IN THE COURT OF CRIMINAL APPEALS
AT NASHVILLE, TENNESSEE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	
vs.	)	**CASE NO. M2002-02186-CCA-R3-CD**
	)	
RICHARD FILAURO,	)	
	)	
Appellant.	)	

ON APPEAL AS OF RIGHT FROM THE
DAVIDSON COUNTY CRIMINAL COURT

BRIEF OF APPELLANT

David L. Raybin
HOLLINS, WAGSTER & YARBROUGH, P.C.
SunTrust Center, 22nd Floor
424 Church Street
Nashville, Tennessee 37219

Attorney for Appellant

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

DESIGNATION OF THE RECORD 3

DESIGNATION OF THE PARTIES 3

STATEMENT OF THE ISSUES 4

STATEMENT OF THE CASE 5

STATEMENT OF THE EVIDENCE AT THE HEARING ON THE MOTION TO WITHDRAW GUILTY PLEA 7

ARGUMENT 23

CONCLUSION 40

CERTIFICATE OF SERVICE 41

APPENDIX 42

TABLE OF AUTHORITIES

STATE CASES:

Henning v. State, 201 S.W.2d 669, 184 Tenn. 508 (1947) 36

Howell v. State, 569 S.W.2d 428 (Tenn. 1978) 31

McConnell v. State, 12 S.W.3d 795 (Tenn. 2000) 34, 37-39

Ray v. State, 451 S.W.2d 854 (Tenn. 1970) 25

Rudd v. State, 497 S.W.2d 746 (Tenn. Crim. App. 1973) 25

State ex rel Crist v. Bomar, 365 S.W.2d 295, 211 Tenn. 420 (1963) 35

State v. Burkhart, 566 S.W.2d 871 (Tenn. 1978) 31

State v. Conrad, Tenn. Crim. App. at Knoxville, filed May 15, 2003 (unpublished) . . . 26

State v. Davis, 823 S.W.2d at 220 24

State v. Drake, 720 S.W.2d 798 (Tenn. Crim. App. 1986) 24

State v. Green, ____ S.W.3d ____ (Tenn., 2003) 7, 23

State v. Haynes, 696 S.W.2d 26 (Tenn. Crim. App. 1985) 24, 31, 36

State v. Henry, 946 S.W.2d 833 (Tenn Crim. App. 1997) 35

State v. Howse, 634 S.W.2d 652 (Tenn. Crim. App.1982) 36

State v. Lyons, Tenn. Crim. App. at Nashville, filed August 15, 1997 (unpublished) . . . 27

State v. Mahler, 735 S.W.2d 226 (Tenn. 1987) 37

State v. Silva, 80 S.W.2d 485 (Tenn. Crim. App.1984) 35

State v. Tizard, 897 S.W.2d 723 (Tenn. Crim. App. 1994) 8, 29

State v. Turner, 919 S.W.2d 346 (Tenn. Crim. App. 1995) 24, 37, 39

Summerlin v. State, 607 S.W.2d 495 (Tenn. Crim. App. 1980) 31

Teague v. State, 772 S.W.2d 932 (Tenn. Crim. App. 1988) 31

Woods v. State, 928 S.W.2d 52 (Tenn. Crim. App. 1996) 31

STATE STATUTES:

Tenn. Code. Ann. §40-23-101 35

Tenn. Code. Ann. §40-35-501(i)(3) 33

TENNESSEE RULES:

Tennessee Rule of Criminal Procedure 32(f) 23

INTRODUCTION

This is an appeal as of right by Mr. Richard Filauro from the Criminal Court of Davidson County which denied Mr. Filauro's motion to withdraw his guilty plea filed pursuant to Rule 32(f) Tennessee Rules of Criminal Procedure. As this Court is aware, this Rule permits a defendant to move to withdraw his guilty plea before the guilty plea becomes final on the ground of "manifest injustice."

Mr. Filauro asserts that his guilty plea to two counts of child rape with a sentence of twenty-five years at one hundred percent should be set aside for three reasons:

First, he was told by his lawyers that the sentence was to be served at one hundred percent but that this might be less (when it could not) and that he might get his jail credit even though he "waived" it.

Secondly, there was a conflict between his attorneys as to the advisability of taking this plea offer to rape of a child with a sentence of twenty-five years at one-hundred percent with no jail time. Given that Mr. Filauro is over fifty-years old, a plea agreement of this duration was utter madness given the lack of evidence against him.

Lastly, Mr. Filauro asserts that the trial court was without jurisdiction to have accepted a plea to a Range I sentence where the sentence was outside of the range. The maximum sentence is twenty-five years for Range I, but the district attorney insisted that Mr. Filauro not have his jail time. Mr. Filauro agreed to give up his pretrial jail credit of eighteen months. However, because this sentence must be served at one-hundred percent and the maximum sentence is twenty-five years, the practical effect of this plea agreement is that Mr.

Filauro will be confined for twenty-six and a half years on a twenty-five year sentence which is legally impossible and is in direct violation of the statutes governing sentencing. Thus, the conviction is void and the plea should be set aside as a matter of law.

DESIGNATION OF THE RECORD

The record in this matter consists of four volumes. The first volume is the technical record which will be designated herein by the abbreviation T.R. The transcript of the guilty plea appears as the second volume. Volumes III and IV consist of the testimony at the hearing on the motion to withdraw the guilty plea. There are seven exhibits.

DESIGNATION OF THE PARTIES

Mr. Filauro will be referred to in this brief as the defendant or by his name Richard Filauro. The State of Tennessee will be referred to as the State.

STATEMENT OF THE ISSUES

1. **WHETHER THE DEFENDANT SHOULD BE ALLOWED TO WITHDRAW HIS GUILTY PLEA TO PREVENT MANIFEST INJUSTICE.**

2. **WHETHER THE GUILTY PLEA SHOULD BE STRICKEN AS A MATTER OF LAW BECAUSE THE SENTENCE WAS UNLAWFUL BEING OUTSIDE THE STATUTORY RANGE OF PUNISHMENT.**

STATEMENT OF THE CASE

It was alleged that Mr. Filauro had sexually abused his step-granddaughter on various dates in 1998 and 1999. On November 19, 1999, Mr. Filauro was indicted for two counts of rape of a child. (T.R. 1-3). Mr. Filauro pled guilty to both of these offenses on May 10, 2002. The guilty plea petition appears at T.R. 5-6.

On the date of his plea the judge accepted the plea for the offenses of rape of a child and sentenced Mr. Filauro to twenty-five years for each offense at one-hundred percent and the sentences to run concurrently. (T.R. 8-9). The judgment forms reflect that the defendant "waived" any pretrial jail credit as part of the plea.

Mr. Filauro filed a *pro se* notice of appeal to this Court dated May 30, 2002 which was filed by the clerk on May 31, 2002. (T.R. 11).

On May 31, 2002, recently retained counsel for Mr. Filauro, David Raybin, filed a notice to strike the *pro se* notice of appeal. (T.R. 12). A motion to withdraw the guilty plea was also filed on May 31, 2002 by newly retained counsel Mr. Raybin. (T.R. 14-15).

On June 27, 2002, Mr. Filauro filed an amended motion to withdraw the guilty plea. (T.R. 16-21).

On July 16, 2002, this Court granted the motion to dismiss the *pro se* notice of appeal filed by Mr. Filauro. (T.R. 32). An evidentiary hearing was conducted on July 1, 2002. The trial court entered an order on July 30, 2002 denying the motion to withdraw the guilty plea. (T.R. 35-43).

On August 27, 2002, the defendant filed a timely notice of appeal to this Court. Mr. Filauro remains confined pending his appeal.

STATEMENT OF THE EVIDENCE AT THE HEARING ON THE MOTION TO WITHDRAW GUILTY PLEA

The evidentiary hearing began with a lengthy discussion between the defense counsel and the judge as to whether the court had jurisdiction to set aside the guilty plea. Without belaboring the point here, suffice it to say that the Supreme Court has recently resolved this issue in *State v. Green*, _____ S.W. 3d ____ (Tenn., 2003), finding that a trial court has jurisdiction to hear and decide a motion to withdraw a guilty plea for thirty days after the plea is entered. Given that Mr. Filauro's motion to withdraw his guilty plea was filed within the required thirty days, jurisdiction is no longer an issue here with respect to the timely filing of the motion itself.

As to the merits of the motion, the defense first called Jennifer Thompson who was one of two lawyers representing Mr. Filauro at the time of the guilty plea.

Ms. Thompson first became involved in representing Mr. Filauro in the Summer of 2001. Mr. Filauro had already been represented by Mr. Aaron Wyckoff but Mr. Filauro was looking for an additional attorney who had experience with child abuse cases and had some trial experience in these matters. (Vol. III, pp. 15-16). In addition, Mr. Filauro "liked the idea of having a woman in case the case went to trial." (Vol. III, p. 16).

Ms. Thompson attempted to negotiate the case with Assistant District Attorney Brian Holmgren. She said that they had two formal meetings in his office but they had spoken multiple times either in the courtroom or by telephone.

Ms. Thompson said that the district attorney felt that Mr. Filauro was guilty and that he was not interested in offering any "small amount of jail time." Ms. Thompson said that the district attorney was not interested in Mr. Filauro pleading guilty to aggravated sexual battery and thought that Mr. Filauro was a pedophile. (Vol. III, p. 17).

The defendant's ex-wife had turned over to the district attorney some computer files and some photographs of women. The defense attorney said that she had looked at some of these pictures but they were not of distinctly young children and they could have well been over the age of eighteen. In other words, they just looked like pictures of young flat-chested women. Also, some of the "naked" pictures were actually cartoons. Ms. Thompson said that the district attorney claimed that he thought this might be admissible at trial. (T.R. 19). Ms. Thompson said that she thought there were some "chain-of-custody" issues relating to these photographs. Moreover, she thought that these photographs would be more prejudicial than probative and that they would not be related to the specific issues here. (T.R. 19).

At this point defense counsel showed Ms. Thompson a copy of the opinion in *State v. Tizard*, 897 S.W.2d 723 (Tenn. Crim. App. 1994) and Ms. Thompson agreed that *Tizard* holds that photographs of this sort are not admissible. (Vol. III, p. 20).

With respect to the plea offer, Ms. Thompson said that in April she spoke to the district attorney by telephone and he would offer twenty-five years concurrently. She said that the other offers were thirty-five or forty-five years which she thought was "extremely high" but that the twenty-five years "was within, I think, a range that Mr. Filauro would think was acceptable." (Vol. III, p. 20).

Given that the plea was on May 10th, Ms. Thompson advised that she did meet with Mr. Filauro about this plea offer of twenty-five years. She said that she first told him that it would be twenty-five years at eighty percent. She said that this conversation occurred about a week or a week-and-a-half before the guilty plea.

Ms. Thompson said that Mr. Filauro had been told about the eighty percent figure and then returned the next day and told them that in fact it was eighty-five percent. (Vol. III, p. 21). This state of affairs lasted for yet another day or so and then Ms. Thompson said that she discovered that rape of a child is one-hundred percent. (Vol. III, p. 21-22).

Ms. Thompson then went back to the jail and brought the statutes with her and spoke with him about the specific statutes dealing with the one-hundred percent. She said that:

> We discussed whether or not [Tennessee Department of Correction] was actually implementing that. . . that law, because I have had other people that have been sentenced and it is my understanding that TDOC did not implement the one-hundred percent service.

Ms. Thompson said that although she was not making him any promises that they might not implement this he was told that they might not implement the one-hundred percent service requirement. (Vol. III, p. 23).

Ms. Thompson said that when the district attorney made his offer of twenty-five years it would be from the date of the guilty plea and so "I explained to Mr. Filauro that he was not gonna get any jail credit and it would be from the date of the plea." (Vol. III, p. 24). Ms. Thompson said that Mr. Filauro had about a "year-and-a-half worth of jail credit." Ms. Thompson said "I think he had been in jail since November of 2000, about then, so he

wanted this jail credit which would make his sentence more like twenty-three-and-a-half years to serve."

Ms. Thompson said that she talked to some other lawyers and was of the opinion that she did not think he could be denied jail credit and that it was something that could not be bargained away. She said that her concern was that if she raised this issue with the district attorney then he might withdraw the offer or change the offer.

Ms. Thompson then told Mr. Filauro that she believed that once he served twenty-five years in jail that it would be illegal for him to stay in jail any longer and that once his term would expire he might have a cause of action after that. (Vol. III. p. 26).

Ms. Thompson advised that Mr. Wyckoff was very uncomfortable for Mr. Filauro to take a plea of that magnitude, "I think Mr. Wyckoff felt that twenty-five years was not worth having a plea over, that it was so much time, and that the client was already at an age, that it would be worth while going to trial over." (Vol. III, p. 26).

With respect to the strength or weakness of the State's case Ms. Thompson said that she agreed that there was "no evidence, no witnesses to any of this, except for the child herself." (Vol. III, p. 27). Ms. Thompson agreed that there was no medical evidence at all in the case. She agreed that there was no evidence that the child had been penetrated. (Vol. III, p. 28).

Ms. Thompson agreed that the child had been examined and that the medical examination was "absolutely neutral." (Vol. III, p. 28). A copy of the discovery was provided to Ms. Thompson which included an interview with the victim. This exhibit is

labeled exhibit two in the record and states that the victim “was unsure of penetration.” (Vol. III, p. 29).

Ms. Thompson also said that the child had given a taped statement to the investigators that “it had not happened” and that “no, he did not touch me.” (Vol. III, p. 30).

The guilty plea petition was filed as exhibit three which is also contained in the technical record at pages 5-6. (Vol. III. p. 31). Ms. Thompson said that Mr. Filauro actually signed the document the morning of the guilty plea.

Ms. Thompson testified that it was clear to Mr. Filauro on that day and perhaps the day before that it would be twenty-five years at one-hundred percent with no jail credit. (Vol. III, p. 32).

Ms. Thompson said that she was not aware that Mr. Filauro was taking anti-depressants and had been doing so for quite some time while he was in the jail. Ms. Thompson was not aware of Mr. Filauro’s education level. (Vol. III, p. 33).

Ms. Thompson said that Mr. Filauro has no prior criminal record other than a joy riding conviction. Certainly he had no convictions that would elevate his sentence into Range II. (Vol. III, p. 33).

The next exhibits were the judgment forms which were marked as exhibit four and also appear in the technical record at pages 8-9.

Ms. Thompson said that the guilty plea was on a Thursday or a Friday and that the next week Mr. Wyckoff called her to tell her that “Mr. Filauro was unhappy with his guilty plea.” (Vol. III, p. 35).

On cross-examination Ms. Thompson said that she had been practicing law since 1996 and had handled about a dozen sexual abuse cases. She said that the vast majority of those cases had resulted in a guilty plea as opposed to a trial. (Vol. III, p. 36).

Ms. Thompson said that she became aware that Mr. Holmgren had "different ways of dealing with cases of this nature than a lot of other prosecutors." (Vol. III, p. 37). She agreed that Mr. Holmgren did not engage in plea negotiations unless the defendants were willing to acknowledge responsibility for their offenses. She said that this would not be a best interest plea or anything of the sort and that it would have to be a guilty plea. (Vol. III, p. 38).

Ms. Thompson said that the case was scheduled for December 3, 2001 and that it was continued because Mr. Wyckoff had a federal trial. Ms. Thompson said that she had looked at the discovery materials and was able to look at the physical evidence in the district attorney's office. (Vol. III, p. 39-40).

Ms. Thompson said that she communicated back to the district attorney on or about May 3rd that Mr. Filauro was willing to accept the plea agreement and that the plea would be set for May 10. (Vol. III, p. 46). The district attorney asked Ms. Thompson if Mr. Filauro wanted to reject the plea agreement. Ms. Thompson said "I don't specifically remember him saying that he flat out wanted to reject it. I know that he was having a hard time deciding what it was he wanted to do." (Vol. III, p. 47).

Ms. Thompson said she was trying to get the jail credit and still keep the plea and discussed *habeas corpus* with Mr. Filauro. (Vol. III, p. 48). Ms. Thompson agreed that she advised Mr. Filauro that he could seek through collateral means a way of getting the jail

credit of 18 months at some later time. (Vol. III, p. 48). Ms. Thompson said that she was not guaranteeing a *habeas corpus* but that, "in my experience, it would meet that criteria." (Vol. III, p. 49).

With respect to whether this was an intelligent decision on the part of Mr. Filauro, Ms. Thompson said:

> Well, I do think that he was very wishy-washy; and I do think that he was easily influenced. I was trying to not - - I was trying to not take a stand, because I felt like he would be easily influenced. And in the past he had been influenced to do things by others. So, I wouldn't say there's nothing. I don't think - -. I did not get the impression that he didn't understand what was going on, but he was very hesitant about the idea. I mean, it was not an easy decision for him to make. (Vol. III, p. 50).

On redirect, defense counsel asked Ms. Thompson about the topic of any statement that Mr. Filauro had made about "touching" the victim. That part of the discovery related only that Mr. Filauro "had touched his step-granddaughter in the vaginal area during bathing or when examining her for any injuries and the like." This is exhibit five and was addressed at page 62.

The judge started asking some questions and inquired as to whether Ms. Thompson had discussed with Mr. Filauro consecutive sentencing and advised Mr. Filauro that he might receive consecutive sentencing. (Vol. III, p. 65).

The next witness was Mr. Aaron Wyckoff who testified that he has been an attorney for thirty-three years. He said that he was previously an assistant district attorney and also an assistant united states attorney. (Vol. III, p. 67). Although Mr. Wyckoff has handled many criminal cases he said he has only handled three child sexual abuse cases in his entire

career. One was when he was a prosecutor, the other was as a defense attorney and the third was Mr. Filauro's case here.

Mr. Wyckoff was recommended to Mr. Filauro by Mr. Raybin. Mr. Wyckoff was aware that Mr. Raybin had first represented Mr. Filauro when the allegations first surfaced in 1999. (Vol. III, p. 69). After Mr. Filauro was indicted Mr. Wyckoff took over the case and met with Mr. Raybin and obtained a copy of his file. (Vol. III, p. 69).

Mr. Wyckoff met with Mr. Raybin after Mr. Wyckoff was retained and discussed the case with Mr. Raybin. Mr. Raybin told him that the case "should be settled for sexual battery on an eight to twelve year sentence, somewhere in that range." (Vol. III, page 70).

Mr. Wyckoff then began working on the case with then-assistant district attorney Philip Wehby who told Mr. Wyckoff that the case was probably going to have to be settled, if at all, for child rape. Mr. Wyckoff said that Mr. Raybin had been involved in the case in Juvenile Court earlier and then Mr. Filauro was indicted in 1999 and was arrested early the following year. (Vol. III, p. 73).

Mr. Wyckoff said that he became aware that Ms. Thompson was involved in the case after he had his "famous meeting with Assistant District Attorney Holmgren." (Vol. III, p. 73). Mr. Holmgren offered Mr. Wyckoff forty years and then Mr. Wyckoff told Mr. Filauro that the case was going to be for trial. (Vol. III, p. 75).

Then, Mr. Wyckoff went back to Mr. Holmgren and was told by Mr. Holmgren that he did not accept best interest pleas. So at this point Mr. Wyckoff said that the case was

definitely for trial. Mr. Filauro had always maintained his innocence and never told Mr. Wyckoff that he was guilty of the charges. (Vol. III, p. 76).

Apparently, Mr. Filauro, who was in the jail, had talked to a number of prisoners over there and they had told him about Ms. Thompson and that she was very experienced in child sexual abuse cases. He said that Mr. Filauro was a very timid soul and that he had lost his confidence. (Vol. III, p. 78). Mr. Filauro apparently had engaged Ms. Thompson to see if she could negotiate a plea to a lesser offense and that she had the expertise in trying these kind of cases. (Vol. III, p. 79).

Mr. Wyckoff said that he never met with Mr. Holmgren regarding plea bargaining after that in light of his "famous meeting" with Mr. Holmgren here in the courtroom. (Vol. III, p. 80).

Mr. Wyckoff said that on or about April 19th he received a call from Ms. Thompson that there was a plea agreement for eighty percent and that later it was changed to eighty-five percent. (Vol. III, p. 81). They realized at this point that there was a mistake and went to see Mr. Filauro and told him that it was twenty-five years at eighty-five percent rather than eighty percent. Mr. Wyckoff said that, after consulting his calendar, he had seen Mr. Filauro on Tuesday, April the 13th and discussed with him the eighty percent. It was the next day that they changed it to eighty-five percent. (Vol. III, p. 83).

On May 3rd, they were still operating on the assumption that it was eighty-five percent and then a day or two before the plea Ms. Thompson said that she was confused and that it was one-hundred percent. Mr. Wyckoff said that his discussion with Mr. Filauro about the

one-hundred percent was on the 9th with the plea being on the 10th but that the discussion was between Mr. Filauro and Ms. Thompson and that he was not there. (Vol. III, p. 85).

Mr. Wyckoff said that the jail credit situation was discussed with Mr. Filauro beginning on April 13th and that the district attorney did not want him to have any jail credit. Mr. Wyckoff said that he had never been involved in a case where somebody did not get their jail credit. (Vol. III, p. 86). With respect to the propriety of the plea for twenty-five years with loss of jail credit of a year-and-a-half, Mr. Wyckoff said that he was opposed to the guilty plea. He said that Mr. Filauro was fifty-two years old and did not see the difference between a twenty-five year sentence at his age or a fifty year sentence. (Vol. III, p. 86).

Mr. Wyckoff said that he knew that Mr. Filauro had been on anti-depressants since Mr. Filauro had come back from Canada and had been on anti-depressants for almost a year-and-a-half. Mr. Wyckoff had never seen Mr. Filauro when he was not on anti-depressant medication. (Vol. III, p. 87). Mr. Wyckoff said that Mr. Filauro was "a timid soul, a quiet person, and extraordinarily polite person and a very nice person." (Vol. III, p. 88). Mr. Wyckoff said that he was of the impression that Mr. Filauro could be easily influenced by people.

Mr. Wyckoff said that he did not sign the plea agreement and in fact had refused to sign the plea agreement. (Vol. III, p. 88).

Mr. Wyckoff said that the plea was on Friday, May 10th and he heard from Mr. Filauro on Monday the 13th or Tuesday the 14th. (Vol. III, p. 89). Mr. Filauro was calling

and said, "Mr. Wyckoff, I think I had a game played on me." He told Mr. Wyckoff that he wanted to "take Ms. Thompson to the Board of Professional Responsibility."

Mr. Filauro then said that he wanted to know who he could talk to about this. Mr. Wyckoff agreed that Mr. Filauro pleads guilty on Friday and by Monday or Tuesday he is calling Mr. Wyckoff and is unhappy about the situation. (Vol. III, p. 90).

The last offense witness was Mr. Filauro himself. Mr. Filauro stated that he is fifty-one years old. (Vol. III, p. 106). Mr. Filauro testified that he was interrogated by the detective on April 25, 1999 and hired Mr. Raybin a few days or few weeks later. (Vol. IV, p. 107). Mr. Raybin represented Mr. Filauro in juvenile proceedings. (Vol. IV, p. 108). There was also a divorce action and a separate attorney represented him there. Mr. Filauro was arrested in Canada and was returned to Tennessee on November 18, 2000. Mr. Filauro has been in continuous custody in the jail since November 18, 2000. He never made bond. He was never taken to any other jurisdiction and has always been in Nashville in jail awaiting trial. (Vol. IV, p. 108).

Mr. Wyckoff was retained to represent Mr. Filauro the day he was brought back to Tennessee. (Vol. IV, p. 109). Mr. Filauro testified that he was taking medication while he was in the jail.

> The medication was to help me shut my mind down, to prevent me from just drifting off and continuously - - I'd keep thinking, I couldn't shut it down. It was just to - -let me get some sleep. Whenever lights went out, whatever, I just couldn't stop thinking; it just wouldn't shut down. (Vol. IV, p. 109).

Mr. Filauro had seen a psychiatrist five or six times over at the jail. He was taking Diazepam which is an anti-depressant. The initial dosage was 25 milligrams and was raised to 75 milligrams. The medicine effected his thinking.

> I couldn't concentrate on anything. As far as, if I needed to - - for instance, if I needed to call my brother and ask him any questions, I needed to write it down ahead of time, or else my train of thought would be - - would be just jumping from one thought to another. (Vol. IV, p. 110).

Mr. Raybin had visited Mr. Filauro out at the penitentiary after he had been transferred there following his plea. Mr. Filauro quit taking the medication after he was at the penitentiary and was not on any medication at the time of the hearing here to withdraw the guilty plea.

Mr. Filauro testified that the plea bargaining agreement came up as the case was getting close to trial. There were some other jail inmates who were getting ridiculously large sentences. "There was a gentlemen who went to court, who had an offer of ten years at thirty percent; and he; you know, said he didn't do it and went to court and ended up getting seventy years." (Vol. IV, p. 112). The man's lawyer was Jennifer Thompson.

Mr. Filauro said that everybody else was getting plea offers and he was not getting any offers and was concerned about that and asked Ms. Thompson if he had any offers and he thinks that he had an offer of forty years. Eventually Ms. Thompson said that he had a twenty-five year offer. It was Mr. Filauro who at least suggested to Ms. Thompson that she engage in some sort of plea negotiation with the district attorney and "this was because people were getting fifty, sixty, seventy years when they went to trial and [had] ten year offers." (Vol. III, p. 114).

Mr. Filauro understood that he was going to get twenty-five years at eighty-five percent but at first she said it was twenty-fiver years at eighty percent. Mr. Filauro said, "Well, from the time I hired both attorneys, each one of them came to me with the law books; and they went over the charges and the statutes, and my understanding was eighty-five percent." (Vol. IV, p. 115).

At some point Ms. Thompson said that it was one-hundred percent and that she had made a mistake and it was one-hundred percent day-for-day and one of the statutes she went over was rape of a child and the other is a multiple rapist. Mr. Filauro said he had no idea she was talking about a multiple rapist.

Mr. Filauro said that the first time Ms. Thompson talked to him there was a guilty plea form and there was nothing on it about one-hundred percent and that later she said it was one-hundred percent but then later she said it might not really be one-hundred percent, it might be less, and it might be eighty percent and the Department of Corrections might not make it a hundred percent. (Vol. IV, page 117). Mr. Filauro said that he thought that he would get out to the Department of Corrections and they might only make it eighty-five percent. (Vol. IV, p. 177).

Ms. Thompson said that she did not think it was legal for him to be denied jail credit and that somewhere down the road it would be restored. (Vol. IV, p. 118).

Mr. Filauro said that when he got to the penitentiary he found out that it was a hundred percent and that there is no such thing as eighty-five percent. He also found out that there was no such thing as them giving him the jail credit later on. (Vol. IV, p. 118). When

Mr. Filauro found out that it really would be a hundred percent and that the jail credit could not be restored he did not want the guilty plea and wanted to take it back. Mr. Filauro said that he called Mr. Wyckoff up on Monday or Tuesday of the following week and he was upset and thought that a trick had been played on him:

> That I signed for more years than what I was offered, and that - - when I left - - when I left outta here - - like I say, I really don't remember what went on in court too much - - when I left outta here, the young lady in the corner went out the door with me and I was told her that - - that I - - I got was a paper (sic); and she said, no, I got a life sentence. . . . I don't know her name, but she usually sits in the corner right there with this gentleman [court officer] is sitting. The court officer had told the gentleman that I had a life sentence. (Vol. IV, p. 119).

Mr. Filauro talked to Mr. Wyckoff about reporting Ms. Thompson to the Bar:

> I was just upset. I thought someone - - she wasn't representing me properly, when I found out that I had a life sentence; and - - and, as far as this one hundred percent was going down - - I mean, the stuff that I - - really don't comprehend during this - - the sentence and plea. . . I have no idea. I don't if it was from the medication or what; I just - - my mind was - - wasn't thinking like I should have been. (Vol. IV, p. 120-121).

Mr. Filauro said that he pled guilty because "the way sentences were going on these cases, there is - - I wasn't gonna come out alive." (Vol. IV, p. 121).

Mr. Filauro said that he thought he was going to get eighty-five percent instead of a hundred percent and that he could get his jail credit down the road. (Vol. IV, p. 121). Now he understands that none of that is true. (Vol. IV, p. 122).

Mr. Filauro said that he filed a notice of appeal himself on May 30th which was the day before Mr. Raybin had come out to see him. He said that he filed this because he did not know whether Mr. Raybin was going to be hired or not. Mr. Filauro said that he had made

up his own mind even before he saw Mr. Raybin that he wanted to appeal his guilty plea. (Vol. IV, p. 123).

Mr. Filauro said that he really wants to withdraw his guilty plea. Mr. Filauro said he has consulted with Mr. Raybin since approximately May 6, 1999 and has had plenty of time to consult with Mr. Raybin about this. He feels that the plea was wrong, that he should never have entered it and that he should have gone to trial. (Vol. IV, p. 125).

On cross-examination Mr. Filauro said that he was on medication which was approximately 75 milligrams. The medication was designed to help him shut his mind down so he could sleep. His thought pattern was a lot different from when he was not on the medication.

The judge asked Mr. Filauro some questions:

Q. General Holmgren was asking you about jail credit or not. I mean, what you're saying here today is, whether you were confused about eighty-five percent versus one-hundred, which would get you at twenty-one years versus twenty-five, or whether you got jail credit or not, you want to withdraw your plea.

A. Yes, sir.

Q. Now, you said, you know, that you were taking your medication. I assume, you were taking your medication, when you left here and said you heard somebody say, "He just got a life sentence"; right?

A. As I walked out the door; yes, sir.

Q. Yeah. I mean, you remember that.

A. Yeah. It clicked; yes.

Q. And that sort of made you think, "What's going on?" or - -

A. Well - -

Q. - - "What've I just done?" or what - - what effect did that have on you?"

A. It - - it didn't really affect me that day, sir. It wasn't until the weekend. And I just sat there, and something - - something just wasn't right. It just - - you know - - like, it - - whenever - - when I first heard it, I didn't think nothing of it; I was just in a daze, I had no idea.

Q. Well, did - - you heard Mr. Wyckoff say he'd been telling you that for a few weeks.

A. Yes, sir.

Q. And we've heard the testimony about Mr. Wyckoff said he relayed to you what he and Mr. Raybin apparently thought this case was worth, about the eight-to-twelve. Do you recall that?

A. Offhand, I don't remember; but I - - I believe some time they might've said that. I - - I - -at this time I don't remember, sir.

Q. Well, why didn't you hire Mr. Raybin to represent you in this court?

A. I'm sorry?

Q. Why didn't you hire Mr. Raybin to represent you in this court on this case?

A. Why did I or didn't I? I - -

Q. You didn't. Why didn't you?

A. My relatives hired him.

Q. I mean, why didn't you hire him to represent you, before you pled guilty?

A. I didn't have enough money, sir.

(Vol. IV, pp. 133-134).

The final exhibit was the transcript of the guilty plea which also appears in the record here as Volume II.

ARGUMENT

1. WHETHER THE DEFENDANT SHOULD BE ALLOWED TO WITHDRAW HIS GUILTY PLEA TO PREVENT MANIFEST INJUSTICE.

Manifest injustice requires that this guilty plea be set aside.

The withdrawal of a guilty plea is controlled by Tennessee Rule of Criminal Procedure 32(f), which provides:

> A motion to withdraw a plea of guilty may be made upon a showing by the defendant of any fair and just reason only before sentence is imposed; but to correct manifest injustice, the court after sentence, but before the judgment becomes final, may set aside the judgment of conviction and permit the defendant withdraw the plea.

In *State v. Green*, ____ S.W. 3d _____ (Tenn. 2003) the Supreme Court held that a trial judge's jurisdiction to hear and decide the motion to withdraw the guilty plea continues for thirty days after the plea is entered:

> Each defendant who enters a plea agreement regardless of whether there has been a waiver of the right to appeal, has thirty days within which to determine whether circumstances exist that may prompt the filing of a motion to withdraw the previously entered plea pursuant to Rule 32(f) [Tennessee Rules of Criminal Procedure].

In our case, Mr. Filauro did not wait until the expiration of thirty days to complain about the propriety of his guilty plea as many defendants do, thus necessitating the filing of a post-conviction petition with all of its constitutional ramifications. Rather, Mr. Filauro pled guilty on a Friday and on the following Monday or Tuesday was on the phone to his lawyer voicing his objection. Indeed, the facts relate that Mr. Filauro pled guilty on May 10, 2002 and on May 30, 2002, Mr. Filauro files a *pro se* notice of appeal to this Court. In the words

of *State v. Green*, Mr. Filauro had clearly determined that "circumstances exist that prompt the filing of a motion to withdraw the previously entered plea."

As the record reflects, Mr. Filauro's family retained the undesigned counsel to undo the mischief of his previous lawyers and on May 31, 2002 a motion to withdraw the guilty plea was filed by the undersigned counsel as well as notice striking the *pro se* notice of appeal. (T.R. 12-15). It is clear, then, that Mr. Filauro did not wait until the last minute to file his complaint. He acted promptly because he realized that he had not received the plea agreement that he had bargained for. There was confusion between his lawyers and, undoubtedly, in his own mind as to what was happening to him. Thus, this Court should consider the timing of the motion which clearly weighs in Mr. Filauro's favor.

The standard of review in such matters is well-settled. The decision of whether to grant a motion to withdraw a plea of guilty rests within the discretion of the trial judge and is not subject to reversal unless it appears that there was an abuse of discretion. *State v. Drake*, 720 S.W.2d 798 (Tenn. Crim. App. 1986), and *State v. Haynes*, 696 S.W.2d 26, 29 (Tenn. Crim. App. 1985). The burden of proof is on the defendant. *State v. Davis*, 823 S.W.2d, at 220.

A trial court will not, as a general rule, be reversed for denying the request for withdrawal of a guilty plea where the proof shows that the defendant had a "change of heart," or where the entry of the guilty plea is to avoid a harsher punishment, or the defendant is dissatisfied with the harsh punishment imposed by the trial court or a jury. *State v. Turner*, 919 S.W.2d 346, 355 (Tenn. Crim. App. 1995). Here the guilty plea was not made with a

reserved sentencing hearing. Thus, it cannot be said that the guilty plea withdrawal motion is based on dissatisfaction with the sentence imposed by the court or jury.

It cannot be said that Mr. Filauro pled guilty to avoid a harsher punishment. Certainly it is conceivable that he could have received consecutive sentencing although, without any past criminal record it is highly unlikely that this would have been the case. Be that as it may, however, given the fact that Mr. Filauro is over 50 years old and the sentence is in excess of twenty-five years a "harsher" sentence would have been irrelevant. According to the mortality tables in the Tennessee Code Annotated, a white male at age 51 has a life expectancy of 22.55 years. In this case Mr. Filauro pled guilty to a crime and received a sentence which exceeds his life expectancy. Thus, it cannot be said that Mr. Filauro pled guilty to escape some harsher punishment such as, in the usual case, where a person takes a life sentence to avoid the death penalty. See *Rudd v. State*, 497 S.W.2d 746 (Tenn. Crim. App. 1973).

The remaining factor for which a withdrawal is not allowed is the so-called "change of heart." The most famous "change of heart" was that of James Earl Ray who pled guilty to the murder of Dr. Martin Luther King, Jr. and subsequently moved to withdraw his guilty plea. Under the facts the Tennessee Supreme Court found that "we are simply deciding whether or not, after he entered a plea of guilty. . . he can thereafter have a change of heart and make a motion for new trial. We think not." *Ray v. State*, 451 S.W.2d 854 (Tenn. 1970).

It is clear that Mr. Filauro's decision to withdraw his guilty plea is not some late change of heart. Within three days of his guilty plea he is on the phone with Mr. Wyckoff threatening to report Jennifer Thompson to the "Bar" for "playing a trick on him." The "trick" of course was Mr. Filauro's gross misunderstanding as to the effect of the plea which, as a practical matter, rendered the plea involuntary.

The source of the problem dealt with the confusion about one hundred percent and eighty-five percent and eighty percent as well as the jail credit situation where Ms. Thompson said that Mr. Filauro "might" get the benefits of these lower numbers and jail credits and that the Department of Correction might not apply these restrictions to Mr. Filauro. When Mr. Filauro got to the penitentiary he learned that all of this was shear fantasy and that none of these things would occur. Thus, Mr. Filauro promptly took steps to remedy this situation.

While the trial judge has broad discretion in these matters the discretion certainly can be abused. A recent case illustrating the problems with mistaken advice and misunderstanding illustrates the point. In *State v. Conrad*, Tenn. Crim. App. at Knoxville, filed May 15, 2003 (unpublished) (a copy attached hereto) the defendant pled guilty to three counts of attempted statutory rape. He argued that his guilty plea was involuntary because his attorney erroneously advised him that he would not have to register with the Tennessee Sexual Offender Registry. The defendant argued that had he known that he was subject to the registry he would not have pled guilty but would have gone to trial. This Court held that

"the trial court abused its discretion in determining that a manifest injustice did not occur relative to the defendant's entry of guilty pleas."

It is clear that the "manifest injustice" doctrine is different than the constitutional standards we see in post-conviction cases:

> The concept of manifest injustice under Rule 32(f) is not identical to the requirements of constitutional due process. However, we agree that where there is a denial of due process, there is a manifest injustice as a matter of law. . . . Federal courts have consistently held that, although there may be considerable overlap between the standards, manifest injustice allows a trial judge greater latitude than the constitutional requirements. . . . The facts disclosed in a hearing might not be sufficient for the court to conclude that the guilty plea was involuntary and violative of due process, yet the court may be of the opinion that clear injustice was done. . . . Implicit in this analysis is a recognition that, although the standards overlap, 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. . . . 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. The defendant has the burden of establishing that a plea of guilty should be withdrawn to prevent manifest injustice. . . In summary, the trial court must review the appellant's motion to withdraw the guilty plea under the manifest injustice standard of Rule 32(f) as it is amplified in this opinion. The review encompasses the elements enumerated in Rule 11(c), Tennessee Rules of Criminal Procedure. . . . subject to the proviso that manifest injustice may conceivably exist even where all of these elements are satisfied. If the trial court determines that the existing evidence is inadequate for applying the requisite standard, a further hearing should be ordered, bearing in mind that discretion should always be exercised in favor of innocence and liberty.
>
> *State v. Lyons*, Tenn. Crim. App. at Nashville filed August 15, 1997 (unpublished) (copy attached) (citations omitted).

There are numerous reasons why manifest injustice exists here. First, the record is clear that Mr. Filauro was taking anti-depressant medication and did not fully understand

what he was doing. Most importantly, however, there was a severe conflict between his attorneys as to the advisability of taking his plea offer of twenty-five years at a hundred percent with no jail time. Given that Mr. Filauro is over fifty years old, a plea agreement of this duration is utter madness given the lack of evidence against him. [1] As noted in the Statement of Facts, there was a conflict between Mr. Wyckoff and Ms. Thompson as to the advisability of taking this plea. Indeed, Mr. Wyckoff declined to execute any of the forms dealing with the conviction.

The fact that there was a conflict between his attorneys as to the advisability of taking this plea is certainly strong evidence that Mr. Filauro was totally confused about what he was doing to the point where his guilty plea was virtually involuntary. Most importantly, there was absolutely no reason for Mr. Filauro to have pled guilty to this particular offense. There is no evidence in this record that the proof against Mr. Filauro was particularly strong. Indeed, the evidence is directly to the contrary. First, there was no confession on the part of Mr. Filauro to doing anything except touching his step-granddaughter while bathing her which is perfectly normal.

The charge, being rape, the State had to prove penetration. There was not a shred of medical evidence that there was any penetration. Indeed, as the record reflects, the child herself was unsure if there even was any penetration which, of course, is a material element of the offense. (Vol. III, p. 29). Certainly there were no witnesses to any of this except for the testimony of the child herself. While the State had some cartoons and pictures of young

[1] As noted earlier, Mr. Filauro is almost fifty-two years old. According to the mortality tables he has a life expectancy of 22.55 years and thus the twenty-five year sentence at one-hundred percent exceeds his life expectancy.

looking women that was allegedly taken from Mr. Filauro's residence, it was made clear to the defense attorneys at the evidentiary hearing that this sort of testimony would not be admissible at the trial. See *State v. Tizard*, 897 S.W.2d 732 (Tenn. 1994). (Vol. III, p. 20).[2]

Apart from a conviction for joy riding, the defendant had no prior record and could not be impeached by any convictions. (Vol. III, p. 33). As noted, there was no physical evidence in this case such as DNA or other evidence of that sort. While there was a physical examination of the child it was absolutely neutral disclosing no evidence whatsoever that the child was abused by anyone. (Vol. III, p. 28).

It was alleged that the defendant's uncle was involved in some scheme to pay money to the former wife of the defendant however, there is no evidence that the defendant was involved in this. (Vol. III, p.57).

What is clear from the record here is that there was a severe mistake and mis-communication on the part of his own attorneys. First, he was told that he would serve eighty percent of the sentence. Then he was told that he would serve eighty-five percent of the sentence. Then, fatally, Mr. Filauro was told that he would serve a hundred percent of the sentence <u>but</u> that it might not really be a hundred percent of the sentence. Ms. Thompson

---

[2] In *State v. Tizard*, 897 S.W.2d 732, 742-746 (Tenn. Crim. App. 1994), the court was concerned with the admissibility of sexual explicit photographs. The court held that:

> However, the hurdle lies in attempting to translate this [evidence] into further legitimate inferences which are sufficiently relevant to an intent to commit a sexual battery upon the victim. We believe the hurdle is insurmountable. That is, to the extent that the ultimate inference sought to be drawn by the state, i.e., the defendant's intent to commit a sexual battery upon the victim, must be derived from initial inferences about the defendant's character traits circumstantially drawn from the questioned evidence, such evidence's probative value on the ultimate inference is greatly attenuated.

In summary, the court in *Tizard* found that the sexually explicit evidence was inadmissible and, indeed, was reversible error. The conviction was reversed.

testified that she and Mr. Filauro discussed that the Department of Correction might not implement the one hundred percent service. Although she did not make any "promises," Mr. Filauro was clearly left with the impression that TDOC might not implement this and he would only serve eighty-five percent of the twenty-five years. (Vol. III, pp. 22-24). Mr. Filauro himself testified that he was told that it would be eighty-five percent or that it might be a hundred percent and he was thinking that when he got out to the prison it would only be eighty-five percent. (Vol. IV, p. 117).

The next question involves Mr. Filauro's eighteen months of jail credit. The record is crystal clear that Mr. Filauro had been in jail prior to his guilty plea for approximately eighteen months. The record reflects that Mr. Filauro returned to Nashville from Canada on November 18, 2000. (Vol. IV, p. 108). The date of the guilty plea was May 10, 2002. (T.R. 8-9). This eighteen months is a significant amount of pretrial jail credit. In any event, the lawyer told Mr. Filauro that it was not legal for Mr. Filauro to lose his jail time and that later on he could be credited with his jail time and could go to court and receive it. (Vol. IV, p. 118, testimony of Mr. Filauro) and (Vol. III, p. 26, testimony of Jennifer Thompson).

Ms. Thompson was very clear that "in my opinion, once he served twenty-five years in jail it would be illegal for him to stay in jail any longer." (Vol. III, p. 26). Indeed, Ms. Thompson said that she did not put the "waiver" of jail credit in the guilty plea form. (Vol. III, p. 32). If this Court will examine the guilty plea form in the Technical Record at pages 5-6 the Court will observe that there is nothing stated therein regarding waiver of jail credit.

If there were ever a "misunderstanding" between lawyer and client this clearly falls within the doctrine of "manifest injustice." Mr. Filauro believed that the Department of Correction will let him out after eighty-five percent and that he would really get his jail credit time but then when he got out to the prison he found out all of this is totally false. This goes to the very heart of the plea agreement itself. That is why he thought some "trick" had been played on him.

There have been numerous instances where a guilty plea was set aside because of gross misconception of the sentence. *State v. Haynes,* 696 S.W.2d 26 (Tenn. Crim. App. 1985) (plea set aside because of misconception in regard to the amount of time defendant would serve); *Teague v. State*, 772 S.W.2d 932 (Tenn. Crim. App. 1988) (guilty plea set aside where defendant was misled as to the effect of his plea on a subsequent charge; extensive discussion of issue); *Woods v. State*, 928 S.W.2d 52 (Tenn. Crim. App. 1996) (plea set aside because the defendant was unaware that the agreed sentence was illegal); and *Summerlin v. State*, 607 S.W.2d 495 (Tenn. Crim. App. 1980) (everyone thought the defendant could apply for probation).See also, *Howell v. State*, 569 S.W.2d 428 (Tenn. 1978)(parole eligibility); *State v. Burkhart*, 566 S.W.2d 871 (Tenn. 1978) (consecutive sentence mandatory).

Apparently there was some concern in some quarters that Mr. Filauro could get fifty years for this crime. It is extremely doubtful if consecutive sentences would have been appropriate in this case. While any sexual offense against a child is serious, the legislature already provides severe penalties for these crimes, in particular, child rate at one hundred

percent. Thus, there would have been very little necessity in consecutive sentences given the significant lack of aggravation. Thus, Mr. Filauro's exposure to anything more than the maximum sentence for a single count is problematic at best. Thus, it is clear that Mr. Filauro pled guilty and received the maximum sentence that he could have received had he gone to trial as a practical matter. Indeed, he received more than the maximum sentence given his alleged waiver of his jail credit.

The undersigned counsel represented Mr. Filauro at the very beginning of this case when these allegations first surfaced. The undersigned counsel if very familiar with this matter and was astounded beyond description that Mr. Filauro had pled guilty to this offense and accepted a sentence of this magnitude. Clearly, something was amiss.

In this case Mr. Filauro pled guilty on May 10, 2002. He almost immediately thereafter tried to retract his plea by contacting his family and within a few days contacted Mr. Wyckoff complaining that he had been "tricked." On May 30, 2002, Mr. Filauro filed a *pro se* "notice of appeal" since he did not know what else to do. The undersigned counsel filed a motion to withdraw the guilty plea on May 31, 2002, after being retained to represent Mr. Filauro.

This is not a case where defendant pleads guilty and then receives a sentence at some contested sentencing hearing and then, dissatisfied with the sentence, moves to withdraw his guilty plea. Rather this is an instance of a total lack of miscommunication and misunderstanding. The confusion surrounding this inappropriate and unjust sentence and plea more than justifies a finding of manifest injustice. Mr. Filauro acted promptly. The

interests of justice are clearly not served here. The trial judge abused his discretion in not setting aside this plea. Accordingly, this Court should reverse this case and remand for a trial. Mr. Filauro asks for nothing more but justice dictates nothing less.

2. THE GUILTY PLEA SHOULD BE STRICKEN AS A MATTER OF LAW BECAUSE THE SENTENCE WAS UNLAWFUL BEING OUTSIDE THE STATUTORY RANGE OF PUNISHMENT.

Mr. Filauro was sentenced to twenty-six and a half years as a Range I Standard offender on two counts of child rape (T. R. 8-9) when the lawful sentence is only twenty-five years. This Court should set aside this guilty plea because the trial court was without jurisdiction to have imposed a sentence of the sort fixed here.

Child Rape is a Class A felony for which the maximum sentence in the Range is twenty-five years. Tenn. Code Ann.§ 40- 35-112 (a). The record is also clear that Mr. Filauro "waived" his jail credit of some 18 months. Technical Record Pages 8 and 9 and Volume II, page 4. Mr. Filauro must serve 100% of the sentence he receives pursuant to Tenn. Code. Ann. §40-35-501(i)(3) which provides, in part, that "nothing in this sub-section shall be construed as affecting, amending or altering the provisions of §39-13-523, which requires child rapists and multiple rapists to serve <u>the entire sentence</u> imposed by the court undiminished by any sentence reduction credits." The lawful maximum sentence is twenty-five years for Range I, but by the district attorney insisting that Mr. Filauro not have his jail time of a year and a half then, of course, Mr. Filauro will be confined for twenty-six and a half years given that there is no release eligibility on this sentence.

It is elementary that it is unlawful to have a twenty-six and a half year sentence as a Range I standard offender for a Class A felony. Thus, the judgment is void as a mater of law.

In *McConnell v. State*, 12 S.W. 3d 795 (Tenn. 2000) the Tennessee Supreme Court examined a plea bargain where the defendant plead guilty as a Range I offender and received a sentence of thirty-five years for second degree murder. As this Court is aware, the maximum sentence for second degree murder is twenty-five years as a Range I offender. The Court in *McConnell* continued to approve the practice of allowing a defendant to plead "outside of his Range" but that the defendant could not have imposed on him a number of years outside of his Range and still be within the Range at the same time. Thus, a defendant could get a maximum sentence of twenty-five years as a Range I offender or, if the defendant agreed to a Range II sentence, then the defendant could lawfully be sentenced to thirty-five years.

The Supreme Court disapproved of the practice of taking bits and pieces of one Range and sentences and parts of other Ranges and combining them together. The Court held that "because the plea bargain agreement exceeded the maximum sentence available under the 1989 Act, the sentence was a nullity and cannot be waived." This was held to be jurisdictional: "The sentencing guidelines of the 1989 Act are jurisdictional and binding on trial courts." The Supreme Court held that the sentence entered by the trial judge was illegal and had to be set aside:

> On remand, the trial court may impose a sentence that is mutually agreeable to the state and [the defendant] so long as the sentence is available under the 1989 Act. If an agreement is not reached, though, [the defendant] may withdraw his guilty plea and proceed to trial on the original charges.

This identical doctrine applies here. This judgement is just as void.

Jail credit in Tennessee is mandatory. "When an accused is taken into custody by the state, Tennessee is required to credit the sentence with the time served in the jail pending arraignment and trial as well as the time subsequent to any conviction arising out of the original offense for which he was tried. The awarding of these credits is mandatory." Tenn. Code. Ann. § 40-23-101 (b). *State v. Henry*, 946 S.W.2d 833(Tenn Crim. App. 1997). See also, *State v. Silva*, 80 S.W.2d 485, 486-487 (Tenn. Crim. App.1984):

> From January 12, 1982 until July 29, 1982 [the defendant] was confined in North Carolina while resisting extradition to Tennessee to answer the escape charge. On March 8, 1983 he entered a plea of guilty to the charge of jail escape and received a sentence of one (1) year to run consecutively to sentences which he was serving at the time. He filed a petition for jail time credit from January 12, 1982 to July 29, 1982. This Court has twice held in unreported cases that a defendant, under the circumstances existing in this case, was not entitled to jail time credit. We said:
>
> ".... [T]he appellant, who escaped and was captured in a foreign State and who by his own act resisted extradition, should not be given credit for the time he served pending resolution of his extradition proceedings. The thrust of Tenn. Code. Ann. §40-3102 (Supplement 1981), was to assure that persons unable to make bond would be given credit for the time they spent in jail prior to and after appealing their conviction....."
>
> "We are of the opinion that the amendments to Tenn. Code. Ann. §40-3102, now encoded as Tenn. Code. Ann. §40-23-101, making it mandatory to allow a defendant credit on his sentence for any period of time he was held in the County Jail or Workhouse, pending his arraignment and trial, does not change the rule pronounced in *State ex rel Crist v. Bomar*, 365 S.W.2d 295, 211 Tenn. 420 (1963). In that case the court said: ".... [T]his brings us to the correct conclusion that it is really up to the prisoner who has been convicted to bring himself within the confines of the law to get the credit for the sentence that he concedes has been rightly fixed against him, and that the prisoner cannot by his acts have this sentence to begin running before he presents himself to the officers for incarceration under the sentence. Here the petitioner by his own acts tried to prevent his return to Tennessee to begin this

> sentence under this judgment which is conceitedly valid and fought extradition to Tennessee and it was this period of time which he now claims should be credited on this sentence. Clearly petitioner's arguments and reasons are not in conformity with established jurisprudence....."

In *State v. Haynes*, 696 S.W.2d 26, 29 (Tenn. Crim App. 1985) the judge was faced with a plea agreement which allowed MORE jail credit than the defendant was entitled to:

> We are also satisfied that the action of the trial judge in setting aside the guilty plea was correct. He found that the guilty plea was entered into through a misunderstanding as to its effect. To allow withdrawal of a guilty plea under such circumstances is a matter which rests in the sound discretion of the trial court. *Henning v. State*, 201 S.W.2d 669, 184 Tenn. 508 (1947). Tenn.R.Crim.P. 32(f). It would have been beyond the authority of the trial court to allow defendant's sentence to be served in the manner which he requested:
>
> "The Legislature determines the purposes of sentencing and the particular penalty for an offense, and the courts may not interfere except in those instances where the sentence imposed violates the Eighth Amendment prohibition against cruel and unusual punishment, ... The method to be used by the judge or jury in reaching the sentence is also within the legislative domain, and absent a clear infringement of a constitutional right of the defendant, the courts may not interfere with the methods chosen by the Legislature."
>
> *State v. Howse*, 634 S.W.2d 652, 656 (Tenn. Crim. App.1982).
>
> At the time of defendant's guilty plea submission, Tenn. Code. Ann. §40-3102, (Tenn. Code. Ann. §40-23-101), provided in pertinent part:
>
> "Hereafter when a person is sentenced to imprisonment the judgment of the court shall be rendered so that such sentence shall commence on the day on which the defendant legally comes into the custody of the sheriff for execution of the judgment of imprisonment; provided that this section shall not apply in a case where, after the rendition of the judgment is stayed by appeal or imprisonment, an execution of the judgment is stayed by appeal or otherwise; and provided further, that this section shall not interfere with the operation of the statute requiring sheriffs in whose custody defendants come for execution of judgments of imprisonment to commit such defendants as soon as possible to jail or to the warden of the penitentiary."

> The trial court shall, at the time the sentence is imposed and the defendant committed to jail, the workhouse, or the state penitentiary for imprisonment, render the judgment of the court as to allow the defendant credit on his sentence for any period of time for which he was committed and held in the city jail or juvenile court detention prior to waiver of juvenile court jurisdiction, or county jail or workhouse, pending his arraignment and trial. The defendant shall also receive credit on his sentence for the time he served in the jail, workhouse or penitentiary subsequent to any conviction arising out of the original offense for which he was tried.
>
> For the trial court to have shortened defendant's sentence by setting it to begin retroactively would have been in derogation of the statute.

Mr. Filauro asserts that it is unlawful to have a Range I sentence here where the length of the sentence is outside the permissible length of Range I and thus the plea is unlawful and subject to being vacated. *McConnell v. State*, 12 S.W. 3d 795 (Tenn. 2000). The defendant asserts that this matter cannot be remedied by giving him his jail credit since the matter is jurisdictional. The judgment is void and is subject to attack on direct appeal.

The trial court in this case overruled Mr. Filauro's arguments on this jurisdictional question based on *State v. Turner*, 919 S.W.2d 346, 359 (Tenn. Crim. App. 1995) which purports to hold that a defendant may waive his right to pretrial jail credit. *Turner* relies upon no authority for this statement but cites *State v. Mahler*, 735 S.W.2d 226 (Tenn. 1987) for the proposition that an accused can bargain to plead guilty to an enhanced range of punishment although he does not qualify for sentencing within the range. If the accused accepted the offer and pleads guilty, the sentence is valid and enforceable. *State v. Turner*, 919 S.W.2d, at 359.

There are several important points here showing that *Turner* is clearly distinguishable from our case here. First, the defendant in *Turner* was convicted for a crime that occurred

prior to the Criminal Sentencing Reform Act of 1989 and, indeed, occurred prior to the sentencing revisions occurring in 1982! Thus, *Turner* was certainly not construing our current law under which Mr. Filauro was convicted.

Next, the *Turner* case, as noted, relied upon *State v. Mahler* which was decided under the 1982 Act. In *McConnell v. State*, 12 S.W. 3d 795 (Tenn. 2000) the Supreme Court distinguished *State v. Mahler* and found that:

> Our decision today in no way alters the ability of the State and defendants to use offender classification and release eligibility as subjects of plea bargain negotiation. These elements of plea bargaining have been and still are properly characterized as non-jurisdictional. However, we do maintain the distinction between the subjects of plea bargaining and the length of a sentence.

Turner, and the trial court here, found that waiving jail credit was perfectly permissible because it was an element of plea bargaining. This is contrary to the central holding in *McConnell* which soundly rejected the notion that anything is permissible as long as it is the result of a plea negotiation:

> The state, despite the constitutional mandate concerning jurisdiction, previous court decisions, and the text of the 1989 Act, nevertheless contends that the sentence is valid. According to the state, the sentence is legal because of what the appellant bargained for and because a similar result could be reached by applying the 1989 Act. These arguments however ignore that to affirm the sentence imposed below is to render ineffective the sentencing provisions of the 1989 Act. While it is true that a plea bargain agreement is contractual. . . . contract principles extend only so far. . . . The 1989 Act establishes the outer limits within which the State and a defendant are free to negotiate and the courts are bound to respect those limits. If we accepted the State's argument then the 1989 Act is not jurisdictional, we could easily be left with a logical corollary to the matter before us: a plea bargained sentence less than the statutory minimum. Sentences beneath the minimum provided for by statute, however, have been consistently rejected as illegal. . . . yet the reasoning advanced by the State would permit this very result and would be an

> expansion of the trial court's jurisdiction by this Court. Such an expansion would be an obvious and impermissible intrusion on the clear constitutional prerogative of the legislature to define the contours of a trial court's jurisdiction.
>
> *McConnell v. State*, 12 S.W. 3d, at 798, (cases omitted).

Finally, it is questionable whether *Turner* is of any precedential value whatsoever. The "defendant-can-waive-jail-credit" ruling is really no ruling at all because *Turner* held that the defendant in that case had, in fact, received his jail credit and thus the question was "moot." *State v. Turner*, *Supra*, at 358-359. Thus, the language in *Turner* dealing with jail credit is purely advisory and, in any event, cannot withstand scrutiny as a result of the 1989 statutes as well as the more recent construction of those statutes found in *McConnell v. State*, *Supra*.

The fact remains that Mr. Filauro will spend twenty-six-and-a-half years in custody on a case where the statutory maximum is only twenty-five years. No matter how one "slices or dices" this issue his real, effective sentence is greater than that authorized by statute which, as our Supreme Court squarely holds, cannot be "waived" away. The matter is jurisdictional. Thus, this sentence is totally void and unlawful and so is the judgment of conviction. This is an issue of law which clearly can be raised on direct appeal. It was raised below and is renewed here.

CONCLUSION

For all of these reasons, Mr. Filauro respectfully requests that this Court reverse the trial court and set this plea aside so that the matter can be tried to a jury.

Respectfully submitted,

____

David L. Raybin, BPR No. 3385
22nd Floor - SunTrust Center
424 Church Street
Nashville, Tennessee 37219
(615) 256-6666

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to Deputy Attorney General Gordon Smith, Office of the Attorney General, 425 Fifth Ave. North, John Sevier Building, Nashville, TN 37202 this 23 day of May, 2003, via hand delivery.

____
David L. Raybin

APPENDIX

State v. Conrad, Tenn. Crim. App. at Knoxville, filed May 15, 2003 (unpublished)

State v. Green, ____ S.W.3d ____ (Tenn., 2003)

State v. Lyons, Tenn. Crim. App. at Nashville, filed August 15, 1997 (unpublished)