**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE**

**AT JACKSON**

**NOVEMBER 1995 SESSION**

FILED

**December 28, 1995**

**Cecil Crowson, Jr.**
**Appellate Court Clerk**

| | |
|---|---|
| **BOBBY EUGENE PIPES,** | ) |
| | ) C.C.A. No. 02C01-9505-CC-00119 |
| Appellant, | ) |
| | ) Hardin County |
| V. | ) |
| | ) (Post-Conviction) |
| | ) |
| **STATE OF TENNESSEE,** | ) Honorable C. Creed McGinley, Judge |
| | ) |
| Appellee. | |

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OPINION FILED: _____

**AFFIRMED**

**PAUL G. SUMMERS,**
Judge

## O P I N I O N

The appellant, Bobby Eugene Pipes, appeals the denial of his post-conviction relief of two separate convictions. One conviction emanates from a guilty plea and the other from a jury trial.

In indictment No. 6811, appellant pled guilty to simple robbery, possession of a firearm during the commission of a felony, felony escape, and aggravated burglary. He was sentenced as a persistent offender and received two twelve year sentences and two six year sentences. The trial judge ordered the sentences to run consecutively.[1] Appellant filed for post-conviction relief to vacate his plea alleging that: (1) he received ineffective assistance of counsel, (2) his plea was involuntarily and unknowingly entered, and (3) his plea was coerced.

In indictment No. 6910, a jury found appellant guilty of aggravated burglary and three counts of theft of property under $ 500.00. The trial judge sentenced him to fifteen years for the burglary and eleven months twenty-nine days for each of the theft convictions. The trial judge ordered all sentences, including those in indictment No. 6811, to run consecutively.[2] Appellant filed for post-conviction relief alleging ineffective assistance of counsel.

Both post-conviction claims were consolidated for disposition by the trial court. The trial court held an evidentiary hearing and dismissed appellant's claims. We affirm.

## GUILTY PLEA

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[1] Sentencing was affirmed by this Court in State v. Pipes, No. 02C01-9111-CC-00242 (Tenn. Crim. App. May 13, 1992).

[2] Sentencing was affirmed by this Court in State v. Pipes, No. 02C01-9212-CC-00288 (Tenn. Crim. App. June 23, 1993).

I

Appellant first asserts that his guilty plea should be vacated because he received ineffective assistance of counsel prior to submission. He argues that: counsel failed to advise him of his constitutional right of confrontation, counsel only met with the him on three occasions, and counsel told him he would receive over 100 years if he did not plead guilty. Appellant, however, on cross-examination, confessed to having had experience in the plea process and knowing that he had a right to call witnesses.

Appellant's former counsel testified. He stated that on two separate occasions he informed the appellant of his constitutional rights and that appellant indicated that he understood those rights. Counsel testified that he and the appellant had discussions concerning possible defenses and sentences. Counsel, however, denies informing appellant he would receive 100 years if he did not plead guilty.

The evidentiary hearing judge found that counsel had fully advised appellant of his constitutional rights prior to the submission of the plea. Appellant had signed a plea submission form and "agreed on the record that [his rights] had been explained fully to him, and that he understood and waived [his rights] in the entry of his guilty plea." The trial judge also noted that appellant was "no novice to the criminal justice system and had been through this procedure many times in the past."

The appropriate test for determining whether counsel provided effective assistance at trial is whether his or her performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). Appellant must establish by a preponderance of the evidence that: (1) the services rendered or the advice given by counsel fell below "the range of competence demanded of attorneys in criminal cases," and

(2) but for counsel's errors, he would not have plead guilty and would have insisted on going to trial. Hill v. Lockhart, 474 U.S. 52 (1985); Porterfield v. Tennessee, 897 S.W.2d 672, 677-78 (Tenn. 1995).

In post-conviction proceedings, the petitioner has the burden of proving the allegations in his petition by a preponderance of the evidence. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the findings of the trial court in post-conviction hearings are conclusive on appeal unless the evidence preponderates against the judgment. State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983); Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978).

Appellant has not carried the burden of proving the allegations in his petition. The hearing judge chose to accredit counsel's testimony over that of the appellant. That is the trial judge's prerogative. We find that the evidence does not preponderate against the post-conviction findings. Accordingly, we find appellant's contention devoid of merit.

II

Appellant's second assignment of error is that the trial court permitted him to enter an unknowing and involuntary plea. Appellant's testimony is unclear and contradictory. However, what can be gleaned from the record is an allegation, by appellant, that he did not understand his constitutional right of confrontation.

We begin by admonishing the state for its failure to include, as part of the record, a transcript of the plea process. Pursuant to Tenn. Code Ann. § 40-30-114 (1990), the state is in dereliction of a statutorily mandated duty. Furthermore, such dereliction makes it exceedingly difficult for us sitting as a court of review to uphold the state's position.

Due process requires that pleas of guilt be knowing and voluntary. Boykin v. Alabama, 395 U.S. 238, 243 (1969). Knowing and voluntary includes the intentional relinquishment of a known right. State v. Mackey, 553 S.W.2d 337, 340 (Tenn. 1977). The relinquishment of the right to self-incrimination will not be presumed from a silent record. Johnson v. State, 834 S.W.2d 922, 923 (Tenn. 1992) (citing Boykin, 395 U.S. at 243).

When a transcript is inadequate to establish that a plea passes constitutional muster, the burden shifts to the state to show by clear and convincing evidence that the defendant voluntarily, understandingly, and knowingly entered his plea. Chamberlain v. State, 815 S.W.2d 534, 541 (Tenn. Crim. App. 1990); Roddy v. Black, 516 F.2d 1380, 1384 (6th Cir. 1975). The state may satisfy this burden by producing extrinsic evidence that the plea was knowing and voluntary. Chamberlain, 815 S.W.2d at 541. The extrinsic evidence may be in the form of testimony by any person present when the defendant entered his plea. Id. The state may also meet its burden by eliciting testimony, from the defendant, on cross-examination that he knew and understood his constitutional rights. Id. "An allegation that the [defendant] was not aware of his constitutional rights is not the same as the allegation that the [defendant] was not advised by the trial court of those rights." Johnson, 834 S.W.2d at 925.

"Appellant is no neophyte to the criminal justice system." State v. Pipes, No. 02C01-9111-CC-00242 (Tenn. Crim. App. May 13, 1992). Prior to his plea in the case sub judice, appellant had previously been convicted of ten to twelve felonies in addition to his misdemeanor convictions. Id. Slip op. at 2. At the evidentiary hearing, the appellant testified on cross-examination as follows:

> Q. How many times have you come through this courtroom before on cases, where you pled guilty?
>
> A. Several times.
>
> Q. And on those occasions did you have lawyers?

A. Yes sir.

Q. And did those lawyers go over your rights with you?

A. Yes sir.

Q. At the time of those guilty pleas, - did the Judge go over your rights with you?

A. Yes sir, - he read them off,--

Q. And at the time of this guilty plea,- did the Judge go over your rights with you?

A. Yes sir.

. . .

Q. You knew you could go to trial,- right?

A. Right,-

Q. You already knew that? And you knew what happened at trials,- people get up and tell things about you,- right?

A. Yes,--

Q. And you knew that you could bring people in to tell things? You knew all of that, didn't you?

A. ---- (no response)

Q. You knew all of that,- didn't you?

A. Yes sir.

Q. And he explained to you what could happen at a trial,- and what could happen if you pled guilty,- he explained that to you,- that is what you said a few minutes ago,- right?

A. Right.

Q. So what rights is it that you didn't understand?

A. ---- I don't understand where you are coming from,-

Trial counsel testified that he explained appellant's rights to him on two occasions. He further testified that appellant indicated he understood his rights. Counsel stated that:

A. Yes, I read his rights to him,- and did the whole procedure,- before a guilty plea is taken, told him that he had the right to go to trial, - the evidence and all.

The evidentiary hearing judge was also the trial judge who accepted appellant's plea. Therefore, the evidentiary hearing judge was also a witness to appellant's plea process. He found that prior to accepting appellant's plea, he questioned the appellant "at some length." He remembered "specifically ask[ing] [appellant] if his plea was voluntary and if any force had been used to compel his plea of guilty." He concluded that:

> all of [appellant's] constitutional rights were explained to him again at the time of his plea submission. The petitioner agreed on the record that [his rights] had been explained fully to him, and that he understood and waived [his rights] in the entry of his guilty plea.

The trial judge also noted that appellant was "no novice to the criminal justice system and had been through this procedure many times in the past."

This Court must scrutinize with guarded caution situations were we can not ascertain, from the trial transcript, that Boykin has been complied with scrupulously. However, because we find clear and convincing extrinsic evidence that appellant was aware of his constitutional rights, specifically the right of confrontation, we affirm the trial court's findings. Accordingly, this issue is without merit.

III

Appellant's third contention is that counsel coerced or induced his plea. Appellant maintains that he was unaware that he could have plead guilty to some of the charges while insisting on going to trial on others. He also alleges "that the only reason he pled guilty was because his attorney advised him if he did not accept the plea agreement he would receive 96 to 100 years." Counsel, however, denied ever informing appellant he would receive 100 years. Counsel also maintains that he advised the appellant that he could plead guilty "on part of the charges, and then take the other charges to a jury trial."

In post-conviction proceedings, the petitioner has the burden of proving the allegations in his petition by a preponderance of the evidence. McBee v. State, 655 S.W.2d 191, 195 (Tenn. Crim. App. 1983). Furthermore, the findings of the trial court in post-conviction hearings are conclusive on appeal unless the evidence preponderates against the judgment. State v. Buford, 666 S.W.2d 473, 475 (Tenn. Crim. App. 1983); Clenny v. State, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978).

We find that the evidence does not preponderate against the trial judge's findings. That the hearing judge accepted the veracity of counsel's testimony is not reversible error. This issue is without merit.

**JURY TRIAL**

We find no merit in appellant's claim that he was denied the effective assistance of counsel during his trial by jury in indictment No. 6910. Appellant argues counsel was ineffective for failing to: (1) procure a "key witness" possessing exculpatory information, and (2) produce a witness to corroborate that certain items belonged to appellant. Appellant, however, was also unable to produce these witnesses at his post-conviction evidentiary hearing.

A petitioner alleging ineffective assistance must prove prejudice by producing competent evidence. State v. Walker, No. 02C01-9203-CC-00068 (Tenn. Crim App. Feb. 24, 1993). When an ineffective assistance claim is based on counsel's failure to produce a witness or put on certain evidence, "then the petitioner must produce that evidence, to not only show the fact that the evidence is producible, but that the evidence would have been helpful." Id. Slip op. at 4; See Brown v. McGinnis, 922 F.2d 425 (7th Cir. 1991) (holding petitioner must produce witness to make a comprehensive showing of what testimony would have been or how it would have changed outcome).

Appellant has neither shown what the mystery witnesses' testimony would have been nor how it would have produced a different result. Accordingly, appellant has not established prejudice. This issue is, therefore, without merit.

## CONCLUSION

Finding no reversible error, we affirm the trial court's judgment denying relief.

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PAUL G. SUMMERS, Judge

CONCUR:

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DAVID H. WELLES, Judge

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WILLIAM M. BARKER, Judge