IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1999 SESSION

FILED

October 12, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

AVERY HASTON NORRIS, JR.,	)	
	)	C.C.A. No. 01C01-9808-CR-00322
Appellant,	)	
	)	Davidson County
v.	)	
	)	Honorable Steve R. Dozier, Judge
STATE OF TENNESSEE,	)	
	)	(Post-Conviction)
Appellee.	)	

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

ALAN E. GLENN, JUDGE

O P I N I O N

The petitioner, Avery Haston Norris, Jr., appeals as of right from the denial of his petition for post-conviction relief by the Davidson County Criminal Court in which he claimed violation of his constitutional right to effective assistance of counsel as provided by both the Sixth Amendment to the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Tennessee. Petitioner argues his judgment should be overturned[1] because he was misinformed by his attorney as to the class and range of punishment of one of the six felony counts for which he was indicted and to which he pleaded guilty; and that counsel failed to represent him zealously during plea negotiations and at the sentencing hearing.[2] Based upon our review of the record, we affirm the ruling of the trial court denying the petition.

PROCEDURAL BACKGROUND

The petitioner is presently serving a sentence of sixty years following his open pleas of guilty to six counts of possession of controlled substances with intent to resell. Petitioner pleaded guilty to each of the following:

Count I	Possession with intent to sell nine hundred and twenty-two point three (922.3) grams of marijuana;
Count II	Possession with intent to sell seven hundred and forty-two point four (742.4) grams of cocaine;
Count III	Possession with intent to sell six hundred and ninety-one (691) tablets of Alprazolam;
Count IV	Possession with intent to sell six hundred and sixty-nine (699) tablets of Diazepan (Valium);
Count V	Possession with intent to sell six hundred sixteen and one half (616½) tablets of Dihydro Codeinone;
Count VI	Possession with intent to sell an unspecified amount of Oxycodone.

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[1] In the alternative, petitioner requests that this court either (1) allow his case to go to trial, or (2) vacate and re-enter the judgment against the petitioner so as to reestablish the statutory period for withdrawing the petitioner's guilty plea.

[2] The issue of counsel's failure to zealously represent petitioner was noted in the petition for post-conviction relief. This issue was not briefed, and therefore we find that it has been waived according to Court of Criminal Appeals Rule 10, which states, in part: "(b) Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." TENN. R. CT. CRIM. APP. 10(b).

The petitioner timely filed a petition for post-conviction relief. Following a full evidentiary hearing, the petition was denied by the trial court. Notice of appeal was timely filed.

STATEMENT OF FACTS

On October 20, 1995, Sergeant McWright with the 20th Judicial District Drug Task Force advised Officer Perry Buck of the Metro Police Department that a confidential informant had told him that petitioner was in possession of a large amount of cocaine that was being offered for sale. On October 25, 1995, Officer Buck conducted a trash pickup at the residence of petitioner and his wife. The search of trash yielded a cocaine kilo wrapper containing white powder residue and several sections of plastic bags containing white powder residue. The residue field tested positive for cocaine. Based on this investigation, police executed a search warrant on October 27, 1995, at the residence of petitioner. When petitioner was observed leaving his residence driving a van, officers executed the applicable portion of the search warrant against him and his van. Counts I through VI of the indictment list the drugs found in the van. The petitioner also had $8,855 in cash on him and a loaded semiautomatic weapon. Property seized from the residence included seven vehicles, thirty-seven weapons, and additional drugs, among a list of other valuable items. The State's case also included two tape-recorded admissions by petitioner concerning the purchase of various items with drug proceeds and the extent of his drug dealings. Petitioner was indicted on July 15, 1996.

The petitioner retained Donald Gregory, a Nashville attorney who had been practicing law for approximately twenty-one years, to represent him.[3] Gregory practiced law in a building which he owned and in which he rented space to Richard Taylor, currently an Assistant Public Defender in the 23rd Judicial District. Approximately one week before trial, which was set for February 11, 1997, Gregory sought the assistance of Taylor. Taylor reviewed petitioner's file as requested by Gregory and prepared a handwritten

[3]Donald Gregory died on June 14, 1997, approximately two and a half months after the sentencing hearing on March 27, 1997, and approximately seven months prior to the filing of the petition for post-conviction relief on January 12, 1998.

memorandum outlining prior convictions for possible enhancement purposes; laboratory reports on the drugs found in petitioner's van; and possible sentencing ranges for each of the counts against petitioner. Gregory received this memo from Taylor five or six days prior to the trial date. In the memo, Taylor incorrectly identified Count II, possession with intent to sell 742.4 grams of cocaine, as a Class B felony when it was in fact a Class A felony. For a Range III offender, this meant a possible sentence of forty to sixty years rather than twenty to thirty years. Taylor did not recall what was the source of his information. Also, Count VI was listed in Taylor's memo as a Class B felony, and that count was actually a Class C felony with a punishment of ten to fifteen years, not twenty to thirty. In summing up, Taylor listed the following on his memo to Gregory:

Total Poss. Fines	$335,000.00	
Total Poss. Time, Conseq.,	Range II:	38-68
	Range III:	68-102

Prior to the trial date of February 11, 1997, Donald Gregory met with Assistant District Attorney General John Zimmermann to discuss settlement. These settlement negotiations were held twice in October and twice in December of 1996. Zimmerman testified at the post-conviction relief hearing that in his discussions with Gregory he went through petitioner's criminal record, including a conviction for voluntary manslaughter, circling the convictions showing that petitioner was a Range III offender. Zimmerman also testified that he discussed the fact that the punishment on the cocaine charge alone was forty to sixty years for a Range III offender.

In October of 1996, the State offered petitioner a forty-year sentence as a Range I offender. This settlement offer was rejected. Petitioner claimed that he rejected the offer because Gregory had told him that the charges against him carried a total possible sentence of only fifty years. Petitioner decided that the offer was not good enough and that he would rather just plead guilty and let the judge decide the sentence. The State made a second offer to settle on December 5, 1996 at forty years as a Range III offender. This was still the settlement offer at a final discussion on December 19, 1996. At that time, Gregory told Zimmerman that his client did not want to take the offer and that the matter

should be set for trial. Trial date was set for January 6, 1997. Because Gregory was injured when he fell at his office building, the trial was postponed until February 11, 1997.

On the morning of the trial, with the State fully prepared to go forward, Gregory advised Zimmerman that petitioner was going to plead guilty. Taylor, who was present at the trial to assist Gregory, apparently prepared the petition to enter a plea of guilty, although he testified that he could not recall whether he signed this petition. This was to be an open plea with no agreements between the State and petitioner as to any of the charges. Zimmerman signed this petition. The petition prepared by Taylor perpetuated the error he had made earlier in his memo to Gregory and listed Count II as a Class B felony rather than a Class A felony and listed Count VI as a Class B felony rather than a Class C felony. These errors were discovered during plea colloquy. The fact that Count VI should have been a Class C felony was discovered first and corrected. The error as to Count II was discovered during the court's explanation of the effect that petitioner's prior sentences would have on the length of his sentence under Count II. When petitioner was informed by the court that the correct sentence range for a Class A felony as a Range III offender was forty to sixty years rather than twenty to thirty, he told the court that he wanted to change his plea. The court told petitioner, "It's not twenty to thirty years. Your sentence range is forty to sixty years. Now, you, do you want to reconsider? I'm not trying to encourage you not to do this plea; but the sentence range on Count Two is forty to sixty years. He's [General Zimmerman] right; it's over three hundred grams."

Court was then adjourned for petitioner to consult with counsel and co-counsel, Gregory and Taylor. Petitioner and his family met for an hour and forty-five minutes with Gregory and Taylor in the cafeteria downstairs in the courthouse. When court reconvened, a new petition to enter a plea of guilty was presented to the court. This petition was signed by Taylor, as co-counsel for petitioner.[4] The court proceeded to inform petitioner

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[4]The first petition was destroyed at the plea hearing once the trial court was provided a new form by counsel and co-counsel of appellant. The trial court noted that a new form was not necessary, but counsel replied:

> MR. GREGORY: Your Honor, if I'm not mistaken, the original paperwork
> (continued...)

concerning all his legal rights and finally stated: "This is your day in court on the question of guilt. Now, we'll have another hearing. At that hearing, I'll decide what your sentence would actually be. But, this is your day in court on the question of your guilt if you plead guilty. Do you understand that?" Petitioner responded, "Yes, sir." The court continued, " Now that I've explained all – do you still want to plead guilty?" Petitioner responded, "Yes, sir." Later, testifying at the post-conviction hearing, petitioner explained his decision to go ahead and enter a guilty plea in the following exchange with his counsel:

> Q. Well, Mr. Norris, why didn't you just go ahead and, then, come upstairs and say . . . just run the dice? We'll just go ahead and have a jury trial? Why didn't you do that?
>
> A. I was nervous and I was . . . uh . . . and, I just didn't want to take it to trial. Uh . . so, I didn't know what to do.

Both Gregory and Taylor represented petitioner at the sentencing hearing held on March 27, 1997. At that hearing, Gregory stated that whatever sentence petitioner received, it would probably be a "death sentence" for him because of his cancer of the liver.[5] Joseph McKinney, a minister at Joelton Church of Christ, who had known petitioner since he started attending McKinney's church some six months earlier, testified as a character witness for the defendant. Jerry McCoo, one of the Sunday School teachers at the church, also testified for the defendant. Both men testified as to petitioner's efforts to turn his life around.

The petitioner was represented by new counsel, Richard McGee, at the post-conviction hearing. Donald Gregory had died some seven months earlier. Both Taylor and Lewis Burnett, an attorney whose office was also in the building owned by Gregory,

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[4](...continued)

> showed it was a "B" felony. We corrected it to show it was an "A" felony.
> THE COURT: "A" and, then, Count Six...
> MR. TAYLOR: Count Six we reduced.
> THE COURT: From a "B" to a "C."
> MR. TAYLOR: "B" to "C."
> THE COURT: Right; all right. I'll throw the other one away.

[5]Richard Taylor testified at the post-conviction relief hearing that, prior to the sentencing hearing, Gregory had received a letter from petitioner's treating physician which indicated that the cancer was in remission and that a negative prognosis would not be proper at that point in time.

testified at the hearing as to Gregory's condition at the time of his representation of petitioner. Taylor, who began renting space from Gregory in the early part of 1996, approximately one year before the trial of petitioner, testified that during 1996, Gregory's physical condition deteriorated. Gregory suffered from severe back pain, diabetes, and depression. Taylor responded to a question asked him at the post-conviction relief hearing concerning Gregory's condition—"In your opinion, was he physically capable of actually trying a case with a jury?"—by responding, "No, sir. There's no way." Taylor also testified that, subsequent to the representation of petitioner, he associated with Gregory, who was lead counsel according to Taylor, on an aggravated child abuse case. Burnett testified at this same hearing that he "did not think Don committed ethical violations" but that "he was not practicing to the best of his ability."

Following the hearing in this matter, the trial court entered a comprehensive written opinion on July 14, 1998 in which the court made a number of findings. The court noted that the petitioner had "nine (9) prior felony convictions (all by way of guilty pleas)" and that he had given "full confessions to Metro law enforcement officers as well as ATF officials." Additionally, the court found that there was "no proof to show that, but for Mr. Gregory's representation, there would have been any more favorable outcome for the petitioner." The opinion of the trial court also includes the following:

> The Court finds that although an error was committed by trial counsel in terms of the advice given him about the possible punishment, this error was not so serious for this Court to find that the petitioner's Sixth Amendment right to counsel was not protected. It is not uncommon for the Judge at guilty plea hearings to clarify for the defendant or his attorney the effects of a sentence in terms of ranges or release percentages prior to accepting a guilty plea. The petitioner must overcome the presumption that counsel's conduct falls within the wide range of acceptable professional assistance. State v. Williams, 929 S.W.2d 385 (Tenn. Crim. App. 1996). Further, the Court is not convinced that the petitioner would not have pled guilty and insisted upon a jury trial had it not been for counsel's erroneous advice. The petitioner voluntarily chose to enter these pleas knowing that Judge Shriver would sentence him to the proper range according to the law. The Court fully apprised the petitioner of his rights prior to the plea and this explanation included the proper range of punishment for each count of the indictment. The Court finds that the guilty pleas satisfied the requirements of Tennessee Rules of Criminal Procedure 11 and met the constitutional standards of Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709 (1969). The petitioner

> is presumed to be aware of the possibility of the Judge imposing separate sentences for separate crimes, thus the petitioner cannot now benefit from the setting aside of these valid pleas. See Bailey v. State, 924 S.W.2d 918 (Tenn. Crim. App. 1995). The petitioner's claim that he would not have entered the pleas had it not been for the erroneous information must fail because he entered the pleas even after being informed of the accurate range.

As we now review the claims of the petitioner, we note that these findings by the trial court are afforded "the weight of a jury verdict and are conclusive on appeal unless the evidence in the record preponderates against those findings." State v. Henley, 960 S.W.2d 572, 578 (Tenn. 1997), cert. denied, __U.S.__, 119 S.Ct. 82, 142 L.Ed.2d 64 (1998). This court can neither reweigh or reevaluate the evidence, nor can it "substitute [its] inferences for those drawn by the trial judge." Id. at 579.

ANALYSIS

I. Grounds for Post-Conviction Relief

The grounds on which a prisoner may petition the court for post-conviction relief are set out in Tennessee Code Annotated § 40-30-203: "Relief under this part shall be granted 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." The Sixth Amendment to the U.S. Constitution and Article I, Section 9 of the Tennessee Constitution are sources of the right of an accused to effective assistance of counsel.[6] Our Supreme Court has determined that "[t]hese two constitutional provisions are identical in import with the result that a denial of the Sixth Amendment right to the effective assistance of counsel is simultaneously a denial of the right to be heard by counsel, as provided under the Constitution of Tennessee." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

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[6]The Sixth Amendment provides, in part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Article I, Section 9 of the Tennessee Constitution provides, in part: "That in all criminal prosecutions, the accused hath the right to be heard by himself and his counsel . . . ."

Therefore, 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), perm. app. denied (Tenn. 1998) (noting that the same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The U.S. Supreme Court articulated the standard that is widely accepted as the appropriate standard for all claims of a convicted defendant that counsel's assistance was defective in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). 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 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. As for the prejudice prong of the test, the 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." Id. at 694, 104 S.Ct. at 2068. Finally, the Court stated what it deemed a critical point:

> Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.

Id. at 696, 104 S.Ct. at 2069. 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." Id. at 697, 104 S.Ct. at 2069; see also Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996) (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). "A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings. Failure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition." Id.; see also Cone v. State, 927 S.W.2d 579, 581 (Tenn. Crim. App. 1995), perm. app. denied (Tenn. 1996) (finding that petitioner's claim that issues raised in a second petition were "novel" failed as "vague and conclusory"). Finally, we note that when post-conviction proceedings have included a full evidentiary hearing, the trial judge's findings of fact and conclusions of law are given the effect and weight of a jury verdict, and this Court is "bound by the trial judge's findings of fact unless we conclude that the evidence contained in the record preponderates against the judgment entered in the cause." Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App.), perm. app. denied (Tenn. 1990).

Petitioner in this case presents the following factual allegations to support his constitutional claim of ineffective assistance of counsel:

1. Counsel's erroneous advice regarding the potential exposure petitioner faced prejudiced petitioner in that his guilty plea was not knowing and voluntary;

2. Counsel's deficient advice prejudiced petitioner's ability to make an intelligent decision concerning a plea settlement.

II. Knowing and Voluntary Guilty Plea

The record supports petitioner's claim that counsel erroneously advised him that

Count II of his six-count indictment, possession of 742.4 grams of cocaine with intent to sell, was a Class B felony rather than a Class A felony.[7] The memo which Attorney Taylor prepared for counsel approximately a week before trial date memorialized the error. Petitioner argues that this error constituted deficient performance by counsel and that petitioner was prejudiced because his guilty plea was not understandingly and knowingly entered and because he rejected a favorable plea agreement.

The United States Supreme Court has held "that the two-part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." Hill v. Lockhart, 474 U.S. 52, 58, 106 S.Ct. 366, 370, 88 L.Ed.2d 203 (1985). Here, petitioner alleges that he was prejudiced by counsel's deficient performance because he was deprived of his right to make a guilty plea that was "understandingly and knowingly entered."[8] Petitioner also implies that his guilty plea was not voluntary because he was "placed in an untenable situation on the day of trial" and presented with a "Hopson [sic] choice."

The test for determining the validity of a guilty plea is well settled: "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." North Carolina v. Alford, 400 U.S. 25, 31, 91 S.Ct. 160, 164, 27,

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[7]The Tennessee Drug Control Act of 1989 classifies cocaine as a Schedule II controlled substance. See Tenn. Code. Ann. § 39-17-408(b)(4) (1997) (listing Schedule II drugs and other substances as including "Coca leaves (DEA Drug Code No. 9040) and any salt, compound, derivative or preparation of coca leaves (including cocaine (DEA Drug Code No. 9041)) . . . ." Criminal offenses and penalties are set out in Tennessee Code Annotated § 39-17-417, which states in subsection (a) that "[i]t is an offense for a defendant to knowingly; (1) Manufacture a controlled substance; (2) Deliver a controlled substance; (3) Sell a controlled substance; or (4) Possess a controlled substance with intent to manufacture, deliver or sell such controlled substance." Subsection (j) states the following:

> A violation of subsection (a) with respect to the following amounts of a controlled substance, or conspiracy to violate subsection (a) with respect to such amounts is a Class A felony, and, in addition thereto, may be fined not more that five hundred thousand dollars ($500,000): . . . (5) Three hundred (300) grams or more of any substance containing cocaine.

Tenn. Code Ann. § 39-17-417(j)(5).

[8]Petitioner cites the standard for guilty pleas in Boykin v. Alabama, 395 U.S 238, 242, 89 S.Ct. 1709, 1711, 23 L.Ed.2d 274 (1969), articulated in the Court's holding that "[i]t was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."

L.Ed.2d 473 (1970). Specifically, "defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Lockhart, 474 U.S. at 59, 106 S.Ct. at 370.

Petitioner came to court on February 11, 1997 prepared to enter a guilty plea rather than go to trial. Once the error as to Count II was discovered and petitioner was informed by the court that he was pleading to a Class A felony rather than a Class B felony, petitioner was understandably nonplussed. The difference in punishment for Count II for a Range III offender such as petitioner was the difference between forty to sixty years as opposed to twenty to thirty. Petitioner's first instinct was to withdraw the plea and go to trial.[9] After meeting with both his lead counsel and co-counsel for nearly two hours, petitioner returned to court with a new petition to enter a plea of guilty and petitioner so pleaded in open court. The new plea statement was signed by the petitioner and both counsel. The statement is a pre-printed form that was filled in by petitioner's counsel and then presented to the court. This form includes, among others, the following statements:

> 14. I understand that I am presumed innocent of the charge(s) against me, and if I went to trial, that presumption would remain with me throughout the trial unless and until overcome by all of the evidence presented by the State.
>
> 15. I understand that I have the right to plead "NOT GUILTY" to any offense(s) charged against me and to persist in that plea, and that if I choose to plead "NOT GUILTY" the Constitution guarantees me (a) the right to a speedy and public trial by jury . . . .
>
> * * *
>
> 19. I declare that no person has pressured, forced, threatened, or intimidated me into pleading "GUILTY".
>
> 20. I believe my lawyer has done everything any lawyer could have done to represent me and I am satisfied with my legal representation and assistance in this case. I have had no problem communicating with my attorney.

In addition to signing this statement, petitioner's plea colloquy with the court included the following exchange:

> THE COURT: You have a right to have a trial. Your case is set for trial today. You have a right to have a trial. If you had a trial, you could plead not guilty, you could insist that you're

[9]Petitioner said, "I -- I'm gonna change my plea. I mean, I ain't -- I'm just gonna let 'em try it and see what, you know....I mean, I've got (indiscernible)."

> not guilty all through the trial, and a jury would decide whether you're guilty or not. Do you understand that?
>
> MR. NORRIS: Yes, sir.

Later, in accordance with Rule 11 of Tennessee Rules of Criminal Procedure,[10] the court asked:

> THE COURT: Has anyone pressured you, threatened you or promised you anything to get you to enter this plea?
>
> MR. NORRIS: No, sir.
>
> THE COURT: Are you entering this plea of your own free will?
>
> MR. NORRIS: Yes, sir.

The transcript of the submission hearing established that the trial court complied with the requirements of Rule 11, Tennessee Rules of Criminal Procedure, and the principles of Boykin and Lockhart. We find that the trial court asked a sufficient number of questions to ensure that the petitioner was fully aware of the effect of his plea and entered it freely and voluntarily after reviewing his options with counsel. The option of going to trial was clearly not one petitioner had any true desire to exercise. In fact, the record shows the very opposite, and quite understandably so, since the State's response to request for discovery laid out an overwhelming case against petitioner including full confessions to law enforcement officers. We find that petitioner, therefore, has not met his burden of showing that his guilty plea was not voluntary and knowing and that but for the error of counsel, he would have chosen to go to trial rather than enter a guilty plea.[11]

III. Intelligent Rejection of Favorable Settlement Offer

The second of petitioner's arguments is that he rejected a settlement offer not fully

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[10]Subsection (d) states, in part:

> Insuring That the Plea Is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement.

TENN. R. CRIM. P. 11(d).

[11]Also, we do not agree with petitioner that manifest injustice will result unless petitioner is permitted to withdraw his guilty plea, as petitioner argues. The petitioner has produced no credible evidence that his plea was involuntary and unknowing. See State v. Turner, 919 S.W.2d 346, 355 (Tenn. Crim. App. 1995).

realizing just how favorable an offer it was because of counsel's failure to inform petitioner that possession of 742.4 grams of cocaine was a Class A rather than a Class B felony.[12] Defense counsel met with the Assistant District Attorney four times to discuss settlement. General Zimmerman gave the following testimony:

> I had discussed with Mr. Gregory, and, again, as Your Honor pointed out, I don't know what -- what was communicated to the defendant. But, I discussed with him in October -- that -- uh -- just the punishment alone on the Cocaine charges, forty to sixty years, [be]cause his client was Range Three. We went through the record and I circled the convictions showing that he was a Range Three. . . . We had an open file discovery in this case. I had attached several police reports to the discovery response. Uh -- basically, I felt the case was strong enough that my attitude towards Mr. Gregory was to tell him as much as we could about the case, and that would affect a settlement.

The State's first settlement offer, made in October of 1996, was for forty years as a Range I offender. Petitioner admits to having been informed of this offer. A final settlement offer was made by the State on December 5, 1996 for forty years as a Range III offender. Petitioner argues that he would have accepted the initial offer of settlement proposed by the prosecuting attorney if he had known that he was facing a charge with a minimum sentence of forty years for Count II alone. Petitioner cites State v. James Howard Turner, No. 83-287-III (Tenn. Crim. App., Nashville, Aug. 7, 1984)[13] to support his contention that deficient advice regarding a settlement agreement should provide a rationale for the withdrawal of a guilty plea. Petitioner argues that a "Turner test of prejudice" should be applied, although no such test is outlined in the case cited. In State v. James Howard Turner, petitioner prevailed on a claim of ineffective assistance of counsel because counsel from New Mexico, in spite of the recommendations of in-state, associated counsel, recommended that defendant Turner, facing a three-count indictment for first degree murder and aggravated kidnapping in two counts, reject the State's offer of settlement of two years and instead go to trial. The trial court found that lead counsel "greatly

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[12]This Court has found that counsel can properly be found ineffective based solely on the pretrial representation of the accused. State v. James Howard Turner, No. 83-287-III, slip op. at 3 (Tenn. Crim. App., Nashville, Aug. 7, 1984).

[13]Petitioner failed to include a copy of this unpublished opinion, according to Court of Criminal Appeals Rule 19, which states, in part: "Unpublished opinions of the Court of Criminal Appeals may not be cited in any court unless a copy is furnished to the Court and to adversary counsel." TENN. R. CT. CRIM. APP. 19(c)(4). Nevertheless, we will address its relevance.

understated the risks of going to trial" and that counsel was "overly optimistic of the outcome of the case, and that he relayed this unrealistic feeling about the probable outcome of the case to the defendant." Id., slip op. at 6. The trial court concluded that the State's offer was so generous, considering what was at stake for Turner, that defense counsel should have recommended acceptance of the offer. Id.

Here, petitioner testified that his counsel said "he felt that [forty years] was a reasonable offer." Petitioner testified at the post-conviction hearing, after the death of counsel Gregory, that counsel had told him that his total exposure for all six counts was only fifty years. Petitioner claims that had he known that the total risk was far greater than fifty years, he would have accepted the offer. Contrary to that supposition is the testimony of General Zimmerman that he had discussed with defense counsel in October of 1996 "just the punishment alone on the Cocaine charges, forty to sixty years, [be]cause his client was Range Three." The trial court found it incredible that petitioner would think that he could receive no more than a fifty-year maximum sentence on six felony counts, given the extensive record of experience in the criminal justice system that petitioner had accumulated. That experience spans more than two decades, including a charge of first degree murder in 1974, a charge that was later reduced. It includes nine prior felony convictions, all by way of guilty pleas, and several other misdemeanor convictions. So extensive a record, it can reasonably be assumed to have provided appellant with a thorough knowledge of plea bargaining tactics and sentencing procedures. We presume, as did the trial court, that the petitioner knew he could receive separate sentences for the six separate crimes with which he was charged. This presumption further weakens his present claim as to his understanding about the possible punishment. See Bailey v. State, 924 S.W.2d 918, 919 (Tenn. Crim. App. 1995) (citing Sheehan v. State, 411 So. 2d 824, 828 (Ala. Crim. App. 1981), for the proposition that "most basic logic and reflection makes it apparent that separate offenses merit separate punishments"). Additionally, there is no evidence that the Taylor memo detailing petitioner's possible maximum sentences for the six felony charges posed any shock to lead counsel. That memo indicated a possible maximum sentence of 102 years. Even if the memo had been accurate, petitioner's true

maximum sentence was not far off this number, being 117 years instead of the 102 years Taylor calculated in his memo. The facts also showed that petitioner simply did not want to plead in December and be incarcerated during the holidays.

Finally, petitioner argues that he should not have been placed in the position of having to choose between going to trial with an attorney who was "not mentally or physically capable of going to trial" or entering a plea without a favorable agreement in place. We note that lead counsel was sharp enough to point out an error in petitioner's record of prior convictions prepared by the State to the court at the sentencing hearing.[14] We also note that co-counsel was present when petitioner made his choice to enter a guilty plea rather than go to trial, and presumably would have remained in court for the trial. Co-counsel did not consider lead counsel so incompetent as to prohibit co-counsel's agreeing to try a serious felony case with him in the following months.

Although the record appears to support the conclusion that counsel identified Count II to petitioner as a Class B felony rather than a Class A felony, we find instructive the fact that counsel met with the prosecutor four times in October and December prior to the trial date, and that the prosecutor specifically told defense counsel that the punishment for the cocaine charge alone was forty to sixty years and that the State was willing to settle for forty years. When counsel relayed this offer, petitioner admitted that he considered this a "minimum" offer. If that is true, forty years is a minimum only for a Class A felony for a Range III offender, which is what General Zimmerman testified he told counsel. Such a settlement offer is "reasonable," as petitioner admits he was advised, in light of the fact that the maximum for a Class A felony for a Range III offender is sixty years. Petitioner claims to have been advised by counsel that his maximum sentence was only fifty years. It is unclear whether petitioner believed this figure referred to his maximum for Count II or to his possible maximum consecutive sentence. Either way, petitioner has failed to meet his burden of showing that deficient advice of counsel prejudiced petitioner in that counsel's

[14]Gregory corrected the prior convictions record by pointing out to the State, "You have it listed as cocaine. And, if I recall, it was Dilaudid."

advice caused petitioner to reject a favorable settlement with the State.

CONCLUSION

The record supports the finding of the trial court. Petitioner was fully aware of the consequences of his guilty plea and his plea was made voluntarily and knowingly. Petitioner's rejection of a favorable settlement has not been proven a consequence of counsel's deficient advice. Accordingly, the judgment of the trial court is affirmed.

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ALAN E. GLENN, JUDGE

CONCUR:

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JOSEPH M. TIPTON, JUDGE

_____
JOE G. RILEY, JUDGE