

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

AUGUST 1999 SESSION

**FILED**

February 2, 2000

Cecil Crowson, Jr.  
Appellate Court Clerk

**DAVID L. BOESE,**

Appellee,

VS.

**STATE OF TENNESSEE,**

Appellant.

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C.C.A. # 03C01-9807-CC-00229

\*

BRADLEY COUNTY

\*

Honorable Carroll L. Ross, Judge

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(Post-Conviction--Second Degree  
Murder; Aggravated Assault)

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FOR THE APPELLANT:

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OPINION FILED: \_\_\_\_\_

**REVERSED AND REMANDED**

**JOHN EVERETT WILLIAMS,**  
Judge

**OPINION**

The petitioner, David L. Boese, appeals pro se from a Bradley County Criminal Court order dismissing his pro se petition for post-conviction relief. In his petition, he asserts that his guilty pleas in state court to one count of second degree

murder and one count of aggravated assault were involuntary and thus violative of his constitutional rights. The petitioner had two appointed attorneys, one for the state charges and one for federal charges. His petition alleges that both attorneys provided him ineffective assistance of counsel. The trial court found that the petition failed to state a claim upon which post-conviction relief may be granted and dismissed the appeal without an evidentiary hearing. Concluding that the petition states a colorable claim for post-conviction relief, we REVERSE and REMAND.

### **BACKGROUND**

In December 1996, the petitioner was arrested for and charged with second degree murder and aggravated assault. He was subsequently indicted for first degree murder. The petitioner faced other charges in federal court. Correspondence from the petitioner's appointed federal counsel, Perry H. Piper, to counsel appointed for the state charges, Wayne Carter, stated that Piper could obtain a favorable plea agreement for the federal charge if the petitioner entered a state plea to any charge less than first degree murder. On February 25, 1998, the petitioner entered his guilty pleas to the state charges. He received sentences of nineteen and one-half years and of ten years, to be served concurrently with each other and with the imposed federal sentence.

On May 21, 1998, the petitioner filed a pro se petition for post-conviction relief, which the trial court dismissed without appointing counsel and without an evidentiary hearing. The record includes: (1) the petition, alleging ineffective assistance of state counsel; (2) correspondence, alleging ineffective assistance of federal counsel; and (3) briefs from the petitioner and the state.<sup>1</sup> The petition asserts that Carter, state counsel, did not know the law and thus was unable to properly represent the petitioner. Alternatively, in the correspondence, the petitioner alleges that Piper, federal counsel, was ineffective in advising him that a state plea was the only way to avoid a federal life sentence. On May 26, 1998, the trial court found that the petition read together with the correspondence failed to state a claim

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<sup>1</sup> His brief also asserts that he was denied a right to speedy trial, that the prosecution suppressed exonerating evidence, that unspecified counsel failed to conduct a proper factual investigation, and that counsel refused to file a notice of appeal on his behalf. None of these additional issues were asserted in the original petition.

on which post-conviction relief could be granted and dismissed the petition without an evidentiary hearing.

### **ANALYSIS**

Post-conviction relief is available when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States. See Tenn. Code Ann. § 40-30-203. The petitioner asserts that he was denied his constitutional right to effective assistance of counsel, a right secured by the Sixth Amendment of the United States Constitution and Article I, Section 9 of the Tennessee Constitution. See Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975) (The pertinent rights secured by the two documents are congruent.). However, “[t]he petition must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.” See Tenn. Code Ann. § 40-30-206(d). The total submission received indicates two different claimed bases for relief: (1) The petition asserts a claim of ineffective assistance of state counsel; and (2) the associated correspondence asserts a claim of ineffective assistance of federal counsel.

The petition read with the submitted correspondence asserts two claims of ineffectiveness. First, that the federally-appointed counsel coerced the defendant’s plea in state court by incorrectly advising him of the impact his state plea would have on the federal charge. The trial court found no post-conviction relief procedure that provides for a setting aside of a state court conviction as a result of alleged misrepresentations made by a federal counsel regarding federal charges. We agree with that conclusion and with the trial court’s holding that the petition failed to state a claim upon which post-conviction relief may be granted regarding Piper’s alleged misrepresentations.

However, a fair reading of the petition reveals that it also asserts that state counsel was ineffective in his failure to know “the relevant law” and therefore advise appropriately. He argues, in essence, that had state counsel been aware of the true

impact that his state plea would have on his federal charges, he would not have entered his state plea.

Although the documentation submitted with the petition does not lend much support for this claim of ineffective assistance of state counsel,<sup>2</sup> “the . . . post-conviction statute contemplates and due process requires that he be, at least, afforded the opportunity to prove his claim.” See Waite v. State, 948 S.W.2d 283, 285 (Tenn. Crim. App. 1997). It does not appear beyond doubt that he can prove no set of facts in support of this claim. See Swanson v. State, 749 S.W.2d 731, 734 (Tenn. 1988)(quoted in Waite, 948 S.W.2d at 285)(reviewing applicability of Swanson holding after enactment of 1995 statute). We remand for the appointment of counsel as outlined in Tennessee Code Annotated § 40-30-207, and the state should respond according to Tennessee Code Annotated § 40-30-208. See id.

### CONCLUSION

We REVERSE and REMAND such that the trial court may be presented with and address the issue of ineffective assistance of counsel, as well as any other cognizable basis for post-conviction relief.

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JOHN EVERETT WILLIAMS, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

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<sup>2</sup> In fact, the correspondence states that the petitioner was pleased with Carter's services and wished him to continue representation.

ALAN E. GLENN, Judge