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

# ROGER STEVE YANT v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Giles County**
**No. 12987 Robert L. Jones, Judge**

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**No. M2007-01936-CCA-R3-PC - Filed December 22, 2008**

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The petitioner, Roger S. Yant, appeals the Giles County Circuit Court's dismissal of his petition for post-conviction relief from his conviction for rape of a child, a Class A felony, and resulting sentence of thirteen and one-half years. On appeal, the petitioner contends: (1) that his plea was not a valid guilty plea; and (2) that if the plea was valid, it was not entered knowingly, intelligently, and voluntarily based upon a lack of understanding of his rights, which resulted from his being mentally challenged. After review of the record, we conclude that the plea was valid and that the record supports the post-conviction court's finding that the plea was entered knowingly, voluntarily, and intelligently. Thus, the judgment of the post-conviction court is affirmed.

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

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JAMES CURWOOD WITT, JR., J., joined.

Michael D. Rohling and Bernard McEvoy, Nashville, Tennessee, for the appellant, Roger Steve Yant.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; T. Michel Bottoms, District Attorney General; and Patrick S. Butler, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Factual Background

The petitioner pled guilty in the Giles County Circuit Court to one count of rape of a child. The minimum underlying facts of the case can be gleaned from the following colloquy, which occurred at the guilty plea hearing:

[TRIAL COUNSEL]: The State's proof would be that there is a statement by the child, statement from the child's great-grandmother or great-aunt - - I'm not sure . . . that [the seven-year-old victim] came home with a [handwritten] note [from the petitioner] and some money. The grandmother started to question her about this and these allegations came up as a result.

The child would have been carried to the hospital, examined, and was not - - it appeared to be maybe some redness, but not anything out of tact. Of course, as you know, they can explain that away.

In addition to that, after these things were done, the child was carried to the facility in Nashville at Vanderbilt. Examined there. Additional statements.

Then [the petitioner] was called to the jail. He gave a statement. We filed a motion to suppress. There are dueling psychologists that would have come forward on this. And the statement was incriminating.

. . . The child is prepared to testify. The other folks are prepared to testify. That's how we got to this agreement.

. . . .

There was not any physical damage . . . .

THE COURT: And does the child's version, if believed by the jury, establish a penile or digital penetration?

[TRIAL COUNSEL]: Yes, Your Honor.

. . . .

[THE STATE]: Your Honor, there's one count on this indictment. The State could seek, I think, additional counts that would encompass quite a range of time, there, Your Honor. There would have been digital and penile penetration, if we had sought additional counts.

[TRIAL COUNSEL]: That is part of our plea arrangements, that there will be no additional counts.

THE COURT: . . . [I]t looks like the parties have agreed that [the petitioner] would be sentenced as a[n especially] mitigated offender.

In response to questioning by the court, the petitioner testified that he was fifty-five years of age, had no prior criminal record, and had dropped out of school in the seventh grade after he was placed in a "mental retarded class." He went on to state that he had worked at his factory job for almost thirty years and had a driver's license. The court then questioned the petitioner regarding any medications he was taking, and the petitioner responded that no medications he was taking affected his understanding of the proceedings.

The trial court then went on to explain, with trial counsel's assistance, the rights guaranteed to the petitioner including the jury function, his right to trial, his right to be found guilty beyond a reasonable doubt, the presumption of innocence, his right to subpoena witnesses, his right to testify or not, and his right to an attorney. The petitioner indicated his understanding of the rights. The following then occurred between the court and the petitioner:

> THE COURT: Now, . . . are you satisfied with what [trial counsel] has done for you, and on your behalf, in helping you decide how to dispose of this case?
>
> [THE PETITIONER]: Well, yes, sir, 'cause if I go the other way, I'd probably get 25 or 30 years, and I've got two little grandkids.
>
> THE COURT: Well, you probably wouldn't get more than 25 years.
>
> [THE PETITIONER]: Well, eventually - - if I take this, I'll eventually see them, again. Maybe. If I make it through it.
>
> . . . .
>
> THE COURT: Okay. In other words, you apparently think that if you went to trial, the odds might be against you?
>
> [THE PETITIONER]: Yes, sir.
>
> THE COURT: Because you think they might believe this girl?
>
> . . . .
>
> [THE PETITIONER]: Well, yes, sir. I think that's the way it's going.

The court then stated that it "must be satisfied that you're doing this freely and voluntarily, and because you think it's in your best interest." The court asked the petitioner if it was "in your best interest for the Court to approve this settlement," to which the petitioner responded, "Well, I'd get to see my grandkids." The court then questioned the petitioner regarding the thirteen and one-half year sentence, which was to be served at one hundred percent, and the petitioner indicated his understanding, including that he would have to serve "about every day of that thirteen-and-a-half

years." The petitioner also indicated to the court that no one had pressured him into making the decision to accept the plea agreement, with the court specifically informing the petitioner that it was not "your sister's decision, your brother's decision, your lawyers decision. It's your decision." The petitioner then, asking for permission to say one thing, stated that the police detective, Joey Dickey, had pressured him into making the taped confession. After questioning the petitioner about why he felt he was pressured into confessing, the court stated, "I think we've covered a factual basis. I haven't asked the [petitioner] if he's actually guilty, and I don't think I need to, if he's told me he thinks it's in his best interest to settle this way." Following a discussion with the attorneys regarding the fact that no more charges would be filed as part of the agreement, the court addressed the petitioner and asked him if he had any questions or if he needed a few minutes to discuss the decision with his family or attorney, to which the petitioner responded "no." The court then stated:

> The Court finds that this [petitioner] understands the nature of the charge against him, and the consequences of pleading guilty to the charge. He understands, I think very clearly, that the consequences of this plea will be his spending the next thirteen-and-a-half years, or near thereto, in the State Penitentiary, and that he will be nearly 70 years of age at the time of his release.
>
> The Court also finds that there is a factual basis for the plea, and that the [petitioner] has freely and voluntarily entered into this agreement.
>
> The Court is aware that the defendant may have some possibility of getting relief on a motion to suppress. But at the same time, he may not.
>
> If there is evidence of other events involving this victim and this [petitioner], he would be at some risk for possible conviction on multiple counts, and even consecutive sentencing on two or more counts.

The court then specifically noted that "this is a fair settlement, and even though this [petitioner] has some mental limitation, that he has a sufficient understanding of the law and the procedure that he would need to understand in order to enter a knowing and voluntary plea." The court subsequently found the petitioner guilty of rape of a child and sentenced him, as an especially mitigated offender, to thirteen and one-half years in the Department of Correction.

Following his conviction, the petitioner filed a petition for post-conviction relief alleging multiple instances of ineffective assistance of counsel and that his plea was not knowingly, intelligently, and voluntarily entered. At the subsequent hearing, the petitioner elected to proceed only upon the claim that his plea was not knowingly, intelligently, and voluntarily entered based upon his mental limitations. Four witnesses testified at the hearing, those being trial counsel, the petitioner's brother, his sister, and the petitioner himself.

Trial counsel testified that he had been retained by the petitioner's family and that he was aware that the petitioner was "challenged." Because of the petitioner's limitations and his mental

state at the time, trial counsel communicated mostly with the petitioner's family, as he believed that they were best able to communicate with the petitioner in a way in which he could understand. However, he did meet with the petitioner on some occasions. Based upon his understanding of the petitioner's limitations, trial counsel had the petitioner tested by a psychologist in order to determine whether his confession should be challenged in a motion to suppress. Trial counsel spoke with the prosecuting attorney on multiple occasions regarding the petitioner's situation in hope that the State would agree to a lesser charge. The best offer that trial counsel could negotiate was for the petitioner to plead to rape of a child but with an agreed sentence of thirteen and one-half year. Trial counsel testified that he informed the petitioner's family throughout the various stages of the plea negotiations.

At a meeting in his office, at which the petitioner, his two brothers, and his sister, were present, trial counsel informed them of the final agreement offered by the State. He further informed them that the State was considering the possibility of filing additional charges if the agreement was not accepted. According to trial counsel, the group left the office to discuss the petitioner's decision. A short while later, trial counsel received a call from the petitioner's brother stating that the petitioner had decided to accept the agreement. The following day, the petitioner returned to trial counsel's office, along with his two brothers, and they reviewed the plea agreement and completed the paperwork. Trial counsel stated that he specifically reviewed the elements of the offense with the petitioner and his family and discussed the rights that the petitioner would be waiving by accepting the plea agreement. He further testified that he reviewed these facts in simple terms in order to aid the petitioner's understanding. Trial counsel acknowledged that he did recommend that the petitioner accept the plea based upon the fact that, even if he was successful on the motion to suppress, the State still had a strong case against the petitioner, as well as the possibility of additional charges being filed.

The petitioner's sister, Linda Fox, testified regarding the petitioner's mental condition. She stated that he had been a slow learner, was placed in special education classes, and had dropped out of school in the seventh grade. She testified that the petitioner had difficulty learning new things and problems functioning in daily life without assistance. She acknowledged being at a meeting at trial counsel's office in which the plea agreement was discussed. She stated that trial counsel urged the petitioner to accept the plea. However, in contradiction to trial counsel's testimony, she stated that he did not review the elements of the offense, did not explain the range of possible punishments, did not discuss the State's proof or possible defenses, and did not explain certain rights that the petitioner would be forfeiting by pleading guilty. According to Ms. Fox, trial counsel basically gave them an ultimatum to accept the agreement "within an hour and a half" or the State would file additional charges. The group left together to discuss the options, after which the petitioner decided to accept the agreement.

The petitioner's brother, Paul Yant, also acknowledged being present at the meeting during which trial counsel communicated the plea offer. According to Yant, trial counsel did explain the terms of the agreement and informed them about the possibility of additional charges if the agreement was not accepted. According to Mr. Yant, it was the petitioner's decision to accept the

agreement because of the possibility of additional charges. However, he testified that he did not believe that the petitioner understood the full implications of the plea agreement.

The petitioner himself testified and stated that his hearing problems and his inability to understand "big words" interfered with his ability to understand what trial counsel explained to him. He did acknowledge that he had told the trial court that he understood his right, but he stated that he lied. On cross-examination, the petitioner acknowledged that trial counsel had informed of the possibility of additional charges and that he had taken the agreement in exchange for the State agreeing not to bring those charges. Moreover, he stated that one reason he accepted the plea was that he knew he would be released in thirteen and one-half years and have a chance to see his grandchildren.

The petitioner's employment records were also introduced, verifying that he had been employed by the same employer for nearly thirty years, that he had been given certificates of accomplishment and merit raises, and that he had worked in several areas of the plant. Additionally, the petitioner introduced the two forensic psychological evaluations, one prepared by the defense and the other by the State, previously prepared to determine if the petitioner's initial statement to police was given knowingly, intelligently, and voluntarily based upon his mental limitations. Both reports concluded that the petitioner was mildly mentally retarded, and portions of both indicated that he might have lacked the capacity to relinquish his rights, with the State's report concluding that "all of the available evidence suggests that [the petitioner] had the capacity to knowingly waive his right, but that his ability to do so intelligently was impaired by his intellectual deficits and anxiety level."

The post-conviction court proceeded to question the petitioner regarding his understanding of the instant proceedings, to which the petitioner responded that the reason for the post-conviction petition was to have his plea overturned because he believed he might get a shorter sentence after trial. The post-conviction noted, however, that the important question in answering whether the plea was entered knowingly and voluntarily was what the petitioner understood at the time he entered the plea, rather than what the petitioner currently understood with regard to his rights. The court then referenced the transcript of the plea hearing and noted that:

> . . . it's clear that the Court talked to the then defendant, now petitioner, about his various rights. I talked to him about the statement that he gave to Joey Dickey. He told the Court that it was a true statement, but he wishes he had not made it.
>
> He told the Court about the medication he was taking, some other factors about his health. He talked about his right to a trial by jury, many other things required by the rules and the cases in Tennessee.
>
> I noted, as I read through the transcript, that I probably did not slow down enough to ensure that I got the proper answer about the fact that he may be waiving an appeal as well. But I'm really not sure that that particular right has to be discussed in a plea hearing. . . .

. . . .

I frankly doubt that Exhibits 1 and 2 [the two reports of psychologists hired by the defense and the State in preparation for the motion to suppress hearing], are substantive evidence in this case as to the [petitioner's] mental capacity. And the sister that attempted to testify about his mental capacity was extremely reckless about some of the exaggerations she made during her attempt to paint him in a poor light as possible with regard to his spelling skills and various other life-related skills.

But at the time, on December the 29th, 2005, that the [petitioner] appeared before the Court, he persuaded the Court that he had an adequate understanding; not law school . . . understanding; maybe not even a high school understanding of what the law was, but he knew that sexual penetration of a 7-year-old girl was wrong. He knew he was entitled to have a jury trial. He knew that he could do worse. He could do better.

And he had discussed his settlement agreement, we know by direct evidence today, with his lawyer, his mother, and three siblings. And the strong implication from today's proof is that he also discussed it with his wife, and his two daughters. And they had an opportunity to discuss it with him.

Many of those same people were in court on the 29th, and those same people were the ones that hired [trial counsel]. They're the ones I'm having trouble understanding today. They hire a lawyer. They let him take the advice of his lawyer. And then they run and hire other lawyers to second-guess what [the petitioner] and [trial counsel] decided was the best thing to do.

Not only, apparently, were they persuaded on December the 29th, that that was the best thing to do, but most importantly, [the petitioner], himself, was persuaded that that was in his best interest on December 29, 2005. And he persuaded this judge, that he believed, that [the petitioner] believed, it was in his best interest to settle this case, this way.

. . . .

The Court's satisfied that this man who held a job for almost 30 years, had a long-term marriage, raised two children, knew what he was doing on December the 29th, 2005.

And nothing that he said or his family members have said, today, have persuaded the Court that [the petitioner's] testimony on December the 29th, or the Court's impression of him and his answers on that date, made the plea improper in any sense of the word.

> The Court finds that it was knowingly done, voluntarily done, and was then and now in his best interest. Therefore, the petition, or the relief sought in the petition, will be denied.

The petitioner timely appeals the dismissal of the petition.

**Analysis**

On appeal, the petitioner asserts that his plea was not entered knowingly, intelligently, or voluntarily and, further, did not constitute a valid guilty plea. Specifically, he contends that, because of his mental limitations and his failure to understand the relinquishment of rights and consequences of the plea, he was not capable of entering the plea in the manner prescribed by law. Moreover, he contends that there was in actuality never a valid plea entered, as the petitioner never specifically admitted guilt and the stated facts do not constitute a factual basis for the plea to the charged offense.

In order to succeed on a post-conviction claim, the petitioner bears the burden of showing, by clear and convincing evidence, the allegations set forth in his petition. T.C.A. § 40-30-110(f) (2006). Moreover, post-conviction relief may be granted only if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103 (2006). The Due Process Clause of the United States Constitution requires that guilty pleas be knowing and voluntary. *State v. Wilson*, 31 S.W.3d 189, 194 (Tenn. 2001); *see also Boykin v. Alabama*, 395 U.S. 238, 243, 89 S. Ct. 1709, 1712 (1969).

**I. Validity of the Plea**

First, we address the petitioner's contention that the plea was not valid because he did not admit guilt and no factual basis was established. Initially, we note that while the issue was mentioned in the post-conviction petition, no proof was presented at the post-conviction hearing on this issue. Thus, there was no ruling by the post-conviction court. Moreover, the State failed to address the petitioner's argument in its brief. Nonetheless, we conclude that the record is sufficient to permit review and, in the interest of justice, do so. However, we conclude that the petitioner's argument is without merit.

We agree with the petitioner that a reading of the transcript does indicate that he was never asked by the trial court to admit guilt. The court did, however, specifically asked the petitioner if he was accepting the agreement because it was in his "best interest." According to the petitioner's argument, this indicates that the court is "attempting to accept a nolo contendere plea, [which] is contrary to the judgment in this case." We agree that the judgment of conviction indicates that the petitioner pled guilty rather than pled nolo contendere. The petitioner's argument, however, appears to confuse a nolo contendere plea with an *Alford* or best-interest plea. We would note that pursuant to Tenn. R. Crim. P. 11, which the petitioner claims was violated by this agreement, no factual basis is required prior to the acceptance of a nolo contendere plea. *State v. Crowe*, 168 S.W.3d 731, 747 (Tenn. 2005). Pursuant to an *Alford* plea, a defendant who wishes to enter a plea but does not wish

to acknowledge guilt may, in the court's discretion, plead guilty based on a representation that the plea is in the defendant's best interest. A plea of this type is acceptable upon a showing that it is voluntarily and intelligently entered. *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970). The *Alford* plea is a viable option to a defendant in Tennessee, and a trial court may accept a defendant's "best interest" plea so long as there is a factual basis for the plea. *Hicks v. State*, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998) (citing *Dortch v. State*, 705 S.W.2d 687, 689 (Tenn. Crim. App. 1985)).

As does the petitioner, we note that the record is not clear if the petitioner was entering a straight guilty plea or an *Alford* plea. However, this court has previously explained that a defendant's failure to understand the difference between the two types of plea agreements does not make an *Alford* plea involuntary. *Clifford Sims v. State*, No. W2004-02167-CCA-R3-PC (Tenn. Crim. App. at Jackson, May 30, 2006). "It [makes] no difference to the petitioner whether the trial court accepted his plea as an *Alford* plea or a garden-variety guilty plea . . . [i]f the petitioner had the information required to make an intelligent decision and if he understood the consequences of pleading guilty . . . ." *Hicks*, 983 S.W.2d at 248. Though we acknowledge that the record could have been clearer regarding what type of plea agreement it was, contrary to the petitioner's assertion, it is clear what the terms of the agreement were. We conclude that if the petitioner intelligently, knowingly, and voluntarily entered into the agreement, we cannot find that it constitutes an invalid plea.

The petitioner also claims that the plea is invalid because no factual basis was given to support the plea. *See* Tenn. R. Crim. P. 11(f); *see also State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977). However, given the purposes of the *Mackey* requirements, the petitioner's claim is actually a challenge to the voluntariness of his plea. Our supreme court has often stated that a challenge to the voluntariness of a guilty plea based on a violation of the *Mackey* precepts, which exceed the requirements of *Boykin v. Alabama*, is not a constitutional claim and, therefore, is not properly raised in a post-conviction petition. *Bentley v. State*, 938 S.W.2d 706, 711-12 (Tenn. Crim. App. 1996) (citing *State v. Frazier*, 784 S.W.2d 927, 928 (Tenn. 1990); *State v. Prince*, 781 S.W.2d 846, 853 (Tenn. 1989)). Thus, the petitioner's claim is not cognizable in a post-conviction proceeding.

**II. Knowing, Intelligent, & Voluntary Entry of Plea**

In evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme court has stated, "The 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. at 31, 91 S. Ct. at 164. The constitutional mandate that guilty pleas be knowing is essentially fulfilled by the court informing the accused of his or her constitutional rights against self-incrimination, to confront witnesses, and to trial by jury. *Boykin*, 395 U.S. at 243, 89 S. Ct. at 1712. Any other requirement in excess of *Boykin* is not based upon any constitutional provision, federal or state. *State v. Prince*, 781 S.W.2d 846, 853 (Tenn. 1989).

In making this determination, the reviewing court must look to the totality of the circumstances. *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). Indeed, a

> court charged with determining whether . . . pleas were 'voluntary' and 'intelligent' must look to various circumstantial factors, such as the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

*Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). A plea cannot be voluntary if the accused is "'incompetent or otherwise not in control of his mental facilities.'" *Id*. (quoting *Brown v. Perini*, 718 F.2d 784, 788 (6th Cir. 1983)).

On appeal, the petitioner, relying upon the *Blankenship* factors, contends that the record establishes that the plea was not knowingly, intelligently, and voluntarily entered. According to the petitioner, the transcript of the plea hearing establishes that the petitioner struggled in comprehending the plea proceeding, went on tangents, and was confused as to his rights. However, our review of the record supports the post-conviction court's finding that the petitioner entered a knowing, intelligent, and voluntary guilty plea. The trial court focused heavily upon what occurred during the plea colloquy. While the petitioner did introduce a forensic examination report that concluded the petitioner could not have knowingly and voluntarily waived his rights during police interrogation, the trial court properly concluded that such a report was of little value in assessing the validity of the petitioner's guilty plea. A reading of the transcript leads us to the conclusion that both trial counsel and the trial court were very thorough in their explanations of the various rights the petitioner was giving up by pleading guilty. Moreover, contrary to the petitioner's claim, the transcript does not reveal that the petitioner did not understand those rights. It was clear that he was aware of the consequences of the plea arrangement into which he was entering and that he made that decision, in part, to avoid additional charges and to possibly see his grandchildren in the future. This is a valid reason to accept a plea agreement. The court also clearly accredited the testimony of trial counsel that he had explained the plea agreement and the resulting consequences to the petitioner in a previous meeting. We do not revisit the issue of credibility on appeal; rather, we defer to the post-conviction court's ruling in that regard. *Black v. State*, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990).

We likewise agree with the court that trial counsel was more than aware of the petitioner's mental limitations and made every effort possible to ensure that he was apprised of and understood his case. Trial counsel testified that he met and spoke with the petitioner's family on multiple occasions and explained the situation to them so they could relay the information in a manner in which the petitioner would understand. The record supports the conclusion that both trial counsel and the trial court, when accepting the plea, were aware of the petitioner's limitations and made

adequate adjustments in their handling of the situation. Moreover, while testimony was given with regard to the petitioner's limitations, testimony was also given that he had functioned in society as an adult, held the same job for almost thirty years, maintained a marriage, and raised two children. With regard to the petitioner's contention that he was forced to accept the plea in only one and one-half hours, we cannot conclude that this made the plea involuntary and unknowing. Trial counsel testified that he explained the details of the agreement. Moreover, the transcript of the guilty plea hearing indicates that the petitioner's rights were covered in depth at that time. Additionally, a reading of the transcript belies the petitioner's contentions that he was not aware of the strength of the State's case, as he himself stated that he accepted the plea in part because he felt it would go the State's way if the case proceeded to trial. The record also does not support the petitioner's contention that he accepted the plea based on a "childlike determination of his lifespan." The remarks made by the petitioner at the plea hearing indicate that he was aware of the nature and consequences of the plea and made a knowing, intelligent, and voluntary decision to accept the agreement.

## CONCLUSION

Based upon the foregoing, the denial of the petition for post-conviction relief is affirmed.

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JOHN EVERETT WILLIAMS, JUDGE