

SUPREME COURT OF GEORGIA

Burns v. State

291 Ga. 547 (2012) · Decided September 10, 2012

SUMMARY

The Supreme Court of Georgia affirmed the denial of Leviticus Burns’s motion for an out-of-time appeal following his negotiated guilty plea to murder. The court held that the plea record sufficiently demonstrated waiver of the applicable Boykin rights, while claims requiring an evidentiary hearing had to be pursued through habeas corpus; it also held that the guilty plea waived challenges to the arrest warrant.

CASE DETAILS

COURT	Supreme Court of Georgia
WRITING FOR THE COURT	Benham, Justice
JURISDICTION	Georgia
DECIDED	September 10, 2012
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appellant appealed the trial court's denial of his motion for an out-of-time appeal from a murder conviction entered after a negotiated guilty plea.
STANDARD OF REVIEW	The opinion does not expressly state a separate standard of review; it reviews whether the asserted issues could be resolved from the record and whether the denial of an out-of-time appeal was proper.
PRECEDENTIAL VALUE	Published precedential opinion of the Supreme Court of Georgia
PARTIES	Leviticus Burns v. State

TOPICS

- plea bargaining
- appellate procedure
- habeas corpus
- right to counsel
- due process

PRACTICE AREAS

- criminal procedure
- appellate procedure
- post-conviction relief
- constitutional law

QUESTIONS PRESENTED

1. Whether Burns had an appeal as of right from his judgment of conviction and sentence entered on a guilty plea.
2. Whether the plea was involuntary or constitutionally invalid because Burns was told of his right to remain silent but not expressly told of a separately worded right against self-incrimination.
3. Whether failure to read every right listed in Uniform Superior Court Rule 33.8 rendered the plea invalid under the Georgia Constitution.
4. Whether ineffective-assistance allegations concerning parole eligibility and appellate rights could be resolved on an out-of-time appeal based solely on the existing record.
5. Whether Burns's guilty plea waived his challenge to the validity of his arrest warrant.

HOLDINGS

1. A criminal defendant has no unqualified right to a direct appeal from a judgment of conviction and sentence entered on a guilty plea; an appeal lies only when the issue can be resolved from facts appearing in the record.
2. The plea was knowing, voluntary, and intelligent because the advisement that Burns had the right to remain silent or testify on his own behalf at trial sufficiently conveyed the privilege against compulsory self-incrimination; Boykin does not require magic words.
3. A trial court's failure to read every right enumerated in Uniform Superior Court Rule 33.8 does not, by itself, render a guilty plea involuntary or constitutionally invalid under the Georgia Constitution.
4. The ineffective-assistance allegations could not be reviewed in the out-of-time-appeal proceeding because they required a post-plea evidentiary hearing; they must instead be pursued through habeas corpus.
5. Burns waived defenses concerning the validity of his arrest warrant by entering a guilty plea.

KEY QUOTATIONS

“Nothing in the Boykin decision requires “magic words” to convey the defendant’s rights during a guilty plea proceeding.” (291 Ga. at 547)

“These allegations cannot be resolved solely by facts in the record, but would require a post-plea evidentiary hearing.” (291 Ga. at 548)

FACTUAL BACKGROUND

Burns was indicted for the October 2001 shooting death of Reginald Berry. He entered a negotiated guilty plea to murder in February 2003 and was sentenced to life imprisonment, while his other charges were placed on a dead docket. During the plea hearing, he was advised of trial-related rights, including the right to remain silent or testify, the right to a jury trial, and the right to cross-examine witnesses.

PROCEDURAL HISTORY

In February 2003, Burns pleaded guilty to murder arising from the shooting death of Reginald Berry and received a life sentence; his other charges were placed on a dead docket. In May 2011, he moved for an out-of-time appeal, which the trial court denied. The Supreme Court of Georgia affirmed.

DISPOSITION

affirmed

CASES CITED

- Brown v. State, 290 Ga. 321 (1) (720 SE2d 617) (2012)
- Boykin v. Alabama, 395 U.S. 238 (1969)
- Sanders v. Holder, 285 Ga. 760, 761 (684 SE2d 239) (2009)
- Adams v. State, 285 Ga. 744, 745-746 & n. 3 (683 SE2d 586) (2009)
- Davis v. State, 289 Ga. App. 526 (3) (657 SE2d 609) (2008)
- Wells v. State, 276 Ga. App. 844 (625 SE2d 90) (2005)
- Britt v. Smith, 274 Ga. 611, 614 (556 SE2d 435) (2001)
- Gibson v. State, 290 Ga. 516, 517 (2) (b) (722 SE2d 741) (2012)
- Gibson v. State, 290 Ga. 516, 517 (2) (a) (722 SE2d 741) (2012)

OPINION

BENHAM, J.

Benham, Justice. In February 2003, appellant Leviticus Burns entered a negotiated guilty plea to a murder charge stemming from his indictment for the October 2001 shooting death of Reginald Berry. Appellant's other charges were placed on a dead docket, and he was sentenced to life in prison for murder.

In May 2011, appellant moved for an out-of-time appeal which motion the trial court denied. Appellant timely appealed, and we now affirm for the reasons set forth below. 1. "[A] criminal defendant has no unqualified right to file a direct appeal from a judgment of conviction and sentence entered on a guilty plea, and an appeal will lie from a judgment entered on a guilty plea only if the issue on appeal can be resolved by facts appearing in the record." Brown v. State, 290 Ga. 321 (1) (720 SE2d 617) (2012) (citation and punctuation omitted). (a) Appellant complains that, during the plea hearing, he was informed of his right to remain silent, but not informed of the right against self-incrimination and, as such, his plea was not knowing and voluntary under Boykin v. Alabama, 395 U. S. 238 (89 SC 1709, 23 LE2d 274) (1969).

We disagree. Boykin requires the State to show that a defendant was informed of the privilege against compulsory self-incrimination, the right to a trial by jury, and the right to confront one's

accusers in order to establish that the defendant's guilty plea was voluntarily, knowingly, and intelligently made. *Sanders v. Holder*, 285 Ga. 760, 761 (684 SE2d 239) (2009).

The plea hearing transcript shows that appellant was admonished by the district attorney as follows: [Y]ou have a right to a jury trial where you would have the right to testify, [the] right [to] remain silent. You'd have the presumption of innocence, the right to have the State prove your guilt beyond a reasonable doubt, right to call witnesses, *548right to cross-examine the State's witnesses, present any evidence you wished and the right to an attorney at trial.

Decided September 10, 2012. *Leviticus Burns*, pro se. Nothing in the *Boykin* decision requires "magic words" to convey the defendant's rights during a guilty plea proceeding. *Adams v. State*, 285 Ga. 744, 745 (683 SE2d 586) (2009).

The terms "right to remain silent" and "right against self-incrimination" are interchangeable as long as there is understanding that the rights apply at trial. *Id.* at 746, n. 3. Since appellant was advised about his right to remain silent or testify on his own behalf at trial, his right to a trial by jury, and his right to cross-examine the State's witnesses, he was made sufficiently aware of his *Boykin* rights before waiving them.

See *Davis v. State*, 289 Ga. App. 526 (3) (657 SE2d 609) (2008); *Wells v. State*, 276 Ga. App. 844 (625 SE2d 90) (2005). (b) Appellant opines that since the right to remain silent and the right against self-incrimination are mentioned separately in Rule 33.8 of the Uniform Superior Court Rules, each right should have been read to him as part of his due process rights under the Georgia Constitution.

The fact that a trial court does not read every right enumerated in Rule 33.8 does not render the plea involuntary or constitutionally invalid under the Georgia Constitution. *Britt v. Smith*, 274 Ga. 611, 614 (556 SE2d 435) (2001) ("This Court has never expressly held that a trial court's failure to comply fully with USCR 33.8 violates the defendant's right to due process guaranteed under the Georgia Constitution.").

The record shows that appellant's plea was valid under both the federal and state constitutions. (c) Appellant alleges that his counsel was ineffective by failing to advise him about his parole eligibility and his appellate rights. These allegations cannot be resolved solely by facts in the record, but would require a post-plea evidentiary hearing.

Therefore, the allegations are not subject to review stemming from a motion for out-of-time appeal, but must be pursued in an action for habeas corpus. *Gibson v. State*, 290 Ga. 516, 517 (2) (b) (722 SE2d 741) (2012). 2.

Finally, appellant contends that his arrest warrant was invalid. This alleged error cannot be sustained because appellant waived any defenses regarding the warrant for his arrest when he

entered his plea. Gibson, *supra*, 290 Ga. at 517 (2) (a). Judgment affirmed. All the Justices concur. Paul L. Howard, Jr., District Attorney, Paige Reese Whitaker, Marc A. Mallon, Assistant District Attorneys, Samuel S. Olens, Attorney General, PaulaK.

Smith, Senior Assistant Attorney General, for appellee.