(2)

to the correctness of such recital. Petitioners complain that only by producing before the jury eye witness or other direct evidence of guilt could the Tennessee procedure be obeyed. In affirming dismissal of the state habeas corpus proceeding, the Supreme Court of Tennessee discussed, without finding fault, the procedure followed in the State Court. We are of the opinion that if there was less than satisfactory compliance with Tennessee law in submitting evidence to the jury, it did not deny petitioners fair treatment or any fundamental constitutional rights. Violation of a state statute does not, by itself, constitute deprivation of any right granted by the United States Constitution. Snowden v. Hughes, 321 U.S. 1, 11, 64 S.Ct. 397, 88 L.Ed. 497, 504 (1944); Beck v. Washington, 369 U.S. 541, 554–555, 82 S.Ct. 955, 8 L.Ed.2d 98 (1962); Townsend v. Sain, 372 U.S. 293, 311–312, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)."

[9] While we indulge every reasonable presumption against waiver of fundamental constitutional rights and do not presume acquiescence in the loss of fundamental rights, we find in the present case that petitioner and his counsel intentionally relinquished or waived the presentation of evidence by the injured party to the jury under T.C.A. § 40–2310.

On the subject of waiver it has been noted that:

"As a general rule, subject to certain exceptions, any constitutional or statutory right may be waived if such waiver is not against public policy. In fact, the trend of modern authority is in favor of the doctrine that a party in a criminal case may waive irregularities and rights, whether constitutional or statutory, very much the same as in a civil case. Some jurisdictions, however, regard certain rights as nonwaivable in capital cases, or even in felony cases generally. * * *

"Where a constitutional right accorded the accused is treated as waivable, it may be waived by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it." 21 Am.Jur.2d Criminal Law, § 219.

State ex rel. Lea v. Brown, 166 Tenn. 669, 64 S.W.2d 841, 91 A.L.R. 1246 (1933), states:

"A party may waive any provision of a contract, statute, or constitution intended for his benefit. Bouvier & Anderson's Law Dictionaries. These and other textbook authorities follow the language of Mr. Justice Strong in the early case of Shutte v. Thompson, 15 Wall. 151, 159, 21 L.Ed., 123, 'a party may waive any provision, either of a contract or of a statute, intended for his benefit.' So, it was said in a leading case, In re Cooper, 93 N.Y. [507], 512, 'It is very well settled that a party may waive a statutory and even a constitutional provision made for his benefit, and that having once done so he cannot afterward ask for is protection. (Lee v. Tillotson, 24 Wend. [N.Y.], 337 [35 Am.Dec. 624]; Embury v. Conner, 3 N.Y. 511 [53 Am.Dec. 325]; Cooley's Const. Lim. 181.) The appellant is in this position. He participated as an actor in procuring the order which he now seeks to set aside, and took his chance. * * * To that end there was not only acquiescence on his part, but intelligent and efficient dealing with the matter and consent to the order. By this consent he must be deemed to have made his election and should be held to it.'"

166 Tenn. 692–693, 64 S.W.2d 848.

We agree with the State's argument that analogous to the instant case is the right given in T.C.A. § 24–103, providing that neither husband nor wife "shall testify as to any matter that occurred between

State ex rel. Barnes
v
Henderson
423 SW 2d 497 (1968)