

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 8, 2022 Session

FILED

03/06/2023

Clerk of the
Appellate Courts

CHAD V. HUGHES v. STATE OF TENNESSEE

Appeal from the Circuit Court for Robertson County
No. 74CC4-2020-CR-40, 74CC2-2020-CR-89 Robert Bateman, Judge

No. M2021-01526-CCA-R3-PC

The Petitioner-Appellant, Chad V. Hughes, entered a guilty plea to exploitation of a minor by electronic means, a class C felony, and theft of property less than \$1000, a class A misdemeanor.¹ Pursuant to the plea agreement, the Petitioner received a suspended sentence of five years' probation for the conviction of exploitation of a minor by electronic means and time served for the theft conviction. As part of the special conditions of probation, the Petitioner was subject to the requirements of the sex offender registry and required to have no contact with his ex-wife, his step-daughter-victim, or his biological daughter without a juvenile/divorce court order. The Petitioner now appeals the denial of post-conviction relief, alleging ineffective assistance of trial counsel in failing to pursue a bond reduction, in failing to conduct a pre-trial investigation, in failing to retain a digital forensic examiner, and in failing to advise the Petitioner of the legal implications that pleading guilty to exploitation of a minor by electronic means would have on his dependency and neglect case. Based on trial counsel's alleged deficiencies, the Petitioner argues that his guilty plea was not knowingly and voluntarily entered. Upon our review, we affirm.

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

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which ROBERT H. MONTGOMERY, JR. and TOM GREENHOLTZ, JJ., joined.

Patrick McNally, Nashville, Tennessee, for the Petitioner-Appellant, Chad V. Hughes.

Herbert H. Slatery III, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Robert J. Nash, District Attorney General; and Jason White, Assistant District Attorney General, for the Appellee, State of Tennessee.

¹ The Petitioner does not challenge the misdemeanor theft conviction on appeal.

OPINION

On October 28, 2020, the Petitioner signed a Petition for Waiver of Trial by Jury and Request for Acceptance of Plea of Guilty, a form which provided detailed information including that trial counsel had advised the Petitioner of the nature and cause of the charges against him and possible defenses. The form also noted that the Petitioner had been advised of the potential punishment provided by law, stated the offenses to which the Petitioner was pleading as detailed above, and expressly provided the following special conditions:

Other orders: Sentence to be served consecutively to 2020-CR-89 [theft case]. Probation is to be supervised under sex offender directives. Defendant is to receive sex offender treatment evaluation and follow recommendations. Defendant must be registered on sex offender registry prior to release from jail. As a special condition of probation: Defendant is to have no contact with [ex-wife], the victim, or with . . . children of [ex-wife]--with the exception that [the Petitioner] may be allowed limited contact to exchange or visit his now eight-year-old biological child upon an order by the divorce court/juvenile court allowing contact, but in no form shall he have contact with the victim pursuant to T.C.A. § 40-39-211.

The form contained other relevant information including the right to plead not guilty and proceed to trial, the right to a speedy trial, the right to compel witnesses to testify, the right to an attorney, and the right against self-incrimination. In closing, the form noted the Petitioner was exercising his own free will and choice without any threats or coercion of any kind and requested the trial court to accept the Petitioner's guilty plea to the aforementioned terms. The form was also signed by trial counsel and the assistant district attorney.

Two days later, on October 30, 2020, in open court, the trial court held a guilty plea hearing, and trial counsel announced the pleas as follows:

[TRIAL COUNSEL]: [The Petitioner] is going to enter a plea to Count One as a Range One Offender to the display of electronic communication material containing sexual activity to a minor, a Class C Felony. It will be five years to serve but suspended to supervised probation. That sentence is going to be consecutive to the other case. This probation is going to be obviously subject to the sex offender directives and he will receive treatment, evaluation and follow recommendations, and he is to be registered as an offender before his release from jail. There is a special condition of his probation, which kind of goes along with the requirements for those who are registered.

He is to have no contact with [], his estranged wife, the victim in this case, or with [ex-wife's] other children. Now, he will be able to have limited contact in order to arrange to see his eight-year-old biological daughter, provided he gets some kind of divorce –

[COURT]: Court ordered visitation.

[STATE]: Right now, there is no visitation ordered, Your Honor.

[COURT]: He is not going to be able to do that until he has something in writing.

[TRIAL COUNSEL]: That's correct.

[STATE]: Any matters pending in Divorce Court and in Juvenile Court. If either of those Courts give him visitation, then he can exercise the visitation only with the biological child.

The State proffered the factual basis underlying the Petitioner's exploitation of a minor by electronic means guilty plea: "the proof would show that on March 4th, 2019, [the Petitioner] sent a pornographic video to his then eleven [-] year [-] old step [-] daughter. She did observe this. This was discovered and reported to the police." The State added that once the judgment was entered, they would take it to the sex offender registration officer, who was prepared to register the Petitioner before being released from jail that day.

The Petitioner was placed under oath. The trial court then engaged in a dialogue with the Petitioner regarding the offenses and his desire to plead guilty. The trial court explained that the exploitation of a minor by electronic means case was set for trial conference on January 29th, that the Petitioner would be sentenced to five years' supervised probation, and that the Petitioner needed to be placed on the sex offender registry before being released from jail. The trial court informed the Petitioner that he could not have any contact with the victim in the case "or any of the other children except that if you do get Court ordered visitation with your biological child arranged." The trial court asked the Petitioner, "[i]s that your guilty plea and your agreement today?" The Petitioner responded affirmatively. The trial court inquired whether the Petitioner had any questions or if there was anything that he did not understand. The Petitioner responded negatively.

The trial court continued to explain the Petitioner's rights and the rights he would be waiving by pleading guilty. The Petitioner responded affirmatively that he understood

the rights as explained by the trial court. The trial court then determined that the Petitioner was entering a knowing and voluntary guilty plea and accepted the terms of the plea agreement. The trial court again emphasized that the Petitioner would have to register with the sex offender registry before being released from jail. The Petitioner, attempting to clarify whether his transportation back to another county would be an issue, informed the trial court that he was transported from another county and would be going back that day. The trial court explained that it would not be an issue, that the Petitioner would need to ensure he was placed on the sex offender registry before returning to the other county, and that he would need to report to probation immediately after resolving his matter in the other county.

On December 7, 2020, the Petitioner filed a pro se motion to withdraw his guilty plea. This motion was in the form of a handwritten letter notifying the trial court clerk that the Petitioner had hired a new lawyer, that he was seeking to withdraw his guilty plea, and that he was filing a motion for “mis[]representation.” The record does not include an order disposing of this pro se filing. On January 4, 2021, with the aid of post-conviction counsel, the Petitioner filed a petition seeking post-conviction relief alleging trial counsel was ineffective in failing to request an expert, in failing to review the State’s discovery with the Petitioner, and in failing to advise the Petitioner of the consequences of entering the guilty plea on his “open” dependency and neglect case. In support of trial counsel’s failure to request an expert claim, the Petitioner alleged in the petition that he “told [trial counsel] that he did not intentionally send any pornographic material. Any inappropriate material that ended up on the child’s tablet was a mistake due to the family sharing a ‘Cloud’ plan. This was a claim that could have easily been proven with the metadata testing.” In support of trial counsel’s failure to advise the Petitioner of the consequences of his guilty plea claim, the Petitioner argued that trial counsel was aware of the “open” dependency and neglect case that “spawned” from the same facts. The Petitioner insisted that trial counsel should have advised him of the “possible consequence of terminating [the Petitioner’s] parental rights to all of his children” and that the Petitioner’s conduct underlying the guilty plea “would bar [the Petitioner] from asserting any defense” in his dependency and neglect case under the doctrine of *res judicata*.

Additionally, based on trial counsel’s alleged deficiencies, the Petitioner argued that his guilty plea was unknowing and involuntarily entered because (1) he was not advised that, as a consequence, his guilty plea could be used against him in the dependency and neglect case and (2) “he was denied access to evidence which may have been favorable to him and without that knowledge, he could not have knowingly and voluntarily entered into a plea agreement.” On January 14, 2021, the State filed its response arguing that the Petitioner entered a knowing and voluntary guilty plea because he was advised of the direct consequences of the guilty plea by the trial court and that, even if trial counsel were deficient in failing to obtain an expert, “it would not have likely changed the outcome of

the matter.” On February 5, 2021, an amended petition for post-conviction relief was filed for the purpose of including a case number omitted from the original petition. The amended petition was the same as the original petition in all other respects.

On October 29, 2021, the post-conviction court held an evidentiary hearing during which the Petitioner, the Petitioner’s civil attorney for the dependency and neglect matter, and trial counsel testified. The Petitioner, a union electrician with an associate degree in electrical work, acknowledged his guilty plea at the start of his testimony but nevertheless proclaimed his innocence. The Petitioner said that he told trial counsel that he was innocent of the exploitation of a minor by electronic means offense during his representation. The Petitioner testified that communication was an “issue” with trial counsel, that he spoke with civil counsel more than trial counsel, and that the Petitioner wrote a letter to the Tennessee Board of Professional Responsibility attempting to fire trial counsel. The Petitioner said he did in fact fire trial counsel, but he eventually changed his mind. The reasoning for doing so, the Petitioner explained, was that while he was originally on bond, he was taken into custody for missing his arraignment court date in one of his cases. He had assumed that both cases were arraigned on the same day, but they were not. His original counsel in general sessions court retired before the second arraignment court date, which resulted in the confusion about his court dates.

The Petitioner recalled being taken into custody in July 2020. The Petitioner said he received an offer in the first week of October, which he initially declined. He later contacted trial counsel to enter the October 30, 2020 guilty plea, because “just being in jail and you are hearing people in jail and the bad experiences of taking eighteen months you know, to two years to fire one attorney and getting another one.” Although the Petitioner chose to stay with trial counsel because he did not want to “drag [his] case out any longer,” the Petitioner did not “feel like [trial counsel] was listening to [him] and doing what [he] thought he needed to do.”

The Petitioner testified that he asked trial counsel to file a bond motion, but trial counsel replied that “his office does not do that.” Asked if trial counsel’s response had anything to do with his decision to plead guilty, the Petitioner replied, “Yes.” The Petitioner further explained that a bond reduction hearing did occur; however, trial counsel “moved away from the podium that day and said I was kind of like on my own, you know, on doing the bond reduction because his office does not do bond reductions.” The Petitioner later explained that his guilty plea was not voluntary because “it was pretty much take what they are offering or – you know, try to get another lawyer or sit in jail, you know?”

The Petitioner met with trial counsel two or three times for “not very long” while in custody. Asked to describe his interaction with trial counsel, the Petitioner said their

conversations initially concerned trial counsel and civil counsel meeting and hiring an electronics expert. However, according to the Petitioner, trial counsel said “that wasn’t a good idea[.]” Asked whether a video was at issue in this case, the Petitioner replied, “I never knew whether it was a video or a picture or what it was.” He insisted he was never told about the existence of a video, and he denied receiving discovery or a copy thereof. The Petitioner acknowledged that he told trial counsel that he was undergoing divorce proceedings when the exploitation of a minor by electronic means case was initiated, that the alleged incident occurred a year and a half prior to the divorce proceedings, and that he told trial counsel that his wife may have been acting “vindictive.” In the Petitioner’s view, trial counsel was “listening to the . . . District Attorney, more than he was listening to [the Petitioner].”

Regarding the plea agreement, the Petitioner testified that he understood he “may have to go on the sex registry but [trial counsel] said he didn’t know what all this stuff pertained to. That would just be something in the future he would have to find out.” The Petitioner stated that trial counsel said, “he wasn’t familiar with all the sex registry stuff or any of the stuff that you have to do through all that stuff.” Had the Petitioner been told the plea agreement included compliance with the sex offender registry, the Petitioner agreed that he “might have made a different decision.” Asked if he might have made a different decision if there had been an expert hired who could retrieve metadata from the phone, or if Facebook records were subpoenaed, or if he would have been given either option, the Petitioner replied, “Yes.” The Petitioner agreed that trial counsel did not advise the Petitioner that he could hire an expert or subpoena records from Facebook. The Petitioner denied that trial counsel explained the possibility of trial or what was involved with a trial.

The Petitioner explained that at the time of the guilty plea, his dependency and neglect case was pending and that his guilty plea ultimately caused him to lose visitation with his children. The Petitioner agreed that trial counsel did not advise him that losing visitation with his children was a possible consequence of entering the guilty plea. Asked if he might have made a different decision if he was told about the effect the plea agreement would have on the dependency and neglect case, the Petitioner stated, “I would have.”

On cross-examination, the Petitioner testified that civil counsel began representing him in his dependency and neglect case a “couple of months” after the dependency and neglect case began. The Petitioner knew that trial counsel and civil counsel discussed the instant case, and that civil counsel was trying to get trial counsel to hire an “electronics expert.” Based on these conversations, the Petitioner conceded that he was aware that he could hire an electronics expert if he had chosen to do so. The Petitioner agreed that trial counsel explained the charges to him; however, the Petitioner insisted that he did not know the plea agreement included compliance with the sex offender registry until trial counsel announced the terms of the plea agreement in court. The Petitioner agreed that he

“understood what was going on and made the conscious decision to take the plea.” The Petitioner agreed that he did not ask civil counsel how entering the guilty plea would affect his dependency and neglect case because civil counsel told him that he only practiced civil law. The Petitioner agreed that he did not ask the trial judge about the effect of the plea agreement on his dependency and neglect case when the trial judge asked if he had any questions during the guilty plea hearing. Although the Petitioner agreed that trial counsel informed him that the plea agreement required him to have no contact with the victim, the Petitioner insisted that he was not informed that he would not be able to have contact with his family, daughters, and grandchildren. The Petitioner later clarified that he believed the order of no contact with the victim was a part of probation and not compliance with the sex offender registry.

Civil counsel, a veteran attorney with a general law practice, testified that the Petitioner had been a client of his for many years and that he was hired to represent the Petitioner in his dependency and neglect case. The underlying facts of the instant case and the dependency and neglect case were “exactly the same.” Discovery requests by civil counsel to the Department of Children’s Services (DCS) and subpoenas for records from the Springfield Police Department to access the video at issue had been unsuccessful. Civil counsel explained that “the only way [he] knew to really get the material without driving [the Petitioner] into bankruptcy was to try and get it through the criminal proceedings.” Civil counsel had conversations with trial counsel about obtaining discovery from the State; however, he was unable to obtain any information concerning the video from trial counsel or juvenile court. Civil counsel learned from a detective that the video could not be shared with him because it was “highly sensitive” and contained child pornography. Civil counsel then contacted a company, Logic Force, and inquired about the retrieval of metadata from the video to locate its origin. Civil counsel learned it would cost \$2500 to retain Logic Force as an expert.

Civil counsel noticed several “red flags” in the juvenile court petition that could have “exonerated” the Petitioner. He said the timing of the complaint raised a red flag because the Petitioner’s wife learned of the video more than a year before reporting it to DCS. Based on his thirty years of practice, civil counsel opined that it was uncommon for a parent to delay disclosing allegations of child sex abuse. The allegations in the juvenile court petition contained evidence of a motive for the Petitioner’s wife to report the act, which was another red flag. According to civil counsel, “it sounded more like [the Petitioner] was being framed for this than he had actually done it.” Civil counsel believed a bond reduction in the instant case would have helped the Petitioner in the dependency and neglect case because he would have had access to the Petitioner to prepare for trial. Additionally, the juvenile court magistrate would have considered child visitation if a condition of the Petitioner’s bond in the instant case included the ability to see his children.

While civil counsel conceded that he was not an expert in metadata, he said he knew “when he should try and find out” whether a video contained metadata. Civil counsel agreed he could not confirm if the video in question contained metadata. Although civil counsel spoke with the Petitioner about the instant case “very few” times, civil counsel agreed that he told the Petitioner about hiring an expert to obtain the metadata from the video and that this situation could be a “set-up” by the Petitioner’s wife. Civil counsel later clarified that his discussions with the Petitioner regarding the metadata may have occurred after the Petitioner entered his guilty plea. Finally, civil counsel opined that trial counsel was deficient in representing the Petitioner because trial counsel should have requested discovery from the State to obtain the video, the devices that sent and received the video, and any other evidence the State possessed.

Trial counsel was licensed to practice in 2004, had various litigation experiences as a judge advocate with the United States Army, and was hired as an assistant public defender in 2019. Prior to the instant case, he had handled approximately 15 to 20 jury trials and “several hundred” case dispositions per year. Trial counsel testified that he reviewed the discovery in the instant case, including the video. Trial counsel evaluated the strength of the State’s case and shared it with the Petitioner. Trial counsel and the Petitioner specifically discussed the video, the credibility of the Petitioner’s estranged wife, and the delayed reporting of the offense. Per his office policy, a copy of the written discovery material was sent to the Petitioner by mail. Trial counsel also discussed the classification of the offenses, the potential punishment, and the sex offender registry with the Petitioner. The sex offender registry was discussed with the Petitioner several times, both written and verbally. Trial counsel told the Petitioner that “there are a litany of things that are required of people on the sex offender registry” and that he was unable to share every detail. Trial counsel also told the Petitioner that compliance with the sex offender registry was “extremely onerous” and “largely inconvenient and difficult.” Trial counsel specifically told the Petitioner that the sex offender registry placed “restrictions on where [he could] work, where [he could] live. [Offenders] can’t be within a thousand feet or different distances of daycare centers, playgrounds, school zones.” The Petitioner was also told that sex offenders “ha[d] to register their social media accounts, they have to update the State on where they live, where they work, what they drive.”

Trial counsel explained that prior to entry of his guilty plea, the Petitioner had previously “signed paperwork” reflecting the terms of the plea agreement and the requirement for the Petitioner to comply with the sex offender registry. Trial counsel said the Petitioner “backed out” and filed a bar complaint against him. The Petitioner later reached out to trial counsel, changed his mind, and sought to enter a guilty plea. Trial counsel said he updated the guilty plea paperwork, added the State’s additional condition of no contact with the Petitioner’s biological child without a juvenile/divorce court order, and sent the Petitioner this information in a “kiosk message.” Trial counsel had the

Petitioner sign the paperwork, which acknowledged the aforementioned information had been explained to the Petitioner. Trial counsel emphasized that prior to entry of the guilty plea, he and the Petitioner discussed going to trial, retaining an expert, and sharing the possible information obtained from an expert with his civil counsel. Because the Petitioner changed his mind and entered a guilty plea, the case did not proceed to trial and trial counsel did not retain an expert. Several weeks before entering the plea agreement, the Petitioner instructed trial counsel to cease communication with civil counsel.

Trial counsel explained that “where electronics are involved . . . he had experience with defending child porn cases,” and he had previously worked with a digital forensic expert. Trial counsel was aware that “when there is a question as to a file, how that file was transferred, you know, what IP addresses are associated with the transfer of a file, there are digital experts that are able to take a look at computers and tell you more than you can ascertain from the (inaudible).” Prior to entry of the guilty plea, trial counsel discussed with the Petitioner the possibility of hiring an expert for the purpose of determining how the video was transferred. Trial counsel conceded that “what [he] had in [his] discovery was not the major file format. What [he] had in the discovery was a video taken of – I want to say someone holding a tablet, which was playing a video.” Trial counsel acknowledged he was “somewhat removed” from the “actual file itself.” However, trial counsel averred that had the Petitioner chosen to proceed to trial, trial counsel would have retained an expert, who would have “dug right into, as close as we could get to the file in question.” Trial counsel explained that the Petitioner knew that it would take time to hire an expert as well as time for the expert to prepare for trial. Trial counsel believed “the time that [the Petitioner] was waiting in jail seemed to be weighing on him.”

On cross-examination, trial counsel agreed that a month and a half had elapsed between the Petitioner’s arraignment court date and the Petitioner’s guilty plea hearing. Trial counsel recalled that he visited the Petitioner in jail at least one time. Trial counsel agreed that he left the Petitioner at the podium during the bond hearing but only to explain his financial situation. Trial counsel said the bond hearing proceeded “just the way that any other person in jail asks for bail,” except that trial counsel wrote and filed the bond motion at the Petitioner’s request.

Trial counsel spent “several hours” reviewing discovery from the State and the discovery that civil counsel shared from the Petitioner’s dependency and neglect case. Trial counsel agreed that the video he obtained from the State was “a recording of a recording.” Asked if whether hearing aloud that he received a “recording of a recording” in discovery from the State sounded “weird,” trial counsel replied as follows:

In a word, no. Obviously, I prefer to get the discovery in its native format. I see a lot of shortcuts taken by law enforcement in that they will take a screen

shot of a ring door cam or they will take a video of something else, rather than providing the file itself, I will get some representation of the file in discovery.

Trial counsel's "understanding" was that the video was sent or "done by Facebook messenger," and that he could have issued a subpoena to Facebook. Trial counsel opined that the Petitioner "was not driven by . . . the merits of our litigation strength, it was his impatience with waiting in jail." Asked if he gave the Petitioner his opinion of whether the Petitioner should accept the plea agreement, trial counsel replied matter-of-factly, "[n]o, it's his choice to make." Trial counsel did advise the Petitioner that while the plea agreement allowed him to be released from jail, some of trial counsel's clients preferred to stay in jail to avoid compliance with the requirements of the sex offender registry.

Trial counsel expressly told the Petitioner that compliance with the sex offender registry was a requirement of the plea agreement, and it was "unambiguous" that the Petitioner would be placed on the sex offender registry before he was released from jail. Trial counsel verbally explained the requirement of compliance with the sex offender registry to the Petitioner. This information was also clearly delineated on the Petitioner's guilty plea paperwork, the kiosk message trial counsel sent to the Petitioner, and described to the Petitioner at the guilty plea hearing. Trial counsel later clarified that the Petitioner changed his mind to accept the plea agreement within weeks of the case being set for trial.

Civil counsel was called as a rebuttal witness on behalf of the Petitioner. Civil counsel clarified that the Petitioner "asked [trial counsel] to speak to [civil counsel] at length about what was going on with [the Petitioner's] case, in part because he was concerned it wasn't being handled correctly." Civil counsel listened to the testimony of trial counsel and had been unaware that trial counsel only had a "video of a video." Civil counsel considered this to be a "huge red flag" and opined "it [made it] all the more imperative to get the discovery because there's a huge chain of custody issue, there's a huge authenticity issue[.]" Civil counsel testified that trial counsel just "intimated pretty clearly" that law enforcement took the video of the video. However, civil counsel agreed that the only facts he knew about the video were facts he had been told, and he did not know if law enforcement or someone else took the video from the tablet.

The post-conviction court's written order denying relief was entered November 30, 2021. In denying the petition, the post-conviction court found that the Petitioner was not deprived of his constitutional right to effective assistance of counsel because he failed to prove trial counsel's alleged deficiencies amounted to prejudice. The record shows the Petitioner's notice of appeal was filed January 3, 2022. However, the State and Petitioner agree the public case history shows the Petitioner's notice of appeal was filed on December

23, 2021. Accordingly, we consider the Petitioner to have timely filed his notice of appeal, and his case is now properly before this court for review.

ANALYSIS

In this appeal, the Petitioner argues that he was denied the effective assistance of counsel based on trial counsel's failure to pursue a bond reduction, failure to conduct a pre-trial investigation, failure to retain a digital forensic examiner, and failure to advise the Petitioner of the legal implications of pleading guilty to exploitation of a minor by electronic means would have on his dependency and neglect case. Based on trial counsel's alleged deficiencies, the Petitioner also argues that his guilty plea was not knowingly and voluntarily entered. Because the Petitioner has raised his ineffective assistance of counsel claim for failure to pursue a bond reduction and failure to conduct a pre-trial investigation for the first time on appeal, the State submits these claims have been waived. See Holland v. State, 610 S.W.3d 450, 458 (Tenn. 2020); Grindstaff v. State, 297 S.W.3d 208, 219 (Tenn. 2009); Cauthern v. State, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004).

As to the remaining claims, the State argues that the post-conviction court properly denied relief. The State maintains that the Petitioner failed to establish that trial counsel was ineffective in failing to obtain a digital forensic examiner given the Petitioner's decision to enter a guilty plea and the Petitioner's failure to present a digital forensic examiner at the post-conviction hearing. Black v. State, 794 S.W.2d 752, 737 (Tenn. Crim. App. 1990). The State further posits that the Petitioner failed to establish that trial counsel was ineffective in failing to advise him of the effects of his plea and registering as a sex offender on his case in juvenile court, which was the precise issue presented to the post-conviction court. See Adkins v. State, 911 S.W.2d 334, 350 (Tenn. Crim. App. 1994) (noting that while an attorney's failure to inform a defendant about the direct consequences of his guilty plea amounts to ineffective assistance of counsel, the same is not true for the collateral effects of a plea). Because the sex offender registry has been found to be nonpunitive, it is a collateral consequence of a guilty plea, not a direct consequence. Ward v. State, 315 S.W.3d 461, 472 (Tenn. 2010). To the extent the Petitioner attempts to expand this claim to include trial counsel's failure to explain all potential consequences of the sex offender registry requirement of his plea, the State again insists this issue was not preserved below and is therefore waived.

I. Ineffective Assistance of Counsel. We begin our analysis of these issues by acknowledging the following well-established legal framework. Post-conviction relief is only warranted when a petitioner establishes that his or her conviction or sentence is void or voidable because of an abridgment of a constitutional right. Tenn. Code Ann. § 40-30-103. A post-conviction petitioner has the burden of proving the factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); see Tenn. Sup. Ct. R. 28, §

8(D)(1); Nesbit v. State, 452 S.W.3d 779, 786 (Tenn. 2014). Evidence is considered clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from it. Lane v. State, 316 S.W.3d 555, 562 (Tenn. 2010); Grindstaff v. State, 297 S.W.3d 208, 216 (Tenn. 2009); Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

A claim for post-conviction relief based on alleged ineffective assistance of counsel presents a mixed question of law and fact. Mobley v. State, 397 S.W.3d 70, 80 (Tenn. 2013) (citing Calvert v. State, 342 S.W.3d 477, 485 (Tenn. 2011)). A post-conviction court's findings of fact are conclusive on appeal unless the evidence in the record preponderates against them. Calvert, 342 S.W.3d at 485 (citing Grindstaff, 297 S.W.3d at 216; State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999)). "Accordingly, we generally defer to a post-conviction court's findings with respect to witness credibility, the weight and value of witness testimony, and the resolution of factual issues presented by the evidence." Mobley, 397 S.W.3d at 80 (citing Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999)). "However, we review de novo a post-conviction court's application of the law to its factual findings and accord no presumption of correctness to the court's conclusions of law." Id. (citing Grindstaff, 297 S.W.3d at 216; Finch v. State, 226 S.W.3d 307, 315 (Tenn. 2007); Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006)).

The right to effective assistance of counsel is protected by both the United States Constitution and the Tennessee Constitution. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to prevail on an ineffective assistance of counsel claim, a petitioner must establish (1) his lawyer's performance was deficient and (2) the deficient performance prejudiced the defense. Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Strickland v. Washington, 466 U.S. 668, 687 (1984). A petitioner proves deficient performance if the petitioner proves that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). A petitioner proves that a deficiency resulted in prejudice if the petitioner establishes "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 370 (quoting Strickland, 466 U.S. at 694). However, to establish prejudice in the context of a guilty plea, a petitioner must show that there is a reasonable probability that, but for counsel's errors, the petitioner would not have entered his guilty plea and would have proceeded to trial. Serrano v. State, 133 S.W.3d 599, 605 (Tenn. 2004) (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

The Supreme Court clarified this standard in Lee v. United States, 137 S. Ct. 1958 (2017), noting that the inquiry demands "a case-by-case examination of the totality of the evidence." Id. at 1966 (internal quotation marks omitted). The Court elaborated:

“Surmounting Strickland’s high bar is never an easy task,” Padilla v. Kentucky, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L.Ed.2d 284 (2010), and the strong societal interest in finality has “special force with respect to convictions based on guilty pleas.” United States v. Timmreck, 441 U.S. 780, 784, 99 S. Ct. 2085, 60 L.Ed.2d 634 (1979). Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney’s deficiencies. Judges should instead look to contemporaneous evidence to substantiate a defendant’s expressed preferences.

Lee, 137 S. Ct. at 1967. Because a petitioner must establish both prongs of the Strickland test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.” Goad, 938 S.W.2d at 370.

In assessing an attorney’s performance, we “must be highly deferential and should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” State v. Burns, 6 S.W.3d 453, 462 (citing Strickland, 466 U.S. at 689). In addition, we must avoid the “distorting effects of hindsight” and must “judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” Strickland, 466 U.S. 690. “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. “The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation.” Goad, 938 S.W.2d at 369. “However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation.” House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (quoting Goad, 938 S.W.2d at 369).

The validity of a guilty plea is a mixed question of law and fact that is reviewed de novo. Lane, 316 S.W.3d at 562. To be valid, a guilty plea must be entered into knowingly, voluntarily, and intelligently. Id. (citing State v. Mackey, 553 S.W.2d 337, 340 (Tenn. 1977); North Carolina v. Alford, 400 U.S. 25, 31 (1970); Brady v. United States, 397 U.S. 742, 747 (1970); Boykin v. Alabama, 395 U.S. 238, 242-44 (1969)). “[T]he record of acceptance of a defendant’s plea of guilty must affirmatively demonstrate that his decision was both voluntary and knowledgeable, i.e., that he has been made aware of the significant consequences of such a plea[.]” Mackey, 553 S.W.2d at 340; see Tenn. R. Crim. P. 11(b)(1). “Courts are constitutionally required to notify defendants of only the direct consequences—not the collateral consequences—of a guilty plea.” Ward, 315 S.W.3d at 467. “The most obvious ‘direct consequence’ of a conviction is the penalty to be imposed.

It is, therefore, well-recognized that the defendant must be apprised of the sentence that he will be forced to serve as the result of his guilty plea and conviction.” Blankenship v. State, 858 S.W.2d 897, 905 (Tenn. 1993) (internal quotations omitted).

When determining whether a guilty plea was knowingly, voluntarily, and intelligently entered, the court must consider “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” Lane, 316 S.W.3d at 562 (quoting Grindstaff, 297 S.W.3d at 218). If a guilty plea is not knowingly, voluntarily, and intelligently entered, then the defendant has been denied due process, and the guilty plea is void. Id. (citations omitted). A plea is not voluntary if it is the result of “[i]gnorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats” Blankenship, 858 S.W.2d at 904 (quoting Boykin, 395 U.S. at 242-43). In determining whether a guilty plea is voluntarily and intelligently entered, a trial court must look at a number of factors, which include the following:

- 1) the defendant’s relative intelligence; 2) the defendant’s familiarity with criminal proceedings; 3) the competency of counsel and the defendant’s opportunity to confer with counsel about alternatives; 4) the advice of counsel and the court about the charges and the penalty to be imposed; and 5) the defendant’s reasons for pleading guilty, including the desire to avoid a greater penalty in a jury trial.

Howell v. State, 185 S.W.3d 319, 330-31 (Tenn. 2006) (citing Blankenship, 858 S.W.2d at 904).

II. Waiver. The Petitioner argues ineffective assistance of counsel based on trial counsel’s failure to pursue a bond reduction and trial counsel’s failure to conduct a pre-trial investigation. Additionally, the Petitioner argues that the post-conviction court misinterpreted his claim as to trial counsel’s failure to advise him of the legal implications of his guilty plea to exploitation of a minor by electronic means on his dependency and neglect case. The Petitioner submits that his claim below “was not about the possible outcome of the [d]ependency & [n]eglect case; but rather, the immediate certainty of precluding him from relitigating the factual basis of his conviction during the [d]ependency and [n]eglect trial.” As none of these issues were presented, argued, or ruled upon by the post-conviction court, the State insists they are waived.

A person seeking relief under the Post-Conviction Act must file a petition with the court of record where the conviction occurred that “include[s] all claims known to the petitioner for granting post-conviction relief[,]” and the petitioner “shall verify under oath that all the claims are included.” Tenn. Code Ann. § 40-30-104(d) (2018); Holland, 610 S.W.3d at 457. If the petitioner is granted an evidentiary hearing, the issues at the hearing

are limited to those raised or stated in the petition. See id. § 40-30-110(c) (“Proof upon the petitioner’s claim or claims for relief shall be limited to evidence of the allegations of fact in the petition.”); Tenn. Sup. Ct. R. 28, § 8(D)(4) (requiring that the issues at the evidentiary hearing “be limited to issues raised in the petition”); Holland, 610 S.W.3d at 457. An issue is considered waived, and no longer grounds for relief, “if the petitioner personally or through an attorney fail[s] to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented[,]” with two limited exceptions that are not applicable here. Tenn. Code. Ann. § 40-30-106(g) (2018); Holland, 610 S.W.3d at 457-58 (citing Grindstaff, 297 S.W.3d at 218-19 (holding that a petitioner waived his claim that he did not knowingly and intelligently enter into his guilty plea because “neither the original petition nor the amended petition . . . specifically alleged” this ground and the post-conviction court did not make any determination as to the issue)); State v. West, 19 S.W.3d 753, 757 (Tenn. 2000).

The precise issues in the Petitioner’s amended petition for post-conviction relief, in this case, were limited to whether trial counsel was ineffective in failing to request an expert, in failing to review the State’s discovery with the Petitioner, and in failing to advise the Petitioner of the consequences of entering a guilty plea to exploitation of a minor by electronic means on his “open” dependency and neglect case. Based on trial counsel’s deficiencies, the Petitioner argued that his guilty plea was unknowing and involuntarily entered because (1) he was not advised that, as a consequence, his guilty plea could be used against him in the dependency and neglect case and (2) “he was denied access to evidence which may have been favorable to him and without that knowledge, he could not have knowingly and voluntarily entered into a plea agreement.” In support of his claim of trial counsel’s failure to advise him of the consequences of his guilty plea, the Petitioner argued in the amended petition that trial counsel was aware of the “open” dependency and neglect case that “spawned” from the same facts. The Petitioner further insisted that trial counsel should have advised him of the “possible consequence of terminating [the Petitioner’s] parental rights to all of his children” and that his conduct underlying the guilty plea “would bar [the Petitioner] from asserting any defense” in his dependency and neglect case under the doctrine of *res judicata*.²

² Res judicata and collateral estoppel are related doctrines. Res judicata bars a second suit between the same parties or their privies on the same cause of action with respect to all issues which were or could have been litigated in the former suit. Collateral estoppel bars a second suit between the same parties and their privies on a different cause of action only as to issues which were actually litigated and determined in the former suit. Bowen ex rel. Doe v. Arnold, 502 S.W.3d 102, 107 n.6 (Tenn. 2016) (citing Goeke v. Woods, 777 S.W.2d 347, 349 (Tenn.1989); Massengill v. Scott, 738 S.W.2d 629, 631 (Tenn.1987)).

At the close of proof at the post-conviction hearing, the post-conviction court sought clarification of the Petitioner's arguments. The transcript from the hearing reveals, in pertinent part, as follows:

[COURT]: I will entertain argument. Let me ask you, as you start -- your claims are ineffective assistance of counsel for failure to obtain a forensic expert on the tape and then failure to inform about the sex offender registry? Have I got both of them?

[POST-CONVICTION COUNSEL]: Yes, Your Honor.

[COURT]: Anything else, or is it just those two issues? I am not limiting your argument. I am trying to be sure I understand where we are going on it?

[POST-CONVICTION COUNSEL]: That is essentially the main parts of my argument. I mean there are some additional parts that I think came out today that would say why [trial counsel] would have been deficient in this? [64-65]

After post-conviction counsel concluded argument, the post-conviction court again sought clarification of the Petitioner's issues. The hearing transcript reveals the following:

[COURT]: Alright, and the two issues though, the two things that Defense Counsel should have done, that your contention is should have done that they didn't do, is obtain the services of an expert and then also inform -- inform your client of the consequences of the sex offender registry? Is that the two complaints?

[POST-CONVICTION COUNSEL]: Yes, the sex offender registry --

[COURT]: Failure to get an expert?

[POST-CONVICTION COUNSEL]: And failure, about the D and N case.

[COURT]: Anything else you want to bring up?

[POST-CONVICTION COUNSEL]: Well, no, Your Honor, just the fact that I think you should consider kind of all this stuff as well.

[COURT]: Thank you for your argument.

The record shows that the amended petition did not formally raise ineffective assistance of counsel claims based on trial counsel's failure to pursue a bond reduction and trial counsel's failure to conduct a pre-trial investigation. Moreover, in its order denying relief, the post-conviction court did not rule upon these issues. Accordingly, we agree with the State, and conclude that the Petitioner has waived these claims by failing to properly include them in his amended petition or at the post-conviction evidentiary hearing.

As to the Petitioner's claim regarding trial counsel's failure to advise him of the legal implications of his guilty plea on his dependency and neglect case, the record shows this claim was supported by dual grounds in the amended petition. That is, the Petitioner argued that trial counsel was ineffective in failing to advise him of the legal implications of his registry as a sex offender on the dependency and neglect case as well as trial counsel's failure to advise him that the guilty plea would bar any defenses to the dependency and neglect case. The above exchange between post-conviction counsel and the post-conviction court demonstrates further that post-conviction counsel alerted the post-conviction court as to the dual grounds in support of this claim. The post-conviction court categorized the issue as "ineffective assistance of counsel for failure to advise the Petitioner of the effect the plea might have on the pending case regarding child custody[.]" quoted the first prong of the Petitioner's argument from the amended petition, stated "[i]t appear[ed] the argument was that the sex offender registry requirements will affect the matter pending in juvenile court[.]" and so ruled. However, it is clear that the very next sentence of the amended petition, following the quoted section of the amended petition, and omitted from the post-conviction court order, addressed the preclusive effect the guilty plea would have on the dependency and neglect case and provided, "[a] plea agreement on this criminal case would bar [the Petitioner] from asserting any defense concerning the conduct in that case under the doctrine of res judicata and thus places him at risk of having parental rights terminated."

We acknowledge that the post-conviction court was required to make findings of fact and conclusions of law as to all grounds presented in the petition. See Tenn. Code Ann. § 40-30-111(b) (Supp. 2022) ("Upon the final disposition of every petition, the court shall enter a final order, and except where proceedings for delayed appeal are allowed, shall set forth in the order or a written memorandum of the case all grounds presented, and shall state the findings of fact and conclusions of law with regard to each ground."); Tenn. Sup. Ct. R. 28, § 9(A) ("The order shall contain specific findings of fact and conclusions of law relating to each issue presented."). Because the purpose of section 40-30-111(b) is to facilitate appellate review of the post-conviction court's decision, "the failure of the [post-conviction] judge to abide by [40-30-11(b)] does not always mandate a reversal of the [post-conviction] court's judgment." State v. Swanson, 680 S.W.2d 487, 489 (Tenn.

Crim. App. 1984); Oscar Thomas v. State, No. W2012-01646-CCA-R3-PC, 2013 WL 5761398, at *6 (Tenn. Crim. App. June 28, 2013). Here, because the Petitioner's claim is purely a legal issue which we review de novo with no presumption of correctness, see Pylant v. State, 263 S.W.3d 854, 867-68 (Tenn. 2008), the post-conviction court's failure to make specific findings on this issue does not preclude appellate review.

We additionally note, with respect to the first ground articulated in the amended petition and ruled upon by the post-conviction court, trial counsel's failure to advise on the implications of the Petitioner's guilty plea and the Petitioner's registry as a sex offender on the dependency and neglect case, the Petitioner does not present any argument in his brief, and thus we consider it waived. More to the point, the Petitioner concedes as much in his brief by noting that while the post-conviction court relied upon "nonbinding authority," the post-conviction court "correctly concluded the possible termination of parental rights is a collateral consequence as the determination lies within the discretion of a court." Talbott v. State, 93 S.W.3d 521, 526 (Tex. App. 2002) (rejecting petitioner's claim that her guilty plea was involuntary because she did not know that her parental rights could be terminated if she entered the plea and concluding that parental rights were collateral consequence of plea as the decision to terminate her parental rights was not within the authority or discretion of the criminal court); Slater v. State, 880 So. 2d 802 (Fla. Dist. Ct. App. 2004) (termination of defendant's parental rights was a collateral consequence of pleas for which trial court had no duty to inform defendant). Accordingly, the sole ground remaining for our review under this issue is whether the Petitioner entered a knowing and voluntary guilty plea given trial counsel's failure to advise him that the guilty plea in his criminal case would bar the Petitioner from asserting any defense in his dependency and neglect case.

III. Failure to Retain a Digital Forensic Analyst. The Petitioner argues that trial counsel was ineffective in failing to retain a digital forensic analyst because the Petitioner informed trial counsel that "any sexually inappropriate image on the child's tablet was due to the family sharing a 'cloud' plan." The Petitioner acknowledges the requirement under Black v. State for witnesses to be presented during the evidentiary hearing when challenging trial counsel's failure to discover, present, or interview a witness in support of a petitioner's defense. 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) ("When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing."). He nevertheless contends the post-conviction court erred in deciding that a digital forensic expert needed to be presented at the post-conviction hearing to prove his claim, because he presented "tangible evidence as to what the expert testimony would have been under the unusual circumstances of this case." In response, the State asserts that the post-conviction court properly denied relief because the Petitioner failed to present an expert at the post-conviction hearing. We agree with the State.

At the evidentiary hearing, the Petitioner conceded that trial counsel spoke with him and advised him that he could hire a digital forensic analyst or an expert to analyze the origin of the video. Trial counsel testified that he obtained the video in discovery from the State and that he reviewed the video with the Petitioner. However, because the Petitioner entered a guilty plea, trial counsel did not seek to obtain an expert to analyze the video. The Petitioner did not offer to admit the video into evidence, and he failed to present an expert to testify regarding analysis of the video at the evidentiary hearing. The post-conviction court accredited trial counsel's testimony that he would have retained an expert had the Petitioner not entered a guilty plea and the case proceeded to trial. The post-conviction court found that "trial counsel's performance did not fall below an objective standard of reasonableness," and that trial counsel's performance "both met and exceeded the standard." The record supports the determination of the post-conviction court. The Petitioner failed to present the video or an expert who had reviewed the video to determine its origin. Without this information, the Petitioner's arguments to this court are speculative and in direct contravention of Black. Even if we assume that trial counsel was deficient, the Petitioner would be unable to establish the prejudice prong of Strickland because the content of the video, whether it contained metadata, or the origin of the video remain unclear. Finally, there was no testimony establishing that the video was no longer in the custody of the State or otherwise not preserved. Accordingly, because the Petitioner has failed to demonstrate that but for trial counsel's failure to obtain an expert to analyze the video, he would not have entered a guilty plea and proceeded to trial, he is not entitled to relief.

IV. Failure to Advise the Petitioner of the Consequences of the Guilty Plea.

The Petitioner argues that his guilty plea was not knowingly and voluntarily entered because trial counsel failed to advise him that entry of a guilty plea in his criminal case would bar the Petitioner from asserting any defense in his civil, dependency and neglect case. In support, the Petitioner cites Bowen ex rel. Doe v. Arnold, 502 S.W.3d 102, 117-18 (Tenn. 2016), which abolished the mutuality requirement for defensive and offensive collateral estoppel in Tennessee and expressly adopted sections 29 and 85 of the Restatement (Second) of Judgments. According to the Petitioner "[c]riminal defense practitioners were put on notice that a guilty plea had the immediate, definite, largely automatic consequence of a preclusive effect in a collateral civil litigation, characteristics of a direct consequence." He acknowledges the relevant authority regarding direct and collateral consequence distinctions in the context of the sex offender registry, see State v. Nagel, 353 S.W.3d 112, 119 (Tenn. 2011) and Ward v. State, 315 S.W.3d 461, 467 (Tenn. 2010), and contends that but for the omission of advice by trial counsel on the preclusive effect of entering the guilty plea, there is a reasonable probability that the Petitioner would not have pleaded guilty. Finally, the Petitioner argues, contrary to the finding of the post-conviction court, that the guilty plea did prejudice him during the dependency and neglect

case because he was precluded from asserting that he did not send the video to his step-daughter under the collateral estoppel doctrine.

As an initial matter, we are not convinced that Bowen applies here. Cf. In re Treylynn T., No. W2019-01585-COA-R3-JV, 2020 WL 5416649, at *11 (Tenn. Ct. App. Sept. 9, 2020), appeal granted, cause remanded (Dec. 16, 2020) (applying preclusive effect to criminal severe child abuse best interest/Alford plea in civil, dependency and neglect case based on Bowen over dissent by Judge Steven Stafford discussing in footnote 2 the conflict in Tennessee cases regarding use of Alford pleas under the collateral estoppel doctrine). In Bowen, a case involving a criminal defendant who had been convicted by a jury, the Tennessee Supreme Court began its analysis with a historical overview of collateral estoppel, which is an issue-preclusion doctrine that “promotes finality, conserves judicial resources, and prevents inconsistent decisions” by barring “the same parties or their privies from relitigating in a later proceeding legal or factual issues that were actually raised and necessarily determined in an earlier proceeding.” Bowen ex rel. Doe v. Arnold, 502 S.W.3d at 107 (internal citations omitted). To prevail with a collateral estoppel claim, the party asserting it must demonstrate:

(1) that the issue to be precluded is identical to an issue decided in an earlier proceeding, (2) that the issue to be precluded was *actually raised, litigated, and decided on the merits* in the earlier proceeding, (3) that the judgment in the earlier proceeding has become final, (4) that the party against whom collateral estoppel is asserted was a party or is in privity with a party to the earlier proceeding, and (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity in the earlier proceeding to contest the issue now sought to be precluded.

Id. (citing Mullins v. State, 294 S.W.3d 529, 535 (Tenn. 2009) (emphasis added)).

With respect to the particular issue presented, Bowen held that Tennessee courts should be guided by section 85 of the Restatement (Second) of Judgments when determining whether offensive or defensive collateral estoppel should apply in a civil action based on a prior criminal judgment. The Court stated as follows:

The general rule under section 85 is that “[a] judgment in favor of the prosecuting authority is preclusive in favor of a third person in a civil action . . . [a]gainst the defendant in the criminal prosecution as stated in [section] 29.” Restatement (Second) of Judgments § 85. Because section 85 incorporates section 29, which in turn incorporates section 28, *courts have considerable discretion to allow for relitigation if the circumstances*

enumerated in sections 28 and 29 convince the court that relitigation is warranted.

Bowen ex rel. Doe v. Arnold, 502 S.W.3d at 116 (internal footnote omitted; emphasis added). Section 28 provides five exceptions to the general rule of issue preclusion, and section 29 provides an additional eight circumstances for courts to consider when determining whether

[a] party precluded from relitigating an issue with an opposing party, in accordance with §§ 27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue.

Restatement (Second) of Judgments § 29.

Bowen clearly addressed the preclusive effect of a conviction by a jury, and not the preclusive effect of a conviction obtained by a guilty plea as in this case. This is significant because collateral estoppel “can be used only to prevent ‘relitigation of issues actually litigated’ in a prior lawsuit.” Nevada v. United States, 463 U.S. 110, 130 n.11 (1983) (quoting Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979)); Aetna Cas. & Sur. Co. v. Niziolek, 395 Mass. 737, 748 (1985). When a conviction is entered after a plea of guilty, “no issue [is] ‘actually litigated’ . . . since [the defendant] decline[s] to contest his guilt in any way.” Haring v. Prosise, 462 U.S. 306, 316 (1983); Ohio v. Johnson, 467 U.S. 493, 500 n.9 (1984) (noting that “the taking of a guilty plea is not the same as an adjudication on the merits after full trial”); Grange Mut. Cas. Co. v. Walker, 652 S.W.2d 908, 910 (Tenn. Ct. App. 1983) (rejecting argument that guilty plea constitutes a judicial admission on all facts alleged). As noted in Prosise v. Haring:

Whatever the differences among courts and commentators as to the ‘actually litigated’ requirement for issue preclusion, there has been general agreement—to the point of convention—that among the most critical guarantees of fairness in applying collateral estoppel is the guarantee that the party sought to be estopped had not only a full and fair opportunity but an adequate incentive to litigate ‘to the hilt’ the issues in question.

667 F.2d 1133, 1141 (4th Cir. 1981), *aff’d*, 462 U.S. 306, 323 (1983). In rejecting the notion that a defendant had a substantial incentive to elect a trial over entry of a guilty plea, the Supreme Court reasoned that “a defendant’s decision to plead guilty may have any number of other motivations[,]” Haring v. Prosise, 462 U.S. at 318, including the prospect

of a favorable plea agreement or the expectation or hope of a lesser sentence. Id. Accordingly, as Bowen is inapplicable, we conclude the Petitioner is not entitled to relief.

Alternatively, even if a judgment of conviction obtained as a result of a guilty plea is considered “actually litigated” under the collateral estoppel doctrine, the Petitioner is not entitled to relief. While we typically apply the two-prong Strickland analysis for purposes of ineffective assistance of counsel claims of this nature, in Padilla v. Kentucky, the United States Supreme Court observed that it had “never applied a distinction between direct and collateral consequences to define the scope of constitutionally ‘reasonable professional assistance’ required under Strickland[.]” 559 U.S. 356, 365 (2010) (holding that the Sixth Amendment requires an attorney for a criminal defendant to provide advice to non-citizen clients about the risk of deportation arising from a guilty plea). The Court later explained that when it approached the ineffective assistance of counsel issue in Padilla, its “first order of business was . . . to consider whether the widely accepted distinction between direct and collateral consequences categorically foreclosed Padilla’s [Sixth Amendment] claim, whatever the level of his attorney’s performance.” Chaidez v. United States, 568 U.S. 342, 355 (2013) (holding that Padilla did not apply retroactively because it announced a new rule under Teague v. Lane, 489 U.S. 288 (1989)). Although Chaidez did not expressly endorse the direct-collateral consequence approach to ineffective assistance of counsel claims, it clarified that Padilla did not “eschew the direct-collateral divide across the board[.]” but simply relied “on the special ‘nature of deportation’—the severity of the penalty and the ‘automatic’ way it follows from conviction—to show that ‘[t]he collateral versus direct distinction [was] ill-suited’” to the unique circumstances of deportation. Chaidez, 568 U.S. at 355 (citing Padilla, 559 U.S. at 357).

Here, the Petitioner does not argue that trial counsel’s failure to inform him of the preclusive effect his guilty plea would have on his civil, dependency and neglect case is equally as unique as deportation, and we have little trouble concluding that it is not. Padilla reasoned that deportation was ill-suited for the direct-collateral consequence analysis primarily because (1) it results automatically from the entry of the plea, and (2) it is a particularly severe penalty. Padilla, 559 U.S. at 366. Given the considerable discretion afforded to trial courts under sections 28 and 29 of Restatement (Second) of Judgments in determining when a judgment in favor of the prosecuting authority is preclusive in favor of a third person in a civil action against the defendant in the criminal prosecution, we conclude that it does not result automatically from the guilty plea. Additionally, assuming Bowen applies, its impact is relatively minor in comparison to the severe penalty of deportation. While Bowen removed a defendant’s ability to explain or defend the facts underlying the guilty plea, Tennessee courts have repeatedly adhered to the practice of admitting a defendant’s prior guilty plea in a subsequent civil proceeding as competent evidence of an admission against interest. See Tenn. R. Evid. 803; Grange Mut. Cas. Co. v. Walker, 652 S.W.2d at 910 (“A plea of guilty . . . is generally not conclusive on the

issues in a subsequent civil action but is competent evidence as an admission against interest.”) (internal citations omitted). We now turn to consider whether the preclusive nature of the guilty plea on the subsequent civil, dependency and neglect case is properly categorized as a direct or collateral consequence.

“[N]either our federal nor state constitution requires that an accused be apprised of every possible or contingent consequence of pleading guilty before entering a valid guilty plea. Courts are constitutionally required to notify defendants of only the direct consequences—not the collateral consequences—of a guilty plea.” Ward, 315 S.W.3d at 466-67 (citing Brady, 397 U.S. at 755; Blankenship, 858 S.W.2d at 905). “The distinction between a collateral and a direct consequence has often been formulated as turning on whether the result represents a definite, immediate and largely automatic effect on the range of the defendant’s punishment.” Id. (internal quotations omitted). On the one hand, a consequence of a guilty-pleaded conviction that is merely “remedial and regulatory,” having “no effect on his range of punishment,” is a collateral consequence of a guilty plea. Rigger v. State, 341 S.W.3d 299, 313-14 (Tenn. Crim. App. 2010). On the other hand, a “punitive” consequence of a guilty plea—one that entails “an additional part of a defendant’s sentence”—is a direct consequence of the plea, and it imposes upon the trial court “an affirmative duty to ensure that a defendant is informed and aware of the [consequence] prior to accepting the plea.” Id.; see also Chaidez, 568 U.S. at 349 n.5 (“[E]ffects of a conviction commonly viewed as collateral include civil commitment, civil forfeiture, sex offender registration, disqualification from public benefits, and disfranchisement.”). Nevertheless, our supreme court in Ward made clear that a direct consequence is not merely something that, as the Petitioner argues, has “a definite, immediate, and largely automatic consequence of a conviction.” Ward, 315 S.W.3d at 472. Rather, a direct consequence must be something that has “an effect on the length, manner, or service of the defendant’s punishment.” Id.

The record shows that the Petitioner retained civil counsel in the civil, dependency and neglect proceeding, and that civil counsel was aware of the instant, criminal case. Trial counsel and civil counsel communicated with one another about the Petitioner’s pending matters, and neither trial counsel nor civil counsel advised the Petitioner of the potential preclusive effect the guilty plea would have on the civil, dependency and neglect proceeding. In applying the above authority, the preclusive effect of the guilty plea did not have “an effect on the length, manner, or service of the defendant’s punishment” and was not an additional part of his sentence. Id. Moreover, as previously discussed, whether the guilty plea would later be determined preclusive in favor of a third person in a civil action against the defendant in the criminal prosecution as stated in section 29 of Restatement (Second) of Judgments § 85, is left largely to the discretion of the civil court and beyond the control and responsibility of the court accepting the guilty plea. As such, the Petitioner’s claim must fail because the preclusive effect/nature of a prior guilty plea in a

subsequent civil action constitutes a collateral consequence. Because the Petitioner has failed to establish that his guilty plea was not knowingly and voluntarily entered based on trial counsel's failure to advise him of the preclusive effect his guilty plea in his criminal case would have in his civil, dependency and neglect case, he is not entitled to relief.

CONCLUSION

Based on the above authority and analysis, we affirm the judgment of the circuit court.

CAMILLE R. MCMULLEN, JUDGE