

UNITED STATES COURT OF APPEALS  
for the Fifth Circuit

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No. 94-30101  
Summary Calendar

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CLINTON R. PAYNE,

Petitioner-Appellant,

VERSUS

JOHN P. WHITLEY, Warden,  
Louisiana State Penitentiary and  
RICHARD P. IEYOUB, Attorney General,  
State of Louisiana,

Respondents-Appellees.

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Appeal from the United States District Court  
for the Eastern District of Louisiana  
(CA-93-3921-N(6))

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(February 6, 1995)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:<sup>1</sup>

On January 26, 1986, in a Louisiana state court, Clinton R. Payne pleaded guilty to simple burglary of a dwelling. On the same date, he was sentenced to a 12-year term of imprisonment. Payne signed a form that explained the rights he was waiving with his plea. The State later filed an information alleging that Payne had been convicted of burglary twice before, in 1975 and in 1981. The

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<sup>1</sup> Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

State asked the state trial court to resentence Payne as a repeat offender.

On March 24, Payne's multiple-offender proceeding was conducted in open court.<sup>2</sup> At the hearing, Payne admitted to the

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<sup>2</sup> The following exchange occurred among the court, counsel and Payne:

BY MR. MEYER:

Your Honor, I have had occasion to discuss this matter with Mr. Payne this morning, alright, and at this time on his behalf I would tender to the Court an admission that in fact he is the same Mr. Payne set out in the -- in the petition before the Court for the multiple bill and that he exceeds [sic] and admits to all the allegations of that petition. I would add, however, that Mr. Payne has informed me that through negotiation or, not negotiation, but at least discussions with his prior attorney and the district attorney and the Court, that he had been made -- given assurance that the sentences on a multiple bill would be not -- would not be in excess of the sentence initially awarded, which was twelve years.

BY THE COURT:

Is that correct, Mr. Payne, do you agree with what your attorney just said?

BY THE DEFENDANT:

Yes, sir, Your Honor.

BY THE COURT:

You are the same Clinton Payne that was charged and convicted in Section "J" in case number 250-742 of simple burglary on the first day of August, 1975 --

BY THE DEFENDANT:

Yes, sir.

BY THE COURT:

--you pled guilty? And do you understand by being adjudged, if you are adjudged a double offender, that you are going to -- or is this a triple -- this is a triple offender?

allegations of the multiple bill indictment and indicated he understood the consequences of his plea. Payne's attorney expressly acknowledged that Payne would be adjudged a triple offender.

After exhausting state remedies<sup>3</sup>, Payne sought habeas relief on grounds that 1) the state trial judge had failed to inform him

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BY MR. MEYER:  
This is a triple, Your Honor.

BY THE COURT:  
That you are going to lose your good time, you are not going to get any good time, you are going to have to do flat time, you understand that?

BY THE DEFENDANT:  
Flat twelve, huh, Your Honor?

BY THE COURT:  
Right.

BY THE DEFENDANT:  
Yes, sir, I understand that.

BY THE COURT:  
Alright. Alright, the Court finds the defendant's a triple offender. You are ready for sentence?

BY MR. MEYER:  
Yes, sir.

BY THE COURT:  
Sentence imposed on January 21, 1986[,] is rescinded and set aside, defendant is, on his plea of guilty, defendant is sentenced to serve twelve years at hard labor in the custody of the Department of Corrections, the first year to be without benefit of probation, parole, or suspension of sentence. The sentence is to run concurrently with any other sentence.

<sup>3</sup>**State v. Payne**, No. 92-K-1406 (La. App. 4th Cir. July 22, 1992) and **State v. Payne**, 625 So.2d 167 (La. 1993).

of his right against self-incrimination at the multiple bill proceeding; and 2) the evidence supported finding only one and not two previous convictions. The district judge rejected Payne's contentions and denied him habeas relief. This court granted Payne a certificate of probable cause for an appeal.

I.

Payne contends on appeal that the state trial judge did not inform him of his right against self-incrimination at his multiple offender hearing, in violation of **Boykin v. Alabama**, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). However, in federal habeas review, we do not inquire whether the state court judge specifically informed Payne of his "**Boykin** trilogy of rights." Instead, we ask whether "the totality of the circumstances shows that the defendant was . . . denied due process." **Lee v. Whitley**, No. 93-3791, slip op. at 5 (5th Cir. Jun. 28, 1994). In **Lee**, we explained:

Various factors may be examined. For example, the court may inquire whether the multiple bill hearing was temporally and functionally related to the guilty plea hearing and whether counsel had advised the defendant; or the court may consider the contents of the hearing and whether the defendant actually had the prior convictions as admitted. In short, the court inquires whether the defendant knew what he was admitting and intended to admit it.

*Id.* (internal citation omitted). See also **Joseph v. Butler**, 838 F.2d 786, 789-91 (5th Cir. 1988); **Buckley v. Butler**, 825 F.2d 895, 900-02 (5th Cir. 1987); **cert. denied**, 486 U.S. 1009 (1988).

Our review of these factors establishes that Payne was not denied due process. The transcript of the multiple-offender

hearing indicates that Payne had consulted with both his current attorney and his previous attorney before entering his true plea. The record also reveals that Payne and his lawyer had discussed the multiple-offender enhancement with the district attorney's office before the hearing. This fact suggests that Payne was well aware that he was in court to plead to the enhancement contained in the indictment.

Additionally, the trial judge sufficiently explained the consequences of Payne's true plea. At the hearing's outset, Payne's attorney informed that judge that Payne expected his new sentence to be the same number of years as his original sentence. The trial judge made sure that Payne understood that he was going to have to serve his new sentence without any good time. Payne acknowledged that he would now have to serve a "flat twelve" years.

We note that Payne's multiple-offender hearing was not temporally or functionally related to his earlier guilty plea hearing. However, this fact is insufficient to persuade us that Payne did not know what he was admitting or that he did not intend to admit it.

Payne vehemently asserts that the state court's failure to to inform him of his rights violated Louisiana state law. However, because this claim does not involve federal constitutional issues, it is not within our purview. **Smith v. McCotter**, 786 F.2d 697, 702-03 (5th Cir. 1986).

## II.

Payne also contends that the state failed to produce

sufficient evidence to support his sentencing as a multiple offender. Although the trial judge did not ascertain on the record whether Payne had a second prior conviction, this was not constitutional error. A defendant waives sufficiency of the evidence as an issue by pleading guilty. **E.g., United States v. Bell**, 966 F.2d 914, 915 (5th Cir. 1992); **United States v Broome**, 628 F.2d 403, 405 (5th Cir. 1980). Likewise, an offender such as Payne who pleads "true" to a multiple-offender indictment has waived the issue of the sufficiency of the factual basis for his plea.

For good measure we note that, because the purpose of Payne's hearing was to alter a pre-existing sentence, it was especially unlikely that the state court judge was constitutionally required to determine a factual basis for Payne's plea. We have already established that "[s]tate courts are under no constitutional duty to establish a factual basis for the guilty plea prior to its acceptance, unless the judge has specific notice that such an inquiry is needed." **Smith**, 786 F.2d at 702-03. This is particularly true in a multiple-offender proceeding, where the state judge is not determining what the accused has done, "but rather . . . what the state has previously determined that he has done." **Buckley**, 825 F.2d at 903. The judge at the multiple-offender hearing was entitled to assume that the "previous determination must have been a formal, judicial determination of guilt and hence one as to which the full measure of constitutional protections was available." **Id.**

There was nothing in Payne's multiple-offender hearing to put the trial judge on notice. Payne's attorney announced at the outset of the hearing that Payne had agreed to plead true to the charges in the multiple-offender indictment. Payne answered affirmatively when the trial judge asked him if he agreed with his attorney's statement, and did not object when his attorney informed the judge that Payne was a triple offender. Payne was presumably served with the multiple-offender indictment, which additionally informed Payne that the state was asserting both of his prior convictions.

### III.

The totality of the circumstances indicate that Payne received the process that was due at his multiple-offender hearing. Payne waived his sufficiency claim by pleading true, and the district court was not required to ascertain a factual basis for Payne's true plea.

AFFIRMED.