IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 3, 2024

ERIC MARTELL SMALL v. STATE OF TENNESSEE

Appeal from the Circuit Court for Tipton County
No. 10731 A. Blake Neill, Judge

No. W2024-00609-CCA-R3-PC

Petitioner, Eric Martell Small, appeals as of right from the Tipton County Circuit Court's denial of his petition for post-conviction relief in which he claimed that he received ineffective assistance of counsel and that his guilty plea was coerced, involuntary, and unknowing. Following our review, we affirm.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., and JILL BARTEE AYERS, J., joined.

J. Jeffrey Lee, Covington, Tennessee, for the appellant, Eric Martell Small.

Jonathan Skrmetti, Attorney General and Reporter; Garrett D. Ward, Senior Assistant Attorney General; Mark Davidson, District Attorney General; and Jason R. Poyner, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background

a. Guilty Plea and Sentencing Proceedings

At the September 7, 2023 hearing, the trial court stated that the case was set for trial that morning and recited the charges. Petitioner addressed the trial court and stated, "We can't be on the same page with my lawyer, because I spoke to him and I made it clear to him that I was not going to trial." The trial court informed Petitioner that he had two options, which were to go to trial or plead guilty and return to court for a sentencing hearing. The trial court noted that it would answer any questions Petitioner had.

Petitioner responded, "It's just . . . a big misunderstanding with my lawyer. Lack of communication. It's got to be." He requested time to contact his family and hire his "own" attorney, which the trial court denied. The trial court noted that the case had been pending since February 2022, that Petitioner had "plenty of time to hire a lawyer," and that the court's understanding was that the State did not intend to make a plea offer. The trial court stated that it would allow Petitioner to speak to his attorney[1] about the potential sentence ranges if he pleaded guilty.

Petitioner stated that he had mostly discussed his case with co-counsel, who was not present. He stated that he had only met trial counsel twice. Petitioner noted that he told co-counsel that he "was not going to trial in this case." The trial court responded that co-counsel was on his way from another court and that trial counsel was "competently able to represent" Petitioner in the meanwhile. Petitioner agreed to speak to trial counsel during a short break.

After court resumed, trial counsel announced that Petitioner was going to make an open plea and that Petitioner wished for his sentence in this case to run concurrently with his federal case. Trial counsel asked the prosecutor to confirm for the record that it had "pulled all offers" and was not willing to make additional offers, and the prosecutor agreed. The prosecutor stipulated that the agreement was that the sentence in this case would run concurrently with Petitioner's federal sentence, which "includes a portion or the same set of circumstances." The prosecutor added, though, that Petitioner's sentence in this case was mandatorily consecutive to Tipton County Circuit Court case number 10644 because Petitioner was released on bond in case number 10644 when he committed the offenses in this case.

After a recess, the prosecutor addressed the trial court and explained that Petitioner had been indicted for possessing three different firearms and that Petitioner had previous violent felony convictions. The prosecutor noted that the State's notice of intent to seek enhanced punishment showed that Petitioner was a "persistent offender" and that a recent change in the law provided that Petitioner was required to serve 85% of the sentences.

The prosecutor stated,

> So for a B felony [possession of a firearm by a convicted violent felon], he's looking at 20 to 30 years at 85 percent. That would be the range in that case. For the aggravated burglary is a C felony. That's one count of aggravated burglary as a career offender. Theft of property, [$]2,500 to 10,000. That being a D felony for a career offender. Criminal attempt to

[1] The record reflects that Petitioner was represented by two attorneys, to whom we will refer individually as trial counsel and co-counsel and collectively as defense counsel.

commit aggravated burglary being a D felony for a career offender. And resisting arrest, a B misdemeanor.

The prosecutor then gave the following factual basis for the plea:

Had this matter gone to trial, the State would have called witnesses who are present here today. We would have called Ms. Shirley Jackson . . . Ms. Jackson will testify that between 7:00 and 7:30 [on July 3, 2021], she noticed an unfamiliar car parked in her driveway. That turned out to be a Saturn SUV that was registered to [Petitioner] . . . .

She called her son and she also called 911. Her son lives a short ways away . . . and came over and confronted [Petitioner]. Ms. Jackson also had a conversation with him briefly in the driveway. He said he was looking for his keys, couldn't find his keys.

The police were called. Munford Police Department Officers Blackwood and Workmeister responded in two separate vehicles. And with the assistance of Tedrick Jackson, who was chasing [Petitioner] on foot through the neighborhood, [Officer Workmeister] located [Petitioner] after he came over a wooden fence and held him at gunpoint. Officer Workmeister . . . took him into custody with the assistance of Officer Blackwood. He was wearing a black tank top, black shorts, a black cap, a White Sox logo on it. All described by Ms. Jackson in her phone call with 911 and her son's phone call with 911.

Police did go back . . . with [Petitioner] and located the vehicle. Obviously looking in the window of the vehicle, there [were] bags in the vehicle, a pink suitcase, a black plastic bag with the barrel of a rifle sticking out of it. A canvas of the neighborhood and talking with neighbors did result in the house at 67 Chance Avenue, it was discovered, had been broken into.

The residents there are Leslie and Cor[ie] Yarbrough and their . . . three children including a 10-year-old daughter. It was discovered using the neighbor's surveillance camera that was pointed at that house while they were on vacation that [Petitioner] had driven through that neighborhood, passed their houses at about 5:30 in the morning in that same vehicle, the dark Saturn SUV that was parked . . . in Ms. Jackson's driveway. There is a trail through the dew leading through the back yards to the houses on Chance. And it was discovered using the neighbor's security system owned by Mr. Corey Dunkin.

There is actually a video of [Petitioner] walking through the yards and checking the door at . . . 51 Chance . . . . He actually went to that house first, attempted to enter that front door. Left that front door, went around to the other house, walked around it coming to a window. It appeared to be unlocked. He's actually on video raising that window, looking around. He jumps through the window. He's in the house for a long time.

One of the things that the Yarbroughs did while they were on vacation was left a camera, a motion-[s]ensored camera inside of their home. And [Petitioner] is viewed for a couple hours inside of their home. He is going through their house, ransacking the house, taking things off the wall, taking TVs, looking through all the rooms, and staging things in bags, [a] suitcase, backpacks that he's found throughout the house. And he leaves through that window twice, if not three times, to take items back to his car through the back yards to 28 Shortline where he's placing things into the SUV and returns to the house to load up more items.

This goes on for two, two and a half hours. He's actually seen coming and going through that window two or three times. There are still shots of him coming in and out of the house and video of him coming in and out of the house . . . . [W]hen he is located by the police, he has in his possession a set of keys that belong to a white GMC Sonoma truck. That truck was parked in the driveway at 67 Chance, which is the address of the Yarbrough house that was broken into and burglarized. Those keys were left inside of the house and identified by the homeowners as their key[s]. Obviously, they didn't give [Petitioner] permission to go into their house, ransack it, steal things and take the vehicles to their truck (sic).

The items -- Mr. Corey Dunkin would testify to authenticate the still shots and videos from his camera system. And that [Petitioner] did not have permission to try to breach the front door of his house to go into it.

The third witness being Officer Workmeister who . . . would testify about taking [Petitioner] into custody, about the things he had in his possession, about finding a backpack that belonged to the Yarbroughs that was placed in a garbage can at the neighbor's residence that contained numerous items, including hand sanitizer, socks, medications, clothing, headlamp, rifle rounds, tools, 30-30 rounds that he was wearing as he exited the window and for whatever reason placed in a trash can.

. . . .

Also called to testify would be Detective Hamm who participated along with the officers of the Munford Police Department and the execution of a search warrant on a car that was towed from the scene. There was an inventory done, but there was also a search warrant done on the car, in which there was a pink suitcase that belonged to the little girl that lived at the Yarbrough residence. There was two black rifle cases, an AK rifle, a 30-30 rifle, a shotgun 12 gauge, six black handgun cases, an air soft rifle, an ammo box with miscellaneous ammo, 254 rounds, green Highland tactical backpack, a jewelry box with miscellaneous jewelry. There was a hammer, a DeWalt drill, a brown work bag, five rings, two sets of headphones, cooler, high beam product in a blue purse with medication bottle, an Apple watch, some Saturn keys with a key fob that belonged to [Petitioner] that fit the car. A flashlight, some wine, a bottle of wine, Vienna sausages, miscellaneous clothes, a suitcase, . . . some black trash bags that were taken from the Yarbrough home that were used to collect and transport the stolen items. Clothes basket, a black safe, a fire stick, trimmers, a maroon bag with personal items, an ASUS laptop, an HP laptop, another HP laptop, an iPad, a black purse, a bag of jewelry, a $2 bill that was given to Mrs. Yarbrough by her grandmother in 1984. Three $1 bills that were taken from a pink rainbow wallet that belonged to the 10-year-old girl who lived at the house, three shotgun shells, an oven mitt, a 240 volt battery for the DeWalt and a photo album, . . . family memories.

Mr. Yarbrough would be called to testify [to the value of the stolen firearms] and that they were operational weapons that fired.

We'd ask [Petitioner] to stipulate to a factual basis for possession of three firearms while being a person convicted of prior violent felonies. Aggravated burglary of the Yarbrough home, attempted burglary of the Dunkin house, theft of property, and resisting arrest.

Petitioner stipulated to the facts and submitted the plea to the trial court for "disposition and judicial sentencing." After Petitioner was sworn, the trial court examined him as follows:

Q. [Petitioner], you understand that in this indictment you're charged with three counts of possession of a firearm by a convicted felon with the underlying felonies being violent felonies for violent convictions. As charged, they carry a range of 20 to 30 years to serve at a rate of 85 percent before your release eligibility date and a fine up to $25,000; do you understand that?

A. Yes.

Q. You're charged with one count of aggravated burglary. As charged, it carries a sentence of 15 years to serve at a rate of 60 percent before your release eligibility date and up to a $10,000 fine; do you understand that?

A. Yes.

Q. You're charged with one count of theft of property valued between [$]2,500 and $10,000 and one count of criminal attempt to commit aggravated burglary. As charged, both of those carry a sentence of 12 years to serve at a rate of 60 percent before your release eligibility date and up to a $5,000 fine; do you understand that?

A. Yes, sir.

Q. Finally, you're charged with one count of resisting arrest. As charged, it carries up to six months in the county jail and up to a $500 fine; do you understand that?

A. Yes, sir.

Q. You understand also that these matters would have to be served mandatorily consecutive to Tipton County Docket Number 10644?

A. Yes, sir.

Q. And I understand there's an agreement with the State that they would be concurrent with the federal sentence that you're currently serving; is that your understanding?

A. Yes, sir.

Petitioner asserted that he understood that he was waiving his rights to plead not guilty, have a jury trial, confront and cross-examine witnesses, and testify or decline to testify. Petitioner testified that he was not satisfied with defense counsel. However, when asked by the trial court if defense counsel had "adequately explained" what was happening in court and what Petitioner faced at a sentencing hearing, Petitioner responded affirmatively. He denied having any questions for defense counsel or the trial court.

Petitioner confirmed that he was entering his plea voluntarily; that no one was forcing him to plead guilty or promising him anything in exchange for his plea; and that he

understood the plea hearing was his "day in court" and that he would have a sentencing hearing to determine the sentence. Petitioner stated that he understood that his convictions could be used to enhance his punishment in future prosecutions.

The trial court found that Petitioner was competent to enter a guilty plea, that he understood the consequences of pleading guilty, and that he was freely, voluntarily, and intelligently entering his plea. The court also found that sufficient facts supported the plea and accepted the plea.

At the sentencing hearing, the trial court noted that the sentences for aggravated burglary, theft, and attempted aggravated burglary were determined by statute, and the court asked for evidence and argument relative to the firearm possession counts.

Corie Yarbrough testified about the effect of the burglary on her family. She identified photographs of Petitioner entering and exiting the house through her daughter's bedroom window. She noted that the house was "destroyed" and that her children no longer felt safe in the house.

While reviewing the presentence report, the trial court stated that Petitioner's criminal history began when he was eighteen years old with misdemeanor drug convictions; Petitioner was thirty-eight years old at the time of the sentencing hearing. The trial court listed the following felony convictions: aggravated assault at age twenty-one; two counts of possession of cocaine "with the intent" and aggravated assault at age twenty-five; reckless aggravated assault at age twenty-seven; and coercion of a witness, possession of a firearm by a convicted felon, and reckless endangerment at age thirty. The trial court also noted that Petitioner dropped out of high school in tenth grade and had four children.

Petitioner declined to make an allocution. The trial court stated that it had considered the guilty plea, the evidence at the sentencing hearing, the presentence report, the nature and characteristics of the criminal conduct involved, the validated risk and needs assessment, and principles of sentencing and arguments as to sentencing alternatives.[2] The trial court found relative to the nature of Petitioner's conduct that it could not "think of much worse criminal conduct except for actual physical violence to someone" and that "pretty much everybody's great fear is that somebody is going to come into their home."

The trial court found that Petitioner was ineligible for alternative sentencing. The court also found that confinement was necessary to protect society by restraining Petitioner, who had a long history of criminal conduct, that measures less restrictive than confinement

[2] The trial court noted that the Administrative Office of the Courts did not provide statistical information for persistent or career offenders.

had frequently or recently been applied unsuccessfully to Petitioner, and that confinement was necessary to avoid depreciating the seriousness of the offenses.

The trial court found that no mitigating factors had been argued and that none applied. The trial court applied enhancement factor (1), that Petitioner had a history of criminal convictions beyond those necessary to establish his range, only to the offenses for which Petitioner was a career offender. *See* Tenn. Code Ann. § 40-35-114(1). The court also applied enhancement factor (3), that the offenses involved more than one victim, finding that five people lived in the Yarbrough home; and factor (13)(A), that Petitioner was released on bond at the time of the offenses and had been subsequently convicted of the prior offense, evading arrest. *See* Tenn. Code Ann. § 40-35-114(3), (13)(A).

Relative to the alignment of the sentences, the trial court found that Petitioner was a professional criminal who knowingly devoted his life to criminal acts; that Petitioner's record of criminal activity was extensive; and that Petitioner was a dangerous offender whose behavior indicated little regard for human life and no hesitation about committing a crime in which the risk to human life was high. *See* Tenn. Code Ann. § 40-35-115(b).

The trial court sentenced Petitioner as a persistent offender to concurrent sentences of twenty-five years for each of the three counts of possession of a firearm by a convicted felon (Counts 1, 2, and 3). The trial court sentenced Petitioner as a career offender to fifteen years for aggravated burglary (Count 4), twelve years for theft of property (Count 5) and twelve years for attempted aggravated burglary (Count 6). The trial court sentenced Defendant to six months for resisting arrest (Count 7). The trial court aligned Counts 4, 5, 6, and 7 concurrently with each other but consecutively to Counts 1, 2, and 3 for a total effective sentence of forty years. The trial court noted that the forty-year sentence was mandated to be served consecutively to Petitioner's twelve-year sentence in case number 10644. The court ordered the sentence to run concurrently with his federal sentence in case number 2:22-CR-20040-TLP.

b. Post-Conviction Proceedings

Petitioner subsequently filed a timely pro se petition for post-conviction relief, which post-conviction counsel amended. At the post-conviction hearing, Petitioner testified that co-counsel thought he was a Range III, persistent offender because he believed Petitioner had three prior Class B felony convictions. Petitioner claimed that he told co-counsel that he only had two prior Class B felony convictions and that co-counsel apologized and clarified that Petitioner was not a Range III offender.

Petitioner testified that co-counsel showed him the State's notice to seek enhanced punishment, which was received as an exhibit. The one-page notice stated that Petitioner,

"based upon the following felony convictions, is a . . . [m]ultiple [o]ffender (Range II)" and listed eight prior convictions between 2006 and 2015.

Petitioner next identified a document co-counsel gave him, which contained a grid of sentence ranges and information about how to calculate the offender classification, which was also received as an exhibit. Petitioner identified his handwriting and co-counsel's handwriting on the document. On the second page, co-counsel had written the Range II sentences for each count of the indictment; below the ranges, he had written, "Presented 6-12-23 w/ Discovery to client . . . by [co-counsel]."

On the same page, a long black line was drawn below co-counsel's name, beneath which was a handwritten table of the Range III sentences for the counts of the indictment. At the right side of the table was written, "Updated & Presented to client by [co-counsel] 6-14-23[.]"

Petitioner testified that he conversed with co-counsel about "whether [he was] a multiple or persistent or career" offender and that Petitioner initially believed he was a multiple offender. Petitioner stated that, after co-counsel discussed his offender classification with him a couple days later, he understood that he was a persistent offender.

Another copy of the State's notice was received as an exhibit; the top of the paper had a handwritten notation reading, "Amended." The notice was stamp filed on March 18, 2022, and reflected that Petitioner was a "Career Offender (Range III)" based upon the same list of prior convictions.

Petitioner testified that co-counsel never discussed with him that he was a career offender; he maintained that co-counsel specified that he was a persistent offender. Petitioner stated that, during discussions with co-counsel about whether to plead guilty or go to trial, Petitioner continued to assert his belief that he was, in fact, a multiple offender. He noted that he thought he "would be able to present some proof of that" to defense counsel "at some point." Petitioner stated that, although he asked co-counsel to "follow up on that," co-counsel did not resolve the issue to Petitioner's satisfaction.

Petitioner testified that he asked co-counsel if his only having two Class B felony convictions meant that he was a multiple offender and that counsel responded that "it wasn't going to matter because [the prosecutor] doesn't like [Petitioner]." Petitioner was unable to convince co-counsel that he was a multiple offender.

The guilty plea form was received as an exhibit. The sentence ranges reflected that Petitioner was a Range III[3] offender as to possession of a firearm by a convicted felon (Counts 1-3) and a career offender as to aggravated burglary (Count 4), theft of property between $2,500 and $10,000 (Count 5), and attempted aggravated burglary (Count 6). In the "[o]ther conditions" section of the form, the following was handwritten:

> concurrent w/ federal sentence 2:22-CR-20040-TLP
> mandatory consecutive to Tipton Co. Circuit No. 10644
> ~~All counts concurrent~~
> Seeking all counts concurrent

Petitioner testified that he pleaded guilty because he thought he would receive concurrent sentences. He asserted that "down here [on the plea form] where it's been scratched out . . . where I entered a guilty plea due to the fact that all counts should run concurrent. But after I entered the plea, it was scratched out by [trial counsel] that -- seeking all counts to run concurrent." Petitioner affirmed that he thought someone changed the form after he pleaded guilty. Petitioner stated that he believed trial counsel's statement at the plea hearing, "that any sentence in this case is going to run concurrent," meant that all counts of the indictment would run concurrently with his federal case.

Post-conviction counsel read from the plea hearing transcript the prosecutor's stipulation that Petitioner's sentences would be served concurrently with his federal sentence because both sets of charges involved the same factual basis but that the sentences would be served consecutively to case number 10644. When asked whether he understood that "there was some discussion during the plea that some of this was going to run concurrent; some was going to run consecutive[ly]," Petitioner responded, "[T]hat was after I had already pleaded, sir."

Petitioner agreed that case number 10644 was mandatorily consecutive because he committed the offenses in this case while he was released on bond. Petitioner stated, "From my understanding, all counts are supposed to r[u]n concurrent to . . . my [f]ederal conviction but consecutive to [case] number 10644." Petitioner said that trial counsel told the trial court, "[A]t the . . . judicial sentencing we'll . . . be seeking concurrent sentencing for each count." When asked how he "resolve[d] that, in . . . [his] mind, given that [he] had heard the State say that some of this would have to run consecutive," Petitioner responded, "The -- the Docket's Number 10644."

[3] Although the plea form did not specify that Range III referred to a persistent offender, the use of "career" for some offenses makes it clear that Petitioner was considered a persistent offender for the counts labeled as Range III.

A copy of Petitioner's federal judgment in Case number 2:22CR20040-1-TLP was received as an exhibit and reflected that Petitioner pleaded guilty in that case on September 23, 2022, to three counts of felon in possession of a firearm and three counts of possession of a stolen firearm. *See* 18 U.S.C. §§ 922(g)(1), (j). On April 10, 2023, the federal court imposed an effective sentence of 144 months to be served concurrently "with any anticipated, undischarged sentence in Tipton County Circuit Court Docket No. 10731 and shall be served consecutively to the sentence in Tipton County Circuit Court Docket No. 10644."

Petitioner stated that it was his understanding that all counts of this case were supposed to run concurrently with his federal sentence. He noted that co-counsel told him that, generally, his Tipton County charges would have been dismissed after his federal plea but that the prosecutor did not like him and wanted to "try [Petitioner] twice again over here in this court." Petitioner stated that he relied upon co-counsel's assessment of the situation when deciding whether to plead guilty.

The following exchange occurred:

> Q. When did you first learn that some of the counts in this case would be concurrent . . . and some would be consecutive?
>
> A. After I had already pleaded, sir.
>
> . . . .
>
> Q. Do you recognize these as the judgment sheets in Docket Number 10731?
>
> A. Yes, sir.
>
> . . . .
>
> Q. [Petitioner], what was your reaction when you saw that Counts l, 2 and 3 [of case number 10731] were concurrent with [the federal case] and Counts 4, 5, 6, 7 were consecutive?[4]
>
> A. It was my understanding that, like I said, that when I took the plea, that all counts would be served concurrent but consecutive to [case] No. 10644[.]

[4] The record does not reflect that any of the counts of case number 10731 were run consecutively to Petitioner's federal case.

> Q. And if you had known that not everything would run concurrent, not only with the Counts 1 through 7, but also with the [f]ederal [case], might you have made a different decision about whether to go to trial or plea?
>
> A. Yes, sir. Yes, sir. Most definitely.

Petitioner testified that, at the time of his guilty plea, he had not "resolved any issues" about his range. He stated that, at the plea hearing, the trial court "appointed" trial counsel, although he had only met trial counsel once before that day; Petitioner stated that he only spoke with co-counsel previously. Petitioner stated that co-counsel communicated a 20-year plea offer to him a few weeks after his arrest and that trial counsel "wasn't even aware of" the offer.

Petitioner testified that, on the morning of trial, he thought he was coming to court to accept a plea offer. He stated that, during the break in which he spoke to trial counsel, they called co-counsel and that co-counsel told him, "[J]ust take 25 years. It's going to be an open plea. You're not going to get no more than 25 years." Petitioner stated that co-counsel "pretty much convinced" him to plead guilty. When asked whether he would have accepted a 25-year plea offer, Petitioner responded negatively and stated that he would have gone to trial. Petitioner testified that defense counsel did not "go through it from A to Z . . . for [him] to understand . . . what was really going on, from my understanding, like [he] said, that all counts was supposed to be concurrent."

On cross-examination, when asked whether the plea hearing transcript contained a statement that the sentences in case number 10731 would run concurrently, Petitioner responded that his case was supposed to be concurrent with his federal case. The post-conviction court interjected and explained several times that every count of case number 10731 had been ordered to be served concurrently with the federal sentence. Petitioner maintained that "that wasn't what [his] lawyer explained to [him]," and the post-conviction court allowed the State to resume its questioning.

Petitioner acknowledged the crossed-out statement on the guilty plea form and reiterated that he had signed the form before the language had been crossed out. Petitioner denied that defense counsel had ever explained that he could be a persistent offender for one conviction and a career offender for another conviction. Petitioner recalled seeing the trial court's discussion of his respective offender classifications in the plea hearing transcript and the trial court's reviewing them with him at the hearing, although he did not "quite" remember the prosecutor and trial counsel's speaking about it.

When asked why he did not accept the 20-year plea offer, Petitioner testified that he believed he was not a persistent offender because he did not have three previous Class B

felony convictions. He agreed that he was prepared to go to trial on the day of the guilty plea. Petitioner stated that he did not go to trial because,

> from my understanding, I would plead to all counts to run concurrent, sir. The only reason I didn't take the 20-year sentence, the 20-year plea, is because I was being sentenced outside my guideline. I didn't have three B felonies, and [I] pointed out to [co-counsel], and he . . . said I was correct about what I was speaking about, sir. That's the reason why I didn't take the plea, sir.

Petitioner stated that he pleaded open because he hoped the trial court "would find it in [his] favor to see that [he] hadn't been . . . convicted of three B felonies, only two." Petitioner stated his belief that because he had only two Class B convictions, "it's supposed to have kept [him] at a multiple."

When asked how he had been coerced into pleading guilty, Petitioner stated that co-counsel had told him over the phone that the trial court would not sentence him to more than 25 years. Petitioner acknowledged that trial counsel, the prosecutor, and the trial court stated that there was no sentencing agreement other than concurrent service with the federal case and consecutive service with case number 10644. Petitioner stated that co-counsel "[a]pparently" lied to him.

Petitioner testified that co-counsel communicated a 20-year offer to him and told him one or two days before the trial date that the offer was "still on the table." Petitioner noted that he was unaware that they were preparing to go to trial. Petitioner recalled receiving an offer of 25 years the first time he met with trial counsel, which was several months before the trial date. When asked whether it would surprise him to learn that the State had made no offers after the day of the initial offer, Petitioner responded, "I got here . . . in this jail in June . . . . [S]ince June, . . . the offer . . . from [the prosecutor] was 20 years."

When asked whether he had any other misunderstandings regarding the possible sentences he could have received, Petitioner replied, "I never would -- that was never -- was even discussed. We never even discussed that." Petitioner affirmed, though, that the trial court told Petitioner that he could get between twenty and thirty years. While further discussing the crossed-out language on the plea form about concurrent sentencing, Petitioner reiterated that the phrase "seeking concurrent sentencing" had been added after his plea.

On redirect examination, Petitioner affirmed that defense counsel told him that the counts of the indictment would run concurrently with one another and that it was "a factor" in his decision to plead guilty.

Co-counsel testified that trial counsel, his law partner, was appointed to Petitioner's case. Co-counsel stated that he appeared at a June 2023 court date when trial counsel was unable to attend, that co-counsel met with Petitioner five times to prepare for trial, and that he unsuccessfully attempted to visit Petitioner on two additional occasions. Co-counsel noted that he and trial counsel tried to give clients "the benefit of two attorneys" in most cases. Co-counsel stated that Petitioner had concerns and misunderstandings of the law and that they "always discussed" sentencing ranges. Co-counsel said that Petitioner brought up sentencing range issues related to the State's notice and that co-counsel had to consult with trial counsel. Co-counsel stated that he and trial counsel did "extensive research" to confirm Petitioner's sentencing ranges. Co-counsel added that he reviewed the discovery materials with Petitioner and, at Petitioner's request, brought him case law on several topics.

Co-counsel testified that trial counsel conducted research regarding Petitioner's sentencing ranges, although co-counsel presented the research to Petitioner. Co-counsel stated that he discussed the potential sentences with Petitioner, including ranges. He said that Petitioner "was very adamant that he was not properly ranged" and that, "ultimately, we decided that on the . . . felony possession of weapon counts . . . he was a persistent offender, Range III. The aggravated burglary, he was a Range III persistent. But then we did explain to him that the Ds and the Es, he was a career offender on those." Co-counsel stated that he explained to Petitioner the risks of entering an open plea, including that his sentence "could be . . . more than what the minimums would be" and that "the other charges could go consecutive, and it could be a substantial sentence."

Co-counsel testified that he thought Petitioner might receive consecutive sentencing because the evidence was "compelling." He noted that the State's evidence included "basically a glamour shot of [Petitioner] coming out the window with items" and that the case was not a good one for trial. Co-counsel added that "there was a lot of discussion on whether or not [the prosecutor] hated [Petitioner] or disliked him[.]"

Co-counsel stated that, the first time he met Petitioner in court, he

> had to attempt to get him to stop talking because he was yelling that he was guilty. He just kept saying he was guilty in court . . . . I had discussions with him about to, please not talk open[ly] like that. You know, let us discuss the case with him and . . . he told me then that he was going to do what . . . he felt he needed to do, whether it was acting crazy or whatever[.]
>
> . . . .

> So, he was very adamant from the beginning he did not want to go to trial . . . . Now, we prepped it as if we were going to trial, but he was very adamant from the beginning, he did not want to go to trial. He was aware the evidence was bad. He was guilty. He was guilty. He was guilty. That was a . . . point of discussion multiple times.

Co-counsel stated that the State never made a 20-year plea offer, and he clarified that he told Petitioner that they "were hoping to get a 20-year offer." Co-counsel noted that Petitioner told him that he would not accept a 20-year offer but that he would accept an 18-year offer. Co-counsel stated that he met with the prosecutor multiple times in the hope of negotiating a 20-year offer, although they "never officially had that." Co-counsel said that the only plea offer made by the prosecutor was for a 25-year sentence. He said that, with Petitioner's criminal history and the State's proof, it was a case in which he would "[n]ot usually" expect to receive a good plea offer.

Co-counsel denied ever telling Petitioner that "the maximum that he could get was 25 years"; co-counsel stated that he "made a statement to [Petitioner] that we were unsure with this kind of case how [the trial court] would rule on it." He said, though, that Petitioner risked a longer sentence at trial "because of all the proof that could be put out." Co-counsel stated that because plea negotiations were unsuccessful, their "only option was to hope [they] would get some mercy from the c[o]urt in an open plea."

On cross-examination, co-counsel testified that he and Petitioner discussed trying to obtain a 20-year offer and that co-counsel was confident that "that was the direction the case was going to be resolved in." Co-counsel noted that, "even then, [Petitioner] was adamant he wouldn't take a 20-year offer." He reiterated that the State never made a 20-year offer.

Trial counsel testified that he prepared the guilty plea form and that he initially wrote "all counts concurrent" because that was what Petitioner was seeking. However, the prosecutor would not agree to those terms, so trial counsel crossed out the phrase and wrote "seeking all counts concurrent." Trial counsel stated that he told Petitioner about the prosecutor's not agreeing to concurrent sentencing but explained that they would ask the trial court to impose concurrent sentences. He stated that Petitioner seemed to understand the situation before he entered his plea.

Trial counsel testified that he reviewed the plea form with Petitioner in the courtroom hallway, including the range of punishment "and what he was facing on each range" and the fact that the State was not recommending a sentence.

Trial counsel testified that, early in the representation, the prosecutor made a 25-year offer at 45% service and that the prosecutor conveyed that, if Petitioner rejected the

offer, it would be withdrawn and no further offers would be made. Trial counsel noted that he attempted multiple times to "convince [the prosecutor] to go back to at least consider the 25" but that the State made no further offers.

Trial counsel testified that he was prepared for trial on the day Petitioner pleaded guilty. He denied that he said or did anything to convince Petitioner to plead guilty, noting that Petitioner came to court "adamant that he was not wanting to go to trial[.]" Trial counsel said that Petitioner's incentive to plead guilty "would be to avoid having a parade of witnesses to further infuriate the trial court." He agreed that the State provided no incentive for the guilty plea.

On cross-examination, trial counsel testified that, during the break in the plea hearing, he and Petitioner met for ten to fifteen minutes. He noted that he had met Petitioner previously two times at court appearances, including when the State made its 25-year offer. Trial counsel thought that he resolved any confusion Petitioner had during the meeting at the break in the plea hearing, and he noted that Petitioner's "main concern was being concurrent with the [f]ederal sentence."

When asked whether the trial court discussed needing to "find out . . . what range" Petitioner was during the plea hearing, trial counsel responded,

> I think we had agreed at that point in time. He was concerned with the fact that he didn't have three B felonies, and that's correct. But looking at the sentencing guidelines as to determining what range he was, it fell within the persistent range for the Bs and the Cs, but the career felony range on the Ds and Es, based on his prior criminal history.
>
> The following exchange then occurred:
>
> Q. Okay . . . . I see the [c]ourt . . . said, "We need to figure that out to make sure that we're telling him correctly that it's mandatory consecutive." But that . . . discussion about figuring out how they're going to run happened after you had already had the 10 to 15-minute break with him on page 9.
>
> A. I'm not sure I remember the timing, but it sounds like it might be right.
>
> Q. Do you believe that you had it figured out when you were advising him, whether it was consecutive or concurrent, or what range he was?
>
> A. The ranges we definitely had figured out, because that's what was put on the plea form. The concurrent versus consecutive, as to the [f]ederal

> sentence, we had figured that out. But the concurrent within the counts themselves, . . . that was where the back and forth went, and then the State would not agree to that either[.]

At the conclusion of the hearing, the post-conviction court entered a written order denying relief. Relative to the knowing and voluntary nature of the plea, the post-conviction court found that, on the day of trial, Petitioner immediately informed the trial court that he wanted to enter a plea and not go to trial. The trial court explained to Petitioner that the State had withdrawn its prior plea offer and that Petitioner would be entering an open plea. After Petitioner had an opportunity to discuss his options with defense counsel, Petitioner affirmed that he wished to plead guilty.

The post-conviction court found that the trial court reviewed Petitioner's rights with him and that, although Petitioner indicated dissatisfaction with defense counsel's representation, Petitioner acknowledged that counsel "adequately explained to him what was going on in the courtroom that day and . . . what he was faced with at a sentencing hearing." The post-conviction court found that Petitioner affirmed that he was voluntarily entering his plea, that no one was forcing him to plead guilty, and that he had no questions for the trial court or defense counsel.

The post-conviction court found that Petitioner "seemed intelligent . . . and did not struggle with understanding the [c]ourt's questions or the proceedings." The post-conviction court noted that Petitioner was a career offender who was very familiar with criminal proceedings. The post-conviction court further found that defense counsel was competent and met with Petitioner on "numerous occasions" to explain his offender classification, the potential range of punishment, and the nature of the charges.

The post-conviction court acknowledged that the trial court "failed to ask specifically if Petitioner understood the [c]ourt could run his sentences consecutively with one another, but Petitioner's plea paperwork indicated that at sentencing he would be seeking concurrent sentences, showing consecutive sentences were an option." The post-conviction court noted that Petitioner pleaded guilty "because of the overwhelming evidence against him; he frankly told the [c]ourt on the day of his trial that there must be a mistake because he intended to enter a plea of guilty." The post-conviction court concluded that Petitioner knowingly and voluntarily entered his plea and that he was "not entitled to relief from it simply because he is dissatisfied with his sentence."

Relative to Petitioner's claim that defense counsel did not explain that the counts of the indictment could be run consecutively, the post-conviction court found that Petitioner had not proven the factual basis for the claim by clear and convincing evidence. The post-conviction court credited defense counsel's testimony that they told Petitioner the trial court could order consecutive sentences. The post-conviction court found that the evidence

supported trial counsel's testimony that he crossed out "all counts concurrent" and wrote "seeking all counts concurrent" when the prosecutor refused to agree to concurrent sentencing as part of the plea agreement. The post-conviction court noted trial counsel's statement at the plea hearing that, "at the judicial sentencing, we'll be seeking concurrent sentences for each count." The post-conviction court specifically "d[id] not accept Petitioner's allegation that his counsel changed the plea paperwork after his plea."

Petitioner timely appealed.

Analysis

On appeal, Petitioner asserts that he received ineffective assistance of counsel because (1) trial counsel "failed to determine Petitioner's sentencing range until the morning of trial, demonstrating that [defense] counsel could not have advised Petitioner whether to go to trial with enough notice to make a knowing and voluntary decision"; and (2) trial counsel "included language on the plea paperwork suggesting that concurrent sentencing was possible, notwithstanding the fact that the court had just determined on the record that mandatory consecutive was required." He argues generally that these errors rendered his plea unknowing and involuntary. The State responds that defense counsel's representation was not deficient, that Petitioner was not prejudiced, and that he entered a knowing and voluntary plea.

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* (Tenn. 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 not have pleaded guilty and would have insisted on going to trial." *Id.* at 59.

A. Failure to determine Petitioner's sentencing range until the morning of trial

Petitioner's issue, as stated, is as follows:

> The [post-conviction] court abused its discretion[5] in denying post-conviction relief when [defense] counsel failed to determine Petitioner's sentencing range until the morning of trial, demonstrating that [defense] counsel could not have advised Petitioner whether to plea or to go to trial with enough notice to make a knowing and voluntary decision. Additionally, whether the court's assistance in determining Petitioner's sentencing range on the morning of trial cures [defense] counsel's deficient performance.

However, the discussion in this section of Petitioner's appellate brief focuses on consecutive sentencing, which we address as a separate issue below. Petitioner's argument recounts the break in the proceedings for Petitioner to talk with trial counsel "about what [his] potential ranges [were] on each of these offenses if [he did] plead guilty." Petitioner then states that, after trial counsel announced that Petitioner wished to enter an open guilty plea, "the State announced that he would be sentenced consecutively" and that "a portion of the cases would be mandatory consecutive because Petitioner was on bond at the time that these offenses were committed."

The remainder of Petitioner's argument states,

> Petitioner's trial counsel could not have advised Petitioner regarding whether his current and prior offenses would run together, because his trial counsel was still unaware of the event dates [at the time of the short break during the plea hearing], and how they may affect sentencing. Petitioner had already entered[6] an open plea when he first heard from the State and the court (never from his defense attorney) that he would receive mandatory consecutive sentencing.

Petitioner also argues that the trial court's resolving "the ambiguity regarding mandatory sentencing between Petitioner's previous charge and existing charge (and also between Petitioner's state and federal charges)" did not serve to "cure" the alleged deficiency because "[t]he standard is not whether Petitioner was adequately counseled by the court

[5] We note that the standard of review for denial of post-conviction relief is not for an abuse of discretion. 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, and this court is bound by the post-conviction court's factual findings unless the evidence preponderates against them. *Kendrick*, 454 S.W.3d at 450.

[6] We note that a guilty plea is not entered until the trial court concludes the plea colloquy, finds that the plea is knowing and voluntary, and accepts the plea agreement. *See* Tenn. R. Crim. P. 11(b), (c).

and the prosecutor." Although Petitioner's brief largely does not address the substance of his offender classification/sentencing range issue, we will consider it.

At the post-conviction hearing, Petitioner elicited a quantity of testimony related to his offender classification and sentencing range. The post-conviction court, confining its analysis to Petitioner's stated issues in the amended petition, found that "Petitioner had competent counsel who testified they met with him on numerous occasions to explain his offender status, the ranges of his punishment, and the nature of the charges against him." The post-conviction court found that the trial court and defense counsel "extensively discussed the nature of the charges against [Petitioner] and his range of punishments" at the plea hearing.

Petitioner's claim fails because the record supports the post-conviction court's determination that Petitioner was fully informed of the sentencing ranges he faced. The post-conviction court credited defense counsel's testimony that they researched Petitioner's offender classification and explained it to him, along with the corresponding sentencing ranges. The trial court allowed Petitioner additional time during the plea hearing to discuss his options with defense counsel privately. Petitioner also stated under oath that, although he was dissatisfied with defense counsel, they had adequately explained what was happening in the courtroom and what he faced at sentencing. The plea agreement form contains both Petitioner's offender classification and the sentencing ranges for each count, and the trial court read them aloud before Petitioner entered his plea. Petitioner confirmed that he understood the plea agreement and possible sentences.

Further, Petitioner did not carry his burden of establishing that, but for the alleged delay in determining his offender classification or sentencing range, a reasonable probability existed that he would have gone to trial. The plea hearing transcript reflects that Petitioner arrived at court determined to plead guilty, as he stated multiple times. Petitioner spoke directly to the trial court and did not rely on trial counsel to communicate his concerns or questions. Petitioner's plea agreement was not motivated by a desire for a more favorable offender classification or sentencing range—he was concerned about receiving concurrent sentencing with his federal case and hoped the trial court would be more lenient in sentencing if it did not hear the full measure of the State's evidence.

Petitioner was fully informed about the terms of his guilty plea and the potential sentences, and he had the opportunity to object and ask questions of defense counsel or the trial court before entering his plea. We note that Petitioner could have appealed from his sentence if he believed his offender classification or sentencing ranges were improperly determined. *See* Tenn. R. App. P. 3(b) (providing that an appeal as of right lies from a criminal judgment from a guilty plea "if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence"). Petitioner is not entitled to relief on this basis.

B. Concurrent sentencing

Petitioner contends that trial counsel[7] rendered ineffective assistance when he "included language on the plea paperwork suggesting that concurrent sentencing was possible, notwithstanding the fact that the [trial] court had just determined on the record that mandatory consecutive was required." He argues that, although trial counsel told Petitioner that they would ask the trial court to impose concurrent sentences,

> what is missing from this discussion with trial counsel is the further explanation that not only was concurrent sentencing not agreed by the prosecutor; it was also not allowable under the law due to the offense dates. Concurrent sentencing would have been an illegal sentence and was never a remedy that the trial court could have granted.
>
> Between the disjointed communications between the [co-]counsel and . . . trial counsel, the contrast between what was stated on the record and what was written on the plea form, and the quick meeting on the morning of trial – when . . . trial counsel still believed that concurrent sentencing was available – Petitioner could not have made a knowing and voluntary plea. Petitioner should be able to trust [trial] counsel's writings on the plea form regarding sentencing. Petitioner therefore argues that trial counsel's performance was deficient, and he seeks relief on this issue.

(citations to record omitted).

As the State notes, Petitioner evinces a fundamental misunderstanding of how mandatory consecutive sentencing applied to his case. Because Petitioner was on bond in case number 10644 when he committed the offenses in his case, by statute, the sentence in this case had to run consecutively to the sentence in case number 10644. The trial court's discretion to order that the individual counts of *this case* be served consecutively to one another is a separate matter.

As a result, the premise of Petitioner's issue—whether defense counsel rendered ineffective assistance by "includ[ing] language on the plea paperwork suggesting that concurrent sentencing was possible, notwithstanding the fact that the court had just determined on the record that mandatory consecutive was required"—is flawed because the trial court's reference to mandatory consecutive sentencing was to case number 10644 and had nothing to do with the possibility of concurrent sentencing within the counts of

[7] In this section of his brief, Petitioner notes that co-counsel was not in court for the guilty plea and also states that co-counsel was the person who wrote "seeking all counts concurrent" on the plea form. The record reflects that the testimony Petitioner attributed to co-counsel was given by trial counsel.

case number 10731. Moreover, trial counsel could not have been deficient for advising Petitioner that concurrent sentencing was possible within case number 10731 because it was, in fact, within the trial court's discretion to order concurrent sentences. Petitioner is not entitled to relief on this basis.

Knowing and Voluntary 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. The post-conviction court's findings and the State's brief 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). *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; 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; *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. A reviewing court must examine the totality of the circumstances to determine if a guilty plea was knowing and voluntary. *State v. Turner*, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995).

In this case, the record supports the post-conviction court's determination that Petitioner knowingly and voluntarily pleaded guilty, and he has not overcome the presumption of truth attendant to his statements under oath and the trial court's findings at the plea hearing. *Id.* at 73-74. Defense counsel met with Petitioner multiple times before the plea hearing and researched and spoke to Petitioner about the charges and potential sentences he faced. Petitioner, who has substantial prior experience with the criminal justice system, entered the courtroom on the day of his plea insisting that he did not wish to proceed to trial. He openly expressed his concerns and dissatisfaction with his attorneys to the trial court.

The trial court gave Petitioner time to confer privately with trial counsel, and Petitioner testified at the post-conviction hearing that they called co-counsel during the break to discuss his options. The trial court also reviewed Petitioner's rights with him and the sentencing range for each count of the indictment, and Petitioner stated under oath that he understood his rights, that he had no questions for trial counsel or the trial court, and that he wished to plead guilty without a sentencing recommendation from the State. Petitioner acknowledged at the plea hearing that defense counsel had explained the proceedings to him and what he faced at the sentencing hearing.

The post-conviction court noted defense counsel's testimony that they each explained the possibility of consecutive sentences with Petitioner, as confirmed by the note "seeking all counts concurrent" on the plea form and trial counsel's verbal statement to the trial court that Petitioner would request concurrent sentencing. The post-conviction court specifically discredited Petitioner's allegation that the form was altered after he signed it. Additionally, trial counsel aptly described Petitioner's incentive to enter an open plea as "to avoid having a parade of witnesses to further infuriate the trial court" in light of the overwhelming evidence of Petitioner's ransacking a family home. The totality of the circumstances establishes that Petitioner made an intelligent, rational, and voluntary decision to plead guilty, 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.

s/ *Robert L. Holloway, Jr.*

ROBERT L. HOLLOWAY, JR., JUDGE