IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
April 9, 2002 Session

ERIC ROSS SEWELL v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Sumner County
No. 66-2001 Jane W. Wheatcraft, Judge

No. M2001-02134-CCA-R3-PC - Filed June 5, 2002

The petitioner appeals the denial of his petition for post-conviction relief. The petitioner pled guilty to two counts of aggravated sexual battery, Class B felonies, and one count of attempted aggravated sexual battery, a Class C felony. Subsequently, he filed a petition for post-conviction relief, alleging ineffective assistance of counsel as its main issue. Following a hearing, the court denied relief, and the petitioner timely appealed. On appeal, the petitioner argues that the record shows that trial counsel was ineffective and that the post-conviction court showed bias in its ruling and incorrectly limited his proof at the hearing. Following our review, we affirm the denial of post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ALAN E. GLENN, J., delivered the opinion of the court, in which JOE G. RILEY and NORMA MCGEE OGLE, JJ., joined.

S. Jason Whatley, Sr., Columbia, Tennessee, for the appellant, Eric Ross Sewell.

Paul G. Summers, Attorney General and Reporter; Helena Walton Yarbrough, Assistant Attorney General; Lawrence R. Whitley, District Attorney General; and Sallie W. Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner, Eric Ross Sewell, was indicted on six counts relating to the sexual abuse[1] of eleven-year-old A.B.,[2] alleged to have occurred between November of 1997 and March of 1998. As part of a plea bargain agreement with the State, he pled guilty to two counts of aggravated sexual battery and one count of attempted aggravated sexual battery. The remaining three counts were

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[1] A copy of the petitioner's indictment was not included in the record.

[2] It is the policy of this court to identify minor victims of sexual abuse by their initials only.

"retired." According to the terms of the plea bargain agreement, the trial court sentenced the petitioner as a violent offender to concurrent eight-year sentences at 100% for each count of aggravated sexual battery and to four years as a Range I, standard offender for the attempted aggravated sexual battery, to be served consecutively to his concurrent eight-year sentences, for an effective sentence of twelve years. In addition, the court ordered the petitioner to pay a $1500 sex offender tax, submit to DNA testing, register as a sex offender, and refrain from contact with the victim and the victim's family. No direct appeal of his convictions was filed.

On January 5, 2001, the petitioner filed a petition for post conviction relief which, although *pro se*, recites that he was assisted in its drafting by counsel who represented him at the post-conviction hearing and in this appeal. The hearing on the petition for post-conviction relief occurred on July 5, 2001. After hearing opening statements from both sides and the State's oral motion to dismiss the petition, the court limited the evidentiary hearing to ascertaining whether trial counsel was prepared to try the petitioner's case as of January 4, 2000, the day before petitioner's trial was scheduled to begin. Following the presentation of proof, the post-conviction court denied relief; and the petitioner timely appealed, presenting the following four issues:

> I. The post-conviction court erred in concluding that the petitioner received effective assistance of counsel.
>
> II. The trial court improvidently granted the State's oral motion, made as the post-conviction hearing began, to dismiss issue one of the post-conviction petition, claiming that the petitioner's statements to police were involuntary.
>
> III. By comments made during the ruling on the post-conviction petition, the post-conviction court demonstrated bias.
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> IV. The post-conviction court erred in not permitting testimony at the hearing that the petitioner's statements to police were involuntary.

DISCUSSION

Post-Conviction Hearing Testimony

Both sides made lengthy statements prior to the presentation of proof at the evidentiary hearing. Recognizing that the petitioner had pled guilty to certain of his charges, post-conviction counsel stated that "[o]ur purpose here today is to look at the actions of [petitioner's] counsel and to see if [his] constitutional rights were violated because he was placed in a situation where he had no choice." Petitioner's counsel continued that his client, believing on the eve of trial that his then counsel was not prepared for the trial, "would like to have had that opportunity to contemplate whether he should take an offer or not, and to know that if he didn't take the offer, that he had a prepared counsel."

The State responded that the post-conviction "petition should be dismissed before this hearing even starts" because the complaints which the petitioner sought to make were waived by his pleas of guilty to the charges.

Petitioner's counsel then tried to counter the State's response by saying that "this case is much more complicated than State's counsel makes it out to be." Again acknowledging the petitioner's confession, he argued that the victim "made statements that were contradictory to the confession." He said that the victim's daughter would testify that "she saw nothing and that nothing could have gone on without her knowledge." Another of the victim's friends would testify, according to petitioner's counsel, that "she was there, not all, but many of the times when the alleged victim was there, and that she, too, will say she never saw anything inappropriate and that she was never out of the sight of [the petitioner] and the alleged victim." Additionally, the petitioner's ex-wife was available to testify that "she was home during these occurrences. No complaints to her, no complaints to anyone." Although the admissibility of the petitioner's confessions had been contested prior to his pleas of guilty by an unsuccessful motion to suppress, post-conviction counsel sought to present evidence at the post-conviction hearing as to why the court should have determined that the statements were inadmissible. As for how he would explain the petitioner's confessions to a jury, post-conviction counsel stated:

> How do you deal with a confession that's out there? The only way you can, and that is to walk through step by step and explain. Mr. Sewell, what do you mean by this? Is there any reasonable, rational explanation for this? Is there anything you can say to explain why you felt that you had to say this?
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> And the evidence would have shown that Mr. Sewell is a very meek individual and that Mr. Sewell was intimidated. And that is what he was prepared to testify to, and that's what he is prepared to testify to.
>
> So, yes, there is a confession, but according to my client and according to the evidence we will present, that confession, Your Honor, is – yes, it's words on a piece of paper, but the words themselves were spoken and some of them were not meant. Some of them are taken out of context, Your Honor. We have a confession that is, in essence, about 12 or 15 minutes worth of several hours. So my client wanted the opportunity to explain that.

Following additional argument as to the scope of the hearing, the post-conviction court stated, "I am going to allow an evidentiary hearing only as to whether or not [trial counsel] was prepared to go to trial on January 4th of 2000." Thus, the post-conviction court did not allow the petitioner to testify at the hearing as to why the court had erred in its pre-guilty plea ruling that the confession was voluntary. The parties then proceeded to present evidence.

The petitioner's father, Eugene Sewell, testified as the first witness that he had met his son's trial counsel at his son's court appearances, but the only time he attended a meeting with counsel and his son was on January 4, 2000, the day before the trial was to begin. The petitioner had asked both of his parents to be present at this meeting, where they all discussed the State's plea bargain offer. Mr. Sewell said that he and his wife urged their son to go to trial and fight the charges against him, but they knew it was their son's decision. Trial counsel explained that the charges against the petitioner could result in a sentence of over forty years if he were found guilty. Mr. Sewell testified that he heard counsel say, "if [the petitioner] wanted to take the case to court, then he would work the night through, if necessary, to prepare the case for him, his defense." Mr. Sewell said that he understood counsel's statement to mean that he would not start preparing for his son's trial until early evening before it was to begin. He also heard counsel say that "his hands were tied," a statement which counsel did not explain. Mr. Sewell said that his son's attorney did not discuss anything about trial strategy or witnesses with them, but he indicated that if the petitioner wanted to go to trial, then they would start preparing at that moment. Mr. Sewell said he later sent a letter to counsel requesting a refund of $10,000 because of the way counsel had handled his son's case. Counsel did not refund any money and sent Mr. Sewell a letter stating that he had provided adequate services. Mr. Sewell said that he was not aware of what his son's attorney had done to prepare for trial.

The petitioner's mother, Elizabeth Sewell, testified that she remembered being at the meeting with the petitioner and trial counsel on January 4, 2000. The petitioner had asked his parents to attend the meeting to help him decide whether to take the plea bargain agreement offered by the State. She remembered counsel saying, at the meeting, that "his hands were tied and that if he had to he would work all night to get ready for the trial." Based on this statement, she felt trial counsel was unprepared to go to trial the next morning. Although she understood that her son was facing a possible fifty-year sentence if he were found guilty at trial, she and her husband encouraged their son to go to trial with the hope that he would get a lesser sentence. Mrs. Sewell said there was no discussion at the meeting of the witnesses to be called at trial, and no other discussion of counsel's preparation for trial. She said that deliberately she had never read her son's confession to the police.

Because the post-conviction proceedings were limited to whether trial counsel was prepared to go to trial on January 4, 2000, two of the petitioner's witnesses did not testify:

> MR. WHATLEY: Your Honor, I call Holly Sullivan to the stand.
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> GENERAL BROWN: I object to this testimony, Your Honor, unless it relates to the January 4th meeting.
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> THE COURT: That's all I'm going to allow.
>
> MR. WHATLEY: Your Honor, one inquiry, then. With regard to the next two witnesses, Ms. Sullivan and [petitioner's daughter], I believe that in order for the Court to determine whether or not in fact [trial

> counsel] was ready on the 4th, it is important for the Court to understand what potential witnesses were there.
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> THE COURT: The Court understands that. I read the affidavits.
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> MR. WHATLEY: Thank you, Your Honor. We'll go on to our last witness, [the petitioner].

The record on appeal does not include a copy of the indictment. However, according to the judgments, which are included in the record, the aggravated sexual batteries occurred on "Nov., Dec. '97" and "Jan. '98." The attempted aggravated sexual battery occurred in "Mar. '98." The affidavit of Holly Sullivan states that she had spent the night with the petitioner's daughter "many times" at the Sewell residence. He never did anything inappropriate while she was there. She spent the night there on one occasion in the summer of 1998 with the victim and the petitioner's daughter and was not aware of any time when the petitioner and the victim were "alone together for any substantial time." She did not witness any inappropriate behavior on that occasion.

The affidavit of the petitioner's daughter, Rachel Sewell, states that the victim spent the night with her "[a]pproximately twice per month for about two years prior to [the petitioner's] incarceration." According to the affidavit, she did not recall her father being alone with the victim "for any length of time," and she did not observe any "inappropriate conduct" by her father. The affidavit states that the victim "had a tendency to seek the attention of others and to be the center of attention" and that "[s]he would sometimes exaggerate things to gain this attention." The petitioner's daughter was "never served with a subpoena to testify at [her] father's trial."

The petitioner testified that although he and trial counsel had talked on the phone several times on January 4, 2000, they did not meet at his office until 5:00 p.m. that day, and their meeting lasted approximately forty-five minutes. The purpose of the meeting was to discuss the State's plea bargain agreement but not to talk about potential defenses for trial. The petitioner remembered trial counsel saying, "My hands are tied because of your testimony." The petitioner asked trial counsel what would happen if he did not take the plea bargain, and counsel replied, "We will work into the evening and through the night to get this ready to go to trial." The petitioner interpreted this statement to mean that "we would work into the night and burn the midnight candle in order to get ready for a trial. . . . I felt at that point that if he wasn't ready by then why should we work through the night to get ready for a trial." The petitioner said he and trial counsel had met several times prior to that meeting, for a total of about ten hours, including time spent preparing for hearings. He said that at the moment he signed the plea bargain agreement, he did not feel that his attorney was prepared to go to trial. He described his state of mind when he signed the plea bargain agreement:

> Q Why did you sign the agreement?
>
> A Because I was weighing two evils against each other.

Q And what were they?

A The evils that – of the situation – I call them evils, but the situations that were before me. I saw 12 years in front of me and I saw 40 years or better the next day. And if I knew that he was not prepared to take it to trial, then I was looking at a three-hour or four-hour or five-hour trial to where there was no chance, if he's not prepared, without having any witnesses besides myself to call to even bring a iota of disbelief, I took the plea.

The petitioner said that trial counsel never presented him with any information about trial strategy or evidence at the meeting on January 4, 2000. He gave counsel the names and contact information for his daughter, Rachel, and his daughter's friends, Holly Sullivan and Chelsea Griner, because he felt they would make good witnesses at trial. Trial counsel talked to the petitioner's daughter for about fifteen minutes before deciding that she would not be a witness at trial. The petitioner did not ask trial counsel if he was prepared to go to trial and admitted that he did not know what attorneys do to prepare for trial. When asked on cross-examination if his daughter had been present when he had touched the victim as he described in his confession, the petitioner replied:

Yes, my daughter was there. As far as what I said to the police during my interrogation, there was things that was said in that interrogation that were coerced or given to the fact that was never researched as far as what I actually was meaning by what I was saying. Okay?

Now, as far as what Rachel would consider inappropriate behavior, me coming up behind and grabbing someone and shaking them in a playful manner or wrestling with them, I nor Rachel found that to be criminal in its intent. So, yes, she would say there were times of wrestling. But – I'm sorry, but if it pleases the Court, and I might say this – my thumbs are not that big and that's a very big girl we're talking about. I never had my chance to prove anything in a court of law.

Q So you're going to use the size of your thumbs in your defense?

A Yes, ma'am, I will.

The petitioner's trial counsel testified, as the next witness, that he had been practicing law in Sumner County since 1993. He estimated that 75% of his caseload was criminal. Counsel said he always knew that the petitioner's confessions to the police, wherein the petitioner admitted to five incidents of sexual abuse, would be difficult to overcome at trial. He said he had been ready to go to trial and that he and the petitioner would have decided which witnesses to call. He stated that the

petitioner's daughter, Rachel Sewell, probably would have been a witness at trial. Her testimony would have been helpful because she claimed to have been present nearly all of the time when the victim visited the Sewell residence, and she never saw her father touch the victim inappropriately. However, he feared that Rachel's testimony would have been subject to impeachment since the victim had said that Rachel refused to talk to her about the incidents. Counsel said that he did not think that subpoenas were needed for their potential witnesses and that not issuing subpoenas to family and friends is a common defense strategy to keep the State from knowing which witnesses the defense will call.

Counsel said he thought that Rachel's friend, Holly Sullivan, would not have been a very good witness because her testimony would not have covered the time periods listed in the indictments. However, he admitted that he should have met with Holly Sullivan and her mother sometime before trial. Counsel said he talked to Rachel Sewell only once. He assumed everything she and the petitioner had said were true and felt he would be able to get the necessary testimony from her at trial. He also believed that the petitioner would make sure that his daughter was at trial if they needed her to testify. Counsel said he did not contact Rachel the day before trial because he felt he needed to talk to the petitioner first. Counsel testified that he was well aware that the victim's statements were inconsistent. He said that he had "outlined, tabbed, [and] highlighted" her statements to focus on these inconsistencies and to prepare for his cross-examination of her at trial. Counsel said that he had given the petitioner an open invitation from the beginning to come to his office to discuss his case anytime. He said that while he had been preparing for a jury trial from the beginning, he had also been trying to ensure that his client had the best plea bargain he could get from the State.

When asked if the sole purpose of the pretrial meeting with the petitioner was to discuss the plea agreement, he responded:

> As I stated to you, from his actions from the afternoon of the 3rd on into the 4th, it was as if he didn't want to prepare for trial. When we lost the motion to suppress, we had a very blunt conversation, and I said, you know, we're going to be lucky – going into the motion to suppress, I was hoping that go [sic] we would win it, number one, and I think he was, too. But I've always told him from day one that that would be a monumental victory if we were able to accomplish that. We gave it our best shot.
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> After the motion to suppress, I told him – and I can't remember the time line – I believe it was that same afternoon or shortly thereafter, but the DA did reiterate an offer that I was surprised to get, that it was as good as it was. I felt she would probably come back with a 15-year offer.

> So it was my impression, from the way he was acting and not getting with me and saying let's get ready to try this thing, that he was leaning towards taking the offer. And he would tell me when I would call – I'd say, look, the offer is set to expire at 11:00. He didn't say – he never once said I don't want it, reject it. That would be real simple. That would make my life much simpler on the 3rd and 4th. He did not say that. Yes, he rejected earlier offers, but this was a better offer, and he did not reject the offer.

Counsel said that, during his representation of the petitioner, he requested and prepared for a preliminary hearing, filed a motion for a bill of particulars, participated in full discovery with the State, obtained all of the petitioner's statements, including the one taken during the polygraph examination, and attained the relevant law enforcement case files. He said he had "spent approximately 60 to 70 hours, at a minimum, working in preparation on this case." Once the petitioner accepted the plea bargain, the petitioner never called him to say that he had changed his mind.

At the conclusion of the hearing, the post-conviction court made oral findings:

> All right. In the years that [trial counsel] has been practicing in this court – which he said is from 1993 – I have never known him to come into the courtroom unprepared or even halfway unprepared. If anybody prepares a case, it is [trial counsel].
>
> I don't know – it has not been brought out, but this case was actually set for trial November 30th. And we had a hearing on some motions on November 18th, one of which was a motion to continue, which the Court did not – wasn't particularly pleased about and which I state.
>
> But I noticed when I was reading over the file yesterday that [trial counsel] said, "I wanted Your Honor – this is not an attempt to push this case back. There is some further discovery that we wish to have as the defense, and, also, in reviewing this material five or six hours yesterday, I found some additional materials that were missing that should not be a problem to get."
>
> And then General Brown said, "I think some pages were missing in one of the interviews."
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> So he was, I think, really preparing to go to trial in November and then discovered that there was some material missing and the State had a witness problem. But the fact is [trial counsel] has been

working on this case – or had been working on this case since he had a preliminary hearing.

He did everything that I expect a defense lawyer to do, and then [sic] I think a defendant has a right to expect a defense attorney to do. He had the preliminary hearing. He had it transcribed. He would not agree with the State to waive it because he wanted to have the opportunity to cross-examine the victim at the preliminary hearing. He talked to the officers. He reviewed all the materials. He was as familiar with every statement that was going to be made as any attorney could be.

When he came in here on that motion to suppress we had a long hearing, 161 pages, in fact, worth of hearing; and he was extremely prepared, and he knew the facts up one side and down the other.

I think that it is unfortunate that the Sewells interpreted his comment that I will work this evening or into the evening or even all night – I think that they really misunderstood and perhaps took it from that that he was not prepared. But this Court knows that he was prepared at every single hearing that we had.

And the fact of the matter is this defendant was really – based on the statements that he made, would have had an uphill battle at trial. That doesn't mean he's not entitled to a trial. I understand that. But certainly had he wanted to have a trial, I have no doubt that [trial counsel] was ready to try it because he had been in this court any number of times and I know how ready he was. So to say, as defense counsel has done, that preparation didn't start until after 5:00 on January 4th is certainly not the case.

Now, as to – [trial counsel] said he probably should have interviewed Holly Sullivan. Holly Sullivan, I think, would have done more to hurt this case. Holly Sullivan did not have a good time line. I have read that affidavit, and certainly [trial counsel] knew what she was going to testify to. He had some reservations about her testimony.

But I think to look back and say, yes, he should have had her in the office and he said perhaps he should have, but, to me, in the grand scheme of everything that went on in this case, that is just insignificant.

> As far as Rachel was concerned, there was no question that she was there. And I just – you know, she could have testified and [trial counsel] would have put her on the stand.
>
> But, nonetheless, I think to come in here and say that this defendant should have a new trial because – or should have a trial because there was ineffective assistance of counsel, I think under the standards that I have to look at, which is Baxter v. Rose and Strickland v. Washington, not only was counsel competent and effective within the standards that I have to look at, but I think counsel exceeded the competency of most counsel in this type of case.
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> I think [trial counsel] certainly put in the effort; he certainly put in the time; and he was certainly prepared to go to trial. I don't think, looking at it, that there's anything that he could have done differently. And I think really [the petitioner] ought to be thankful every day that he had [trial counsel], that he got the sentence he got, because he was certainly facing a great deal more time had he gone to trial.
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> So the . . . petition . . . for post-conviction relief is going to be denied.

ANALYSIS

I. Standard of Review

A post-conviction court's findings of fact are conclusive on appeal unless the evidence found in the record preponderates against the findings. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999) (citing State v. Keith, 978 S.W.2d 861, 864 (Tenn. 1998); Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997)). This court may not "reweigh or reevaluate" the evidence. Id.; see also Henley, 960 S.W.2d at 579. Appellate review of a post-conviction court's application of law to the facts is *de novo*, without a presumption of correctness. See Burns, 6 S.W.3d at 461 (citing Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998)). *De novo* review is required for cases that involve "mixed questions of law and fact." Id. (citing Harries v. State, 958 S.W.2d 799, 802 (Tenn. Crim. App. 1997)). Our supreme court has stated that "issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact" and are subject to *de novo* review. Id. (citing Goad v. State, 938 S.W.2d 363 (Tenn. 1996)).

In order to determine the competence of counsel, Tennessee courts have applied standards developed in federal case law. See State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The United States Supreme Court articulated the standard

in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), which is widely accepted as the appropriate standard for all claims of a convicted petitioner that counsel's assistance was defective. The standard is firmly grounded in the belief that counsel plays a role that is "critical to the ability of the adversarial system to produce just results." Id. at 685, 104 S. Ct. at 2063. The Strickland standard is a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S. Ct. at 2064. The Strickland Court further explained the meaning of "deficient performance" in the first prong of the test in the following way:

> In any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances. . . . No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Id. at 688-89, 104 S. Ct. at 2065. The petitioner must establish "that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms." House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (citing Goad, 938 S.W.2d at 369).

As for the prejudice prong of the test, the Strickland Court stated: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." 466 U.S. at 694, 104 S. Ct. at 2068; see also Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994) (holding that petitioner failed to establish that "there is a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different"). When a petitioner enters a guilty plea, as in this case, "the petitioner must show 'prejudice' by demonstrating that, but for counsel's errors, he would not have pleaded guilty but would have insisted upon going to trial." Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998) (citing Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203, 210 (1985); Bankston v. State, 815 S.W.2d 213, 215 (Tenn. Crim. App. 1991)).

Courts need not approach the Strickland test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697,

104 S. Ct. at 2069; see also Goad, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

By statute in Tennessee, the petitioner at a post-conviction relief hearing has the burden of proving the allegations of fact by clear and convincing evidence. See Tenn. Code Ann. § 40-30-210(f) (1997). A petition based on ineffective assistance of counsel is a single ground for relief, therefore all factual allegations must be presented in one claim. See Tenn. Code Ann. § 40-30-206(d) (1997).

II. Ineffective Assistance of Counsel

The petitioner claims that he received ineffective assistance of counsel, presenting as his primary complaint, that his trial counsel was not prepared to defend his case and, additionally, that counsel should have filed a memorandum of law with his motion to suppress the confessions.

Initially, we note that much of the petitioner's post-conviction complaint ignores two important facts. The first fact, which is relevant to the post-conviction claim that the petitioner's confessions were involuntary, is that, prior to the pleas of guilty, the trial court conducted a lengthy hearing on the motion to suppress filed by trial counsel. The transcript of this motion is 161 pages, thirty of which are the petitioner's testimony. Arguing anew that the statements were involuntary, the post-conviction petition seeks to relitigate the motion to suppress. Additionally, the petitioner fails to recognize that the charges against him were resolved by pleas of guilty, and that the transcript of that hearing does not demonstrate any hesitation by him in pleading guilty or his voicing any complaints, though given the chance to do so, against his trial counsel. In fact, during the guilty plea hearing, the petitioner admitted that he was guilty of the charges against him. Having made those observations, we now will consider in detail the petitioner's allegations.

A. Sufficiency of Trial Counsel's Preparation

The petitioner argues that trial counsel's comment that he would "work all night" to prepare for trial the next morning is evidence that his attorney was unprepared and, thus, provided ineffective assistance of counsel. Petitioner interpreted this comment to reveal that his attorney had completed no prior preparation for trial and would have to stay up all night to be ready for trial the next day. However, the evidence refutes this claim.

The record on appeal includes the following motions which were filed by trial counsel on behalf of the petitioner:

> 1. Motion for Bill of Particulars, seeking dates, times, locations and specifity as to specific acts alleged to have been committed by the petitioner;

> 2. Motion to Suppress the petitioner's November 13, 1998, statement specifying the legal basis on which suppression was sought;
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> 3. Motion to Suppress the petitioner's December 2, 1998, statement and specifying the legal basis for the motion, to which was attached a copy of State v. Shelton, 851 S.W.2d 134 (Tenn. 1993).

The record also includes copies of the petitioner's November 13, 1998, and December 2, 1998, statements which his trial counsel unsuccessfully had sought to have suppressed. For both statements, there is a typed, signed waiver of Miranda rights. Since both statements were typed, it appears likely that audiotapes of the statements also would have been available for the trial.

The first statement, which is thirty-three typed pages, consisted of denials by the petitioner, although in it he did admit "there were situations yes to where there was possible touching above the clothes but never, or brushes or whatever you want to call them but never was my hand skin to skin on [the victim]." He agreed that his hand had slipped under the victim's shirt once when they were wrestling on the floor, and that his hand could have gone into her pants but, if so, he did not "recall it."

However, in the second statement, dated December 2, 1998, the petitioner told of the five times that he had touched the victim:

> OK, there were 5 dates in question, or 5 incidents in question. This is the situations [sic] that happened. The first one November somewhere around November or December of 97. [A.B.] was staying at the house ah, we were wrestling and or playing around and I went to go and grab around her and when I did I touched her breasts. I think I might have squeezed the breasts maybe 10 seconds, somewhere around that point.

He told of the second incident:

> The second incident happened somewhere about January 98 it was a weekend. [A.B.] was spending the night, it was in the living room. [A.B.] had made a smart comment to me as I was walking in the living room. I patiently just walked up behind her and gave her a bear hug from behind, held her for about 10 or 15 seconds, ah, in the course of coming up from behind her and grabbing her I had both hands crossed on the breasts. This again was over the clothing and maybe held it there for a full minute as I was just jokingly shaking her up and down.

He told of the third incident:

> Sewell: The third incident happened late January early February 98, [A.B.] again was spending the night. We were watching a movie in the living room. [A.B.] was on the floor face down watching the movie ah, it started as a massage to the back and I slowly moved down and massaged the buttocks area and started massaging the upper thigh area. In the process of doing it my thumbs came across and started massaging the inner thigh area and at the point touched or brushed the outer . . . . vagina area.
>
> Hesson: You're saying
>
> Sewell: She was wearing
>
> Hesson: you actually touched her vagina?
>
> Sewell: yes, she was wearing short shorts and my thumbs, both thumbs, in the process of massaging the inner legs or inner thighs rubbed up against them. That was an extent of about 30 seconds.
>
> Hesson: OK, are you saying that that went up under the clothing?
>
> Sewell: Yes it did[.]
>
> Hesson: OK, so your skin from your hands touched hers?
>
> Sewell: Yes[.]

He told of the fourth incident:

> The forth [sic] incident happened somewhere around March of 98 it was a weekend, again it was a sleep over it was in the living room. [A.B.] was wearing a half T-shirt a cut-off with no bra ah, they were turning cart wheels and showing off ah, I came up from behind her and went to bear hug her and when I did my hand slipped under the half shirt and touched skin of the breasts. It was below the nipples just into the muscle area of the breasts. I felt the skin and I backed off that was the extent of that situation.

He told of the fifth incident:

> The fifth incident happened in late May ah again it was a sleep over. I was sitting on the edge of the bed with [A.B.] and my daughter. [A.B.] was fixing Rachel's hair. It started out as a back rub, ah, came around to the front and grabbed her at her waist, held there for about a minute or two, and just gave her a tummy hug. Ah, my hands dropped to her legs and to the thighs. I started to rub the legs and work my hand slowly to the vagina area. This is over the clothing. I moved to the crotch and rubbed maybe 10 to 15 seconds and she was wearing spandex. That was the extent of the fifth incident.

At the post-conviction hearing, counsel testified that he had always prepared the petitioner's case as if they were going to trial and there would be no plea bargain offered by the State. Counsel told the petitioner that he would talk to him about his case at anytime and made an effort to return all of petitioner's phone calls. At the evidentiary hearing, counsel explained, in detail, what he had done to prepare the petitioner for trial:

> Q What did you do to prepare him to answer each and every charge in there if he had to take the stand in his behalf?
>
> A We would discuss what he had told the officer that day. Unfortunately, I cannot recall every conversation we had about it. I specifically remember on one instance about the massage, his fingers slipping up in the vaginal area. And our discussion on that particular incident and how we were going to handle it was [the petitioner] said that his hands slipped.
>
> And I said, okay, that's one possibility that we could put to a jury, but let me play devil's advocate. I'm on the jury and I'm thinking, how can you rub a young woman's body in such proximity to where a slip could cause you to come in contact with her vaginal area, and such things as that. And that's the kind of thing that we would discuss.
>
> And, yes, we went through pretty much all of them. The talk about the shirt being pulled up, that was going to be horseplay. That was our – what we were going to try to present to the jury on that. I think [the petitioner] had mentioned that had [sic] more than once.
>
> One of the big hurdles we had was he made a statement to one of the officers – you have it there. I don't recall it verbatim – that he got pleasure out of this or gratification. That was going to be a hard hurdle to overcome. I don't know if [the petitioner] ever really gave

a good explanation that we agreed we could go with in the jury trial on that issue.

During his testimony, counsel said he had been prepared to defend the petitioner's case:

> Q Let's talk about the days leading up to the trial. And, of course, the focus today is January 4th. On that day – let me ask you the question: Were you prepared to go to trial?
>
> A On January 4th?
>
> Q Yes.
>
> A Yes, sir.
>
> Q Okay. You were prepared to go to trial on the 5th? I mean, you were prepared on the 4th for a trial to take place on the 5th?
>
> A That's the answer: Yes, I was prepared for a trial the next day. Obviously – and I know you practice law, too – you're never as prepared as you want to be. That's why in his case – which would be no different from any other case that I have – I'm going to prepare on into the night, whatever it takes, until I feel as comfortable as I possibly can.
>
> Just as when you're taking a law school exam, you study and study and you never feel like you know everything, but all you can do is do as much to get to the point where you feel that you've done everything within your power to be as prepared as possible. And that's what I was attempting to do in this case.

Counsel said that he called the petitioner several times on January 4 to tell him he needed to either accept the plea bargain agreement or come to his office to prepare for trial the next day. However, the petitioner did not arrive at his office until late that afternoon.

Counsel explained what he meant when he said he would "work all night, if necessary" to prepare the petitioner's case:

> Q And during those 60 and 70 hours [of preparation] you weren't ready to go forward on the 4th without working well into the evening?

A The statement – that statement is absolutely trying to be used in the wrong meaning. If I had spent 1,000 hours on this case, I would have worked well into the evening, especially when my client doesn't get to my office until 3:30 the day before trial. So, yes, of course, I'm always going to prepare well into evening.

So I never once told him I was not prepared because I never felt I was unprepared. I felt I was getting – I had a lot of anxiety. I knew we had a trial the next day. I knew my client was mulling over a plea. I was running over here, seeing how the courtroom was going to be set up, going over the statements of the victim, going over his testimony some more, calling him. His parents were calling me; don't do anything yet; we're on our way. There was a lot going on on the 4th.

Counsel testified that an important goal at trial was to attack the inconsistencies in the victim's statements, and he described in detail how he was planning to counteract the effectiveness of the victim's statements:

Q Are you aware – you talked about the time line problems with Holly Sullivan. Are you aware that there were time line problems with the victim?

A Absolutely, and that was where I spent the vast majority of my trial prep. Like I said, I didn't go over it and review it as well as I knew it at the time, but I have – every single statement that that young lady made is documented: her interview with DCS, her interview with the officers, her preliminary hearing; and I have it outlined, tabbed, highlighted. I was seriously – that was my main focus, was the inconsistencies in her statements.

The State asked counsel a series of detailed questions about his preparation for the petitioner's trial:

Q So it's your testimony that in preparation for [the petitioner's] trial on January 5th, leading up from the very beginning of your representation of him, you had a preliminary hearing and had that transcribed; you had full discovery from the State, including the victim's statement. Is that correct?

A Correct.

Q You had both the confessions of the defendant, your client, plus the statement from the TBI on the polygraph. Is that correct?

A That's correct.

Q You had all the case files from law enforcement, and you interviewed both the TBI agent and Detective Hesson vigorously as far as the motion to suppress was concerned?

A Correct.

Q And based on your cross-examination of Detective Hesson, you pretty much knew exactly what his testimony was going to be at trial. Is that correct?

A Yes, ma'am.

Q You filed the motion for a bill of particulars trying to zero in as much as you could on the offenses that your client was accused of. Is that correct?

A That's correct. And that was something that I was initially concerned about, because some of the statements that I read in other discovery, some statements of the victim – I think in one statement she said that he touched her inappropriately on numerous occasions, and I was worried about a potential double jeopardy issue that [the petitioner] might face and did some research and had some case law on that.

Q Did you do other research in this case?

A Certainly. Yeah, with the motion to suppress I did a lot of research. I did a lot of research with regard to the bill of particulars.

Q And the decisions you made in this case, . . ., were these part of your trial strategy trying to get the best deal you could for your client?

A Absolutely.

Q Do you think you did that?

A Yes, I do. Anytime I have a client that accepts that much time in the penitentiary – there's hardly a week that goes by that I don't think about [the petitioner] in the penitentiary.

But, you know, I've talked with a lot of other attorneys. I talked with [another criminal defense attorney] prior to my client entering this plea because from my experience [he] knows as much, if not more, than any other attorney in this area concerning sex offenses. He's had numerous cases regarding them. And I consulted over with him, and that actually was, I believe, the previous offer. In his mind it was a good offer. He said it was a very good offer, considering what my client could face. And I discussed that with my client, told him that I had talked with another attorney who has handled a lot more of these cases than I have. I was very candid with him about that from the get-go.

. . . .

Because, as you know, a lot of these offenses that my client was charged with are not probatable. Two class A felonies he was charged with, if he was just convicted on one of those, well, that's much worse than the deal that I had him. If he were convicted on more than one count, whether it be the aggravated sexual battery or even something less, because these crimes occurred at different times, it's possible that [the trial court] could have ran [sic] his time consecutive. There were a lot of factors that went into the plea that my client ultimately took.

Q [Trial counsel], your client agreed to take this plea on January 4th, is that correct, in your office?

A He did, General Brown.

The transcript of the submission hearing does not demonstrate that the petitioner had any hesitation in entering pleas of guilty to the charges against him:

Q Mr. Sewell, you're under oath. I'm going to go through and ask you some questions. If there's anything that I ask you that you don't understand, I'll be happy to rephrase it. If during the course of my questioning of you you want to stop and talk to your attorney, you have that right.

State your full name for the record, please.

A Eric Ross Sewell.

Q How old are you?

A Thirty-four.

Q And how far did you go in school?

A Just shy of a degree.

Q You are here on a six-count indictment. The District Attorney has indicated that you're here to plead guilty to Counts 1, 2 and 4. Counts 1 and 2 are aggravated sexual battery. They are B felonies. They carry eight to twelve years in the penitentiary. You're receiving a sentence of eight years to be served at 100 percent.

In addition to that, you're pleading guilty to Count 4, which is an attempt to commit an aggravated sexual battery, which reduces it from a B to a C. And that carries three to six years in the penitentiary. You're receiving a four-year sentence at 30 percent, and that will be consecutive to the eight-year sentence, for a total effective sentence of twelve years to be served in the Tennessee Department of Correction.

Is that your understanding of the agreement that's been reached in this case?

A Yes, ma'am.

Q Do you understand the crimes to which you're pleading and do you understand the sentence you're receiving?

A Yes, I do.

Q Do you understand also that you have the right to plead not guilty to these charges?

A Yes, ma'am.

Q If you plead not guilty, are you aware that you do have the right to a speedy and public trial by a jury, and if you elect to have a jury trial [trial counsel] would represent you?

A Yes.

Q Are you aware that you have the presumption of innocence and that remains with you until such time as the State overcomes it by proof beyond a reasonable doubt by competent evidence to the satisfaction of the jury?

A Yes.

Q Do you understand you have the right to have your own witnesses brought into this courtroom to testify on your behalf?

A Yes.

Q Are you aware that you have the right to confront in open court any witnesses that General Brown might call on behalf of the State to testify against you and that [trial counsel] would cross-examine those State witnesses?

A Yes.

Q Are you aware that if you had a jury trial you could either testify or not in your own defense, and if you elected not to testify, I would instruct the jury that that could not be held against you, that that's a right that all criminal defendants have?

A Yes.

Q Do you know that if you were tried by a jury and the jury found you guilty of the crimes and I sentenced you, that you would have the right to appeal and I would appoint an attorney to represent you on the appeal if you were unable to hire [trial counsel]?

A Yes.

Q Do you understand if you plead guilty here this morning, Mr. Sewell, there is not going to be any further trial of any kind, so that by pleading guilty you are waiving or giving up your constitutional rights, including the right to a trial by jury?

A Yes.

Q Do you understand that if you plead guilty the Court or the State may ask you questions about the offense to which you plead, and if you answer those questions under oath, on the record, and in the presence of counsel, your answers may later be used against you in a prosecution for perjury or false statement?

A Yes.

Q Do you understand your rights as I have explained them to you?

A Yes.

Q Do you want to give up those rights by pleading guilty?

A Yes.

Q Are you pleading guilty voluntarily and of your own free will and not as a result of any force, threats, or promises apart from this plea agreement?

A Yes.

Q Are you satisfied with [trial counsel's] services?

A Yes.

Q Is there anything he could have done for you that he has not done?

A No.

Q Have you discussed your plea fully with him?

A Yes.

Q And does your willingness to plead guilty result from discussions that you have had with [trial counsel] and then he had with General Brown on your behalf? Is that how this came about?

A Yes.

Q What's the plea agreement? What are the crimes to which you're pleading on Counts 1 and 2?

A Aggravated sexual battery.

Q And what's the sentence you're receiving?

A Eight years at 100 percent.

Q On Count 4 what are you pleading to?

A Attempted sexual battery.

Q Sentence?

A Four years at 30 percent.

Q How is that running?

A That's running concurrent.

Q It's running consecutive.

A Consecutive. Excuse me.

Q Counts 1 and 2, eight years at 100 percent are running concurrently; and Count 4, four years at 30 percent is running consecutive. What's the total effective sentence you're receiving here today?

A Twelve years.

Q You also have to submit to DNA testing, register on the sex offender list, and have absolutely no contact with the victim or her family.

Are you aware that in pleading guilty, Mr. Sewell, not only are you giving up all the constitutional rights that I've gone over with you, but you're giving up your appellate rights, you may not appeal from either these pleas or from the sentences that are being imposed?

A I understand.

Q You understand that?

A Yes.

Q Are you aware that the Court does not have to accept your pleas unless I'm satisfied that you're guilty of the crimes with which you're charged?

A I'm aware of it, yes, ma'am.

Q Are you taking medication?

A No.

Q Are you under the influence of any alcohol or drugs?

A No.

Q Do you understand what you're doing here this morning?

A Yes.

Q Are you guilty of two counts of aggravated sexual battery?

A Yes, ma'am.

Q What did you do?

A It was stemming from horseplay, inappropriate contact involving horseplay.

Q Are you guilty of the attempt to commit aggravated sexual battery on Count 4?

A Yes.

Q What did you do?

A Again, it was in the acts of horseplay.

Q Did you improperly touch that minor child?

A Yes, ma'am.

Q And do you wish to plead guilty to these charges?

A Yes.

To prove ineffectiveness of counsel, the petitioner must show that his trial counsel's performance was deficient and that but for counsel's mistakes, he would not have pled guilty but would have demanded to go to trial. Hill v. Lockhart, 474 U.S. 52, 58, 106 S. Ct. 366, 370, 88 L. Ed. 2d 203 (1985). Here, the petitioner has failed to make either of these showings. He has taken a vague statement of defense counsel on the eve of trial and attempted to propel it into a showing that counsel was not prepared for trial, resulting in his being forced into unwanted pleas of guilty.

The record on appeal does not show either that trial counsel was ineffective or that, absent the alleged mistakes, the petitioner would not have entered pleas of guilty to the charges. Counsel filed pretrial motions, spent at least ten hours meeting with the petitioner, and sixty to seventy hours "minimum" preparing for the trial. He did not believe that the petitioner's daughter or her friend would be helpful witnesses for the defense. Given the fact of the petitioner's confessions, and the unsuccessful motion to suppress, it appears that these witnesses would have been of little benefit. Likewise, we doubt that the jury would have been impressed by the "small thumbs" defense, which the petitioner related at the post-conviction hearing as his explanation for the admitted intimate touching of the victim. Thus, we conclude that the post-conviction court did not err in determining that the petitioner failed to demonstrate that trial counsel was ineffective. Likewise, we conclude that the petitioner has failed to demonstrate that he pled guilty because of his belief that his counsel was not prepared to go to trial. The transcript of the guilty plea hearing belies such a claim, for the petitioner showed no hesitation in entering his pleas of guilty, and he voiced no complaints of any sort against trial counsel. Accordingly, we conclude that the record supports the determination of the post-conviction court that the petitioner failed to establish that trial counsel was ineffective.

B. Counsel's Failure to File a Memorandum of Law with the Motion to Suppress

The petitioner also argues that his trial counsel was ineffective because he did not file a memorandum of law in support of the motion to suppress.

Initially, we note that, although the post-conviction court limited the evidentiary hearing to whether trial counsel was prepared on January 4, 2000, for trial, post-conviction counsel still was permitted to question trial counsel as to why he had not filed a memorandum of law with the motion to suppress:

> Q [Trial counsel], you mentioned in cross-examination that you did a lot of research on the motion to suppress. Did you provide a memorandum to the Court?
>
> A With my motion? No, I didn't. The motion – if you look at the actual document that I filed, it's pretty short, blunt, and to the point. It's not extravagant. It doesn't have a lot of details, if any, of what we intended to introduce at the hearing. And that was on purpose with regard to details because when I have a motion to suppress, as a

> general rule – unless I'm absolutely – 100 percent the facts are not in dispute, I don't want to give the other side immediate impeachment material.
>
> So my client took the stand in that motion to suppress hearing, and he was able to testify to what he said the officer said and the conditions that he was under and all of that. And at the time, that was the first the General knew about it. To me, it was in our advantage to file a short, non-explanatory document and then present the law to the Judge. I know we went right down through Law 101 with regard to, you know, Mirandizing and constitutional right to counsel. And I was disappointed that we didn't win the motion to suppress. I thought we did a very good job with it. I thought it was a close call, but we didn't win.

The record on appeal includes the 161-page transcript of the hearing on the motion to suppress. The transcript shows that the petitioner's trial counsel made a lengthy opening statement and closing argument. During his summation, he supplied the court with copies of State v. Anderson, 937 S.W.2d 851 (Tenn. 1996), and Smith v. Illinois, 469 U.S. 91, 105 S. Ct. 490 (1984), both of which are relevant to the issue of the voluntariness of the statements and the petitioner's claims at the hearing. Much of the petitioner's testimony at the suppression hearing, particularly as to whether he asked for a lawyer during questioning, conflicted with that of the State's witnesses. The petitioner had signed written waiver of rights forms prior to the taking of both statements. Thus, a prime issue at the motion to suppress was the credibility of the witnesses, whether the petitioner had, as he asserted in his testimony, asked for counsel. With this being the issue, it is difficult to envision that a written memorandum of law would have made the petitioner's testimony more credible, given that his claims in this regard were contradicted by the testimony of Detectives Hesson and Morrow of the Gallatin Police Department and TBI Agent Smith. Also, since the trial court made oral findings at the conclusion of the hearing, it appears that neither the State nor the defense filed written memoranda of law; and unexplained by the petitioner is how, given these circumstances, his counsel could have filed a memorandum. We would be engaging in speculation were we to conclude that the trial court would have reached a different result had the petitioner's trial counsel reduced to writing and filed what he stated during concluding arguments. A delay to permit this would have allowed the State to do likewise. There is simply no evidence that the petitioner was prejudiced by the absence of this memorandum. Thus, the petitioner has failed, as well, to establish that he received ineffective assistance of counsel in this regard.

III. Post-Conviction Court's Errors

The petitioner alleges, also, that the post-conviction court erred in limiting the evidentiary hearing to one issue and in making comments concerning his trial counsel's competency during the post-conviction hearing. We now will examine these claims.

A. Limiting the Hearing to the Issue of Effectiveness of Counsel

One of the grounds raised in the petition for post-conviction relief was that "[t]he conviction was based upon the use of a coerced/unlawfully obtained confession and violation of the Petitioner's privilege against self-incrimination." Upon the State's oral motion to dismiss, the court limited the evidentiary hearing to the issue of whether petitioner's trial counsel was prepared to go to trial on January 4, 2000, but did not allow the petitioner "to testify at his post-conviction hearing regarding the facts surrounding the two statements he gave police." Following lengthy arguments in this regard, the trial court ruled:

> I don't want to hear any more. What I'm going to do is this: I, of course, have been involved in this case from the beginning and I know how hard [trial counsel] worked. I know how many motions were filed and hearings were had. I am going to allow an evidentiary hearing only as to whether or not he was prepared to go to trial on January 4th of 2000. All right?

The petitioner has assigned as error his not being allowed to testify at the post-conviction hearing that his confessions were involuntary. This argument ignores the fact that a defendant cannot lose a motion to suppress, plead guilty, and then file a petition for post-conviction relief to litigate anew the motion to suppress. In State v. Hodges, 815 S.W.2d 151 (Tenn. 1991), our supreme court set out the limited post-conviction options available to a defendant who has entered a plea of guilty:

> Once a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel did not meet appropriate standards.

Id. at 153 (citation omitted); see also Tenn. R. Crim. P. 37(b).

Thus, the post-conviction court was correct in not allowing the petitioner to present testimony as to this claim.

B. Alleged Noncompliance with Post-Conviction Requirements

In addition to arguing that the post-conviction court improperly limited the scope of the hearing, the petitioner makes several complaints regarding the alleged failure of the State and the court to abide by the procedures set out in Tennessee Supreme Court Rule 28.

The petitioner alleges that the State failed to file a timely written motion to dismiss, citing Tenn. Sup. Ct. R. 28, § 5(G) and (H). The State did file a timely response to the petition, although it did not set out facts which would support a motion to dismiss. The petitioner cites no authority for his claim that the State's failure to file a motion to dismiss results in his then being empowered to press a claim which was waived by his pleas of guilty. Accordingly, we conclude this argument is without merit.

Next, the petitioner argues that the post-conviction court failed both to enter an order, prior to the hearing, specifying the claims that were not colorable, as well as a post-hearing order with specific findings of fact and conclusions of law. See Tenn. Sup. Ct. R. 28, §§ 6(B)(5), 9(A). Actually, the post-conviction court did enter a prehearing order stating that "the petition presents a colorable claim." However, at the beginning of the post-conviction hearing, the court determined that the petitioner would not be entitled to proceed on the claim that his confessions were involuntary. As we have previously stated, that claim was waived by his pleas of guilty. Accordingly, we cannot conclude that the petitioner is entitled to relief because the court did not recognize, initially, that one of the claims could not be pressed. As for his complaint that the post-conviction court did not prepare written findings of facts and conclusions of law in this matter, the petitioner is correct that such findings are to be made following a hearing on a petition for post-conviction relief. Tenn. Sup. Ct. R. 9(A). However, this court has held that a post-conviction court's verbal pronouncement of its findings of fact and conclusions of law from the bench, as was the case here, can be harmless error. See State v. Higgins, 729 S.W.2d 288, 290-91 (Tenn. Crim. App. 1987); State v. Swanson, 680 S.W.2d 487, 489 (Tenn. Crim. App. 1984). We conclude that the post-conviction court's providing oral, rather than written, findings was harmless error.

C. Alleged Bias of the Post-Conviction Court

During the hearing on the petition for post-conviction relief, the trial court made certain comments regarding the competency of trial court, the comments being generally that he had worked "hard," that he had never been known "to come into the courtroom unprepared," and that "[i]f anyone prepares a case, it is [trial counsel]." The petitioner argues that these comments concerning his trial counsel's competency constitute judicial bias, since the comments "would lead an ordinary person . . . to reasonably question the trial judge's impartiality at the post-conviction hearing," and that the judge should have recused herself from the matter.

We agree with the petitioner that the post-conviction court's past experience with trial counsel could not be the basis for determining whether he had provided the petitioner with effective assistance of counsel. However, it is clear from the transcript that the post-conviction court's findings were based upon evidence in the record. The court noted, *inter alia*, in its oral findings that trial counsel had been practicing for eight years prior to the post-conviction hearing; that he declined to waive the preliminary hearing as the State had requested, but participated in the hearing so as to cross-examine the victim, and had the hearing transcribed; and that he participated in a lengthy motion to suppress, for which he was well prepared and familiar with the facts. The post-conviction court observed that the defense would have had an "uphill battle" at trial because of the petitioner's

statements; that trial counsel should have interviewed Holly Sullivan, although he knew what her testimony would be, and had "some reservation" about using her as a witness; and that he was "prepared for trial." Applying the standards of Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), the post-conviction court concluded that the petitioner was afforded effective assistance of counsel at the trial level. Thus, the post-conviction court referred to the evidence presented at the hearing and applied the appropriate standard in determining that the petitioner received the effective assistance of counsel. The personal experience observations of the court, which the petitioner casts as evidence of bias, while irrelevant to the issues, are a small part of the findings and do not, in our view, show that the post-conviction court was biased against the petitioner.

We note that the judgment for Count 4 of the indictment, setting out the petitioner's plea of guilty to attempted aggravated sexual battery, does not reflect the conviction offense. The post-conviction court, pursuant to Rule 36 of the Tennessee Rules of Criminal Procedure, may correct this omission.

CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the denial of post-conviction relief.

_____

ALAN E. GLENN, JUDGE