IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 18, 2018 Session

DAVID ENGLEBERT v. STATE OF TENNESSEE

Appeal from the Circuit Court for Rutherford County
No. F-74015-B Royce Taylor, Judge

No. M2018-00189-CCA-R3-PC

The Petitioner, David Englebert, entered guilty pleas to aggravated robbery and four counts of aggravated assault pursuant to a plea agreement, in exchange for an effective sentence of twelve years to be served with an eighty-five percent release eligibility date. The Petitioner subsequently filed for post-conviction relief, asserting that he received ineffective assistance of counsel and that his pleas were not knowingly and voluntarily entered because he was never informed of the elements of the offense of aggravated robbery. The post-conviction court denied his claim without making any findings of fact, and the Petitioner appeals. We conclude that the Petitioner has not established prejudice with regard to his ineffective assistance of counsel claim, and we affirm the post-conviction court's judgment denying that claim. Because there is inconsistent evidence regarding whether the Petitioner was informed about the elements of the offense, we remand for the post-conviction court to make factual findings and credibility determinations relevant to the claim that the Petitioner's pleas were not knowing and voluntary.

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

JOHN EVERETT WILLIAMS, P.J., delivered the opinion of the court, in which TIMOTHY L. EASTER and J. ROSS DYER, JJ., joined.

Thomas S. Santel, Jr., Murfreesboro, Tennessee, for the appellant, David Shannon Englebert.

Herbert H. Slatery III, Attorney General and Reporter; David H. Findley, Senior Counsel; Jennings H. Jones, District Attorney General; and Eric Farmer, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL AND PROCEDURAL HISTORY

The Petitioner's pleas are the result of a home invasion which he committed with his nephew and another accomplice. According to the prosecutor's statement of facts at the plea hearing, the Petitioner and his nephew, wearing ski masks, kicked down the front door of the residence while the third offender remained in the car. The homeowner, two other women, and two children, ages six and four, were present in the home. None of the victims were acquainted with the offenders. The Petitioner and his nephew threatened to kill the victims, putting guns to their heads. They claimed to be undercover police officers looking for the homeowner's son. The Petitioner and his nephew took property valued at under $500 from the home.

The indictment charged the Petitioner with the aggravated burglary of the homeowner's residence in concert with others, four counts of aggravated assault, four counts of aggravated kidnapping, one count of criminal impersonation, and one count of being a felon in possession of a weapon. The victims of the four aggravated assault and four aggravated kidnapping charges were the two guests and two children present in the home. At the plea hearing, the prosecutor noted that Count 1 of the indictment would be amended from aggravated burglary to aggravated robbery. The Petitioner was sentenced as a Range II offender for the aggravated robbery to a term of twelve years in prison with an eighty-five percent release eligibility date. The Petitioner received a Range II sentence of ten years for each of the four aggravated assault convictions. All of the sentences were to be served concurrently. The counts charging aggravated kidnapping, criminal impersonation, and being a felon in possession of a firearm were dismissed.

The Petitioner's nephew simultaneously entered guilty pleas to aggravated burglary acting in concert with others and to four counts of aggravated assault and received concurrent sentences for an effective ten-year sentence. The remaining charges against the Petitioner's nephew were dismissed, and the Petitioner's nephew was to serve twelve months of his sentences in confinement and the remainder on probation.

The Petitioner agreed that the facts of the offenses as recited by the prosecutor were correct. The Petitioner acknowledged that he understood the range of punishment which could be applied to him and that he was waiving his right to remain silent, his right to a jury trial, his right to confront witnesses, and his right to appeal. The trial court informed the Petitioner that his convictions could enhance future punishment. The trial court asked the Petitioner and his nephew, "Did each of you discuss with your attorneys what would happen if you did go to trial with regard to what the State would have to prove to find you guilty and any defenses you might have[?]" The Petitioner responded,

"Yes, sir." The Petitioner's signed plea agreement recites that he understood the nature of the charges against him and what the State would have to prove to establish his guilt. The trial court accepted the pleas and entered the agreed-upon sentences.

The Petitioner filed a timely post-conviction petition, asserting that he received ineffective assistance of counsel and that his pleas were not knowing and voluntary because he was never informed of the elements of aggravated robbery. The post-conviction court appointed counsel, and counsel amended the petition but asserted the same claims.

At the post-conviction hearing, the Petitioner confirmed that he was charged with aggravated burglary rather than aggravated robbery. He first met with trial counsel at a court appearance after his arraignment in the trial court. Trial counsel told the Petitioner that the prosecution had not made a plea offer, and trial counsel did not mention the possibility of pleading guilty to aggravated robbery. The Petitioner testified that he and trial counsel had no communication between this first meeting and the Petitioner's second court appearance, where he "resolved [his] case."

The Petitioner testified that he decided to enter a guilty plea to aggravated robbery because his attorney was "not working for" him and, as a result, he felt he "had no chance of going to trial and winning." He testified that he initially thought that he was pleading guilty to aggravated burglary and that he did not realize that the plea offer was for a guilty plea to aggravated robbery until after he signed the plea agreement. According to the Petitioner, trial counsel explained that the prosecutor "had to up the charge to aggravated robbery at the last minute in order to give [him] 85 percent." The Petitioner averred that he was never informed regarding "what it took to constitute an aggravated robbery" and that trial counsel never explained the elements of the offense to him. He acknowledged that he still entered the plea after discovering the amended charge, explaining that he felt that trial counsel was working with the prosecution, that trial counsel did not believe he had a defense, and that his nephew's plea agreement was contingent on the Petitioner's acceptance of the plea agreement. The Petitioner elaborated that he was told there would be no further plea offers, that he would be found guilty, and that his nephew would likewise not be given another plea offer. He testified that he would not have pleaded guilty if he had known prior to signing the paperwork that he was pleading guilty to aggravated robbery, and he agreed that he would have gone to trial "[r]ather than face the punishment [he was] facing for aggravated robbery."

The Petitioner acknowledged that he kicked in the door of the residence, that he pointed a gun at the victims and told them he was a police officer, and that he searched for drugs and money. He also acknowledged that he was aware at the time that he entered his plea that his sentence would be twelve years with an eighty-five percent

release eligibility date. The Petitioner explained that he told the judge that trial counsel had discussed "what the State would have to prove to find [him] guilty" because he had decided to simply agree with all the questions asked of him.

Trial counsel testified that, prior to the entry of the plea, he "maybe" discussed the elements of aggravated robbery with the Petitioner. He stated, "I don't remember specifically discussing it with him." Trial counsel elaborated that the charge was amended to aggravated robbery because the statute authorized an eighty-five percent release eligibility date for that crime. According to trial counsel, the State's offer was contingent on the Petitioner's not being eligible for parole prior to serving that percentage of his sentence. The Petitioner was aware of what his sentence would be.

The post-conviction court issued a written order denying relief. In the order, the post-conviction court summarized the procedural history of the case and recited the standards of law to be applied to claims of ineffective assistance of counsel. The court made no findings of fact, but simply concluded, "After a careful review of the record, exhibits introduced at [the] Hearing, and applicable law, the Court has determined that no such ineffective assistance of counsel is present in this case." The Petitioner appeals.

ANALYSIS

Our first task is to define the issues raised on appeal. While the Petitioner argued below for relief on two grounds — ineffective assistance of counsel and a plea which was not knowing, intelligent, and voluntary — the post-conviction court addressed only the ineffective assistance of counsel claim. The Petitioner's brief defines the "Issue Presented" as a determination of whether he received ineffective assistance of counsel when his trial counsel failed to explain the elements of aggravated robbery prior to his plea. However, the Petitioner primarily relies on *Henderson v. Morgan*, 426 U.S. 637 (1976), which addresses the voluntariness of a plea entered when the defendant is not apprised of the elements of the offense. The State denies that trial counsel was deficient and asserts that the pleas were knowing and voluntary because the Petitioner was sufficiently informed of the elements of the offense of aggravated robbery. The Petitioner also submitted a reply brief, which asserts that "the issue in [the Petitioner's] case is whether a defendant may enter a voluntary plea of guilty to a charge of Aggravated Robbery without being informed of the elements of the offense." Accordingly, we conclude that the issue of whether the plea was knowing and voluntary has been sufficiently raised on appeal.

The Post-Conviction Procedure Act provides for relief when a petitioner's conviction or sentence is void or voidable due to the abridgment of a right guaranteed by the United States Constitution or by the Tennessee Constitution. T.C.A. § 40-30-103.

The burden of proving allegations of fact by clear and convincing evidence falls to the petitioner seeking relief. T.C.A. § 40-30-110(f). The Petitioner claims that the circumstances of his plea violated his right to effective assistance of counsel during the entry of his guilty pleas. *See Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009). He also asserts that his right to due process was violated because the pleas were not knowingly and voluntarily entered. *See Jaco v. State*, 120 S.W.3d 828, 831 (Tenn. 2003). Both a claim of ineffective assistance of counsel and a claim that a guilty plea was not knowing and voluntary are mixed questions of law and fact. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015); *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010). An appellate court reviews de novo with no presumption of correctness the post-conviction court's conclusions of law, its determinations of mixed questions of law and fact, and its application of law to factual findings. *Kendrick*, 454 S.W.3d at 457. "The trial judge's findings of fact are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings." *Jaco*, 120 S.W.3d at 830.

I. Ineffective Assistance of Counsel

The Petitioner asserts that he received ineffective assistance of counsel when trial counsel failed to explain the elements of the offense to which he was entering a guilty plea. The State contends that the trial court implicitly found that trial counsel discussed the nature of the offense with the Petitioner.

A person accused of a crime is entitled to the assistance of counsel in criminal proceedings under the Sixth Amendment to the United States Constitution and under article I, section 9 of the Tennessee Constitution. These provisions guarantee the reasonably effective assistance of counsel. *Nesbit v. State*, 452 S.W.3d 779, 786 (Tenn. 2014). In other words, a defendant is entitled to assistance "'within the range of competence demanded of attorneys in criminal cases.'" *Pylant v. State*, 263 S.W.3d 854, 868 (Tenn. 2008) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The deprivation of this right is a cognizable claim under the Post-Conviction Procedure Act. *Moore v. State*, 485 S.W.3d 411, 418 (Tenn. 2016). To show that relief is warranted on a claim of ineffective assistance of counsel, the petitioner must show that trial counsel's representation "'so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.'" *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011) (quoting *Strickland*, 466 U.S. at 686).

In order to establish ineffective assistance, the petitioner must establish both that counsel's performance was deficient and that the deficiency caused prejudice to the defense. *Finch v. State*, 226 S.W.3d 307, 315 (Tenn. 2007). A claim may be denied for failure to prove either deficiency or prejudice, and a court need not address both prongs if the petitioner has failed to establish either deficiency or prejudice. *Goad v. State*, 938

S.W.2d 363, 370 (Tenn. 1996). Deficiency requires showing that counsel's errors were so serious "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. To demonstrate deficiency, the petitioner must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Pylant*, 263 S.W.3d at 868. Courts must make every effort "'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.'" *Felts*, 354 S.W.3d at 277 (quoting *Strickland*, 466 U.S. at 689). The reviewing court must begin with "the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all strategic and tactical significant decisions." *Davidson v. State*, 453 S.W.3d 386, 393 (Tenn. 2014).

In determining prejudice, the post-conviction court must decide whether there is a reasonable probability that, absent the errors, the result of the proceeding would have been different. *Grindstaff*, 297 S.W.3d at 216. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *State v. Honeycutt*, 54 S.W.3d 762, 768 (Tenn. 2001) (quoting *Strickland*, 466 U.S. at 694). "That is, the Petitioner must establish that his counsel's deficient performance was of such a degree that it deprived him of a fair trial and called into question the reliability of the outcome." *Finch*, 226 S.W.3d at 316.

The *Strickland* standard for determining whether a petitioner received the ineffective assistance of counsel applies in plea negotiations as well as during trial. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985); *see also Missouri v. Frye*, 566 U.S. 134, 147 (2012). In order to show prejudice in the context of a guilty plea, the petitioner must demonstrate "'a reasonable probability that, but for counsel's errors, he would not have pled guilty and would have insisted on going to trial.'" *Grindstaff*, 297 S.W.3d at 217 (quoting *Hill*, 474 U.S. at 59). The inquiry should focus on whether any alleged deficiency affected the outcome of the plea process. *Grindstaff*, 297 S.W.3d at 217.

In order to establish prejudice in this case, the Petitioner would need to show that, but for counsel's failure to explain the elements of aggravated robbery, he would not have entered guilty pleas to the offenses. *See Cedrick Konard Mitchell v. State*, No. M2004-00861-CCA-R3-PC, 2005 WL 1412100, at *5 (Tenn. Crim. App. June 15, 2005). While the Petitioner testified that he would not have entered the pleas if he had known the nature of the charge of aggravated robbery, "[t]his testimony … does not *ipso facto* establish that he would not have pleaded guilty but for counsel's … performance." *Alan Dale Bailey v. State*, No. M2001-01018-CCA-R3-PC, 2002 WL 215657, at *4 (Tenn. Crim. App. Feb. 8, 2002) (deferring to the lower court's determination that the petitioner was not a credible witness). "[T]he probability that the petitioner might have received a

more severe penalty following a trial may, in a proper case, serve as an indicator that the petitioner nevertheless would have pleaded guilty had he known all the relevant facts." *Id.* at *5; *see Hill*, 474 U.S. at 60 (noting that the petitioner "alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty").

Here, the post-conviction court made no factual findings regarding whether the Petitioner was informed of the nature of the offense. Neither did it make a determination regarding whether the Petitioner was credible when he asserted that he would not have pled guilty had he known the elements of aggravated robbery. It is not clear if the claim was dismissed on the ground of failure to prove deficiency, prejudice, or both. Accordingly, we agree with the Petitioner that the post-conviction court's order cannot be read as a finding of fact that the Petitioner was aware of the nature of the charges.

Nevertheless, we determine that the Petitioner has not shown prejudice. The record establishes that, pursuant to the plea agreement, numerous felony charges were dismissed against the Petitioner and that the Petitioner's nephew received the benefit of a sentence to be served primarily on probation. While the Petitioner averred that he would not have pled guilty had he known, prior to signing the plea agreement, that the amended charge was aggravated robbery, he offered no explanation for continuing with the entry of the plea after discovering the conviction offense, except that he believed that he would lose at trial, that no better offers would be forthcoming, and that he wanted the benefit of the bargain for his nephew. Furthermore, he agreed that his reason for refusal would have been because he would have preferred going to trial "[r]ather than fac[ing] the punishment [he was] facing for aggravated robbery." However, the record clearly demonstrates that the Petitioner was aware of the sentence he would receive. As in *Hill*, the Petitioner made no particular allegation explaining what element of aggravated robbery he contested or why he would not have been willing to plead guilty to aggravated robbery had trial counsel explained the elements. *See Hill*, 474 U.S. at 60. The Petitioner has, simply put, made no particular allegations of prejudice. Accordingly, we conclude that the record is sufficiently developed to permit us to determine that the Petitioner has not established prejudice with regard to this claim and to affirm the post-conviction court's judgment in this regard.

II. Knowing and Voluntary Plea

The Petitioner also argues that his plea was not voluntary because he was not informed of the nature of the conviction offense of aggravated robbery. The State responds that the Petitioner was adequately apprised of the elements of the offense.

In entering a guilty plea, the accused simultaneously waives several constitutional rights. *Blankenship v. State*, 858 S.W.2d 897, 903 (Tenn. 1993) (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969)). Accordingly, a guilty plea must be entered voluntarily, knowingly, and intelligently if it is to comport with due process. *Lane*, 316 S.W.3d at 562. A plea is not voluntary if it results from "'[i]gnorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats....'" *Blankenship*, 858 S.W.2d at 904 (quoting *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969)). "'Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.'" *Id.* at 903 (quoting *McCarthy*, 394 U.S. at 466). This court considers the totality of the circumstances, including evidence at post-conviction, to determine whether a guilty plea was entered voluntarily, knowingly, and intelligently. *State v. Turner*, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). In particular, the court may consider:

> the relative intelligence of the defendant; the 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.

A waiver of a constitutional right "'not only must be voluntary'" but must also consist of "'knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.'" *State v. Crowe*, 168 S.W.3d 731, 748 (Tenn. 2005) (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). "'Adequate notice of the nature of the charges is a constitutional requisite in any criminal prosecution.'" *Sneed v. State*, 942 S.W.2d 567, 569 (Tenn. Crim. App. 1996) (quoting *Bryan v. State*, 848 S.W.2d 72, 75 (Tenn. Crim. App. 1992)). When a defendant pleads guilty without having been informed of the elements of the crime, the plea is not knowingly and intelligently made, and it is consequently invalid. *Bradshaw v. Stumpf*, 545 U.S. 175, 182-83 (2005); *Crowe*, 168 S.W.3d at 748.

Nevertheless, there is no constitutional requirement that the trial court itself provide a litany of the elements of the offense. *Sneed*, 942 S.W.2d at 569; *Bryan*, 848 S.W.2d at 75; *see Jennifer Womac v. State*, No. E2017-00660-CCA-R3-PC, 2018 WL 3217733, at *9 (Tenn. Crim. App. July 2, 2018) (noting that the trial court's duty to advise the defendant under Tennessee Rule of Criminal Procedure 11 and *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977) is not constitutional but may contribute to the

totality of the circumstances determining whether a plea is knowing and voluntary), *perm. app. filed*. Due process instead requires only that the accused have adequate notice of the nature of the charges from some source. *Sneed*, 942 S.W.2d at 569. In the case at bar, the trial court did not itself inform the Petitioner of the elements of the offenses.

The Petitioner primarily relies on *Henderson v. Morgan*, 426 U.S. 637, for the proposition that he did not receive constitutionally adequate notice of the charges against him. In *Morgan*, the defendant was charged with first degree murder and pled guilty to second degree murder but was never informed of the mens rea required for the conviction offense. 426 U.S. at 642-43. The defendant maintained at sentencing that he had not intended to commit the crime. *Id.* at 643. The Supreme Court observed that the plea could not be a voluntary and intelligent admission of the offense without the defendant receiving notice of the true nature of the charge against him. *Id.* at 645. Because the record contained nothing that could stand for a voluntary admission that the defendant had the requisite intent, the Supreme Court concluded that the plea was not voluntary. *Id.* at 646.

Similarly, in *Crowe*, the defendant had been charged with first degree murder but entered a guilty plea to facilitation of second degree murder. *Crowe*, 168 S.W.3d at 734-35. The defendant had steadfastly maintained that he was present at the victim's death but had no role in the crime. *Id.* at 738-39. At the plea hearing, the trial court did not inform the defendant of the elements of the crime but relied on the defendant's representation that counsel had discussed his case and possible defenses with him. *Id.* at 749. The record contained no indication that the trial judge explained the elements of the offense, and there was no representation by defense counsel that he had done so. *Id.* at 751. The Tennessee Supreme Court concluded that the defendant had established that his plea was not voluntarily, knowingly, and understandingly entered. *Id.* at 749. The court in *Crowe* noted that "'the more meticulously [Rule 11] is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.'" *Id.* (quoting *McCarthy*, 394 U.S. at 465). Because the defendant, who persistently averred that he played no role in the crime, was never informed that he was admitting to furnishing substantial assistance in the commission of the crime, the Tennessee Supreme Court concluded that his plea had not been knowingly and voluntarily entered. *Id.* at 752.

When a trial court does not explain the elements of the offense at the plea hearing, the accused may nevertheless be apprised of the nature of the charges through the indictment, the contents of the plea petition, or the statement of charges and stipulated facts presented at the plea hearing. *See Bryan,* 848 S.W.2d at 76. In *Bryan*, the petitioner was charged with receiving stolen property worth over two hundred dollars, but pled guilty to offenses including receiving stolen property worth under two hundred dollars.

Id. at 76. The court found that the indictment, a petition reciting that his attorney had informed him of the nature of the charges, and the statement of facts at the plea hearing together gave the petitioner sufficient notice of the elements of the crime. *Id.* (remanding because the record did not demonstrate that the petitioner was aware of his right against self-incrimination but the State was prevented from introducing further evidence on the issue).

Likewise, the representation of defense counsel that the charge was explained may be adequate to provide notice of the nature of the offense. *Bradshaw v. Stumpf*, 545 U.S. at 183; *Crowe*, 168 S.W.3d at 751; *Clifford Douglas Peele*, 2002 WL 54691, at *4 (concluding that both the indictment and trial counsel's testimony that it was standard procedure for him to explain each element of the crime supported the conclusion that the defendant was apprised of the nature of the charges). The prosecution's summary of the facts relevant to the offense may be sufficient to put the defendant on notice of the nature of the offense. *Crowe*, 168 S.W.3d at 750; *Eddie Lee Murphy, Sr., v. State*, No. M2009-01993-CCA-R3-PC, 2011 WL 255300, at *9 (Tenn. Crim. App. Jan. 20, 2011) (concluding that the petitioner was adequately aware of the nature of felony murder committed during a robbery when, despite the trial court's failure to explain the mental state for the underlying crime, the petitioner was familiar with the elements of robbery from a prior guilty plea and admitted to breaking into the victim's home, taking her property, and killing her). In addition, a self-explanatory legal term may likewise provide sufficient notice. *Crowe*, 168 S.W.3d at 750-51 (citing cases). A signature on a plea agreement which affirms that a plea is voluntarily entered but does not explain the nature of the charges, on the other hand, is not sufficient to show that the petitioner had notice of the nature of the charges against him. *Id.* at 749 ("We are unwilling to assume that because the defendant signed a plea agreement, the defendant entered his plea with a complete understanding of the charge against him."). Finally, if the record does not affirmatively disclose that the accused was informed of the elements of the offense, "'it may be appropriate to presume that in most cases defense counsel routinely explain the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit.'" *Bryan*, 848 S.W.2d at 75 (quoting *Morgan,* 426 U.S. at 647).

In the case at bar, the Petitioner was indicted for aggravated burglary acting in concert with others but pled guilty to aggravated robbery, and accordingly he did not receive notice of the elements of the offense from the indictment. Neither does defense counsel assert that he informed the Petitioner of the elements of the offense. The Petitioner agreed at the plea hearing that his trial counsel had informed him "what would happen if [he] did go to trial with regard to what the State would have to prove to find [him] guilty and any defenses [he] might have." *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."); *State v. Michael Leon Chambers*, No. 01C01-9505-CC-00143, 1996 WL 337340, at *3

(Tenn. Crim. App. June 20, 1996) (concluding that plea was knowing and voluntary where, despite affidavit that the defendant was not advised of an element of the offense, the record showed that the defendant acknowledged at the guilty plea that he was "fully advised by his counsel of the charges made"). If the Petitioner had gone to trial, the State would have had to prove the elements of aggravated burglary in concert with others unless he consented to an amendment to the indictment. At the post-conviction hearing, the Petitioner asserted that trial counsel did not advise him of the elements of the offense and that he had decided to give an affirmative response to all questions at the plea hearing in order to avoid trial. Trial counsel's testimony was that he "maybe" reviewed the elements of the offenses with the Petitioner but that he could not remember "specifically discussing it with him."

The post-conviction court can properly make a credibility determination of testimony presented by the same witness at different times. *Sneed*, 942 S.W.2d at 569 (holding that the trial court, which presided over both the plea and post-conviction hearings, implicitly gave greater credence to the petitioner's response during the plea hearing that he was not coerced than the petitioner's subsequent assertion that he was coerced). In this case, however, the post-conviction court did not make any such determination. The post-conviction court's order only contained the legal conclusion that the Petitioner received "no such ineffective assistance of counsel." The court did not address whether the Petitioner's plea was voluntary. Neither did it make a factual finding or credibility determination regarding whether the Petitioner was ignorant of the elements of the offense, as he asserted at the post-conviction hearing.

In order to facilitate appellate review, we remand the case to the post-conviction court. *See id.* at 569-70 (remanding for findings of fact regarding a claim that the petitioner did not understand the nature of the charges because the appellate court could not determine from the appellate record whether or not the petitioner had notice of the charges); *see also Deon Braden v. State*, No. 01C01-9708-CC-00351, 1998 WL 391759, at *2 (Tenn. Crim. App. July 15, 1998) (remanding for factual findings when a petitioner testified that he was not informed of his potential sentence and trial counsel testified that he could not remember whether he advised the petitioner about sentencing exposure). On remand, the post-conviction court is instructed to make findings of fact regarding whether the Petitioner was informed of the nature of the charges at the time that he entered the guilty plea.

CONCLUSION

Based on the foregoing, we affirm the post-conviction court's denial of the Petitioner's claim of ineffective assistance of counsel. We remand for the post-conviction court to consider the Petitioner's claim that his pleas were not knowing and

voluntary. In particular we instruct the post-conviction court to make findings regarding whether the Petitioner was informed of the nature of the charges when he entered his guilty pleas.

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JOHN EVERETT WILLIAMS, PRESIDING JUDGE