

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
Assigned on Briefs October 29, 2019

FILED

12/19/2019

Clerk of the  
Appellate Courts

**VOLTAIRE YOUNGER v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Knox County  
No. 112252 Steven Wayne Sword, Judge**

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**No. E2018-02168-CCA-R3-PC**

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The Petitioner, Voltaire Younger, appeals the post-conviction court's denial of his petition for post-conviction relief in which he challenged his guilty pleas to the possession of heroin with the intent to deliver and possession of a firearm during the commission of a dangerous felony. The Petitioner received an effective sentence of fifteen years. On appeal, the Petitioner alleges that he received ineffective assistance of counsel and that his guilty pleas were not voluntarily entered. After a review of the record and applicable law, we affirm the judgment of the post-conviction court.

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

JOHN EVERETT WILLIAMS, P.J., delivered the opinion of the court, in which D. KELLY THOMAS, JR., and J. ROSS DYER, JJ., joined.

Leslie M. Jeffress, Knoxville, Tennessee, for the appellant, Voltaire Younger.

Herbert H. Slatery III, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Charme Allen, District Attorney General; and Kenneth Irvine, Jr., Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**PROCEDURAL AND FACTUAL BACKGROUND**

**Plea Hearing**

The Petitioner was present when the Knox County Sheriff's Department executed a search warrant on October 6, 2015, at Ms. Markeisha Ellis's residence and seized multiple drugs. According to the State's recitation of facts at the plea hearing, the search

warrant was based on several undercover heroin purchases made at that residence. Both the Petitioner and Ms. Ellis were at the residence when the officers arrived. During the search, law enforcement found “some heroin, some cocaine, a small amount of marijuana, small amount of pills, [and] some drug paraphernalia that’s consistent with selling heroin.” Officers also found a handgun. The prosecutor stated that the State would have offered proof at trial that established that this residence was within one thousand feet of a school. The State also offered evidence that after the Petitioner was advised of and waived his rights, he admitted to law enforcement that he had participated in selling heroin.

The Petitioner was indicted for thirteen offenses.<sup>1</sup> The prosecutor announced at the plea hearing that the Petitioner had been indicted for possession of heroin with intent to sell within one thousand feet of a school but was pleading guilty to the lesser included offense of possession of heroin with intent to sell, a Class B felony. *See* T.C.A. § 39-17-417(b). The State recommended a twelve-year sentence to be served at thirty percent. The Petitioner also pleaded guilty to possession of a firearm during the course of a dangerous felony, a Class D felony. *See* T.C.A. § 39-17-1324(a), (g)(1). The prosecutor explained that the Petitioner would have to serve a mandatory three-year sentence at one hundred percent and that the sentences would run consecutively to each other for an effective fifteen-year sentence. The remaining eleven counts of the indictment were dismissed pursuant to the plea agreement.

The Petitioner acknowledged that he understood the terms of the plea agreement. The trial court specifically asked the Petitioner if he understood that he would be required to serve an effective sentence of fifteen years with three years to be served at one hundred percent and the remainder to be served a thirty percent, and the Petitioner indicated that he understood. The Petitioner acknowledged that he was entering the pleas voluntarily. The trial court accepted the Petitioner’s pleas and postponed the entry of the final judgment so that the Petitioner would be allowed to spend the holidays with his family before reporting to serve his sentence on January 5, 2017. The Petitioner did not report on that day, and the trial court issued a *capias*. On February 10, 2017, the Petitioner turned himself in to law enforcement, and the State agreed not to pursue additional charges if the Petitioner aided in an ongoing investigation. The prosecutor stated that the Petitioner had provided “valuable information.”

### **Post-Conviction Proceedings**

The Petitioner filed a *pro se* petition for post-conviction relief in which he argued that his guilty pleas were involuntarily entered because he did not understand the nature

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<sup>1</sup> The indictment and the judgment forms are not included in the appellate record.

and the consequences of the plea agreement. He also asserted that his conviction was based on the use of a coerced confession and a violation of the privilege against self-incrimination. Additionally, he argued that trial counsel was ineffective because she did not explain his sentence and failed to provide him with discovery until after he was convicted. The post-conviction court appointed counsel, and counsel filed an amended petition alleging that trial counsel was ineffective. Post-conviction counsel also filed an addendum to the amended petition and argued that trial counsel was ineffective for failing to “file any claim that police violated his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).”

The Petitioner testified at the post-conviction hearing that trial counsel was appointed to represent him in the general sessions court. He stated that trial counsel did not hold a preliminary hearing on his behalf. A bond reduction hearing was held in general sessions court, and the Petitioner said he met with trial counsel once in preparation for the bond hearing. He denied that they discussed the facts of the case during that meeting. The Petitioner testified that after he made bond, he met with trial counsel two times in her office and that he also met with her briefly any time he had a court appearance. He said he told trial counsel that the drugs found in the residence were for his personal use, and trial counsel told him that her defense strategy was to contest the search of the home. The Petitioner testified that on the day of the suppression hearing, trial counsel informed him of the State’s plea offer of twelve years at thirty percent. He said trial counsel told him that he would not be successful at trial and that he was facing a sentence of twenty years at one hundred percent and that he agreed to enter the pleas based upon trial counsel’s representations.

The Petitioner recalled telling trial counsel that he had not been in Ms. Ellis’s home for the six months preceding the execution of the search warrant. He said that he and Ms. Ellis had recently renewed their relationship and that he had stayed at her home the night before the search warrant was executed. The following morning, the officers came to execute the search warrant on Ms. Ellis’s home, and they did not know who the Petitioner was.

The Petitioner also testified that trial counsel never provided him with discovery materials and that he did not receive the discovery packet until after he had entered his plea agreement. He said that his mother went to trial counsel’s office to pick up the discovery packet and that his mother mailed him the packet. The Petitioner testified that when he reviewed the discovery document titled “Knox County Sheriff’s Office Narcotic Unit seizure case notes” he discovered that Officer B. Yearout made a false statement that the Petitioner admitted to officers “that he would sell two to three points of heroin a day, and his girlfriend, Markeisha Ellis, would sell seven to eight points of heroin a day.” The Petitioner claimed he told Officer Yearout that the drugs found in the house were for

personal use. The Petitioner also testified that an officer began questioning him about the drugs found in Ms. Ellis's house prior to advising him of his rights and that he told trial counsel about the officer's questioning.

The Petitioner testified that at the time of the plea hearing, he was suffering from "emotional stress" regarding "the fact that [he] was going to prison." He acknowledged that at the plea hearing, he testified that he understood the rights listed in the plea agreement. At the post-conviction hearing, the Petitioner claimed that he did "[n]ot really" understand the plea agreement. He explained that he only testified that he understood because he was under a significant amount of stress and that he only had thirty minutes to make the decision of whether to accept the plea agreement. He acknowledged that trial counsel did not force him to plead guilty.

On cross-examination, the Petitioner said that whenever he asked trial counsel a question about his case, she would sit in silence for "[m]aybe a few minutes" and would not respond to his questions. He acknowledged that trial counsel made it very clear to him that it was his decision whether he wanted to plead guilty. The Petitioner admitted that he decided to plead guilty because he did not want to risk going to jail for twenty years with a release eligibility date of one hundred percent. He acknowledged that he had previously entered guilty pleas on other cases. He stated that he met with trial counsel one or two times while he was in jail awaiting a bond hearing and that he met with trial counsel an additional two times in her office once he was released on bond.

The Petitioner testified that at the time he entered his pleas, he did not understand that he would receive a fifteen-year sentence because trial counsel informed him that his convictions would be served concurrently for an effective sentence of twelve years. He acknowledged that both the prosecutor and the trial judge made statements during the plea hearing that his sentence would be fifteen years, but he stated that he was not paying attention.

Trial counsel testified at the hearing that she was an assistant public defender who had practiced criminal defense since 1991. Trial counsel brought the Petitioner's file with her, and she confirmed that in her initial interview with the Petitioner at the detention facility, they discussed the Petitioner's background and the events leading to his arrest. Trial counsel recalled meeting with the Petitioner an additional time at the detention facility prior to his bond hearing. Once the Petitioner was released on bond, they met at least two more times at her office. She recalled reviewing the discovery with the Petitioner and stated that it was her practice "in these types of cases, particularly in [C]lass A felonies to go over discovery in minute detail." She also recalled speaking with the Petitioner about the fact that the drugs were found within one thousand feet of a

school and that if convicted of the charged offense, he would have to serve a mandatory prison sentence at one hundred percent.

Trial counsel specifically recalled discussing the Petitioner's statement to Officer Yearout in which he admitted to selling heroin. She stated that the Petitioner told her that he had the heroin for personal use, and they discussed personal use as a possible defense theory. Trial counsel informed the Petitioner that if they went to trial, his statement to Officer Yearout admitting that he sold heroin would come before a jury. Trial counsel filed a motion to suppress challenging the search of the house. She stated that it is her practice to file a more specific motion to suppress if she is unable to negotiate a favorable plea deal. Trial counsel recalled filing a "motion for specific discovery" because she believed that it would help if they pursued a defense theory of personal use.

After reviewing the evidence with the Petitioner, trial counsel advised the Petitioner that he should accept the State's plea offer. Trial counsel denied telling the Petitioner that he would definitely be convicted if he went to trial. Rather, she stated that she told him, "I think there's a really strong likelihood you're [going to] get convicted. I don't like to lose trials, and I'm really worried about losing this trial." Trial counsel testified that she would never force the Petitioner to plead guilty because "it's a point of pride for me that I don't force people to plead guilty or try to get them to do something they don't want to do." Trial counsel recalled discussing the terms of the plea agreement with the Petitioner and answering any questions that he asked.

On cross-examination, trial counsel confirmed that she met with the Petitioner two times while he was at the detention facility before he was released on bond. During those meetings, they discussed the facts of the Petitioner's case. Trial counsel reviewed her case file and testified that they discussed the fact that the search warrant named Ms. Ellis, not the Petitioner. The Petitioner told trial counsel that he was in bed when the search warrant was executed and that officers "kicked in the door [and] dragged him out of bed." While officers were searching the residence, the Petitioner was handcuffed, and officers instructed him to sit under a tree in the front yard. The Petitioner told trial counsel the location where each of the drugs was found during the search, including cocaine, marijuana, Suboxone, and Klonopin.

Trial counsel believed that, based on her conversations with the Petitioner, he lived at Ms. Ellis's residence off and on. Trial counsel said that the Petitioner knew that there was a firearm in the bedroom and that he understood that his firearm conviction would run consecutively to his drug conviction.

The post-conviction court issued a written order denying the Petitioner relief. The court credited trial counsel's testimony. The court found that trial counsel met with the

Petitioner and discussed his case on multiple occasions. The post-conviction court stated that the Petitioner had time to contemplate his decision to enter a guilty plea and that the Petitioner “testified multiple times that he accepted the offer in order to receive a shorter penitentiary sentence.”

The post-conviction court found that trial counsel discussed discovery materials with the Petitioner and that, based on those discussions, they decided that personal use could be a viable defense if the Petitioner proceeded to trial. In addressing the Petitioner’s claim that trial counsel frightened him into entering his guilty pleas, the court found that there was not “any deficiency in the advice [trial counsel] gave the Petitioner.” The post-conviction court determined that trial counsel failed to show that a motion to suppress challenging the admissibility of his confession on the grounds that it violated *Miranda* would have been successful. The Petitioner now appeals.

### ANALYSIS

The Petitioner maintains that the post-conviction court erred in determining that his plea was entered knowingly and voluntarily based upon ineffective assistance of counsel. Specifically, the Petitioner argues that trial counsel was ineffective for failing to: 1) meet with him and provide or discuss discovery; 2) request a preliminary hearing; and 3) include a *Miranda* argument in the motion to suppress.

A petitioner is entitled to post-conviction relief from any conviction or sentence that is “void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” T.C.A. § 40-30-103. The petitioner has the burden of proving the allegations of fact in the petition by clear and convincing evidence. T.C.A. § 40-30-110(f); *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009). “Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Grindstaff*, 297 S.W.3d at 216 (quoting *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998)).

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 v. State*, 120 S.W.3d 828, 830 (Tenn. 2003).

To establish an ineffective assistance of a counsel claim, the petitioner “must show that counsel’s performance was deficient and that the deficiency prejudiced the defense.” *Wiley v. State*, 183 S.W.3d 317, 329 (Tenn. 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 692 (1984); *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996)). This court “need not address both elements if the petitioner fails to demonstrate either one of them.” *Kendrick*, 454 S.W.3d at 457. To establish deficiency, the petitioner is required to show that trial counsel’s actions “fell below an objective standard of reasonableness under prevailing professional norms.” *Wiley*, 183 S.W.3d at 329. Trial counsel’s performance is not deficient when the advice given is “within the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In order to establish prejudice as a result of trial counsel’s deficient performance, the petitioner “must establish a reasonable probability that but for counsel’s errors the result of the proceeding would have been different.” *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (quoting *Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006)). When the case involves a guilty plea, “a petitioner must establish that but for counsel’s deficiency; he would have gone to trial instead of entering the plea of guilty.” *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)).

### **I. Failure to Meet with the Petitioner and Provide Discovery**

The Petitioner maintains that trial counsel was deficient for failing to meet with him more than three times before he pled guilty and failing to provide the Petitioner with discovery materials. The post-conviction court credited trial counsel’s testimony that she met with the Petitioner two times while he was detained, two times at her office, and before and after court appearances. The Petitioner does not argue on appeal that had trial counsel met with him more frequently that he would have elected to proceed to trial rather than enter a guilty plea. The post-conviction court found that trial counsel did meet with the Petitioner and that their discussions “included factual and legal approaches to defending his case.” In its order, the post-conviction court noted that Petitioner had time to contemplate whether he wished to plead guilty. The post-conviction court’s findings of fact “are conclusive on appeal unless the evidence preponderates against those findings.” *Jaco*, 120 S.W.3d 8 at 830. Accordingly, we will not disturb the post-conviction court’s finding that trial counsel met and discussed both the factual and legal circumstances surrounding the Petitioner’s case. We conclude that trial counsel’s performance was not deficient.

To the extent that the Petitioner is making an argument that trial counsel was deficient for failing to discuss discovery material with him, he has not included any argument in his appellate brief that the post-conviction court’s finding that trial counsel

reviewed discovery materials with him was inaccurate. Accordingly, we will not disturb the post-conviction court's finding of fact. *See Jaco*, 120 S.W.3d at 830.

## **II. Failure to Request a Preliminary Hearing**

For the first time on appeal, the Petitioner appears to argue that trial counsel was deficient for failing to ensure that he had a preliminary hearing. During the post-conviction hearing, trial counsel testified that she and the prosecutor came to an agreement that the Petitioner would waive the preliminary hearing in exchange for a reduced bond. Because this issue was not included in the petition for post-conviction relief, the post-conviction court did not address this issue. A petitioner waives an issue when “the petitioner personally or through an attorney fail[s] to present [the claim] for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.” T.C.A. § 40-30-106(g). “It is a well-established rule that this court will not address post-conviction issues that were not raised in the petition or addressed by the post-conviction court.” *Joshua L. Carter v. State*, No. M2017-02401-CCA-R3-PC, 2018 WL 3770036, at \*17 (Tenn. Crim. App. Aug. 8, 2018), *perm app. denied* (citing *Brown v. State*, 928 S.W.2d 453, 457 (Tenn. Crim. App. 1996)). We conclude that this issue is waived.

## **III. Failure to Include a *Miranda* Argument in the Motion to Suppress**

This court has previously determined that when a petitioner argues that trial counsel was ineffective for failing to file a pre-trial motion he “should incorporate a motion to suppress within the proof presented at the post-conviction hearing.” *Terrance Cecil v. State*, No. M2009-00671-CCA-R3-PC, 2011 WL 4012436, at \*8 (Tenn. Crim. App. Sept. 12, 2011). It is a petitioner's burden to “submit evidence (and not just his testimony surmising on the merits of a pre-trial suppression motion) that the suppression motion would have been granted and that there is a reasonable probability” that the proceedings would have concluded differently. *Charles Bradford Stewart v. State*, No. M2015-02449-CCA-R3-PC, 2017 WL 26455651, at \*14 (Tenn. Crim. App. June 20, 2017). The Petitioner has failed to establish a reasonable probability that had trial counsel included a *Miranda* argument within the motion to suppress, it would have been successful and that he would not have entered a guilty plea. On appeal, the Petitioner has failed to show that a motion based on a *Miranda* violation would be granted. Such issues should have been raised given the statements given by the Petitioner. Accordingly, the Petitioner has not met his burden of showing that a motion to suppress based on a *Miranda* violation would have been successful; therefore, he is not entitled to relief on this ground.



## **CONCLUSION**

For the foregoing reasons, we affirm the judgment of the post-conviction court.

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JOHN EVERETT WILLIAMS, PRESIDING JUDGE