courts and fritter away the time and painstaking effort devoted to the sentencing process.

State v. Antonio Demonte Lyons, No. 01C01-9508-CR-00263, slip op. at 15 (Tenn. Crim. App., Nashville, Aug. 15, 1997) (quoting *Kadwell*, 315 F.2d at 670); *see also Crowe*, 168 S.W.3d at 741 (quoting same language from *Kadwell*).

The concept of manifest injustice under Rule 32(f) is not identical to the requirements of constitutional due process; however, when "there is a denial of due process, there is a 'manifest injustice' as a matter of law." *State v. Davis*, 823 S.W.2d at 220 (quoting *United States v. Crusco*, 536 F.2d 21, 26 (3d Cir. 1976)). "[A] trial court may, under some circumstances, permit the withdrawal of a guilty plea to prevent manifest injustice even though the plea meets the 'voluntary and knowing' requirements of constitutional due process." *Antonio Demonte Lyons*, slip op. at 16.

In the present case, the defendant moved to set aside his guilty plea after sentencing but before the judgment was final. The timing of the motion, therefore, invoked the manifest injustice rule. *See* Tenn. R. Crim. P. 32(f). The term “manifest injustice” is not defined either in the rule or in those cases in which the rule has been applied. Trial courts and appellate courts must determine whether manifest injustice exists on a case by case basis. *See Crowe*, 168 S.W.3d at 741-42 (recognizing absence of definition for manifest injustice and citing examples of circumstances warranting withdrawal); *State v. Turner*, 919 S.W.2d 346, 355 (Tenn. Crim. App. 1995). The defendant has the burden of establishing that a plea of guilty should be withdrawn to prevent manifest injustice. *Turner*, 919 S.W.2d at 355.

To determine whether the defendant should be permitted to withdraw his guilty plea to correct manifest injustice, a court must scrutinize carefully the circumstances under which the trial court accepted the plea. An analysis of the plea submission process under Tennessee Rule of Criminal Procedure 11(b) facilitates an inquiry into the existence of manifest injustice. *See generally State v. McClintock*, 732 S.W.2d 268 (Tenn. 1987) (for rules concerning acceptance of guilty pleas); *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977) (same). Tennessee courts have allowed the withdrawal of guilty pleas to prevent manifest injustice when

- (1) the plea “was entered through a misunderstanding as to its effect, or through fear and fraud, or where it was not made voluntarily”;
- (2) the prosecution failed to disclose exculpatory evidence as required by *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and this failure to disclose influenced the entry of the plea;
- (3) the plea was not knowingly, voluntarily, and understandingly entered; and
- (4) the defendant was denied the effective assistance of counsel in connection with the entry of the plea.

Crowe, 168 S.W.3d at 742 (footnotes omitted). Courts have also found that manifest injustice resulted from the trial court’s failure to advise a defendant of the appropriate sentencing range, to apply the appropriate sentencing statute, or to inform a defendant of the consequences flowing from the guilty plea. *Antonio Demonte Lyons*, slip op. at 23-24. A guilty plea, however, should not be withdrawn merely because the defendant has had a change of heart. *Crowe*, 168 S.W.3d at 743; *Ray v. State*, 224 Tenn. 164, 170, 451 S.W.2d 854, 856 (1970). Nor should a defendant’s dissatisfaction with an unexpectedly harsh sentence be sufficient justification for a withdrawal. *Crowe*, 168 S.W.3d at 743; *Clenny v. State*, 576 S.W.2d 12, 15 (Tenn. Crim. App. 1978).

In the present case, the trial court imparted the information listed in Rule 11(b), and the defendant duly acknowledged his understanding of his rights, his impending waiver of those rights, the nature of the charges pending against him and the sanctions that could be imposed, the nature of his plea agreement, his satisfaction with his counsel’s representation, and his general comprehension of the proceedings as well as the voluntariness of the guilty pleas.

Rule 11 further instructs the trial court to elicit a factual basis for the plea-bargained conviction, and in the present case, the prosecutor articulated a factual basis which included references to the victim's age, the defendant's age, and the victim's brain impairment that may have vitiated any consent to the defendant's entry of the house. *See* T.C.A. § 39-11-106(9)(C) (defining "effective consent" as "assent in fact," but excluding from "effective" consent that which is "[g]iven by a person who, by reason of youth, mental disease or defect, or intoxication, is known by the defendant to be unable to make reasonable decisions regarding the subject matter"). The prosecutor's factual basis also described the offense of solicitation that occurred on May 5, 2006, and two acts of sexual penetration that occurred on May 7, 2006. Thus, the factual basis belied all of the claims the defendant now makes regarding the inadequacy of the factual premises for the convictions.

Furthermore, based upon his review of the transcript of the plea submission hearing, the trial judge held that the defendant's pleas were knowingly, voluntarily, and understandingly entered. The record supports that conclusion. Although the trial court heard no testimony on the Rule 32(f) issue, the defendant does not claim that he was denied an opportunity to be heard.

The nub of the defendant's claims on appeal is that the sentencing hearing, which was conducted after the plea was submitted and accepted, evinced possible defenses that the defendant could have pursued had the case gone to trial. In our view, the post-plea testimony does not vitiate the pleas, especially in light of the defendant's affirmation in the plea submission hearing that he understood the charges pending against him and in view of his failure to claim that the victim's sentencing hearing testimony surprised him.

Additionally, although the defendant's claim in his brief that he had been denied the effective assistance of trial counsel was not addressed by the trial court, the defendant neither makes a claim on appeal that he was denied the opportunity to establish ineffective assistance of counsel nor cites to any authority in support of the claim. The latter lapse justifies this court in concluding that the issue is not properly before us, *see* Tenn. Ct. Crim. App. R. 10, and frankly, the defendant is better served by this treatment of the issue. The claim of ineffective assistance of counsel may be presented in a petition filed pursuant to the Post Conviction Procedure Act, but the Act contemplates the filing of only one petition. T.C.A. § 40-30-102(c) (2006). Moreover, a claim of ineffective assistance of counsel states a broad, single ground for relief. *State v. Rowland Keith Hall*, No. E2006-00111-CCA-R3-CD, slip op. at 8 (Tenn. Crim. App., Knoxville, July 1, 2007), *perm. app. denied* (Tenn. 2007); *Roger Clayton Davis v. State*, No. 03C01-9902-CR-00076, slip op. at 5 (Tenn. Crim. App., Knoxville, Jan. 14, 2000). Once raised and adjudicated during the pendency of the conviction proceeding, such as in a motion for new trial or for Rule 32(f) relief or on direct appeal, the issue may be deemed previously determined for purposes of later post-conviction relief. *See* T.C.A. § 40-30-106(h) ("A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing."); *id.* § 40-30-106(f) ("If the facts alleged, taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined, the petition shall be dismissed."). Thus, Tennessee courts have repeatedly cautioned that raising the issue of ineffective assistance of

counsel in advance of a post-conviction proceeding, where the claimant is availed the opportunity of an evidentiary hearing, is “fraught with peril.” *See, e.g., State v. Anderson*, 835 S.W.2d 600, 607 (Tenn. Crim. App. 1992).

In conclusion, we hold that the trial court did not abuse its discretion in denying Rule 32(f) relief, and accordingly, we affirm that court’s judgments.

JAMES CURWOOD WITT, JR., JUDGE