

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 15, 2006

JENALINE N. FISHER V. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court of Davidson County
No. 2003-C-1791 Cheryl A. Blackburn, Judge**

M2005-02651-CCA-R3-PC - Filed September 25, 2006

Petitioner, Jenaline Fisher, contends that the trial court erred in failing to grant her post-conviction relief petition. She contends that the entry of her guilty plea to second degree murder was not knowingly and voluntarily entered. After a thorough review of the record, we affirm the trial court's dismissal of the post-conviction petition.

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

J. S. Daniel, Sr.J., delivered the opinion of the court, in which John Everett Williams and Alan E. Glenn, JJ., joined.

Paul G. Summers, Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Gunn, Assistant District Attorney General, for the Appellee, State of Tennessee.

Ryan Craig Caldwell, Attorney for the Appellant, Jenaline Fisher

OPINION

FACTS

In July 2003, a Davidson County grand jury returned a three-count indictment against the Petitioner Jenaline Fisher. In Count I, petitioner was charged with felony murder during the perpetration of a robbery in violation of Tennessee Code Annotated section 39-13-202. In Count II she was charged with first degree premeditated murder pursuant to the same code section. Count III charged the petitioner with one count of robbery.

In announcing a factual basis for a guilty plea, the State claimed the evidence would show that petitioner conspired with Donvasus D. Watts to lure Moses Pieny, who had previously been in a relationship with petitioner, to petitioner's residence at 1703 Fourth Avenue North, Nashville,

Tennessee, to rob him. After petitioner obtained a gun and delivered it to Mr. Watts, she went to get Mr. Pieny. Watts, Taurus Payne and Joshua Capleton waited inside petitioner's residence for the petitioner to return with Mr. Pieny. When Pieny and petitioner arrived, Watts appeared with a gun and demanded money from Pieny. When Watts learned Pieny had no money, a scuffle ensued. Watts shot Pieny numerous times, resulting in Mr. Pieny's death.

Petitioner assisted in cleaning the residence after Mr. Pieny's body was wrapped in a carpet and removed from the premises. The body was placed in the trunk of a car and dumped in an alley. The next day someone discovered the body while walking through that alley. These events were alleged to have occurred on or about May 30, 2003. Petitioner was arrested June 4, 2003.

On the Monday preceding the entry of the plea, petitioner's case was set to go to trial; however, due to other cases docketed for trial on the same day, petitioner's case was delayed. Pursuant to a plea agreement, petitioner entered a guilty plea on March 11, 2004, to second degree murder as a lesser charge to Count I of the indictment and received a Range II thirty year sentence to be served at one hundred percent. Counts II and III, along with another case (No. 2003-C-2255), were dismissed as part of the plea agreement.

During the plea colloquy the trial judge painstakingly reviewed the range of punishment, the elements for each of the indicted offenses and the constitutional rights afforded petitioner. The trial judge also explained the concept of criminal responsibility for the conduct of another. Petitioner showed some reluctance in entering a plea to second degree murder because of her claim that she was not the shooter. When this reluctance was coupled with petitioner's statement that she was pleading guilty just to go ahead and do her time, the State moved to reject the best interest plea and proceed to trial.

Following a short recess, during which petitioner discussed the matter with her attorney, the following additional colloquy took place:

Q. (By the Court) Now, Ms. Fisher, why are you pleading guilty?

A. I'm guilty of the crime.

Q. Okay. You're guilty. Now, I want to make sure we understand something because there were several people charged in this crime. Is she pleading guilty as part of a criminal responsibility for conduct?

A. General Gunn: Yes.

Q. Maybe that's where we're having the issue is [sic]. Did Ms. Montgomery talk to you about what we call criminal responsibility for conduct of another?

A. Yes, ma'am.

Q. Okay. Which means that you yourself might not have pulled the trigger in this case but that you, because you were participating in the robbery, knew it was

going to happen and were assisting, that you can be held just as liable as anyone else especially as the person who pulled the trigger. Do you understand that?

A. Yes, ma'am.

Q. And is that the difficulty you've been having with saying you were guilty?

A. Yes, ma'am.

Q. Okay. So but you do understand, though, that you can be held responsible even though you didn't pull the trigger yourself? Do you understand that?

A. Yes, ma'am.

Q. So you are pleading guilty then to second degree murder?

A. Yes, ma'am.

Following this additional exchange, the trial court accepted petitioner's guilty plea.

On April 6, 2005, petitioner filed her *pro se* Petition for Post-Conviction Relief. Following the appointment of counsel, the petitioner filed an amended petition on March 18, 2005. The trial court conducted an evidentiary hearing on July 6, 2005 and took the matter under advisement. On October 4, 2005, the trial court entered an order dismissing petitioner's petition in which it concluded petitioner had failed to establish the grounds for relief by clear and convincing evidence. Notice of appeal was timely filed.

DISCUSSION

In this appeal, petitioner's sole claim is that the post-conviction court erred in finding that petitioner's guilty plea had been entered knowingly and voluntarily.¹ She maintains her plea was not knowing and voluntary because counsel failed to meet with her a sufficient number of times; because she did not understand that her sentence would be served at one hundred percent; and because she was affected at the time of the plea by non-prescription medication for a bi-polar condition. For the reasons set out below, we find no merit in these arguments.

Burden of Proof

Tennessee Code Annotated section 40-30-103 (2003) provides that in order for a petitioner to obtain post-conviction relief, the petitioner must show that his or her conviction or sentence is void or voidable because of the abridgement of a constitutional right. The petitioner bears the burden of proving the factual allegations in the Petition for Post-Conviction Relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2003). Evidence is clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusion drawn from the evidence. Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998). On appeal it is the burden of the petitioner to show that the evidence preponderates against the lower court's findings. Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978). In the instant case, the post-conviction claims are couched in terms of ineffective counsel but focus primarily on

¹ Because this is the sole issue raised by petitioner on appeal, any claims relating to the trial court's findings as to ineffective assistance of counsel claims are waived.

whether the guilty plea was knowing and voluntary due to some failure on the part of trial counsel. Accordingly, the Court will review the guilty plea under the following additional standard as well.

Standard of Review

Appellate review of a trial court's determination of whether a petitioner has entered a plea knowingly and voluntarily is under a *de novo* standard of review consistent with the standards set forth in Tennessee Rule of Appellate Procedure 13(d). As such, the trial court's findings of fact on the underlying claim are reviewed upon a *de novo* standard accompanied with the presumption that those findings are correct unless a preponderance of the evidence is otherwise. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). However, a trial court's conclusions of law are reviewed under a purely *de novo* standard with no presumption of correctness given to the trial court's conclusions. Id. at 457.

A defendant who enters a plea of guilty simultaneously waives several constitutional rights including his privileges against compulsory self-incrimination, his right to trial by jury and his right to confront his accusers. For this waiver to be valid under due process it must be "an intentional relinquishment or abandonment of known right of privilege." Johnson v. Zerbst, 304 U. S. 458, 464, 58 S. Ct. 1019, 1023 (1938). Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of law in relation to the facts. Boykin v. Alabama, 395 U. S. 238, 244, 89 S. Ct. at 1709, 1713 (1969).

In order to find that a plea was entered "intentionally" or "knowingly," Boykin requires that the trial court "canvas the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences." Id. at 244. Our Court has adopted the principles enunciated in the Boykin analysis in determining voluntary and intentional pleas of guilty. Blankenship v. State, 858 S.W.2d 897, 903 (Tenn. 1993).

Petitioner claims her guilty plea was not knowing and voluntary because counsel failed to adequately meet with her. Our review of the record reveals the trial court heard testimony that Assistant Public Defenders, Allegra Montgomery or Mike Engle, met with petitioner on six occasions in the penitentiary in addition to the numerous court appearances. According to counsel, they discussed the discovery along with the State's theory that petitioner was guilty under the principle of criminal responsibility for the conduct of another. They explained to petitioner that under this principle she could be liable for the acts of the shooter. The state's proposed facts indicated the petitioner lured the victim to her residence so that he could be robbed and assisted in cleanup following the murder.

Petitioner provides no explanation as to why these meetings/communications with counsel were insufficient. Similarly, she offers no testimony to show how additional meetings with counsel would have assisted her in her decision to plead guilty or proceed to trial.

Any claim that she did not understand the concept of criminal responsibility is also without merit. Not only did counsel explain this principle to petitioner, the trial court specifically referenced the criminal responsibility and its relation to the present case.

The following colloquy negates such claims:

Q. (By the Court) All right. Now, have you thoroughly discussed with your attorney everything about your case? By that I mean have you gone over everything that the State said you did, any defenses that you might have to these charges, or any witnesses that you might call to trial? Have you thoroughly discussed everything with Ms. Montgomery?

A. Yes, ma'am.

Q. Do you understand that she's been discussing this with the State, and they worked out this plea agreement on your behalf?

A. Yes, ma'am.

Q. Okay. Now, actually you were set to go to trial last Monday, but I took up another trial. But we are pretty much prepared to go to trial in your case had we not taken up the other trial. Did you understand that and that your attorneys were ready to go to trial?

A. Yes, ma'am.

Q. Has anybody threatened you or promised you anything other than this agreement in order to get you to plead guilty?

A. No, ma'am. . . .

Q. Now, has Ms. Montgomery - - and I believe Mr. Engle was assisting her in this case - - have they done everything that you wanted them to do with regard to your case?

A. Yes, ma'am.

Q. Okay. Is there anything you can think of that you wanted them to do that they did not do for you?

A. No, ma'am.

These claims are without merit.

Petitioner also claims the guilty plea was not knowing and voluntary because she is bipolar and was not afforded a mental evaluation. Tied to this claim is petitioner's additional allegation that she was suicidal on the date the plea was taken and was under the influence of non-prescription drugs supplied to her by other inmates. These drugs, petitioner claims, affected her ability to understand the import of the plea. However, the colloquy as a whole, especially the following colloquy between the trial judge and petitioner, paints a vastly different picture:

Q. (By the Court) Are you taking any medication today?

A. No, ma'am.

Q. Are you having any difficulty understanding what you're doing?

A. No, ma'am.

The record is completely devoid of evidence to support this claim. Petitioner offered no medical testimony as to her mental state at the time of the plea or in support of her claim that she was bipolar. The only proof advanced was petitioner's own testimony at the post-conviction evidentiary hearing about her suicidal thoughts and depression shortly after her arrest on June 4, 2003, and continuing up to September 2003. However, petitioner's guilty plea was entered some six months later. This claim is without merit.

Finally, petitioner claims her plea now knowing and voluntary because it was her understanding that she received a sentence of thirty years at eighty-five percent as a Range II offender. However, our review of the record of the guilty plea submission contradicts her claim. The court explained the agreed sentence as follows:

Q. (By the Court) Now, you're pleading guilty to second degree murder, which is a knowing killing of another. And that range of punishment is fifteen to sixty years and a fine of up to \$50,000. And we've already discussed what your range of punishment was. And did Ms. Montgomery explain that to you also?

A. Yes, ma'am.

Q. I want to make sure you understand that even though - - when I say a hundred percent I mean - - it means you have to serve all of your sentence. Except if you have any good and honor time, it will only reduce your sentence to eighty-five percent. But there's no guarantee of that. That's really up to you. As you sit here today, you have a one hundred percent sentence. Do you understand that?

A. Yes, ma'am. . . .

The trial court clearly explained the possible punishments and the option of going to trial. More specifically, the Court asked petitioner whether she understood her sentence would be served at one hundred percent. The record indicates petitioner knew she faced an even greater punishment if found guilty of the greater (indicted) offense.

The trial court found that the petitioner failed to prove by clear and convincing evidence her post-conviction petition allegation that her plea was not knowingly and voluntarily entered. We concur with those findings and affirm the trial court's dismissal of the petition.

— J. S. DANIEL, SENIOR JUDGE

