IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 15, 2023

MARK ANTHONY CLEMMONS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Wilson County
No. 16-CR-556 Brody N. Kane, Judge

No. M2022-00560-CCA-R3-PC

Petitioner, Mark Anthony Clemmons, appeals as of right from the Wilson County Criminal Court's denial of his petition for post-conviction relief, wherein he challenged his guilty-pleaded convictions for possession with intent to sell not less than one-half ounce nor more than ten pounds of marijuana; possession with intent to sell a Schedule III controlled substance (dihydrocodeinone); and two counts of sale of not less than one-half ounce nor more than ten pounds of marijuana, for which the trial court imposed an effective twenty-seven-year sentence. On appeal, Petitioner asserts that he received ineffective assistance of counsel based upon trial counsel's failure to explain the consequences of entering an open plea. Following our review, we affirm.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. ROSS DYER, JJ., joined.

Robert D. MacPherson, Lebanon, Tennessee, for the appellant, Mark Anthony Clemmons.

Jonathan Skrmetti, Attorney General and Reporter; Courtney N. Orr, Senior Assistant Attorney General; and Jason L. Lawson, District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

a. Guilty Plea and Sentencing Proceedings

In May 2017, Petitioner entered a guilty plea to possession with intent to sell not less than one-half ounce nor more than ten pounds of marijuana; possession with intent to

sell a Schedule III controlled substance (dihydrocodeinone); and two counts of sale of not less than one-half ounce nor more than ten pounds of marijuana, with the sentence to be determined by the trial court. *State v. Clemmons*, No. M2017-01756-CCA-R3-CD, 2018 WL 3116636, at *1 (Tenn. Crim. App. June 25, 2018).

At the guilty plea hearing, Petitioner testified that he had attained a General Education Diploma (GED) and that he understood that he faced an aggravated perjury charge if he gave false information during the plea hearing. The prosecutor announced that Petitioner would be entering an open guilty plea to four counts of the nine-count indictment, as follows: Count 1, possession of more than one-half ounce but less than ten pounds of marijuana for resale; Count 2, possession of dihydrocodeinone for resale; Count 8, sale of more than one-half ounce but less than ten pounds of marijuana; and Count 9, sale of more than one-half ounce but less than ten pounds of marijuana.

The State announced that it was declining to prosecute the remaining five counts, which were reflected in the indictment as follows: Count 3, unlawful possession of a weapon by a convicted felon; Count 4, possession of a firearm during the commission of a dangerous felony; Count 5, simple possession of alprazolam, a Schedule IV controlled substance; Count 6, simple possession of cocaine, a Schedule II controlled substance; and Count 7, possession of drug paraphernalia.

The trial court asked Petitioner if the prosecutor had accurately summarized the plea agreement, and he answered affirmatively. The court examined a document entitled, "Request for Acceptance of Plea of Guilty, Petition to Waive Trial by Jury, and to Waive an Appeal," and Petitioner affirmed that he had signed the document on its front and back and that trial counsel had reviewed his constitutional rights with him. The court asked, "And further, did you understand what your minimum and maximum sentences and fines were on all these cases, these [nine][1] counts, had you proceeded to trial and been convicted of them?" Petitioner answered affirmatively. Petitioner also agreed that the "manner of service, length, range, concurrent, consecutive will all be determined" at the sentencing hearing. The court asked if there was "anything about what you're making your decision on today that you don't understand or have questions about," and Petitioner responded negatively.

The State provided the following factual basis for the plea:

> Your Honor, starting with September 18th, and also the facts as well on October 1st, these are Counts [8 and] 9 . . . that he's pleading guilty to.

[1] During the initial part of the guilty plea hearing, the prosecutor misspoke and stated that the indictment had ten counts; the trial court later noticed the error, and the prosecutor verified that it was a nine-count indictment.

On that day, a confidential informant working with the Lebanon Police Department notified the detectives that [Petitioner] was selling marijuana and that the informant could purchase marijuana from him.

. . . .

On each of those occasions he reached out to [Petitioner] and a location and a price was agreed upon. On each of those days the informant was searched by the detective making sure there were no drugs or money on his person, and then on each of those days the informant left, went and met with [Petitioner], and at that time there was a hand to hand exchange in which [Petitioner] gave the informant the drugs. The informant gave [Petitioner] the money.

On some of these occasions, it looks like on September 18th, there was also another individual there who participated in the buy as well, but it was arranged and set up through [Petitioner] and it was received from him. And then the same on October 1st. On that day it occurred directly with [Petitioner] and officers were in surveillance positions and were able to see [Petitioner] as he met with the informant.

So on each of those days the drug sale was consummated. The informant then took the drugs that had been purchased and went back and met with the detectives. Those drugs were sent to the Crime Lab and they were confirmed to be marijuana on each occasion greater than one-half ounce.

Based on these offenses there was a search warrant that was obtained for a search of [Petitioner]'s residence on October 3[], 2014. Officers of the Lebanon Police Department executed that search warrant and whenever they executed that search warrant they did find greater than one-half ounce of marijuana present as well as dihydrocodeinone pills.

Based on the previous experience of purchasing from [Petitioner] and the items that were found in the house as well as interviews with various people who were present at the house, the officers did charge him with possession of the marijuana and the dihydrocodeinone for resale. Those drugs were submitted to the Crime Lab and in Count 1, confirmed to be marijuana greater than one-half ounce, and in Count 2, confirmed to be dihydrocodeinone pills. Those would be the facts.

Petitioner acknowledged those facts as true. The court informed Petitioner that he had the right to a jury trial, to remain silent, to testify, to cross-examine witnesses, to present proof, and to appeal. Petitioner affirmed that he understood his rights and that he had decided to waive his rights and plead guilty. He denied having any questions. The court told Petitioner that, if he incurred future criminal charges, he would "probably" receive a more severe sentence based upon having pled guilty in this case. Petitioner stated that he understood and that he did not want to change his decision based upon that information. Petitioner affirmed that he was satisfied with trial counsel's representation and that trial counsel had "done everything he could do given the facts and circumstances in [his] case." Petitioner denied that anyone had pressured him, made him promises, or forced him to plead guilty or that he was under the influence of medication at the time of the hearing.

When asked by the trial court whether he would pass a drug test, Petitioner stated that he had used marijuana the day before the plea hearing. The court stated,

> Of course you understand you won't be allowed to do that while you're on probation. The probation officer is making a note and they're going to screen you. And when they screen you again next time make sure that stuff is gone or where it should be level[-]wise. Do you understand that?

Petitioner answered affirmatively. Petitioner pleaded guilty and stated that it was his decision. The court reviewed the relevant offenses and stated that Petitioner was pleading guilty to three Class E felonies and one Class D felony. Petitioner indicated that this was correct and that he was pleading guilty because he was, in fact, guilty. The court found that Petitioner was competent, that the plea was freely and voluntarily entered, and that Petitioner's decision was knowingly and intelligently made.

At the June 28, 2017 sentencing hearing, Petitioner testified that, while he had been released on bond, he had "picked up" additional charges in Cheatham County related to his possessing marijuana and Xanax and that he understood that it was a problem. Petitioner averred that the drugs were for his personal use. Petitioner stated that he had been using marijuana consistently since he was fifteen years old for anxiety problems, with the exception of a three-year period of incarceration; he noted that he had access to marijuana in prison but chose not to use it. Petitioner said that he had five children between ages one and twenty-two and worked driving a dump truck; he also stated that he owned a kennel.

Petitioner averred that he sold drugs to support his own drug habit and that he had never sought drug treatment. He opined that drug treatment would be beneficial to him and that he wanted to complete intensive outpatient treatment so that he could continue to support his family. When asked what kind of assurance he could give to the trial court that he could succeed if given an alternative sentence, Petitioner responded that he had accepted

that what he did was wrong, that he cared for his children and worked, and that he had very little free time. Petitioner stated that it had been two months since he smoked marijuana and took Xanax and that he suffered from anxiety attacks in public places. Petitioner stated that he did not want any family members at his sentencing hearing because he had caused them enough pain.

On cross-examination, Petitioner acknowledged that, in spite of his testimony that he had not used drugs for two months, he had written in a June 30, 2017 sentencing questionnaire that he could not pass a drug test; the sentencing hearing was on July 28, 2017. Petitioner stated that he understood the consequences of his actions and agreed that he had five prior felony convictions. He affirmed that his cocaine-related convictions occurred when he was using cocaine. Petitioner stated that he was in prison from 2007 until 2009 after violating his probation. Petitioner had also violated probation in 1997 and 1999; violated community correction in 1997; and had "a Wilson County general sessions violation" in 2000.

Petitioner testified that the search warrant in this case was based upon his prior drug sales and that his then-two-year-old child was present when the police executed the warrant. He acknowledged telling the police that he was selling drugs because his barbecue business was not doing well, not because he suffered from anxiety. Petitioner further acknowledged telling the police that he would purchase one pound of marijuana weekly, sell ten ounces, and use the rest of it. He agreed that this pattern continued for three or four months. Petitioner acknowledged that he knew he was not supposed to have a gun and that the gun found in his house was his. He affirmed that he also had several previous misdemeanor convictions.

Petitioner stated that he earned his GED while incarcerated at age seventeen. Petitioner agreed that he completed a prison pre-release program in 2009 and a behavioral modification program in 2008. He acknowledged that, in spite of completing the programs, he committed more criminal offenses. Petitioner stated that he had not been under a doctor's care for anxiety because he did not have health insurance, although he noted that he had gone to the emergency room previously. He said, though, that "[w]hen [he] first started out [he] went to a regular doctor." He agreed that he had never been prescribed anxiety medication.

On cross-examination, Petitioner testified that the gun found in his house was not his but that he told the police it belonged to him because the police threatened to call the Department of Children's Services and have his child removed from his custody. Petitioner denied that he owned any weapons or had them at his home. He averred that, if he had health insurance, he would go to a doctor. Petitioner stated that no one had suggested mental health treatment to him "before the last couple of months" and that he had contacted a mental health provider but that their schedule was "backed up."

The State's Notice of Intent to Seek Enhanced Sentence listed the following prior convictions and details as the basis for sentence enhancement:

Charge	County	Date
Schedule II Drugs Cocaine	Wilson	10/10/1996
Schedule II Drugs Cocaine [Sale]	Wilson	11/19/1999
Schedule II Drugs Facilitation	Wilson	6/1/1996
Simple Possession 3rd Offense	Davidson	8/10/2006
Carjacking	Wilson	11/14/1998

The presentence report contained six pages listing Petitioner's prior charges and convictions, dates of the offenses, dates of the convictions, and the courts of the convictions, and the docket numbers. *See Clemmons*, 2018 WL 3116636, at *1.

The trial court stated that it had considered the evidence presented at the sentencing hearing, the presentence report, the principles of sentencing, arguments as to sentencing alternatives, the nature and characteristics of the criminal conduct, applicable mitigating and enhancement factors, and statistical information on sentencing practices for similar offenses.

Although the trial court did not explicitly find that Petitioner was a Range III offender, the court asked the parties, "Is there an agreement that he is in fact a persistent, Range III offender with these five felony convictions? Is there any dispute on that point?" *Id.* Trial counsel responded, "I'm not disputing the convictions." *Id.* The court also commented that the Administrative Office of the Courts' website did not contain statistics for persistent offenders and observed, "There's no certain category" listed for the number of convictions Petitioner had. *Id.* In addition, the judgment forms reflect that Petitioner was a Range III offender.

Relative to enhancement factors, the court applied factor (1), that Petitioner had additional criminal behavior beyond that necessary to establish his offender range, noting Petitioner's "numerous misdemeanors . . . ; theft, DUI, multiple driving on [a] revoke[d license], escape, [a failure to appear], violations of probation, and at least one parole revocation"; factor (8), that Petitioner failed to comply with the conditions of a sentence involving release into the community, noting his prior probation violations and parole revocation as well as his admitted drug use while on bond and new Cheatham County charges; and factor (10), that Petitioner had no hesitation about committing a crime when the risk to human life was high, noting that "anything does happen during drug transactions." *See* Tenn. Code Ann. § 40-35-114(1), (8), (10). The trial court found that no mitigating factors applied.

The trial court noted that it was "impressed with [Petitioner's] demeanor on the stand. He does appear to be regretful of his behavior. Is it because he's gotten caught and has other charges pending, [the court] doesn't know, but [the court] credit[s] that."

The trial court imposed a twelve-year sentence for the Class D felony and five years for each Class E felony. *See Clemmons*, 2018 WL 3116636, at *1. The court noted that it was imposing the maximum sentence for a Range III offender convicted of a Class D felony. *Id.* The court also stated that it was going to "split the difference" of the four to six years allowed for a Range III sentence for Class E felonies in light of Petitioner's demeanor at the sentencing hearing. *Id.*

Relative to sentencing alternatives, the trial court found that a sentence of confinement was necessary to protect society by restraining Petitioner given his long history of criminal conduct and that measures less restrictive than confinement had frequently or recently been applied unsuccessfully to Petitioner. *See* Tenn. Code Ann. § 40-35-103(1)(A), (C). The court also noted that Petitioner's recent arrest "indicates to [the court] that he does not yet understand the seriousness of what this behavior is." *See* Tenn. Code Ann. § 40-35-103(1)(B) ("[C]onfinement is necessary to avoid depreciating the seriousness of the offense").

Relative to consecutive sentencing, the trial court found "no question" that Petitioner was a professional criminal who had knowingly devoted his life to criminal acts as a major source of livelihood. *See* Tenn. Code Ann. § 40-35-115(b)(1). The court noted the presentence report's "page after page after page of continued [criminal] conduct" and that Petitioner's five prior felony convictions were based upon conduct occurring on different dates. The court found that Petitioner had exhibited a sustained intent to violate the law "for years." The court also found that Petitioner was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high, noting the dangerous nature of "run[ning] with these kind of folks" and the presence of Petitioner's young child in the house. *See* Tenn. Code Ann. § 40-35-115(b)(4). The court ordered consecutive service of all sentences, for an effective twenty-seven-year sentence. *See Clemmons*, 2018 WL 3116636, at *1.

On direct appeal, Petitioner contended that the State's Notice of Intent to Seek an Enhanced Sentence was defective and argued that the trial court improperly classified him as a Range III offender. *Id.* After concluding that Petitioner had waived both issues for failure to make a contemporaneous objection at the sentencing hearing, this court found that Petitioner was not entitled to plain error relief because he had not shown that a clear and unequivocal rule of law was breached. *Id.* at *3. This court noted that Petitioner had not argued that prejudice resulted from any defects in the State's notice; similarly, this court found that, in light of the trial court's discussion of Petitioner's Range III status and

trial counsel's and Petitioner's acknowledgment of his prior convictions, that "the [trial] court's lack of explicit findings as to each qualifying prior conviction is inconsequential." *Id.*

b. Post-Conviction Proceedings

Petitioner subsequently filed a timely pro se petition for post-conviction relief alleging, in relevant part, that he received ineffective assistance of counsel and that his plea was unknowingly and involuntarily entered because he was unaware that he was subject to consecutive sentencing or his status as a Range III offender. The post-conviction court appointed first post-conviction counsel.[2] Petitioner then filed an amended pro se petition, which included a collateral attack on three of Petitioner's guilty-pleaded convictions arising before the instant case and complaints about first post-conviction counsel. The post-conviction court dismissed the pro se amended petition as untimely.

On November 22, 2021, Petitioner, through counsel,[3] filed a second amended petition. The second amended petition specified, in relevant part, that trial counsel provided ineffective assistance by advising Petitioner to plead guilty "without prior determination of sentence range or consecutive/concurrent sentencing." Petitioner averred that he would not have agreed to plead guilty if he knew he might be subject to Range III sentencing or consecutive sentences.

At the hearing, original defense counsel ("original counsel") testified that, at the time he represented Petitioner, he and the prosecutor "had a rather heated argument/exchange in the courtroom" in an unrelated case. Original counsel stated that, after the argument, the prosecutor made a twenty-year plea offer to Petitioner. Original counsel noted his belief that it was an "excessive offer," although he did not know if the offer was a result of Petitioner's case or the argument. Original counsel told Petitioner about his disagreement with the prosecutor and gave Petitioner the option to hire new counsel. Petitioner chose to retain trial counsel, and original counsel refunded part of Petitioner's fee. Original counsel provided trial counsel with his file and "had a couple of phone calls" about the representation but otherwise did not have further involvement in Petitioner's case.

[2] Although no motion from first post-conviction counsel to withdraw or order substituting second post-conviction counsel appears in the record, second post-conviction counsel was representing Petitioner at the time of the March 21, 2022 post-conviction hearing.

[3] The second amended petition indicates that the post-conviction court had directed Petitioner to file the amended petition at a hearing held November 8, 2021. We note that the record does not contain the last page of the second amended petition, so it is unclear who drafted it. The State's response to the second amended petition indicates that the response was served on second post-conviction counsel.

On cross-examination, original counsel identified a copy of the indictment and agreed that the counts related to three events on separate days—two drug sales and the execution of a search warrant. Original counsel stated that he and Petitioner discussed Petitioner's prior criminal record; counsel recalled that Petitioner had at least four felony drug convictions. Although original counsel could not remember if Petitioner had a carjacking conviction, he agreed that the State would know Petitioner's criminal record. Original counsel agreed that two of Petitioner's charges in this case related to weapons and that, "especially after a carjacking, the State would frown upon" the four drug charges and two weapons charges. Original counsel was also made aware of the Cheatham County charges that occurred in the pendency of this case; he noted that they occurred "about the time [he] got away from" Petitioner's case.

Original counsel testified that he and the prosecutor had interacted during several cases over a period of years and that, in original counsel's experience, the prosecutor made plea offers that were "more on the harsh side." Original counsel stated, though, that he wanted to make sure Petitioner was not "hindered by [his] actions" of arguing with the prosecutor in unrelated case. Original counsel agreed that the argument was the only one he and the prosecutor had had and that the unrelated case had been a drug case. He affirmed that the disagreement related to his wanting the prosecutor to make the same offer to his client that was made to a co-defendant, but the prosecutor refused. Original counsel agreed that the prosecutor had never communicated to him that any animosity existed between them, and he said, "This . . . is just my moral compass for a client that I represent, trying to do them right." Original counsel was aware that Petitioner eventually received a sentence that was longer than the plea offer.

On redirect examination, original counsel testified that he thought the plea offer was "pretty extreme for the . . . amount of marijuana and what transpired." He noted that he thought they "had a legitimate argument about the weapon" and that, in his opinion, marijuana should not be treated as harshly as illegal drugs like methamphetamine or heroin.

On recross-examination, original counsel acknowledged that "[t]here was . . . hydrocodone that was possessed for resale in this case" and that he understood the State's point of view that Petitioner had prior drug sales on his record and was continuing to sell drugs. Original counsel affirmed that the State might not agree with his position that a defense existed to the weapons charges. Original counsel also stated that he understood the State's position in increasing its offer in response to Petitioner's possessing a gun after committing a prior violent offense like carjacking.

Petitioner testified that he was forty-three years old and that he had been arrested in May 2016 on the charges in this case before posting bond. Petitioner retained original counsel, and he denied that original counsel ever advised him about the expected outcome of the case. After a court date, original counsel had Petitioner meet him at his office, and

counsel communicated the "heated discussion" he and the prosecutor had in open court. Original counsel conveyed the twenty-year plea offer and stated that it might be in Petitioner's best interest to seek a new attorney. Original counsel told Petitioner that the plea offer was "a little too harsh" for a marijuana charge and did not recommend that Petitioner accept it. Petitioner decided to retain trial counsel, and original counsel refunded part of his fee.

Petitioner testified that he and trial counsel "went over the case," but he denied that trial counsel told him any anticipated outcome. He recalled that trial counsel "talked about he didn't think it was that bad[.]" Petitioner stated that, at his first court date, trial counsel was late and was not present when the case was called; trial counsel eventually arrived and asked for a continuance to familiarize himself with the case. Petitioner said that the twenty-year offer remained open during trial counsel's representation. Petitioner denied that trial counsel ever spoke to him about the case outside of court dates.

Petitioner testified that, when he incurred the Cheatham County charges, his bail bondsman wanted to revoke his bond. Trial counsel told him that if he would "just go ahead and plead . . . to these four charges," the bail bondsman would not revoke his bond, and he would return to court for a sentencing hearing. Petitioner noted that the bail bondsman attended the guilty plea hearing, although he did not speak to Petitioner personally. Petitioner averred that, were it not for the bond issue, he would not have pleaded guilty. He stated that he cared about the bond issue because he "didn't want to get locked up."

Petitioner denied that trial counsel told him an outcome for accepting the plea agreement or what to expect at the sentencing hearing. Petitioner stated that trial counsel talked about "trying to get probation . . . . and if . . . any, a small sentence." Petitioner agreed that the trial court imposed a twenty-seven-year sentence, which was not in a range that trial counsel ever discussed with him. Petitioner noted that trial counsel never discussed his receiving even a ten-year sentence.

Petitioner identified the guilty plea form and testified that he did not fill out the form, although he signed it. Petitioner said that trial counsel brought the form to him and told him that the form related to his pleading guilty to the four relevant charges. Petitioner denied that trial counsel discussed the minimum and maximum sentences on each count or the section of the plea form listing that information. Petitioner denied that trial counsel ever talked with him about facing a possible sentence of "57, 58 years" or about the possibility of consecutive sentencing. Petitioner stated that he did not know the difference between concurrent and consecutive sentencing when he signed the form, and he denied that defense ever explained what those terms meant. Petitioner similarly denied that trial counsel reviewed with him the section of the form specifying Petitioner's constitutional rights. Petitioner agreed with the statements in the form that he had received a copy of the

indictment, discussed it with his attorney, and understood the nature of the charges and any applicable defenses. Petitioner denied reading a statement on the back of the form that affirmed that the signatory had read the full agreement and understood it, and he also denied that trial counsel instructed him to read the full agreement or that particular section before signing.

Petitioner testified that a "few minutes" passed between the time trial counsel handed him the form and when he signed. He maintained that, during this period, trial counsel "was just telling [Petitioner] about the four cases that [he] was pleading out to." Petitioner averred that he did not know that signing the plea form meant agreeing with everything contained in the document.

Petitioner testified that he recalled the trial court's explaining his constitutional rights; he denied that trial counsel ever discussed his rights with him, in spite of his having testified to the trial court that trial counsel did. Relative to handwritten notations reading "nolle" on the plea form beside blanks for Counts 3 through 7, Petitioner stated that he did not know what they meant and that trial counsel did not explain it to him. He acknowledged, though, that the term corresponded to counts to which he did not plead guilty. Petitioner denied that trial counsel explained what an "open" plea was. Petitioner stated that he understood from looking at the form that he would be ordered to pay $8,000 in fines.

Relative to a handwritten notation on the plea form that read, "Sentencing hearing regarding length of sentences, manner of service, and concurrent/consecutive nature of sentences, and range of punishment," Petitioner testified that the notation was not present when he signed the form. He said, though, that he did not understand what the notation meant at the time he signed the form. Petitioner then stated that, if the notation had been on the form at the time he signed it, he would not have understood its meaning.

Petitioner testified that trial counsel never explained "anything" about the plea agreement other than that he was "pleading out to the four charges right there." Petitioner stated that trial counsel never discussed the "terms" of the plea agreement relative to sentencing. The following exchange occurred:

> Q. So, what did you think you were doing when you signed this plea agreement?
>
> A. Plead out . . . I thought I was pleading out to the four charges right there.
>
> Q. Which, to what effect? I mean, what was going to happen to you pleading out to those four charges?

A. I didn't think that I was going to get 27 years.

Q. Why not? Who led you to believe anything differently?

A. Wasn't nothing said about . . . 27 years. Wasn't nothing said about no sentence. It was just that I would come back later, at a later date for a sentencing hearing.

Petitioner testified that, before the guilty plea hearing, trial counsel told him that he would try to get Petitioner a probationary sentence. Petitioner recalled the trial court's reviewing the guilty plea form with him and telling the court that he had marijuana in his system. Petitioner remembered the court's discussing his not being able to use drugs on probation. Petitioner stated that, based upon that exchange, he was "under the impression [he] might get a probation."

Petitioner testified that he was unintentionally late for his sentencing hearing because he did not realize that he needed to be at the 8:30 a.m. docket call. He noted that trial counsel was also late that day. Petitioner stated that he was worried about getting into trouble for the error but that he would not have worried if he had known that he would be sentenced to twenty-seven years in prison.

Petitioner identified a copy of the State's notice of intent to seek an enhanced sentence; he denied that he had seen it before the day of the post-conviction hearing. He denied that trial counsel ever told him about the notice or explained what it meant, although he remembered the prosecutor's telling the trial court at the sentencing hearing that he had filed the notice. Petitioner averred that he tried to say something to trial counsel about it and that trial counsel "shushed" him. He denied that trial counsel explained the notice to him afterward.

Petitioner indicated his understanding that he would be "in the same boat" he was before entering his guilty plea if post-conviction relief was granted, including "a nine-count indictment with potentially 50-something years' worth of total imprisonment" if he was convicted. Petitioner stated that he was going to be eligible for parole the following year but that because he was "already serving time now," he was willing to risk going to trial and receiving a fifty-seven-year sentence. He maintained that he was improperly advised before entering his guilty plea. Relative to his having testified before the trial court that he understood the plea agreement when he "hadn't even read the thing," Petitioner stated that he was "going off the advice of [trial] counsel."

Petitioner testified that, at the time of the guilty plea and sentencing hearings, he did not understand what a Range III or persistent offender was. He denied that trial counsel ever explained sentencing ranges to him. Petitioner remembered going to court in

connection with his previous criminal cases; he did not recall whether it was explained to him that, by pleading guilty to the prior charges, he could receive an enhanced punishment in future cases. He denied that trial counsel explained that his criminal record would affect the "severity" of the sentence the trial court would impose. Petitioner averred that he would not have waived his right to a jury trial and pled guilty if he had known he would be subject to sentencing as a Range III offender.

Relative to the factual basis for the guilty plea, Petitioner testified that he shared his home with his brother and another roommate. He claimed that the gun, dihydrocodeinone pills, and Xanax pills in the house were not his; he noted that the dihydrocodeinone was found on top of a refrigerator, that the gun was in a drawer in his brother's bedroom, and that the Xanax was found "in the other room." He said that he did not know to whom the dihydrocodeinone and Xanax belonged. Petitioner stated that he pled guilty to possession of the pills "[t]hinking that . . . [his] sentence wasn't going to be harsh." He denied telling trial counsel that the pills were not his. Petitioner acknowledged that he sold and used marijuana at the time and that he was guilty of the marijuana-related offenses.

Petitioner acknowledged that he testified at the guilty plea hearing that he was pleading guilty because he was guilty. Petitioner initially affirmed that this was true but then stated that he "never sold them pills. [He] never knew about them at all." Petitioner averred that he did not know about the pills until he saw the indictment. He agreed that the police never discussed the pills with him while executing the search warrant. Petitioner stated that his brother had a prescription for dihydrocodeinone.

Petitioner testified relative to the Cheatham County charges that he gave his car to an unidentified person who was going to "take over the note," that the person returned the car to him, and that the same week, the police pulled him over and found Xanax and marijuana in the car. Petitioner denied that the Xanax was his, although he admitted to possessing the marijuana. Petitioner stated that the resulting Cheatham County charges had been "resolved." He acknowledged that he continued to be "involve[d]" with marijuana pending sentencing in this case.

Petitioner testified that he texted and called trial counsel but that he never responded, and that the only time he saw trial counsel was in court. He averred that he had seen post-conviction counsel "a lot" more than trial counsel.

On cross-examination, Petitioner testified that he had pled guilty to misdemeanor offenses and, on five separate occasions, to felony offenses before incurring the charges in this case. He agreed that he had "quite a bit of experience, standing in a courtroom, pleading guilty in front of a judge." Petitioner acknowledged that, at the sentencing hearing, he and the prosecutor discussed his criminal record, his previous sentences in confinement, the programs he completed in prison, and the State's taking issue with

Petitioner's continuing to commit new crimes. He maintained, though, that he never considered the possibility that he would go back to prison after pleading guilty to four new felonies. Petitioner also maintained that he thought it was possible for him to receive probation after having served a prison sentence. Petitioner acknowledged that he did not know what was going to happen at the sentencing hearing and that he knew at the time he pled guilty that he might receive probation or a sentence of confinement.

Petitioner testified that he and trial counsel reviewed his case at their first meeting at trial counsel's office. He agreed that he and original counsel had also reviewed the case and had met several times. Petitioner stated that he could have driven to trial counsel's office on additional occasions; however, Petitioner did not go to the office in an effort to speak to trial counsel. Petitioner denied that he and trial counsel agreed to meet at court dates. Petitioner agreed that trial counsel requested a continuance because he was still working on the case and needed to "get up to par[.]" Petitioner affirmed that his main complaint was with trial counsel's performance during the plea-bargaining process.

Petitioner agreed that the State's keeping the plea offer the same after trial counsel began his representation indicated that it did not matter who Petitioner's attorney was. Petitioner acknowledged that the trial court asked him questions about the plea form and Petitioner's having signed it to ensure Petitioner understood the plea agreement.

Petitioner acknowledged that the plea form included a statement that read, "I understand the minimum and maximum penalties provided by law for each of my charges." He also acknowledged that a handwritten list of the counts of the indictment was included with the minimum sentence and fine, as well as the maximum sentence and fine. Petitioner agreed that the information was on the form on the day he pled guilty. Petitioner maintained, though, that he did not understand that the list included his maximum sentences. He stated, "I . . . [saw] what was on there, but . . . it was never explained to me what they [were]. I was . . . told what was at the bottom of that paper." Petitioner agreed that he had a GED and was literate. He further agreed that he saw the information about the maximum sentences on the form on the day he signed it.

Petitioner testified that, on the day he pled guilty, he understood what a "stacked" sentence was and that he knew concurrent meant "at the same time." He acknowledged the part of the plea form that stated that his attorney had explained the difference between concurrent and consecutive sentencing. Petitioner maintained that he did not understand that his sentence was to be decided later.

Petitioner acknowledged that, in the guilty plea hearing transcript, the prosecutor read aloud the offenses to which Petitioner would plead guilty and announced that they would schedule "a sentencing hearing to determine the length, manner of service, concurrent or consecutive nature, and the range of punishment, everything pertaining to

this sentence." He agreed that the prosecutor's wording was identical to the written notation on his plea form, although he insisted that the written notation was not present when he signed it. Petitioner acknowledged that the trial court asked him if the prosecutor's summary accurately reflected the agreement; whether he understood the minimum and maximum sentences if he proceeded to trial; and to verify that Petitioner was pleading guilty to four counts and that five counts would be dismissed, with the sentences to be determined at a later sentencing hearing, and that Petitioner had answered the court's questions affirmatively. Petitioner agreed that, although he contended that trial counsel had not reviewed with him the terms of the plea agreement or his constitutional rights, the court informed him of the terms and of his constitutional rights. Petitioner affirmed that he understood his rights; he later asserted that he meant that he now understood his rights, but did not at the time of the plea hearing.

Petitioner further agreed that he told the trial court he was satisfied with trial counsel's representation and that he did not communicate to the court his complaints about trial counsel's failure to meet with him and review the plea form. He denied that his post-conviction petition had "nothing to do with the job [trial counsel] did" and was filed "because of the sentence [he] got." Petitioner testified that he did not understand at the time of the guilty plea hearing that, even if the bail bondsman asked the trial court for Petitioner's bond to be revoked, it was the court's decision whether to revoke it.

Petitioner acknowledged that he received a twelve-year sentence related to the dihydrocodeinone pills and five years each on the marijuana-related charges. He agreed that he told the trial court that he was pleading guilty because he was guilty, although he now claimed that the pills were not his. Petitioner affirmed that he knew from his experience that he could have gone to trial, even if his bond had been revoked, and that he had a trial date scheduled at the time of the guilty plea hearing. Petitioner stated that trial counsel did not promise that he would receive probation, and he agreed that he knew the sentence would be determined by the trial court. Petitioner acknowledged that trial counsel "did what he said he was going to do" and argued for a probationary sentence but that the trial court accepted the State's position instead.

Petitioner agreed that trial counsel never gave him a number related to his probable sentence. Petitioner examined the State's notice to seek an enhanced sentence and acknowledged that it was stamp-filed before his plea hearing. He agreed that nothing in the notice surprised him, that he knew his prior felony convictions, and that he knew he had been to prison. Petitioner knew his criminal history would be discussed at the sentencing hearing. Petitioner agreed that he had testified under oath at the guilty plea hearing and that he told the truth. Petitioner stated that he was not on the lease at the residence that was the subject of the search warrant, although he had been staying there for two weeks. He agreed that the relevant marijuana sales took place at the residence.

Petitioner indicated his understanding that, as a convicted felon, he could not be in a house where a gun was kept.

On redirect examination, Petitioner explained that he answered the trial court's questions affirmatively at the guilty plea hearing when, in fact, he did not understand the plea agreement because trial counsel told him "to agree to everything that was being asked." He stated that, although he now understood what concurrent and stacked sentences were and what range of punishment and "manner of service" meant, he did not understand these terms at the time he pled guilty. Petitioner did not know what alterations were made to the plea form after he signed it. Petitioner maintained that, based upon his interactions with trial counsel, he did not believe he would go to prison or receive "as much time as [he] got."

Upon examination by the post-conviction court, Petitioner testified that he knew the State had offered a twenty-year plea agreement and that it did not change when he switched attorneys. Petitioner indicated that he understood the plea-bargaining process, including both sides compromising on the sentence. He denied, though, that it "was in [his] mind throughout that [twenty years] was a definite possibility[.]" Petitioner maintained that he pled guilty to avoid a bond revocation and "buy[] 60 days of freedom." Upon further redirect examination, Petitioner clarified that he felt that, if his offenses were "that serious," his bond would have been revoked and he would not have been permitted to leave after pleading guilty.

Trial counsel testified that he had practiced law for almost twenty-eight years and that, for twenty-two years, his practice had been almost all criminal defense. He stated that he and Petitioner had a "great relationship" throughout the representation. Trial counsel recalled that Petitioner felt that he had received an unfair plea offer and that a trial date had been set before he began representing Petitioner. Trial counsel recounted several details of the facts of Petitioner's case, and he affirmed that he received and reviewed the discovery materials, talked with Petitioner about the discovery, and spoke with the prosecutor about it. Trial counsel stated that he felt that the defense "had an argument" about the gun because multiple people lived at the house, although it "was a little closer call on the pills" because they were in a common area. Trial counsel said that he did not think they would be successful in defending against the marijuana charges. He noted that he was "a trial lawyer" and was preparing for trial.

Trial counsel testified that he felt he did not obtain enough information about Petitioner's criminal history, although he spoke with Petitioner about it. Trial counsel stated that he received the State's notice of intent to seek an enhanced punishment one or two weeks before the plea hearing and that "things kind of got a little more serious about where we were." Trial counsel did not recall showing Petitioner the notice; he noted, "[W]hen we got to court, some of the things that were going on with the bond and the new

arrest that I didn't know about kind of affected our conversation that day and what we needed to do, before it got away from us." Trial counsel stated that he had "talked [the bonding company] off of a ledge" relative to their wanting to "see if they could surrender his bond that day."

Trial counsel testified that he and the prosecutor were discussing Petitioner's options and that the prosecutor stated that Petitioner could "take a chance" and enter an open plea if he felt the twenty-year offer was unfair. Trial counsel opined that the existing plea offer was "rather harsh" based upon his understanding of the facts. He noted that he had "vehemently" argued for the State to drop the gun charges because the gun did not belong to Petitioner and that Petitioner ultimately did not plead guilty to the gun charges.

Trial counsel testified that he discussed the open plea with Petitioner and that Petitioner asked him what he thought might happen at the sentencing hearing. Trial counsel stated that he told Petitioner, "If we have a really good sentencing hearing . . . there's all kinds of possibilities. Obviously, you could go to jail, [the court] could give you probation, running everything concurrently, but I think it will be something in between." Trial counsel stated that he hoped the court would order a community corrections or probationary sentence or split confinement. Trial counsel said that he made no promises and told Petitioner to "get [him]self together, and do whatever [he] need[ed] to do, because he couldn't afford to go to jail that day." Trial counsel noted that he could not predict what a judge would do and could not guarantee an outcome even if they went to trial. Trial counsel stated that he told Petitioner that they would "try very hard" for an alternative sentence.

Trial counsel testified that the handwritten notations on the plea form were all present when Petitioner signed it. To counsel's recollection, the prosecutor filled out the form as they sat beside one another. Trial counsel stated that, after the form was completed, he reviewed it with Petitioner. Trial counsel said that he told Petitioner his sentencing exposure, including the minimum and maximum sentences, the counts to which Petitioner was pleading guilty, the counts that would be dismissed, and Petitioner's rights. Although counsel did not recall the exact conversation, he knew that he further explained to Petitioner that there would be a sentencing hearing, that the State would ask for "more time," that counsel would ask for probation, and that he discussed the possibility of split confinement or an alternative sentence. Trial counsel said that Petitioner was concerned about whether there was a chance he could receive an alternative sentence. Trial counsel did not recall if he discussed the sentencing range with Petitioner that day; he noted that, although he was aware Petitioner had prior felony convictions, "that's something that always has to be reviewed by the presentence [report] writer to make sure . . . what counts and what doesn't count." Trial counsel stated that he and Petitioner read over the plea form together and that he told Petitioner to sign if he had no questions. Petitioner signed the form.

Upon examining the minimum and maximum sentences listed on the plea form, trial counsel acknowledged that it included sentences for Ranges I, II, and III. He agreed that the maximum sentence given was for a Range III, persistent offender, and that he reviewed that sentencing possibility with Petitioner. Trial counsel did not recall if Petitioner had any specific questions other than his concern about the possibility of an alternative sentence.

Trial counsel denied that he told Petitioner to answer all of the trial court's questions affirmatively "no matter what the Judge asked[.]" He noted that he did not force anyone to take a plea offer because "it's their life, not mine." Trial counsel acknowledged that the bonding company presented a "different issue on top of . . . the normal pressure of, . . . do you take a plea or do we go to trial" because Petitioner had been charged with new offenses. Trial counsel stated that he saw Petitioner sign the plea form and that he did not feel Petitioner had any reservations about doing so. Petitioner never told counsel that he did not understand something during the plea hearing. Trial counsel said that, had Petitioner indicated that he did not understand the plea agreement, he would have stopped and asked Petitioner what he did not understand or considered whether they needed to consider another course of action. Trial counsel stated that, similarly, had Petitioner not wanted to proceed with the plea agreement at any point, they would not have entered the guilty plea.

Trial counsel testified that he believed Petitioner wanted to plead guilty and that, based upon what he knew at the time, it was the correct decision. Trial counsel said that he and Petitioner were hopeful and that he was "shocked" and upset at Petitioner's sentence. Trial counsel noted that, in hindsight, he would rather have tried the case.

Trial counsel testified that he always reviewed constitutional rights with defendants and that Petitioner did not ask him any questions about his rights. Trial counsel affirmed that the trial court also reviewed each of Petitioner's constitutional rights at the plea hearing. Trial counsel denied that he had any concern that Petitioner did not understand what he had done by pleading guilty.

Relative to Petitioner's testimony that he had "shushed" Petitioner during the sentencing hearing, trial counsel testified that he did not recall such an instance but that he might have been trying to listen to a witness or discussion and did not want to miss anything. He noted that he usually asked defendants to write down any questions they had and that he would not ask a defendant to be quiet to "gloss over something[.]" Trial counsel recalled that some discussion had occurred at the hearing about "the enhancement issue."

Trial counsel affirmed that Petitioner testified at the sentencing hearing and that, after a break, the trial court announced that it had considered the enhancement and mitigating factors and the purposes and principles of sentencing. Trial counsel read the following remarks from the trial court at the sentencing hearing:

> I don't have any choice . . . but to order these sentences to run . . . consecutively to serve. I'm going to stack them, five plus five plus five plus 12. That's 27 years. It doesn't bring me joy to do this, [Petitioner], but when you have this extensive of . . . a history of drug abuse, as of today you have nine felony convictions, and now two more that you just picked up . . . within the last four months. It would indicate to me either an inability or refusal to understand the seriousness of your conduct, [Petitioner]. That will be the judgment of the Court. I will direct the State to prepare a judgment to that effect.

On cross-examination, trial counsel acknowledged that he had phrased much of his direct examination testimony in terms of what he habitually or customarily did. He noted that he could not remember exact conversations that occurred five or more years ago. Trial counsel stated, though, that he remembered specifically reviewing the sentencing exposure on each count of the indictment with Petitioner, although he knew he did not discuss it in terms of Petitioner's offender range.

Trial counsel testified that Petitioner hired him to see if counsel could negotiate a better plea agreement than original counsel and that Petitioner wanted a probationary sentence. Trial counsel stated that he and Petitioner knew that "his exposure . . . was high" but that, after learning the facts of the case, trial counsel felt that they had "a good shot" at an alternative sentence.

Trial counsel acknowledged the disparity between his and Petitioner's recollections of their interactions. Trial counsel noted that he could recall many details about Petitioner's case and their conversations, although he did not have a file to review before the post-conviction hearing. Trial counsel had reviewed some court documents, including the plea form. Trial counsel stated that the plea form contained an error relative to the numbering of the counts of the indictment and that it was corrected.

Trial counsel testified he discussed with Petitioner that the bonding company was going to revoke his bond because of the new arrest; he denied that he ever told Petitioner that his bond would be revoked if he did not enter a guilty plea. Trial counsel recalled asking the bonding company not to seek revocation of Petitioner's bond if he could "get this worked out today" and that the bonding company was "still on edge of whether they were going to do it or not, anyway." Trial counsel said that he told Petitioner that he was trying to see if he could keep Petitioner from going to jail that day. When asked whether it was reasonable for a layman client to believe that he needed to plead guilty to avoid having his bond revoked, trial counsel responded, "I guess anyone can take whatever inference they want, but, like I said, it was a fluid situation, . . . he and I were talking about what to do and whether or not he wanted to take this plea and what we needed to do to, to keep them in their position, too." Trial counsel noted that the prosecutor had also indicated

that he would withdraw the twenty-year offer if they did not come to an agreement that day because they had a trial date set. Trial counsel stated that he discussed the prosecutor's position with Petitioner.

Trial counsel testified that Petitioner's fiancée, Kimberly Pollock, came to his office after Petitioner was incarcerated. Trial counsel recalled that she was concerned and that he referred her to an appellate attorney. Trial counsel remembered "something" about a conference call between himself, Ms. Pollock, and Petitioner's appellate counsel. When asked whether he would have told them that he did not "have the kind of recollection about this case that [trial counsel] seem[ed] to have today," trial counsel responded, "I don't know why I would say that I don't have the recollection about that . . . . I don't know how to answer that question." Trial counsel noted that he had never forgotten certain facts about Petitioner's case. Trial counsel stated that, if someone unknown to him called and asked about a client's case, he did not share much information with them.

Trial counsel testified that he met with clients every Sunday. He stated that he did not recall specifically meeting with Ms. Pollock or having a specific conversation with her. Trial counsel noted his desire for Petitioner to know that he was "very concerned," "very upset," and shocked by Petitioner's sentence.

Ms. Pollock testified that she was Petitioner's fiancée and that she had been trying to help him in his post-conviction proceedings by gathering proof; she noted that she had an associate's degree in paralegal studies. Ms. Pollock stated that she went to appellate counsel's office and listened to a telephone call between appellate counsel and trial counsel on speaker phone. Ms. Pollock noted that trial counsel did not know she was listening. According to Ms. Pollock, appellate counsel asked trial counsel if he had any recollection of Petitioner's case, and trial counsel responded negatively. Appellate counsel reminded trial counsel that Petitioner had filed a bar complaint against him.

Ms. Pollock testified that she also met trial counsel twice at his office at her request. She stated that, at the first meeting, trial counsel told her that he had "no recollection of the case whatsoever" or "any paperwork." She said that trial counsel remembered Petitioner after Ms. Pollock told him Petitioner's name and sentence. Trial counsel told Ms. Pollock that "he could not believe that that was what [Petitioner] received" and recalled that the sentence was not what Petitioner expected.

Ms. Pollock testified that, at the second meeting, trial counsel told her that the prosecutor had called him. Trial counsel conveyed to her that he told the prosecutor that he did not remember anything about the case and that he did not have the case file because he had sent it to the Board of Professional Responsibility in connection with Petitioner's bar complaint. Trial counsel stated that he had told the prosecutor that he "would come up

with the paperwork that he had[.]" On cross-examination, Ms. Pollock acknowledged that Petitioner's sentence was affirmed on direct appeal.

The post-conviction court subsequently issued a written order denying relief, in which it found that the State initially offered a twenty-year plea agreement to Petitioner through original counsel. Original counsel feared that the offer was the result of unrelated "acrimony" between himself and the prosecutor; original counsel offered Petitioner a refund of his fee, and Petitioner chose to retain trial counsel. After two court dates, the State's offer remained the same, and Petitioner ultimately chose to enter an open guilty plea to four of the nine counts of the indictment.

The post-conviction court found that trial counsel had practiced law for twenty-eight years, with twenty-two years being nearly all in criminal practice. The post-conviction court noted trial counsel's surprise at the trial court's sentencing decision. The post-conviction court found that, before Petitioner entered his plea, he was charged with two additional drug offenses in Cheatham County. Petitioner's bonding company agreed not to "seek relief from its bond" if Petitioner agreed to plead guilty, which led to Petitioner's agreement to the four-count plea agreement. The agreement allowed Petitioner to remain on bond for the sixty days preceding the sentencing hearing. The post-conviction court found, "Any manner of circumstances are involved in an accused person's decision to plead guilty. Petitioner had his own circumstances and elected to plead open and have a sentencing hearing at a later date."

The post-conviction court noted Petitioner's testimony that trial counsel never made any promises, predicted an outcome, or told Petitioner what to expect at the sentencing hearing. Petitioner affirmed that trial counsel advised him that he would try to get Petitioner probation or a shorter sentence. The post-conviction court stated its personal recollection that trial counsel did "exactly that" at the sentencing hearing.

The post-conviction court found that the only change made to the offer was for the trial court to set the sentence after a sentencing hearing; that the plea agreement form reflected a potential thirty-year sentence on the four counts; and that a handwritten notation near Petitioner's signature reflected that the length, range, manner of service, and concurrent or consecutive nature of the sentence would be set during the sentencing hearing. The post-conviction court noted that the plea form showed a potential sentence of fifty-seven years, less three days, for the original nine counts of the indictment.

The post-conviction court found that, in addition to the two pending drug charges in Cheatham County, Petitioner had five prior felony convictions, four for drug offenses and one for carjacking, that were entered on different dates over a twenty-one-year span. The court found that Petitioner was "well acquainted with the criminal justice system, the give and take of negotiations, the potential for bond revocation and his exposure to a long

prison sentence." The court stated that the plea agreement resulted in the dismissal of five counts of the indictment, which carried a potential effective sentence of twenty-seven years; that "defenses were discussed and utilized in the negotiated plea agreement"; and that trial counsel had not failed to fully investigate, prepare a defense, or effectively negotiate the plea agreement.

Relative to Petitioner's claim that trial counsel failed to advise him of the sentencing range and exposure at sentencing, including the possibility of consecutive sentences, the post-conviction court found "in favor of Respondent Counsel" and found that Petitioner "suffers remorse and regret" but that the guilty plea transcript reflected that "the decision to plea was his and his alone, was knowing and voluntary[,] and was not the result of coercion by [trial counsel] or from lack of knowledge." The court noted again that the full range of potential sentences was contained on the plea agreement form. The post-conviction court also found that the trial court and Petitioner discussed the minimum and maximum sentences.

The post-conviction court found that Petitioner had not proven that trial counsel's representation was deficient or that, but for the alleged deficiencies, Petitioner would have proceeded to trial. The court noted that "[t]his case revolves around Petitioner taking a calculated risk to plead open and face a sentencing hearing. His decision was based, in no small part, on his desire to have an additional sixty . . . days of freedom before the sentencing hearing would take place." The court dismissed the petition, and Petitioner[4] timely appealed.

Analysis

On appeal, Petitioner asserts that he received ineffective assistance of counsel because trial counsel failed to adequately explain the consequences of entering an open plea. Petitioner argues that he "lacked even the most rudimentary understanding of the significant issues involved in . . . 'pleading open'" and that trial counsel's assertions to the contrary were contradicted by his testimony describing his customary practices and Ms. Pollock's testimony. Petitioner also states that he believed he would receive a probationary sentence based upon trial counsel's "working and hoping to obtain" probation; the trial court's statement about Petitioner's not being able to use marijuana while on probation; the dismissal of the firearm-related charges as part of the plea agreement; and Petitioner's remaining free on bond pending sentencing. Relative to prejudice, Petitioner argues that "inasmuch as the entry of the guilty pleas resulted in an effective 27[-]year sentence

[4] Petitioner filed a pro se notice of appeal on April 21, 2022, in case number M2022-00502-CCA-R3-PC. Second post-conviction counsel filed a notice of appeal in the instant case on April 29, 2022. Case number M2022-00502-CCA-R3-PC was subsequently closed by order of this court. Order, *Clemmons v. State*, No. M2022-00502-CCA-R3-PC (Tenn. Crim. App. May 3, 2022).

without [Petitioner's] having had the benefit of trial by jury, prejudice occasioned by the entry of the plea is self-evident" and that "the result of [Petitioner's] not having pleaded 'open' to these offenses, either more or less beneficial to [Petitioner], will necessarily be different." The State responds that Petitioner has not proven that trial counsel's performance was deficient or that he was prejudiced.

In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Post-conviction relief cases often present mixed questions of law and fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Appellate courts are bound by the post-conviction court's factual findings unless the evidence preponderates against such findings. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). When reviewing the post-conviction court's factual findings, this court does not reweigh the evidence or substitute its own inferences for those drawn by the post-conviction court. *Id.*; *Fields*, 40 S.W.3d at 456 (citing *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). Additionally, "questions concerning the credibility of the 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*, 40 S.W.3d at 456 (citing *Henley*, 960 S.W.2d at 579); *see Kendrick*, 454 S.W.3d at 457. The post-conviction court's conclusions of law and application of the law to factual findings are reviewed de novo with no presumption of correctness. *Kendrick*, 454 S.W.3d at 457.

Ineffective Assistance of Counsel

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven for the court to grant post-conviction relief. *Strickland*, 466 U.S. at 687; *Henley*, 960 S.W.2d at 580; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Accordingly, if we determine that either factor is not satisfied, there is no need to consider the other factor. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (citing *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004)). Additionally, review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see Henley*, 960 S.W.2d at 579. We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006).

As to the first prong of the *Strickland* analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." *Henley*, 960 S.W.2d at 579 (citing *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)); *see Goad*, 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate "that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688); *see also Baxter*, 523 S.W.2d at 936.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. *Goad*, 938 S.W.2d at 370. Therefore, under the second prong of the *Strickland* analysis, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

A substantially similar two-prong standard applies when the petitioner challenges counsel's performance in the context of a guilty plea. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *see Dorsey v. State*, No. W2021-01135-CCA-R3-PC, 2022 WL 2840738, at *4 (Tenn. Crim. App. July 21, 2022), *perm. app. denied* (Dec. 14, 2022). First, the petitioner must show that his counsel's performance fell below the objective standards of reasonableness and professional norms. *See Hill*, 474 U.S. at 58. Second, "in order to satisfy the 'prejudice' requirement, the [petitioner] must show that there is a reasonable probability that, but for counsel's errors, he would have not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

Knowing and Voluntary Guilty Plea

Although Petitioner does not raise a freestanding issue contesting the voluntary and knowing nature of his plea, Petitioner's ineffective assistance argument includes discussion of case law requiring that guilty pleas be knowing and voluntary, and the post-conviction court's findings also touch on this related issue. Accordingly, we will address it while resolving Petitioner's ineffective assistance of counsel claim.

When reviewing a guilty plea, this court looks to both the federal standard as announced in the landmark case *Boykin v. Alabama*, 395 U.S. 238 (1969), and the state standard as announced in *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977), *superseded on other grounds by* Tenn. R. Crim. P. 37(b) and Tenn. R. App. P. 3(b). *Don Allen Rodgers v. State*, No. W2011-00632-CCA-R3-PC, 2012 WL 1478764, at *5 (Tenn. Crim. App. Apr. 26, 2012), *no perm. app. filed*. Under the federal standard, there must be an affirmative showing that the plea was "intelligent and voluntary." *Boykin*, 395 U.S. at 242. Likewise, the Tennessee Supreme Court has held that "the 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. "[A] plea is not 'voluntary' if it is the product of '[i]gnorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats . . . ." *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993) (quoting *Boykin*, 395 U.S. at 242-43).

In order to determine whether a plea is intelligent and voluntary, the trial court must "canvass[] the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Boykin*, 395 U.S. at 244. The trial court looks to several factors before accepting a plea, including:

> [T]he relative intelligence of the defendant; degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship, 858 S.W.2d at 904; *Howell v. State*, 185 S.W.3d 319, 330-31 (Tenn. 2006). Once the trial court has conducted a proper plea colloquy, it discharges its duty to assess the voluntary and intelligent nature of the plea and creates an adequate record for any subsequent review. *Boykin*, 395 U.S. at 244.

Statements made by a petitioner, his attorney, and the prosecutor during the plea colloquy, as well as any findings made by the trial court in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). Statements made in open court carry a strong presumption of truth, and to overcome such presumption, a petitioner must present more than "conclusory allegations unsupported by specifics." *Id.* at 74.

As a preliminary matter, to the extent that Petitioner's argument relies on the credibility of trial counsel's testimony, the post-conviction court credited trial counsel over Petitioner. We will not disturb the court's credibility determinations on appeal. *See Fields*, 40 S.W.3d at 456.

Relative to Petitioner's claim that trial counsel failed to advise him of his offender classification and the possibility of consecutive sentencing, the post-conviction court accredited trial counsel's testimony. The court found that Petitioner "suffers remorse and regret" but that the guilty plea transcript reflected that "the decision to plea was his and his alone, was knowing and voluntary[,] and was not the result of coercion by [trial counsel] or from lack of knowledge." The court noted that the potential sentences for the original

nine counts of the indictment, as well as the four counts to which Petitioner pled guilty, were included on the plea agreement form. The post-conviction court also found that the trial court and Petitioner discussed the minimum and maximum sentences.

The post-conviction court noted that "[a]ny manner of circumstances are involved in an accused person's decision to plead guilty. Petitioner had his own circumstances and elected to plead open and have a sentencing hearing at a later date." The court found that Petitioner's "calculated risk" was "based, in no small part, on his desire to have an additional sixty . . . days of freedom before the sentencing hearing would take place." The record supports the post-conviction court's findings.

At Petitioner's guilty plea hearing, the trial court asked Petitioner a series of questions regarding the knowing and voluntary nature of Petitioner's plea. Petitioner affirmed that trial counsel had reviewed his constitutional rights with him. The court asked, "And further, did you understand what your minimum and maximum sentences and fines were on all these cases, these [nine] counts, had you proceeded to trial and been convicted of them?" Petitioner answered affirmatively. Petitioner also agreed that the "manner of service, length, range, concurrent, consecutive will all be determined" at the sentencing hearing. The court asked if there was "anything about what you're making your decision on today that you don't understand or have questions about," and Petitioner responded negatively.

Petitioner said that he understood that, by pleading guilty, he was giving up his right to a jury trial where he would be presumed not guilty. He understood that, by pleading guilty, he was giving up the right to confront the witnesses against him and his right to remain silent. Petitioner testified under oath that he accepted the plea agreement freely, voluntarily, and knowingly, and that his plea was not the result of threats or promises. Petitioner affirmed that he was pleading guilty because he was guilty.

These statements during the plea colloquy, as well as the findings made by the trial court in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings" and carry a strong presumption of truth. *Id.* at 73-74.

At the post-conviction hearing, Petitioner acknowledged that he read on the plea agreement form the minimum and maximum sentences for each count. Petitioner agreed that the trial court informed him of the terms of the plea agreement and of his constitutional rights. Petitioner affirmed that he understood his rights. Petitioner also acknowledged that he had "quite a bit of experience, standing in a courtroom, pleading guilty in front of a judge." Petitioner indicated that he understood the plea bargaining process and that he pled guilty to avoid bond revocation and "buy[] 60 days of freedom."

Further, Petitioner acknowledged that he did not know what was going to happen at the sentencing hearing and that he knew at the time he pled guilty that he might receive probation or a sentence in confinement. Petitioner stated that trial counsel did not promise that he would receive probation, and he agreed that he knew the sentence would be determined by the trial court. Petitioner acknowledged that trial counsel "did what he said he was going to do" and argued for a probationary sentence but that the trial court accepted the State's position instead.

Trial counsel testified that Petitioner wanted a probationary sentence and was concerned with whether that was a possibility in his case. Trial counsel stated that he and Petitioner knew that "his exposure . . . was high" but that, after learning the facts of the case, trial counsel felt that they had "a good shot" at an alternative sentence.

Contrary to Petitioner's assertion that counsel recalled no specific details of his case, trial counsel remembered that he learned about the Cheatham County charges on the day of the plea hearing; that he attempted to persuade the bonding company not to request revocation of Petitioner's bond; that he discussed the case with the prosecutor and obtained the open plea offer; that he discussed the offer and the bonding company's position with Petitioner; that Petitioner asked what could happen at the sentencing hearing; and that he told Petitioner, "If we have a really good sentencing hearing . . . there's all kinds of possibilities. Obviously, you could go to jail, [the court] could give you probation, running everything concurrently, but I think it will be something in between." Trial counsel stated that he made Petitioner no promises and told Petitioner to "get [him]self together, and do whatever [he] need[ed] to do, because he couldn't afford to go to jail that day." Trial counsel told Petitioner that he would "try very hard" for an alternative sentence. Trial counsel also recalled the prosecutor's filling out the plea agreement form as they sat together and reviewing the form with Petitioner. Trial counsel said that he told Petitioner his sentencing exposure, including the minimum and maximum sentences, the counts to which Petitioner was pleading guilty, the counts that would be dismissed, and Petitioner's rights. Trial counsel candidly admitted that he did not discuss Petitioner's sentencing exposure in terms of his offender range. Trial counsel denied that he had any concern that Petitioner did not understand what he had done by pleading guilty, and he noted that if Petitioner had expressed doubts or had questions, they would not have entered the plea until they were addressed.

Nothing in the record overcomes the "strong presumption of truth" of Petitioner's statements in his guilty plea submission hearing. *Blackledge*, 431 U.S. at 73-74. Petitioner has not proven that trial counsel's performance was deficient or that he entered an unknowing or involuntary plea, and he is not entitled to relief.

Conclusion

Based on the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

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ROBERT L. HOLLOWAY, JR., JUDGE