

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs January 24, 2023

FILED  
03/29/2023  
Clerk of the  
Appellate Courts

**TYLER D. BOLTON v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Washington County  
No. 47114 Stacy L. Street, Judge**

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**No. E2022-00836-CCA-R3-PC**

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The Petitioner, Tyler D. Bolton, appeals the Washington County Criminal Court's denial of his petition for post-conviction relief from his guilty-pleaded convictions for possession of twenty-six grams or more of methamphetamine with intent to sell, unlawful possession of a firearm, and two counts of aggravated burglary. On appeal, the Petitioner argues that the post-conviction court erred by denying his motion in limine to exclude jail call recordings from the post-conviction hearing. The Petitioner also argues that the post-conviction court erred by denying relief on his claims alleging that he received the ineffective assistance of trial counsel by trial counsel's failing to adequately investigate the Petitioner's mental health history and request a mental health evaluation prior to advising him to accept a plea offer. We affirm the judgment of the post-conviction court.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

Grace E. Studer, Johnson City, Tennessee, for the appellant, Tyler D. Bolton.

Jonathan Skrmetti, Attorney General and Reporter; Courtney N. Orr, Assistant Attorney General; Kenneth C. Baldwin, District Attorney General; and Justin Irick, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**I. FACTUAL AND PROCEDURAL HISTORY**

**A. Guilty Plea Proceedings**

On January 6, 2020, the Petitioner was indicted by a Washington County grand jury in case number 45835 for possession of twenty-six grams or more of methamphetamine with intent to sell or deliver, possession of a firearm during the commission of a dangerous felony, unlawful possession of a weapon, two counts of aggravated burglary, two counts of theft of property, and simple possession of marijuana. On May 22, 2020, the Petitioner pleaded guilty in case number 45835 to one count of possession of twenty-six grams or more of methamphetamine with intent to sell, one count of unlawful possession of a firearm, and two counts of aggravated burglary, *see* Tennessee Code Annotated sections 39-14-403, -17-434, -17-1307, in exchange for an agreed, effective sentence of twelve years to serve. As part of these proceedings, the Petitioner also pleaded guilty to two counts of aggravated burglary in case number 45921, for which he received an agreed ten-year sentence to run concurrently with case number 45835.<sup>1</sup> Additionally, he submitted to a violation of probation, in which he agreed to serve a two-year sentence consecutively to case number 45835. Thus, the Petitioner received an effective fourteen-year sentence as a result of his guilty pleas and his revocation submission, which the parties agreed would run concurrently with his “[u]nexpired Greene County Criminal Court judgments[.]”

The parties stipulated to the following as the factual bases underlying the Petitioner’s pleas:<sup>2</sup>

Your Honor, Case 45835, on November the 8th, 2019, the sheriff’s department got a call to a possible break-in on Washington College Road, a

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<sup>1</sup> In his pro se petition, the Petitioner does not identify the case number of the case or cases he is challenging on post-conviction, nor does he list the date of judgment or the offenses of conviction. *See* Tenn. R. Sup. Ct. 28, § 5(E)(1) (requiring a post-conviction petition to contain “the biographical and case identifying information” of the challenged case). In his amended petition, filed by counsel, the Petitioner listed the offenses charged in case number 45835 and attached as exhibits to his amended petition both the indictment and the judgments of convictions from case number 45835. The amended petition contained no mention of case number 45921. The indictment and judgment documents from case number 45921 were not exhibited to the amended petition, nor are they included in the appellate record. In its order denying relief, the post-conviction court only listed the conviction offenses from case 45835. Further, in the “Statement of the Case” portion of his appellate brief, the Petitioner only lists the conviction offenses in case number 45835 and makes no reference to the two additional aggravated burglaries to which he pleaded guilty in case number 45921. For these reasons, we surmise that the Petitioner only challenges the convictions arising from case number 45835 in this post-conviction proceeding. Nonetheless, case number 45835 is part of a global plea agreement and were we to grant relief, such may not be viewed entirely in isolation. *See, e.g., State v. Myrtle B. Lambert*, No. E2008-01670-CCA-R3-CD, 2010 WL 1293735 (Tenn. Crim. App. Apr. 6, 2010) (remanding entire “global plea agreement” though the jurisdictional issue did not apply to both cases). In addition, we note that at the hearing, the Petitioner asked the post-conviction court to restore the pre-plea *status quo ante*.

<sup>2</sup> Due to the interrelatedness of the two cases, we will include the factual stipulation for both case numbers 45835 and 45921.

complaint, two of the neighbors and the victim observed this [Petitioner] come out with a bag and place the bag at a location. Come to find out, the – the neighbor’s house had been entered, the proof would show, and different items belong to them found in the bag.

Also found in the bag was a firearm, a Force .380 that had been taken, the [Petitioner] having prior convictions for aggravated burglary out of Greene County.

They also found over three ounces of methamphetamine in the bag which would be – suggest an intent to resale.

....

Same date, November 8th, 2019, the State would show that an individual by the name of Taylor Morgan . . . reported to the police that she had discovered [the Petitioner] inside of her home, hiding behind a door. She reported that he fled the residence upon being discovered.

Officers, while looking for the suspect in the area, spoke to . . . Shirley and – and Glee Broyles reported that [the Petitioner] knocked on the front door of their home . . . and was given a can of Mountain Dew to drink after telling them that he was dehydrated. These witnesses watched him walk to a neighbor’s house and then onto the property of Kenny Woods . . . Shirley positively identified the suspect as [the Petitioner] in a photo lineup as the person who they gave the Mountain Dew.

Kenneth Woods, the owner of the home that [the Petitioner] walked to after leaving there, returned home on this date and discovered that someone had broken into his house and stolen a shotgun, an iPhone, and a sports jacket. He also discovered an empty can of Mountain Dew left on the floor of his residence that did not belong there.

Also on this same date, Jonathan Mauk, who lives . . . in the same area of Washington County, reported to police that on this date someone had broken into his home and stolen a shotgun, a rifle, two hats, and some coins.

The [Petitioner] was located next door to Mauk’s home . . . by Washington County Sheriff’s Office deputies and taken into custody. At that time he had in his possession various coins, including one Canadian coin,

and a hat, both of which were identified as belonging to Jonathan Mauk and missing from his home on that date.

Five days later, on the 13th of November, 2019, Kenneth Woods' sports jacket and Jonathan Mauk's shotgun were located by Marty Higgins hidden inside a refrigerator of a home that was being renovated in the area at that time near Woods' residence.

The Petitioner affirmed that the facts provided by the State underlying his charges were correct. The Petitioner acknowledged that he was "freely and voluntarily" waiving his rights to a jury trial and to appeal any convictions. He affirmed his understanding that he was waiving his right to be represented by an attorney during trial proceedings, to cross-examine the State's witnesses presented against him at trial, to present witnesses on his own behalf, and to not be forced to testify against himself. He affirmed his understanding that he could have proceeded to trial in each of these cases, been convicted of lesser included offenses, received a lesser sentence, or been acquitted on all counts. He affirmed that he was not forced to plead guilty and that he was not promised anything in exchange for his plea other than the announced agreement. The trial court accepted the Petitioner's guilty plea and imposed the sentences previously described.

#### B. Post-Conviction Proceedings

On May 14, 2021, the Petitioner filed a timely pro se petition for post-conviction relief. Following preliminary review, the post-conviction court summarily denied some of the Petitioner's claims as not cognizable and appointed counsel to represent him for his remaining claims. Following this appointment, an amended petition for post-conviction relief was filed on November 24, 2021. The amended petition incorporated the Petitioner's original claims by reference and further alleged that trial counsel was ineffective for failing to investigate the Petitioner's mental health and failing to request a mental health evaluation before advising him on whether to accept the plea offer. The State responded to the amended petition, including four jail call recordings between the Petitioner and his aunt as attachments to the pleading. The Petitioner filed a motion in limine to exclude these jail recordings from the post-conviction hearing. On February 24, 2022, an evidentiary hearing was held.

The post-conviction court first addressed the Petitioner's motion in limine. The jail call recordings included four phone calls between the Petitioner and his aunt, Donna Harmon, that occurred between November 12, 2019, and March 10, 2020. In these recordings, the two discussed the evidence against the Petitioner, what he thought the State could prove, the credibility of the State's witnesses, his dissatisfaction with his first attorney, and the plea agreement conditions he wanted. The Petitioner argued that the State

was introducing these recordings to show trial counsel had reason to believe that the Petitioner was competent at the time of representation. The Petitioner contended that, regardless of personal belief, an attorney must make a reasonable investigation into a client's mental health condition. The Petitioner further argued that it would be inappropriate to use these recordings to determine whether the Petitioner was competent at the time of the recordings without an expert opinion.

The State responded that the issue was whether trial counsel exercised due diligence in investigating the Petitioner's mental health condition. The State argued that the recordings were not offered to show the Petitioner's competency but rather to corroborate the testimony of trial counsel regarding how the Petitioner was communicating with others about his case. The State argued that while personal belief might not be a sufficient basis to determine a client's mental health condition, a decision on whether a mental health evaluation was warranted was based on an attorney's interactions with his client. The State argued that the recordings were relevant to show how the Petitioner was communicating about his case, which was a display of his ability to understand the proceedings.

The post-conviction court admitted the jail call recordings. It reasoned that the recordings were relevant to the issue of trial counsel's state of mind in assessing the need for an investigation into the Petitioner's mental health condition.

Trial counsel testified that he had been licensed since 1997 and had been employed as a public defender for sixteen years. He stated that over his career, he had represented thousands of clients in criminal matters and had requested dozens of mental health evaluations. Trial counsel testified that he met with the Petitioner approximately five or six times either in person or via Zoom during his representation. Trial counsel affirmed that during their discussions, the Petitioner was focused, engaged in strategy, asked relevant questions, and did not ask nonsensical questions. He testified that during these meetings, the two discussed the indictment and "every piece of evidence" the State provided. Trial counsel testified that, upon the Petitioner's request, he provided the Petitioner with a copy of the discovery. He stated that the two discussed the numerous eyewitnesses in the case, the stolen property in the Petitioner's possession, the Petitioner's violation of probation, his Greene County cases, and the risk the Petitioner faced if he proceeded to trial as a career offender.

Trial counsel testified that when discussing a plea agreement, the Petitioner was "very insistent" that his offenses run concurrently with his Greene County cases and that he receive an effective sentence lower than fifteen years, which was the State's initial offer. Trial counsel testified that he suggested obtaining a letter from the United States Attorney's Office declining prosecution for the firearm charge and that the Petitioner was "very grateful" for this suggestion. He stated that the Petitioner said he would consider pleading

guilty if these conditions were met. Trial counsel affirmed he was able to secure such an offer from the State.

Trial counsel testified that the Petitioner was concerned with the State's offer for an effective twelve-year sentence for his pending charges to be served consecutively to his two-year sentence for his violation of probation conviction. He stated that the Petitioner was unhappy that the State had only reduced the effective fifteen-year offer by one year and that he directed trial counsel to get a shorter sentence. Trial counsel stated that he explained to the Petitioner that the State had reduced the sentence for the methamphetamine charge by three years but that the violation of probation was now included in the offer, making the entire effective offer fourteen years. He stated that he advised the Petitioner to accept the plea offer because, if rejected, the Petitioner could be subject to federal prosecution. Trial counsel stated that the Petitioner understood this concern. Trial counsel reiterated that the Petitioner was an "active participant," that their discussions were a "give and take," and that trial counsel did not "have any reason to doubt [the Petitioner's] ability to understand."

Trial counsel testified that in early April, he received a phone call from the Petitioner's mother, Debra Gwinn. During this conversation, Ms. Gwinn stated that the Petitioner did not want to plead guilty and that she had records, approximately twelve years old, that indicated the Petitioner had developmental delays. Ms. Gwinn told trial counsel that there was a doctor in Indiana who was willing to help in the Petitioner's case.

Trial counsel acknowledged that he received and reviewed the documents Ms. Gwinn sent, which were school records from around 2012, some medical records, certificates, and articles. Trial counsel stated that a doctor never contacted him. Trial counsel affirmed that the medical records indicated that the Petitioner had been diagnosed with attention-deficit/hyperactivity disorder ("ADHD"), depression, and polysubstance abuse. The records indicated the Petitioner had an IQ of 83, which was classified as "low average." The medical records showed that the Petitioner had "low average ability" and that "minor weakness[es]" were identified in his psychomotor speed and his speed and accuracy of visual scanning. The records indicated that the Petitioner required redirection to stay on task and that the Petitioner reported his school grades ranged from low to average depending on when he chose to focus and complete tasks. The medical records were entered as an exhibit.

Trial counsel testified that, in his opinion, the records were "very old" and did not presently reflect the Petitioner's abilities. He stated that he was "surprised" by the records and Ms. Gwinn's allegation that the Petitioner did not want to plead guilty because it was "very different" from what he saw and heard from the Petitioner. Trial counsel testified that he recalled discussing "drug issues" with the Petitioner but that Ms. Gwinn's call was

the first time that he had heard about the Petitioner's mental health issues. Trial counsel testified that he spoke with the Petitioner about the records and asked the Petitioner if he had any problems understanding. Trial counsel stated that the Petitioner indicated he understood and that the Petitioner wanted to "resolve things," although he disliked pleading guilty. According to trial counsel, the records did not seem significant to the Petitioner. Trial counsel stated he did not ask the Petitioner for up-to-date mental health records.

Trial counsel affirmed that he was with the Petitioner when the Petitioner pleaded guilty and that the Petitioner affirmatively answered the judge's guilty plea colloquy questions and waiver acknowledgments. The transcript of the guilty plea hearing was entered as an exhibit.

On cross-examination, trial counsel testified that he did not have specific mental health training and that, as an attorney, he relied on the opinions of mental health professionals. He affirmed that involving a mental health expert could generally be useful in mitigation or in developing a defense.

Trial counsel affirmed that the medical records indicated that the Petitioner had an "educational disability," "low average skills," and "minor weakness . . . in all areas[,] including . . . understanding of verbal concepts, range of vocabulary and practical knowledge used in solving everyday problems." Trial counsel stated that after reviewing these medical records, he did not request a mental health evaluation for the Petitioner. He stated that, in his experience, even clients with "detailed accounts" of "much lower ability to understand" than the Petitioner were declared competent and were able to appreciate the wrongfulness of their actions at the time of their offenses. He reiterated the Petitioner demonstrated a "very good ability to understand."

The State played the four jail call recordings between the Petitioner and his aunt, Donna Harmon. The recordings occurred between November 12, 2019, and March 10, 2020. The March 10 recording is the only recording made during trial counsel's representation of the Petitioner. Post-conviction counsel agreed to stipulate to the authenticity of the jail calls and to the identity of the male voice in those calls as being the Petitioner's. Post-conviction counsel renewed her objection to the admissibility of the recordings. Subject to the objection, the post-conviction court allowed the State to play the recordings.

On the three calls made prior to March 10, the Petitioner and Ms. Harmon discussed the lack of evidence the Petitioner believed the State had against him. The Petitioner stated "nothing" tied him to the bag containing the drugs and firearm and that he had only been found with "some change" when arrested. The Petitioner stated that he had requested a

copy of the warrant and a copy of everything found on his person when booked into jail and that he would soon have access to “the law library” for legal research.

The Petitioner and Ms. Harmon discussed the credibility of the witnesses who would testify against the Petitioner. The Petitioner stated that although his memory from the day of the offenses was not good, the witnesses’ testimony at the preliminary hearing was “not right.”

The Petitioner and Ms. Harmon discussed the Petitioner’s dissatisfaction with his first appointed attorney. The Petitioner stated that at his preliminary hearing, he told his attorney what to say and what questions to ask. He stated that at his preliminary hearing, he was not concerned about “beating” the aggravated burglary charges that day but was instead focused on the drug charges.

On the March 10, 2020 call, the Petitioner and Ms. Harmon discussed that trial counsel needed the Petitioner’s decision regarding the State’s guilty plea offer. The Petitioner told Ms. Harmon he needed more time and to see more of the State’s evidence before deciding whether to proceed to trial. He stated trial counsel did not want to “fight” for him. He stated that he would not take the fifteen-year guilty plea offer and that he should fire trial counsel. The recordings were entered as an exhibit.

After the State rested, the Petitioner recalled trial counsel. Trial counsel was asked about the Petitioner’s not recognizing the amount of evidence against him in the recordings, and trial counsel replied that three of the four recordings occurred before his representation of the Petitioner. He stated that after he was appointed to the case, he and the Petitioner reviewed the evidence together, including how the Petitioner was found with the stolen items in his possession, the numerous eyewitnesses that saw him with the stolen items, and the Mountain Dew can he was given being found in a burgled house. Trial counsel stated that the Petitioner was “pretty high” the day of the offenses and that he had told trial counsel that he “didn’t remember a whole lot.” Trial counsel stated that it would have been a “gamble” for the Petitioner to go to trial if he did not have a good recollection of the events when the eyewitnesses stated that their recollections were good. Trial counsel acknowledged that the Petitioner had a “hard time” accepting guilt but that he nevertheless “recognized the risk of going to trial.”

The Petitioner testified that he had a history of mental health issues including ADHD and getting “off focus easy.” He stated that Ms. Gwinn attended many of his medical appointments and would explain “everything” to him. He affirmed that he remembered entering the guilty plea for the instant case but that he did not understand it. The Petitioner testified that he had received mental health treatment while incarcerated to “express” his feelings and to have “somebody to talk to.” He stated that he did not

understand the discovery materials and that trial counsel only told the Petitioner that the offer was in his “best interest.”

On cross-examination, the Petitioner acknowledged that he had heard trial counsel’s testimony and stated that it was a lie. The Petitioner testified that he had informed trial counsel that there was documentation of his mental illness history and that he gave trial counsel permission to speak to Ms. Gwinn. He stated that he only sometimes understood what trial counsel told him. The Petitioner said that when he informed trial counsel that he was confused, trial counsel would tell the Petitioner to simply take trial counsel’s advice.

The Petitioner stated that trial counsel only talked to him about the fifteen-year guilty plea offer related to his charges for possession of methamphetamine, unlawful possession of a firearm, and aggravated burglary. The Petitioner acknowledged that trial counsel discussed the twelve-year guilty plea offer with him but said that trial counsel did not inform the Petitioner that the Petitioner’s sentence for his probation violation conviction would run consecutively to the twelve-year sentence until the day of the Petitioner’s guilty plea hearing. The Petitioner acknowledged that he lied to Ms. Harmon about doing legal research for his case. He acknowledged that trial counsel negotiated a lower sentence than the initial fifteen-year offer.

The Petitioner acknowledged that it was his voice on the recordings. He stated that he remembered pleading guilty at the guilty plea hearing, the judge’s reviewing his rights, and acknowledging he understood those rights. The Petitioner affirmed that he pleaded guilty because he believed trial counsel would not fight for him. The Petitioner acknowledged that he understood what he was charged with, that he had reviewed the evidence against him, that his criminal history would be used against him, and that he would go to prison and qualify for jail credits and parole after serving a portion of his sentence.

Ms. Gwinn testified that the Petitioner had a history of mental illness and that he had tested “very low” in several areas as a minor. She stated that because the Petitioner had been incarcerated for most of his adult life, she was not “very aware” of his diagnosis since the age of eighteen. She testified that she was unable to obtain the Petitioner’s mental health records from the facilities where he had been incarcerated.

Ms. Gwinn testified that she was a program coordinator and managed five recovery homes. She received mental health training every two years for her job. She provided thirteen certificates showing the completion of training courses in the field of mental health. Ms. Gwinn acknowledged that she did not have the expertise to diagnose mental illness or prescribe medication, but she said that she did have the expertise to identify someone suffering from a mental health episode, their need for treatment, and their

limitations in understanding information. The Petitioner asked the post-conviction court to qualify Ms. Gwinn as an expert in mental health. Following the State's voir dire of Ms. Gwinn, the post-conviction court denied the Petitioner's request. Ms. Gwinn's certifications were entered as a collective exhibit.

Ms. Gwinn testified that the Petitioner could appear rational and able to communicate one moment and be unable to the next moment. She stated that the Petitioner could comprehend information written in front of him, but once the Petitioner was no longer viewing the writing, "there [was] no comprehension." She stated that she and the Petitioner did not often speak about his case and that she did not know whether he referred to written material during the times they did discuss it. She explained the two did not often discuss his case because he had been in a "mental health psychotic state" while incarcerated.

On cross-examination, Ms. Gwinn testified that she provided trial counsel with no records or documentation other than those previously discussed in her testimony. Ms. Gwinn stated that she was not a mental health professional. When asked if she was "bias[ed] in favor" of the Petitioner, Ms. Gwinn responded that she would like to see his guilty plea set aside so that he could get "help" for his mental illness and his substance abuse.

The post-conviction court questioned Ms. Gwinn when the State concluded its cross-examination. Ms. Gwinn stated that the Petitioner was age twenty-eight at the time of the post-conviction hearing and that the medical records she provided were from when the Petitioner was around age seventeen. She affirmed that the Petitioner had spent most of his adult life incarcerated. She affirmed that she had addressed the Petitioner's mental health history during previous sentencing hearings, but because previous plea bargains had involved his being placed where he could get help, she had never previously called attention to his mental health during guilty plea negotiations.

On June 14, 2022, the post-conviction court filed a written order incorporating its oral findings denying the Petitioner's request for post-conviction relief. The post-conviction court credited trial counsel's testimony. It found that nothing was presented to the post-conviction court, and that trial counsel observed nothing, indicating current mental health issues in the Petitioner that prevented him from appreciating the evidence against him or the guilty plea agreement. It found that the medical records provided by Ms. Gwinn were outdated and only necessitated trial counsel's having a "cursory" discussion with the Petitioner, which occurred. The post-conviction court found that the Petitioner was "engaged," "asked appropriate questions," and was "highly involved" in the guilty plea negotiations. It further found that the jail call recordings supported the conclusion that the Petitioner was "aware of the evidence" and "exhibited an understanding" of the

proceedings, so as to not give rise to concern about his competency. It noted that trial counsel had requested dozens of mental health evaluations for clients and found that trial counsel saw no evidence exhibiting mental illness in the Petitioner. It found that this evidence showed that trial counsel was not deficient for declining to further investigate the Petitioner's mental health or request a mental health evaluation. It further found that the Petitioner was not prejudiced because the evidence presented showed that going to trial would have resulted in a harsher sentence than the plea agreement trial counsel secured.

## II. ANALYSIS

### A. Motion in Limine

The Petitioner contends that the post-conviction court erred in denying his motion in limine to exclude his jail calls from the post-conviction hearing. He argues that the jail call recordings were not relevant in determining trial counsel's duty to investigate the Petitioner's mental health. Alternatively, the Petitioner contends that the calls, even if relevant, were unfairly prejudicial and that the post-conviction court's error in admitting the recordings was not harmless. The State argues that the recordings were relevant to show that trial counsel did not have a duty to further investigate the Petitioner's mental health and to request an evaluation. We agree with the State.

"The Tennessee Rules of Evidence apply in post-conviction proceedings except as otherwise provided by these rules." Tenn. R. Sup. Ct. 28, § 3. Generally, all relevant evidence is admissible, subject to certain exceptions. Tenn. R. Evid. 402. Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. "In assessing probative value, the court must understand the proof and theory of the case, and whether there is a *real dispute* about the issue the evidence is to prove." *State v. Young*, 196 S.W.3d 85, 106 (Tenn. 2006) (emphasis in original) (citations omitted). Relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Tenn. R. Evid. 403. Evidence is unfairly prejudicial when it has "[a]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Banks*, 564 S.W.2d 947, 951 (Tenn. 1978) (citations omitted). "Rule 403 is a rule of admissibility, and it places a heavy burden on the party seeking to exclude the evidence." *State v. James*, 81 S.W.3d 751, 757 (Tenn. 2002).

Generally, questions concerning the admissibility of evidence are left to the sound discretion of the trial court and its decision will not be disturbed on appeal absent an abuse of discretion. *Pylant v. State*, 263 S.W.3d 854, 870 (Tenn. 2008) (citations omitted). An abuse of discretion occurs when the trial court applies an incorrect legal standard, reaches

an illogical or unreasonable decision, or bases its decision on a clearly erroneous assessment of the evidence. *State v. Mangrum*, 403 S.W.3d 152, 166 (Tenn. 2013) (citation omitted).

We conclude the post-conviction court did not abuse its discretion by admitting the jail call recordings. Trial counsel testified that the Petitioner was engaged in his defense by actively participating in conversations and by asking relevant questions. Specifically, he recalled the Petitioner's wanting his sentence reduced lower than fifteen years, a declination letter from the United States Attorney's Office, and his sentence to run concurrently with his Greene County cases. Trial counsel testified that his interactions with the Petitioner gave him no reason to doubt that the Petitioner understood his case and his plea agreement. These jail calls corroborate trial counsel's testimony regarding the Petitioner's understanding of his case and plea agreement. The phone calls were, therefore, relevant in determining whether trial counsel had a duty to further investigate the Petitioner's mental health condition.

In addition, the Petitioner argues that the recordings, even if relevant, were unfairly prejudicial because the post-conviction court used them to draw improper conclusions as to the Petitioner's state of mind. In admitting the evidence, however, the post-conviction court noted that these calls were related to the state of mind of counsel in assessing the Petitioner's mental health. We conclude that these calls were not unfairly prejudicial because they did not suggest a decision on an improper basis. Accordingly, the post-conviction court did not err by admitting the jail phone call recordings.

#### B. Ineffective Assistance of Counsel

The Petitioner argues that the post-conviction court erred by finding the Petitioner received effective assistance of trial counsel because trial counsel failed to further investigate his mental health condition and request an evaluation prior to advising the Petitioner to accept his guilty plea. The State argues that the post-conviction court did not err by denying the Petitioner's ineffective assistance of counsel claim. We agree with the State.

Post-conviction relief is available when a "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." Tenn. Code Ann. § 40-30-103. The burden in a post-conviction proceeding is on the petitioner to prove allegations of fact by clear and convincing evidence. *Id.* § 40-30-110(1); see *Dellinger v. State*, 279 S.W.3d 282, 293-94 (Tenn. 2009). "Questions concerning the credibility of witnesses, the weight and

value to be given their testimony, and the factual issues raised by the evidence are to be resolved” by the post-conviction court. *Fields v. State*, 40 S.W.3d 450, 456 (Tenn. 2001). On appeal, we are bound by the post-conviction court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Id.* Because they relate to mixed questions of law and fact, we review the post-conviction court’s conclusions as to whether counsel’s performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. *Id.* at 457.

Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Tenn. Const. art. I, § 9; see *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); *Dellinger*, 279 S.W.3d at 293. When a claim of ineffective assistance of counsel is made under the Sixth Amendment to the United States Constitution, the burden is on the petitioner to show (1) that counsel’s performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see *Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). “Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.” *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). The *Strickland* standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

Deficient performance requires a showing that “counsel’s representation fell below an objective standard of reasonableness,” and reviewing courts “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 688-89. When a court reviews a lawyer’s performance, it “must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s conduct, and to evaluate the conduct from the perspective of counsel at that time.” *Howell v. State*, 185 S.W.3d 319, 326 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 689). We will not deem counsel to have been ineffective merely because a different strategy or procedure might have produced a more favorable result. *Rhoden v. State*, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991). We recognize, however, that “deference to tactical choices only applies if the choices are informed ones based upon adequate preparation.” *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992) (citing *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)).

As to the prejudice prong, the petitioner must establish “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. In the context of a guilty plea, the ineffective assistance of counsel is relevant only to the extent that it affects the voluntariness of the

plea. *See Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citing *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)). Therefore, to satisfy the second prong in *Strickland*, the petitioner must show that “there is a reasonable probability that, but for counsel’s errors, he would not have [pled] guilty and would have insisted on going to trial.” *Id.* at 59; *see also Walton v. State*, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997).

The post-conviction court found that the Petitioner failed to establish that trial counsel’s performance was deficient. The record reflects that trial counsel testified that he met with the Petitioner on five or six occasions, discussed the case with him, and explained the risks of proceeding to trial. Trial counsel stated that the Petitioner was “engaged” and an “active participant” in the guilty plea negotiations. When trial counsel learned of a potential mental health condition, he questioned the Petitioner. The Petitioner showed little interest in discussing the mental health records and was instead focused on securing a guilty plea offer that included a concurrent sentence with his Greene County cases, a declination letter from the United States Attorney’s Office, and a sentence lower than fifteen years. The mental health records were over a decade old, and trial counsel said the records did not reflect the Petitioner’s mental acuity at the time of the guilty plea negotiations. Trial counsel stated he had requested dozens of mental health evaluations for clients and saw nothing in his interactions with the Petitioner to suggest an evaluation was warranted in this case. *See Demario Johnson v. State*, W2011-02123-CCA-R3-PC, 2013 WL 772795, at \*8 (Tenn. Crim. App. Feb. 27, 2013) (holding trial counsel’s performance was not deficient for relying on interactions with the petitioner in determining there was no need for a mental health evaluation). Further, no evidence was presented at the post-conviction hearing showing that trial counsel suspected or had reason to suspect that the Petitioner suffered from a mental illness that affected his ability to understand the proceedings or plea agreement. The post-conviction court credited trial counsel’s testimony, and the evidence does not preponderate against this finding.

Additionally, the post-conviction court found that the Petitioner failed to establish that trial counsel’s performance prejudiced the Petitioner. The record reflects that the Petitioner acknowledged that he and trial counsel discussed his possible sentences if convicted as a career offender and how his guilty plea agreement minimized his exposure. The record also reflects that the Petitioner decided to accept the State’s guilty plea offer after these discussions with trial counsel. At the post-conviction hearing, the Petitioner acknowledged that, at the time of his guilty plea, he understood the charges and evidence against him. He stated that he believed the outcome would have been different if trial counsel had “fought for” him, not that he would have decided to proceed to trial.

Further, the post-conviction court found that Ms. Gwinn did not qualify as a mental health expert, and the Petitioner failed to otherwise present an expert to explain what mental health evidence trial counsel should have discovered and how that evidence could

have aided the Petitioner at trial. *See Johnson*, 2013 WL 772795, at \*8 (stating ineffective assistance was not established because the petitioner failed to present a mental health expert at the evidentiary hearing to explain what mental health evidence trial counsel should have advanced); *see also Black v. State*, 794 S.W.2d 752, 758 (Tenn. Crim. App. 1990) (stating that a petitioner contending trial counsel failed to discover, interview, or present witnesses in support of his defense should present these witnesses at the evidentiary hearing). The Petitioner failed to establish how he was prejudiced by trial counsel's decision not to investigate further his mental health condition or order a mental health evaluation.

The record supports the post-conviction court's conclusion that the Petitioner failed to show that trial counsel provided deficient performance or that the Petitioner was prejudiced. Thus, the post-conviction court properly concluded that the Petitioner failed to prove his ineffective assistance of counsel claim. The Petitioner is not entitled to relief on this basis.

### III. CONCLUSION

In consideration of the foregoing and the record as a whole, we affirm the judgment of the post-conviction court.

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KYLE A. HIXSON, JUDGE