IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 21, 2013

JERMEIL TARTER v. STATE OF TENNESSEE

Appeal from the Circuit Court for Sullivan County
No. C54056 R. Jerry Beck, Judge

No. E2012-01698-CCA-R3-PC - Filed October 22, 2013

The Petitioner, Jermeil Tarter, appeals the Sullivan County Circuit Court's denial of his petition for post-conviction relief from his 2005 conviction for sale of one-half gram or more of cocaine within 1000 feet of a school and his twenty-year, Range I sentence. The Petitioner contends that he received the ineffective assistance of counsel because (1) of the manner in which counsel conducted voir dire regarding the issue of the Petitioner's race, (2) counsel failed to advise him adequately regarding his right to testify or remain silent and the advantages and disadvantages of testifying, and (3) counsel failed to inform him fully regarding possible sentencing, the strengths and weaknesses of the State's case, and the benefits and detriments of going to trial or accepting a plea agreement. We affirm the judgment of the trial court.

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

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which ALAN E. GLENN and ROGER A. PAGE, JJ., joined.

Gene G. Scott, Jr., Jonesborough, Tennessee, for the appellant, Jermeil Tarter.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Barry P. Staubus, District Attorney General; and Joseph Eugene Perrin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

According to this court's opinion in the Petitioner's appeal from his conviction, the evidence at the trial showed that:

On November 14, 2003, Officer Freddie Ainsworth of the First Judicial District Drug Task Force participated in an investigation conducted by the Second Judicial District Drug Task Force. Officer Ainsworth, who was working undercover with a confidential informant, Doris Salyers, testified that he was provided $100 in marked bills and directed to a residence on Sevier Street in Kingsport. Other officers near the residence set up audio and video recording equipment. Upon their arrival at the residence, Ms. Salyers approached a white male, asked for "Cathy," and learned that she was not there. At that point, the defendant, a black male, approached them and Officer Ainsworth asked the defendant for "a buck," which he described as street slang for "a Hundred Dollars ($100.00) worth." According to the officer, the defendant then "pulled a medicine bottle out of one of his pockets and he shook out ... four rocks." Officer Ainsworth recalled that "[t]here was still 20, 25 rocks ... in the medicine bottle, the same color and shape as what he had put into my hand." He gave the defendant $100 and then left. The officer later gave the substances to Agent Eddie Nelson.

Afterward, Officer Ainsworth selected the defendant, a black male, from a photographic lineup, explaining that he was ninety percent certain of the identification. He stated that later, when he eventually saw the defendant in person at the preliminary hearing, he became one hundred percent certain of his identification.

Officer Cliff Ferguson of the Kingsport Police Department, who had known the defendant for approximately eight years and was familiar with his physical appearance, viewed the videotape of the transaction and identified the defendant as the individual who sold cocaine to Officer Ainsworth. Officer Ferguson also saw a digitally enhanced version of the videotape which "took some of the glare off of" the images. He expressed certainty that the defendant was the perpetrator.

Officer Eddie Nelson of the Second Judicial District Drug Task Force, who had provided Officer Ainsworth with money to make the controlled purchase, confirmed his receipt of the cocaine from Officer Ainsworth. He recalled that he placed it in a sealed envelope and mailed it to the Tennessee Bureau of Investigation Lab in Knoxville. Officer Nelson testified that at the request of the assistant district attorney, he sent the original videotape recording of the transaction to the Regional Organized Crime Information Center to have the quality enhanced.

Steven Hobbs of the Regional Organized Crime Information Center in Nashville testified that he reviewed and digitized the videotape. He stated that he reduced the gamma settings in order to remove some of the glare. Hobbs explained that he used a video editing system to isolate certain frames of the video and create photographs.

Officer Bryan Bishop, Director of the Second Judicial District Drug Task Force, who supervised the investigation, testified that he operated the surveillance equipment during the transaction. He explained that he made no attempt to recover the "buy" money because he did not want to compromise the "ongoing investigation."

Celeste White, a forensic chemist with the Tennessee Bureau of Investigation, testified that she received the package containing the rocks collected by Officer Nelson, weighed the substance, and then used an ultraviolet spectrophotometer and an infrared spectrophotometer to determine its chemical composition. Testing established that the substance was cocaine base and weighed .54 grams.

Tyler Fleming, Director of Student Services for Kingsport City Schools, testified that at the time of the offenses, the New Horizon School, which housed an alternative school program and several other programs, was located at 520 Myrtle Street. Jake White, an employee of the City of Kingsport Geographic Information System Division, compiled a map which showed the New Horizon School and shaded a one-thousand-foot buffer zone around the school. The map established that the residence on Sevier Street was within one thousand feet of the New Horizon School. White testified that the distance from the center of the New Horizon School building to the residence on Sevier Street was 905 feet.

Doris Ann Salyers, who was called as a witness for the defense, testified that she was unable to identify the individual who sold the drugs to Officer Ainsworth. It was her recollection that the perpetrator was a black male wearing a hooded sweatshirt. During cross-examination by the state, Ms. Salyers acknowledged that she had medical problems which affected her memory and her ability to identify people, including her own family members.

State v. Jermeil Ralph Tarter, No. E2005-01013-CCA-R3-CD, slip op. at 2-3 (Tenn. Crim. App. Mar. 8, 2006), *perm. app. denied* (Tenn. Aug. 21, 2006). The Petitioner filed the present post-conviction action.

At the post-conviction hearing, the Petitioner presented evidence regarding numerous allegations of ineffective assistance of counsel. We have summarized the evidence relevant to the issues he raises in this appeal.

At the request of the Petitioner's attorney, the trial court took judicial notice that the Petitioner was African-American. Post-conviction counsel stated that during voir dire, trial counsel made racially charged comments, including counsel's admission that he had used the "N-word" at times and his making a statement about "colored people" in the context of asking the prospective jurors if they would hold the Petitioner's race against him.

The Petitioner testified that before he was represented by trial counsel, he was represented by a member of the public defender's staff and agreed that he "fired" this attorney. He said his post-conviction complaints did not involve this attorney.

The Petitioner testified that he met with counsel a few times before the trial and that the meetings were brief, that there was "almost no interaction," and that they did not discuss a defense. He said counsel appeared cold and distant and gave him "one-liner" answers when he asked questions about his case.

The Petitioner testified when he inquired about the chance of a fair trial, counsel said it was "[s]lim to none." He said that when he asked counsel if the reason was because the Petitioner was black, counsel said, "Yes." He said that because of these statements, he thought counsel was not prepared to act in the Petitioner's best interests. He said counsel never "directly" made racial remarks in their meetings before the trial.

The Petitioner testified that his communication with counsel during and after the trial was "[v]irtually nonexistent." He said they did not discuss the sentencing hearing or the motion for a new trial. Regarding the trial, he said they never discussed whether he should testify. He recalled counsel's telling the jury that counsel had not yet asked him whether he would testify. He acknowledged that he told the judge he understood he had a right to testify but said he and counsel never discussed the advantages or disadvantages of testifying. He said that he first knew of his right to testify on the day the judge questioned him and that he and counsel did not discuss it other than his telling counsel he was not going to testify.

The Petitioner testified that counsel never advised him of the severity of the sentence he faced if he were convicted at a trial. He said he knew he would receive jail time but not the amount. He said that he did not know if counsel received a guilty plea offer and that they did not discuss plea bargaining. He said he would have considered an offer.

On cross-examination, the Petitioner testified that it was his idea to present a mistaken identity defense. He said he was not an attorney and did not know other possible defenses. He said mistaken identity was the only defense he suggested to counsel. He did not recall meeting with counsel for several hours before the suppression hearing. He agreed that counsel tried to find Doris Salyers, the confidential informant, and that the attorney who handled his case before counsel attempted to find her. He agreed that Ms. Salyers testified at the trial that she could not identify the Petitioner. He said Ms. Salyers was the State's witness and did not recall asking counsel to call her as a defense witness. He did not recall being told before the trial that Ms. Salyers could not identify him. He acknowledged his handwriting on a pro se pleading requesting the removal of his previous counsel. He did not recall, though, that he attached a document stating that the attorney had received information from the State about Ms. Salyers's inability to identify the Petitioner. He did not recall a motion for a continuance that the previous attorney filed because the attorney was attempting to locate Ms. Salyers, who could not identify him. He did not recall a signature line for him on the motion for a continuance. He did not recall stating in his pro se pleading that he did not agree to a continuance. He said he had no explanation for the documents that were attached to the pro se pleading. The pleading and its attachments were received as an exhibit. When shown his signature verifying the allegations of the amended post-conviction petition, which included an allegation that he did not receive a copy of the presentment, he said he did not remember if he received a copy of the presentment.

The prosecutor read a portion of the trial transcript into the record. The transcript contained the Petitioner's acknowledgment that he was aware of his right to testify, that he freely and voluntarily declined to testify, that he thought it was in his best interest not to testify, and that the decision was his, not counsel's. Regarding the trial transcript, the Petitioner testified that the judge questioned him about his right to testify but that counsel never discussed it with him.

When asked if he insisted upon a trial because of his strong belief in his defense that he was not the person in the drug transaction, the Petitioner testified that the trial was necessary because he did not receive a plea offer. He did not recall the State's offering him eight years at 100% service. Although the Petitioner acknowledged his handwriting in a motion to dismiss his attorney, he said he did not write the allegation that counsel was not properly defending him and tried to persuade him to accept a plea offer up until the day of the trial. He did not recall the defense requesting a plea offer. When shown other pro se documents from the court's file in the conviction proceedings, he said they looked "familiar" but was unsure if he wrote them. He did not remember counsel's cross-examining the State's witnesses. He could not identify any facts counsel could have presented as mitigating factors at sentencing but said counsel was a "creative defense attorney" and could have presented

something. On redirect examination, he did not recall discussing an offer with the attorney who represented him before counsel.

A letter from the Petitioner to the trial judge was received as an exhibit. It stated that the Petitioner wished to prove his innocence at trial, that he was making efforts to succeed as an inmate, and that he wanted the court to recommend him for a therapeutic drug treatment program at the John R. Hay House. A forensic video analysis report of the recording of the crime was attached as an addendum to the letter.

Counsel testified that he was seventy-three years old at the time of the hearing. He said he and the Petitioner discussed the only available defense, identity. He said they met several times. He said the identity defense, cross-examination of the witnesses, and investigation were the only available avenues for the defense. He said he reviewed the discovery, including the video recording, to prepare for the trial. He said the Petitioner had copies of the recording and thought that at the Petitioner's direction, he gave a copy to the Petitioner's girlfriend. He said that he had no reason to ask an independent expert to review the recording and that the Petitioner never gave him a reason to question the recording's authenticity or ask that counsel have it examined. He said the original recording "had a sunshine" and was "digitized" by the State. He said the Petitioner insisted that he was not the person in the recording and that he wanted a trial. He said the Petitioner would not consider a plea bargain and was "difficult to deal with." Although he did not specifically recall discussing a plea agreement with the Petitioner, he said he had done it in every case he had ever handled.

Counsel testified that he was "sure" but did not specifically recall discussing whether the Petitioner would testify, as was his habit. He said that he told his clients the pitfalls of testifying and that the client made the decision. He acknowledged the statement in the transcript of voir dire that he did not know whether the Petitioner would testify and that he had not yet asked the Petitioner. He said they had discussed the possibility of the Petitioner's testifying before voir dire, although he was unsure whether he asked the Petitioner before the trial if the Petitioner wanted to testify.

Counsel testified that before and at the time the Petitioner's case was pending, there was controversy about whether indictments were duplicitous if they alleged various modes of committing the same offense. He said that in the Petitioner's case, proof showed that there were four pills and a bottle containing twenty or more rocks. He said he did not see a need to file a request for a bill of particulars.

Counsel testified that in view of the fact that the Petitioner was "colored," they probably discussed the possibility of requesting a change of venue. He said it was necessary

to question prospective jurors first to determine whether there was a basis for requesting a change of venue. He agreed that he told the jurors he grew up with the "N-word," that it sometimes "just comes out of [his] mouth," and that people looked at him in awe. He said he made the statements because his client was African-American and he was trying to determine if anyone had any racial bias or prejudice. He said he grew up in the 1940s to 1970s and was aware of racial "hatred." When asked if he was prejudiced against African-Americans, he said, "Absolutely not." He acknowledged that he sometimes used the "N-word," that he also used the word "whitey," and that he was not sensitive to the "N-word." He said he thought of the Petitioner as a human being and not in terms of the "N-word." He said that he sometimes used the word to try to see how others reacted and that he had to try to "read" jurors based on their facial expressions.

Counsel testified that he and the Petitioner discussed enhancement and mitigating evidence for sentencing. He said no mitigating factors were applicable. He agreed, though, that the mitigating factor for neither causing nor threatening serious bodily injury might apply.

Counsel acknowledged that he did not object to the prosecutor's opening statement about Agent Ainsworth's identifying the Defendant with 100% certainty. He said he "did not catch" the statement at the time. He acknowledged he did not raise the issue in the motion for a new trial and said he did not have a transcript when he filed the motion.

On cross-examination, counsel testified that he hoped he did not fail to represent the Petitioner to the best of his abilities due to the Petitioner's race. He said he took his forty-two years of actively practicing criminal law into consideration in representing the Petitioner. When asked if the transcript of the sentencing hearing accurately reflected that he offered two mitigating factors to the court, he said he did not have any independent recollection but would rely on the transcript.

Counsel testified that he had given his file to the Petitioner's representative but that he would agree with the record if it showed that the Petitioner's previous counsel filed two motions to suppress. He agreed that the previous attorney obtained discovery, including exculpatory information that Doris Salyers, the confidential informant, could not identify the Petitioner. He agreed that he obtained legal process to bring Ms. Salyers from southwest Virginia to testify that she could not identify the Petitioner. He agreed he knew through discovery that Agent Ainsworth was only 90% certain about his identification of the Petitioner from a photograph lineup and that he cross-examined Agent Ainsworth based on this information. He said that the Petitioner wanted him to use defenses other than identity but that ethically, he could not. He said he represented the Petitioner in at least one other case that went to trial. He agreed he provided the Petitioner with the "R.O.C.I.C." report and

photographs. He said he had no basis to challenge the authenticity of the video recording. He did not recall any media attention to the case. He agreed that the Petitioner maintained that he was not guilty and wanted a trial, not the State's plea offer. He said the Petitioner never identified other individuals who counsel might attempt to show perpetrated the crime, any exculpatory evidence, or possible defense witnesses. He agreed it was a common practice for a prosecutor to say during opening statements that a witness had previously identified a defendant and to offer proof during the trial of the witness's identification of the defendant.

On redirect examination, counsel testified that the Petitioner "knew what the plea offer was from the beginning and he was not taking an offer." He said they had "very little discussion" of the offer because he could not force the Petitioner to accept it or insist that the Petitioner accept it. He said the Petitioner relied on the officer's testimony that he was only 90% sure of his identification. He acknowledged he did not have a specific recollection of advising the Petitioner of the offer. The trial court received a letter from the prosecutor to counsel communicating the offer as an exhibit.

An assistant public defender testified that he was the Petitioner's first attorney. He identified the June 18, 2004 motion to withdraw that he filed around the time the Petitioner filed a motion to discharge him. He agreed that his motion stated that he had difficulty communicating with the Petitioner to the point that he left a conference with the Petitioner at the jail. His motion stated, in pertinent part, that the Petitioner failed to cooperate with him and discuss the case and that the Petitioner accused him of providing ineffective assistance and trying to have the Petitioner convicted. His motion stated that the Petitioner began yelling at him during a June 18 meeting and announced his intention to ask the court to remove counsel from his case. When shown on cross-examination an exhibit purporting to be an acknowledgment by the Petitioner of counsel's inability to locate Ms. Salyers, receipt of discovery, and statements regarding whether the Petitioner desired for counsel to request a continuance, Mr. Harrison agreed that he drafted it, noted that the document was unsigned, and stated that he did not think he filed it. The document was an attachment to a pro se motion for removal of counsel filed by the Petitioner on June 21, 2004.

After the proof was received, post-conviction counsel stated that after consultation with the Petitioner, the Petitioner was withdrawing all but three issues: (1) counsel's use of the phrase "N-word" during voir dire, (2) counsel's failure to advise the Petitioner regarding his right to testify, and (3) counsel's failure to advise the Petitioner of the applicable ranges of punishment and the benefits and detriments of going to trial versus accepting a plea offer. The court questioned the Petitioner regarding his withdrawal of other allegations, and the Petitioner acknowledged his understanding.

The trial court noted that the amended post-conviction petition alleged that trial counsel said "N-word" during voir dire, not the six-letter word. The court stated that it had never observed counsel use the six-letter word.

The transcript of the Petitioner's trial was made an exhibit to the post-conviction hearing. It reflects that during voir dire, counsel explained that he sometimes had to "get rough" with witnesses and asked if any prospective jurors would hold this against him or against the Petitioner. Counsel then said:

> What about if [the defendant] is a black man? That is important [in] this day and time. They say racism is over with, but we still have bias and prejudice. I know that. I use certain words that I grew up with, and they come out of my mouth every once in a while, and people look at me in awe, when I use the N word, but you can't just strike something out of your brain. It is there. Sometimes it pops out. That is about all I knew people, colored people, were called, but is there anyone that would hold, just, race, color, against a young man?
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> I listen to a CB radio as I travel the Interstate sometimes. I am afraid to fly, so I go on in a car. I have a driver, my wife, and you hear all sorts of things on that CB radio. Is there anyone that has ever heard anything on a CB about colored people, that would tend to prejudice you or cause you to be biased against a colored person? Okay.
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> . . . .
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> Under our rule of law, our system of justice, he doesn't have to testify. I don't know whether he will or not. I haven't asked him yet, because it will depend on what they do as to whether or not he does. He may think, "Well, I think there is sufficient reasonable doubt to where I don't want to testify." Is there anybody that would hold that against him, if he made that decision? Would you hold it against him, if I gave him some advice on that?

Regarding the claim of ineffective assistance in voir dire, the trial court found that counsel used a "straight forward and to the point" method of addressing the issue of racism that was directed in part to older prospective jurors. Relying on an internet source, the court noted that the African-American population of Sullivan County was 1.8%. The court found that counsel "was pointing out to the jury the changes and how it once was but shouldn't be any longer and asking them at the same time if they had any prejudices."

Regarding the allegation of ineffective assistance in failing to discuss adequately the benefits and detriments of a trial as compared with accepting the State's plea offer, the trial court noted that despite the Petitioner's testimony that he was not advised of an offer from the State, the record contained documents demonstrating otherwise. The court noted the letter summarizing the offer and the Petitioner's pro se motion to dismiss counsel. In the motion, the Petitioner requested new counsel who would not assume his guilt and attempt to persuade him to accept a plea bargain "up until the very day of the trial." The court found that counsel conveyed offers to the Petitioner, who did not accept. The court noted, as well, that the Petitioner was not a credible witness.

Regarding the allegation of ineffective assistance in failing to advise the Petitioner adequately regarding his right to decide whether to testify and the advantages and disadvantages of testifying, the trial court noted that viewed in context, counsel's remarks during voir dire "left the jury knowing that a defendant doesn't have to testify and he will not be offered as a witness unless the facts call for his testimony." The court found that it was implied that the Petitioner would be asked later whether he wanted to testify. The court noted, as well, that the Petitioner was questioned on the record by counsel and the court about his decision not to testify and his understanding of his rights. The court also noted that counsel testified at the post-conviction hearing that it was his habit to discuss with a client before a trial whether the client would testify and that he was sure he followed his habit in the Petitioner's case. The court noted that when he was questioned at the trial about his decision not to testify, the Petitioner was not asked directly if he and counsel had discussed the advantages and disadvantages of testifying but that the Petitioner made it clear that he did not want to testify and that his choice was voluntary. The court denied relief. This appeal followed.

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2012). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. *Id.* at 457. Post-conviction relief may only be given if a conviction or sentence is void or voidable because of a violation of a constitutional right. T.C.A. § 40-30-103 (2012).

Under the Sixth Amendment, when a claim of ineffective assistance of counsel is made, the burden is on the Petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). In other words, a showing

that counsel's performance fell below a reasonable standard is not enough because the Petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The *Strickland* standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the *Strickland* test. *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). The performance prong requires a petitioner raising a claim of ineffectiveness to show that counsel's representation fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The prejudice prong requires a petitioner to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability means a "probability sufficient to undermine confidence in the outcome." *Id.*

I

The Petitioner contends that counsel provided ineffective assistance during voir dire concerning the issue of the Petitioner's race. He argues that counsel's statements communicated to the jury that racial prejudice and the use of racial epithets was acceptable. The State argues that although some attorneys might use different tactics, counsel's tactic was not deficient and that no evidence showed counsel's tactic affected the jury's consideration of the Petitioner's guilt in light of identification testimony from two eyewitnesses. We agree with the State.

As we have noted, counsel referred to his having grown up hearing the "N-word" and having used it himself. His statements were in the context of acknowledging racial prejudices upon which the prospective jurors should not rely in considering the African-American Petitioner's case. Although we acknowledge that counsel's references to the "N-word" was unnecessary to address the possibility of racial prejudice, we cannot conclude that his remarks condoned racism or that they had any negative effect on the Petitioner's receiving a fair trial. The Petitioner failed to establish clear and convincing evidence from which the trial court could conclude that counsel's performance was deficient and that the Petitioner was prejudiced as a result. The Petitioner is not entitled to relief on this basis.

II

The Petitioner contends that counsel provided ineffective assistance by failing to counsel him adequately regarding his right to testify or remain silent and the advantages and

disadvantages of testifying. The State contends that the Petitioner abandoned his claim in the trial court regarding counsel's advice about his right to testify or remain silent and that the Petitioner's proof was insufficient to establish the claim. We conclude that the Petitioner is not entitled to relief on this basis.

The record reflects that the amended petition alleged, "The Petitioner's trial counsel failed to adequately counsel the petitioner concerning his right to testify and right to remain silent and the advantages and disadvantages of testifying." The transcript does not reflect that this was one of the claims the Petitioner withdrew. We conclude that the Petitioner did not abandon this issue.

Counsel testified that although he could not recall specifically discussing whether the Petitioner would testify, it was his practice to discuss the advantages and perils of testifying with his clients. He was certain that he and the Petitioner had this discussion before voir dire. We do not view counsel's statement in voir dire that he had not yet asked the Petitioner if he would testify as a declaration that they had not discussed the benefits and perils of testifying but rather as a statement that counsel had not yet asked the Petitioner what his final decision would be. We note, as well, that the Petitioner was questioned at the trial regarding whether he would testify. He stated that it was his decision, not counsel's, that he would not testify, and that he freely and voluntarily made the decision. We acknowledge that the Petitioner was not specifically questioned at the trial about whether counsel had advised him regarding his decision to testify and that the Petitioner testified at the post-conviction hearing that counsel never discussed with him whether he would testify. We note, though, the trial court's finding that the Petitioner's testimony was not credible. We conclude that the trial court did not err in determining that the Petitioner failed to prove his claim by clear and convincing evidence. The Petitioner is not entitled to relief on this basis.

III

The Petitioner contends that counsel provided ineffective assistance because he failed to inform the Petitioner fully regarding the possible sentence he might receive if he went to trial, the minimum and maximum punishment, the strengths and weaknesses of the State's case, and the benefits and detriments of a trial as opposed to accepting the State's plea offer. The State has not addressed the issue as framed by the Petitioner but contends that the Petitioner failed to prove that counsel did not communicate an offer that the Petitioner would have accepted. We conclude that the Petitioner is not entitled to relief.

The Petitioner testified that although he knew he would receive prison time for the offense, counsel never advised him of the severity of the punishment he faced if convicted. Although counsel could not specifically recall discussing the range of punishment and plea

bargaining with the Petitioner, he was certain he did. He said that the Petitioner insisted he did not commit the offense and that he wanted a trial. Counsel said that the Petitioner knew of the terms of the plea offer from the beginning of counsel's representation but that they did not discuss it at length because he could not force the Petitioner to accept it. He noted that the Petitioner wanted a trial because a police officer was only 90% certain in his identification of the Petitioner. He acknowledged he had no specific memory of discussing the offer with the Petitioner but was certain they discussed the offer. A letter from the prosecutor to counsel regarding discovery stated that the prosecutor had previously extended an offer of eight years at 100% service. In a handwritten, pro se motion to dismiss counsel filed shortly after the trial, the Petitioner requested "an attorney that will properly defend me, and not assume my guilt by trying to persuade me into taking plea bargains up until the very day of the trial, before thoroughly researching my case, and all angles of my defense appropriately." Counsel testified that he reviewed the discovery materials and provided them to the Petitioner's girlfriend at the Petitioner's request and that he met with the Petitioner to prepare for the trial. As we have noted, the trial court found that the Petitioner's testimony was not credible. The record supports the court's determination that the Petitioner failed to prove his claim by clear and convincing evidence.

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

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JOSEPH M. TIPTON, PRESIDING JUDGE