

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs April 18, 2007

BARRY F. BRADEN v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 97-B-763 J. Randall Wyatt, Jr., Judge

No. M2006-01218-CCA-R3-PC - Filed May 16, 2007

Following a jury trial, the Petitioner, Barry F. Braden, was convicted of six counts of aggravated robbery, a Class B felony. The Petitioner received an effective sentence of fifty years in the Department of Correction. This Court affirmed the Petitioner's convictions and sentence on direct appeal. The Petitioner filed a timely pro se petition for post-conviction relief. The petition was amended by counsel and contained thirteen allegations of ineffective assistance of counsel. The post-conviction court held an evidentiary hearing on the petition and subsequently entered an order denying post-conviction relief. The Petitioner appeals the post-conviction court's denial of relief. Because the record on appeal does not include a transcript of the evidentiary hearing in the post-conviction court, we conclude that the Petitioner has waived the issues argued on appeal. Because we must presume that the trial court correctly denied post-conviction relief, the judgment of the post-conviction court is affirmed.

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

DAVID H. WELLES, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ROBERT W. WEDEMEYER, JJ., joined.

Ronald E. Munkeboe, Jr., Nashville, Tennessee, for the appellant, Barry F. Braden.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Lisa Naylor, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Background

A. Trial and Direct Appeal

The Petitioner was convicted by a jury of six counts of aggravated robbery stemming from two separate incidents on October 11 and October 16, 1996, and involving six victims. The facts underlying these offenses were summarized by this Court on direct appeal as follows:

On October 11, 1996, at approximately 6:45 a.m., John Piper, a retiree, was sitting in the backyard of his home located at 563 Croley Drive in Nashville. At the time of the offense, Mr. Piper resided in the home with his wife, Frances Piper, son, Donald Piper, and grandson, Roger Piper, all of whom were home that morning. Suddenly, he felt a person grab his neck from behind and place a gun to his head. From his viewpoint, he identified three assailants, one woman and two men. He testified that all three were African-American. They demanded money and he gave them a five dollar bill in his pocket. They later took his wallet which contained a one dollar bill. The wallet was later recovered that same day, but the money was gone. He was then led into the house at gunpoint and forced to lie face-down on the dining room floor. As he entered the house, he yelled to his wife that they were being robbed. Although they attempted to cover his face with a towel, he pulled it off. As one male assailant held him at gunpoint, the other two assailants began to search the home. They were demanding money and guns. Even though he could not see all of what transpired, Mr. Piper believed that they confronted his wife as she exited their bedroom located on the first floor. Approximately fifteen minutes later, one of the male assailants and the female assailant reentered the room. Earlier, the other male assailant had exited the home to retrieve the car. Then, Mr. Piper heard a car horn blare, and the two remaining assailants ran out the front door. He recalled that the car they escaped in was an older model, large car.

After the assailants left, Mr. Piper entered his wife's bedroom and found her in the closet. He described his wife's mental state as numb and stated that she appeared scared to death. He testified that the assailants took several of his wife's diamond rings and approximately \$80.00 from her pocketbook, none of which was recovered. They also took an antique double-barreled shotgun that was a gift from his father-in-law. After the suspects left, he ran next door to Jenny Brummitt's house and called the police. He was unable to call from his home because the assailants had ripped the phone cords from the wall during the robbery. Approximately one month after the robbery, Detective Whitehurst presented Mr. Piper with photographs of possible suspects. He was unable to identify any of the people as the robbers. However, he stated that although the two male assailants had their faces covered, he was able to see their mouths, noses and eyes. He also recalled that one wore a trench coat. He described the woman as short and small framed, but was unable to identify

her clothing. Mr. Piper testified that the man who came up grabbed him from behind was Mr. Piper's height or taller. Mr. Piper is five feet ten and a half inches tall. When [the Petitioner] stood beside Piper at trial, he testified that [the Petitioner] could have been one of the robbers based on his height. Mr. Piper also commented "I know one thing, this thing cost me my wife." Mrs. Piper did not testify at the trial. At the time of trial, she resided in a nursing home diagnosed with Alzheimer's disease.

Donald Piper testified that on October 11, 1996, he was in his bedroom asleep when he was awakened by a strange man pointing a gun in his face. The man demanded money and Donald gave him \$80.00. He testified that he was unable to see the man's face because he was wearing a hood. The man then ordered him into the closet. A few minutes later, a woman came into the room and peered into the closet. He described both robbers as young, African-Americans. In his opinion, the man was approximately twenty years old. When presented with photographs of potential suspects, he stated that the woman in the photograph "might have been" the woman he saw at the house, but that he was unsure. He was unable to pick out the male assailant.

Roger Piper also testified that he was robbed at gunpoint while he was lying in his upstairs bedroom. He also described the man as African-American and stated that he was wearing a large overcoat with a hood that covered his face. The man demanded money and guns. Items stolen during the robbery included his wallet that contained one ten dollar bill, a checkbook, beeper, and a desk telephone. As he was leaving, the man threatened to shoot Roger if he came downstairs. Although he did not attempt to go downstairs, he looked out a window and saw a lady carrying a shotgun run out their front door and jump into a car that was waiting in front of the house. He described her as an African-American, very thin, with wide eyes and big lips. He described the car as a two-toned, four door large car with a dark blue bottom and light blue top. He watched as the woman threw the shotgun into the car's trunk. He also saw a third person driving the car. He stated that when presented with photographs a month after the robbery, he positively identified the woman, but not the males.

Jenny Brummit, who lived next door to the Pipers, testified that on the morning of October 11, 1996, she noticed strange activity at the Piper home. She recalled hearing the sound of a car horn blowing, and her dog barking frantically. When she peered outside, she saw a two-toned blue mid-eighties model large car, such as an Oldsmobile or Cadillac, parked in front of the Piper's driveway. She noticed a man exit the car and cover the car's license plate with a towel. She described the man as a large African-American man, between five feet ten inches and six feet tall. She watched as a small-framed woman came running out of the house with a shotgun slung over her arm. She saw a third person in the driver's seat. Thinking that her neighbors were dead, she closed her front door. Then, Mr. Piper

came running over and asked her to call the police.

Officer George Espinoza, the first officer on the scene, testified that on October 11, 1996, at approximately 6:50 a.m., he responded to an armed robbery call at 563 Croley Drive. Within three to four minutes, he arrived at the scene and spoke with the victims and took their statements and the description of the suspect's car. He also summoned the Identification Division of the police department to search for hand prints or fingerprints. Officer William Merrill, an employee in the Identification Investigation Division (I.D.), testified that he investigated the crime scene at 563 Croley Drive, and arrived at approximately 7:33 a.m. He explained that the I.D. division is a specialized unit that searches for any type of physical evidence at a crime scene, including fingerprints, body fluids, hairs, fibers, footprints or tire prints. He further explained that fingerprints lifted from a crime scene are called latent prints, and that these type of prints are not visible with the naked eye. Latent prints are usually detected by dusting a surface with a powder which reveals the print. Then, tape is placed over the print, and the print is lifted upon the tape and transferred to a lift card for identification. Upon Officer Espinoza's request, he dusted certain areas for latent prints including a cable tv box, several door frames, hallway doors leading into certain bedrooms and closet doors within those bedrooms. One latent print was lifted from the hallway door leading into Donald Piper's bedroom, and three were lifted from the closet door in Mrs. Piper's bedroom. The latent prints were then placed on lift cards, placed in a latent print envelope, and then submitted to the Latent Print Examiner for identification purposes.

Danny Morris testified that he is employed by the Metro Nashville Police Department as a Civilian Identification Supervisor. His job entails comparing latent impressions with known inked prints, and testifying to the results. He has received extensive training in latent print identification and has been employed as a fingerprint expert for eleven years. After comparing the prints lifted from the Piper crime scene to the fingerprints of potential suspects, he was able to positively identify one print lifted from the hallway door leading into a bedroom as that belonging to Kent Braden. The other latent prints were not matched to any other individual. He testified that no two persons in the world have the same fingerprints.

Demetrius Martin¹ testified that on the morning of October 11, 1996, she, Kent Braden, and [the Petitioner] were "hanging out." She stated that all three were friends and co-workers. They were riding around in [the Petitioner's] car looking for someone to rob when they spotted an elderly gentleman sitting in his backyard. [The Petitioner] who was driving the car, parked the car one house away. She described the car as an eighties model four door blue Oldsmobile. All three then exited the car

¹ Ms. Martin's name is also spelled Dimitrice Martin in portions of the record, including the indictments against her in this case.

and approached the man from behind. She testified that [the Petitioner] and Kent Braden were both armed with guns, a 9 millimeter and a .32. pistol, respectively. Kent Braden then grabbed the man around the neck and demanded money. The man replied that he only had a five dollar bill, which they took. They led the man into his home, and forced him to lie down on the floor. [The Petitioner] held a gun to the man's head, while Kent Braden and Ms. Martin searched the home for money and guns. They entered a bedroom where they confronted a woman who appeared to be the man's wife. After taking her money, they forced her into a closet and took a shotgun found in that closet. They then entered another bedroom, held another younger man at gunpoint, and took his money. They then forced him into a closet. They proceeded upstairs where they encountered another man who gave them money, a checkbook, a pager, and a telephone. During each encounter Kent Braden brandished a gun, and held it to each person's head. After approximately fifteen minutes, they ran out of the residence and drove away. They put some of the stolen property into the car's trunk and split the money. To the best of her knowledge, Kent kept the pager and [the Petitioner] took the rest of the stolen goods to his home. The robbery occurred at approximately 5:00 or 6:00 a.m.

Ms. Martin testified that on the night of October 16, 1996, the three friends also robbed a young couple. On this night they were riding around in [the Petitioner's] car, the same car used in the first robbery, looking for someone to rob. They noticed a young couple and began to follow their car. When the couple pulled into an apartment complex, Ms. Martin and Kent Braden got out of the car and approached the couple. [The Petitioner], the driver, remained in the car. Kent Braden was carrying a .32 pistol, and Ms. Martin was armed with a 9 millimeter. She testified that both guns were the same weapons used in the Piper robbery five days earlier. Holding the couple at gunpoint, Kent then demanded money and the couple's valuables. The man handed Kent his car keys, a watch and some money, and the woman gave Ms. Martin her watch. Kent then instructed the couple to run down the hill in the opposite direction. Kent threw the couple's car keys into a bush, and the pair returned to the car and split the money. She testified that [the Petitioner] was aware of the robbery. Ms. Martin kept the watch stolen from the victim.

Three weeks after the second robbery, Ms. Martin was stopped by police while riding around with friends. It was later discovered that the car they were in was registered to [the Petitioner]. She testified that this car was the same one used in both robberies. However, [at this time she stated, contrary to her trial testimony, that] neither [the Petitioner] nor Kent Braden was with her on that night. She testified that several weeks earlier, [the Petitioner] had bought a new car and asked her to take over payments on the Oldsmobile. At the time of the arrest, she had been driving the car for a couple of weeks, but had not made any payments. Ms. Martin was arrested after police discovered two guns in the car's back seat. Police also discovered a checkbook in the glove compartment, which did not belong to anyone in the car. She

testified that the two guns were the same weapons used in both robberies. She was arrested and charged with possession of weapons and contributing to the delinquency of a minor, after officers discovered that two passengers in the car were minors. She later pled guilty and was placed on probation. When questioned on the night of the arrest, Ms. Martin told officers that she did not know anything about the Piper robbery. On February 4, 1997, Ms. Martin was arrested for the two robberies which occurred on October 11 and 16, 1996. While in custody, she confessed to committing both robberies, and identified Kent and [the Petitioner] as her accomplices in those robberies. She also admitted that she retained the watch stolen from the young woman during the second robbery. With her consent, the watch was retrieved from her apartment.

Ms. Martin further testified that in mid-October she began working at Defender's Services, a cleaning agency, where Kent and [the Petitioner] were employed. Normally, she worked the second shift, from 3:00-11:00 p.m., and both co-defendants worked the third shift, from 11:00-7:00 a.m. She testified that per the company's policy, workers were required to sign in and out on a piece of paper whenever they left their job posts. However, she stated that on several occasions, she was able to leave before her shift ended, all the while marking down that she left at her normal time. She testified that this was a common practice. She further stated that in October 1996, she saw [the Petitioner] practically every night and that they would usually meet at approximately 2:00 or 3:00 a.m., approximately three or four times a week. She assumed that although he was scheduled to work, he probably just signed out. However, on cross-examination, she admitted that employees had to pass a security guard station when leaving Defender's Services. She further admitted that in a written statement given to Detective Whitehurst on February 4, 1997, she stated that she and Kent Braden had robbed a male and female in an apartment complex. She had not mentioned [the Petitioner]. She further denied purchasing the Oldsmobile from [the Petitioner], or paying him any money for the car.

Ms. Martin testified that she has not had any conflict with either co-defendant. She was incarcerated at the time of [the Petitioner's] trial. Ms. Martin also had charges pending in other criminal proceedings wherein she was testifying as a State's witness. She testified that she was not promised anything in exchange for her testimony.

Jay Kavanaugh testified that on October 16, 1996, he and his wife, the former Dawn Ferrell, were robbed while returning home from the Hard Rock Café. He stated that the robbery occurred a little after midnight. At the time of the offense, he was living in a condominium at 2110 Portland Avenue, in Nashville. He testified that they paused in the parking lot when they noticed a car that was vandalized, which caught their attention because it was unusual in their neighborhood. While they were looking at the car, a man and woman approached them. The man,

[w]ielding a large black revolver, pointed the gun directly at Mr. Kavanaugh and demanded his money and other valuables. He testified that the robbery occurred while they were standing under a street light that illuminated the whole parking lot. He further testified that he was able to get a good look at the man because the man was only an arm's length away. Mr. Kavanaugh then identified [the Petitioner], in court, as the person who robbed them. Both suspects were identified as African-Americans. He described the man as thin, and approximately six feet one or two inches tall. He testified that items stolen included his Timex watch and his wallet which contained credit cards, a driver's license, and approximately \$100.00. The woman assailant also took a watch from his wife. The man then frisked him and retrieved his keys from his front pants pocket, and threw them into the bushes. The male assailant then instructed them to turn and run in the opposite direction. They ran and hid in the bushes. When they saw the suspects leave, they immediately called the police and gave a description of the stolen items. On February 7, 1997, Detective Whitehurst called them and they went to the police station to retrieve his wife's watch that had been recovered. While there, Detective Whitehurst showed them a series of six photographs in a photographic lineup. Mr. Kavanaugh positively identified [the Petitioner] in photo No. 5 as the man who robbed him. On the morning of the trial, Mr. Kavanaugh was also presented with a photograph of Kent Braden, [the Petitioner's] cousin. He stated that he was positive that Kent Braden was not the robber. [The Petitioner] also testified that when he entered the courthouse for trial that day, he saw [the Petitioner]. Although no one had informed him that [the Petitioner] was in fact the [the Petitioner] in this case, he stated that when he saw him, he and his wife stated, "[t]hat's the guy that robbed us."

Mr. Kavanaugh admitted on cross-examination that during the photographic lineup, he pointed to [the Petitioner] and stated "[h]e looks kind of close," and then pointed to the man in photo No. 3 and made the same statement. Specifically, he commented that, "[N]o. 3's eyes were too light. Though if I had to pick one, I would say No. 5 [the Petitioner], if I had to pick one." He explained that he ruled out the second suspect No. 3, because he had green eyes or considerably lighter eyes. He further admitted that he could not identify the woman. He reemphasized that he was positive that the person he saw outside the courthouse, and in the courtroom on that day, was the person who robbed him.

Dawn Kavanaugh also testified. She corroborated Mr. Kavanaugh's testimony of the events surrounding the robbery. She described the woman who robbed her as shorter than the man and a little older. She also identified [the Petitioner], at the time of trial, as the man who robbed her. When Detective Whitehurst contacted her a couple of months later to come and retrieve her watch, she participated in a photographic lineup of six different women's photos. She stated that she identified one woman who she was fairly certain was the person who robbed her. When presented with a separate photographic lineup of various male suspects,

she identified No. 5 as the man who robbed her. The man in photo No. 5 was [the Petitioner]. She was also presented, on the morning of trial, with a photograph of Kent Braden. She testified that she was positive that he was not the person who robbed her. In addition, while standing outside the courtroom, prior to the trial, she saw [the Petitioner], and unaware that he was the [the Petitioner], she stated that there was no doubt in her mind that he was the person who robbed her because "I will never forget it." She further testified that she was positive that the watch recovered belonged to her because it had the same scratch in the crystal face.

Mrs. Kavanaugh admitted on cross-examination that on the night they were robbed, she had consumed a few beers. She also admitted that when she identified the man during the photographic lineup she made the following comment, "I'd say it's No. 5 [the Petitioner], if I had to pick one, but it seems his hair was longer. I would be pretty sure of that. I think."

Officer Freddie E. Garrett testified that on November 9, 1996, he was on patrol in a marked police car in West Nashville. He stated that he stopped a car for speeding and that Ms. Martin was a passenger in the car. The car was a four door, blue 1983 Oldsmobile 98, registered to [the Petitioner]. Along with Ms. Martin, there was a male driver and two juvenile passengers. During the stop, he noticed what appeared to be metallic objects in the back seat which he later discovered were guns. One gun was a .38 revolver and the other was a semi-automatic 9 millimeter. He also discovered ammunition for the 9 millimeter. He then arrested Ms. Martin and the driver of the vehicle for weapons possession and contributing to the delinquency of a minor. The juveniles were also arrested on a weapons possession charge. While searching for the car's registration in the glove compartment, he discovered a checkbook belonging to a Mr. Piper. After discovering that none of the car's occupants was named Piper, he called the phone number on the checkbook and discovered that it was stolen during a robbery on October 11, 1996. He transferred the property collected to the property room and impounded the car.

Detective Dan Whitehurst was the chief armed robbery investigator assigned to this case. He testified that initially, he did not have any potential suspects in the Piper robbery. Then, in November 1996, he learned from Officer Freddie Garrett that a checkbook from the Piper robbery had been recovered in a blue Oldsmobile 98, registered to [the Petitioner]. The car's description matched that of the vehicle used during the robbery on October 11. He then submitted the names of the four people arrested by Officer Garrett for a fingerprint analysis and comparison with the latent print lifted from the Piper home. He also took a group of six photographs, which included one of Ms. Martin, to the Piper residence to see if they were able to identify any suspects. After presenting them to each one separately, Roger Piper made a positive identification of Ms. Martin as one of the robbers. He then obtained a warrant for Ms. Martin's arrest for aggravated robbery. He testified that the Pipers

were unable to identify any of the men involved from the photographs presented to them.

Prior to Ms. Martin's arrest, on December 4, 1996, [the Petitioner] called to retrieve his Oldsmobile. Upon Detective Whitehurst's request, [the Petitioner] came to the police station that same day to talk about the car. [The Petitioner] explained that the car belonged to him, but that he had let someone borrow the car. [The Petitioner] admitted that he knew Ms. Martin and the man who was arrested while driving the car. Detective Whitehurst then informed [the Petitioner] that he suspected that the car was involved in an offense. When questioned about his car's whereabouts, on October 11, 1996, [the Petitioner] stated that his car was broken down during the first half of October. He further stated that no one had ever borrowed the car before the date Ms. Martin was arrested. [The Petitioner] also stated that he did not know how the stolen items got into his car. [The Petitioner], who was not under arrest at the time, then left the police station. On February 4, 1997, Detective Whitehurst spoke with Ms. Martin who admitted that she, Kent Braden, and [the Petitioner] had committed both robberies. Ms. Martin gave further descriptions of the victims and events that transpired in the Piper home. He stated that she exhibited knowledge that only someone involved in the robbery would know. He also confirmed that after individually showing Mr. and Mrs. Kavanaugh a photographic lineup, Ms. Dawn Kavanaugh identified both Ms. Martin and [the Petitioner] as the robbers, while Mr. Jay Kavanaugh was only able to identify [the Petitioner]. He recorded the results on a photographic identification form. Detective Whitehurst testified that Mrs. Kavanaugh identified Ms. Martin by stating, "[i]t could have been her [Ms. Martin] . . . if her hair had been different. I'm going to say it was her even though her hair was not like that." A few weeks before the trial, he submitted fingerprints of [the Petitioner] to be compared with the latent prints found in the Piper home. The fingerprint analysis returned negative. Detective Whitehurst also testified that on the morning of trial, he presented the Kavanaughs with a picture of Kent Braden and that both stated, "that's not him."

On cross-examination, Detective Whitehurst admitted that [the Petitioner's] fingerprints were not found on any property confiscated from the Oldsmobile. He also admitted that when he initially conducted the photographic lineup with the Kavanaughs, he did not include a photograph of Kent Braden, although Ms. Martin implicated him as one of the robbers. He stated that he did not have Kent Braden's photograph at that time. He further admitted that [the Petitioner's] name was not mentioned in the report he typed of Ms. Martin's interview of the Kavanaugh robbery. The relevant portion of the report was read into the record, which stated "[o]n 2/4/97, during the interview of Ms. Demetrius Martin, she admitted that she and Kent Braden robbed a male and female white who were standing, facing an apartment."

Patricia Braden, [the Petitioner's] mother, testified that her son was living with her during October 1996. She stated that in February 1996, she gave her son a down payment for an older model blue car. Then, during the first of October 1996, her son bought another car, an older model white Cadillac with the money he received from selling his blue car. She stated that he sold his blue car at the end of September. During October 1996, Ms. Braden was caring for her father who was ill. She testified that [the Petitioner] would often help her by babysitting his younger three-year old brother, Marquis Braden. She testified that to her knowledge, her son [the Petitioner] was there every morning in October when she awakened. She specifically recalled that he was there on Friday, October 11, 1996, because every Friday morning she had to take her father to his chemotherapy treatment at 8:00 a.m. She testified that she would leave their home each morning and leave her younger son in [the Petitioner's] care. [The Petitioner] had a key to the home's front door. She stated that some nights before she went to sleep, she would rig the front door so that no one could enter from the outside, even with a key. She stated that she had met Ms. Martin once, and that [the Petitioner] used to transport Ms. Martin and another friend to visit someone.

She further testified on cross-examination that her son, [the Petitioner], would usually be home on the weekdays before she left at approximately 6:45 a.m. She further testified that Ms. Martin had the car a couple of weeks before November 1, 1996. She remembered that date because it was the day her father died. She also testified that Kent Braden is [the Petitioner's] first cousin.

Kenneth Pritchard testified that in August 1996, he accompanied [the Petitioner] when he purchased the blue Oldsmobile. He also stated that during 1996, he used to come home each weekend from college. During one week-end visit during the middle of October, he saw [the Petitioner] driving a new car, a white Cadillac. He further testified that during the latter part of October, he saw Ms. Martin with the Oldsmobile parked in front of her house, and that [the Petitioner] later told him that he sold it to her.

Mr. Braden, Sr. testified that he originally went with [the Petitioner] when he purchased the Oldsmobile. He did not remember Mr. Pritchard being there. He testified that his son later sold the car to Ms. Martin in October 1996. After his son sold his old car, he purchased a white Cadillac. He testified that he and his son worked at Defender Services on Cockrill Bend in Nashville. He stated that at Defender Services there is only one main entrance to the factory, and that to enter the building, you have to pass a gate and a guard shed. The employee must also sign in at the office, and record the date and time of entry. He stated that the employees are not allowed to come and go at will.

Ann Seat testified that she is a manager at Defender's Services, and was assigned to the Spring Bath Fashions Factory. She stated that [the Petitioner] was a good employee who sometimes worked extra shifts when necessary. A time sheet from October 15, 1996 was entered into evidence without objection. She testified that the time sheet reflected that [the Petitioner] worked a double shift on October 15, 1996. His shift entailed working from 3:00-11:00 p.m. on October 15, 1996, and then 11:00-7:00 a.m. the next morning. She testified that [the Petitioner] probably worked the entire shift. She based this statement on records that were introduced into evidence including [the Petitioner's] check stub and time sheet for that pay period. She testified that these records were kept in the normal course of business. She also identified a check stub for the pay period which concluded on the week of October 19, 1996. It reflected that [the Petitioner] worked a total of fifty-six hours, sixteen hours of which included overtime. She stated that she arrives at work at approximately 6:30 a.m., and that it is her responsibility to check on the employees that work third shift. She was sure that she saw [the Petitioner] when she arrived on October 16, 1996. If not, she would have received a slip of paper from the guard shack informing her that he left early. According to company policy, if an employee leaves early, that employee must stop at the guard shack and write his or her name down and the time that they leave, as well as the time they return. The employee's pay would then reflect any time missed. If any employee's pay is "docked," when that employee picks up his or her check, the employee has to sign a sheet that reflects the amount of time and the pay deducted. On October 16, 1996, she did not receive any notice that [the Petitioner] had left the plant. She testified that employees are not allowed to come and go as they please. She also confirmed that there is only one entrance into the plant, and that at the entrance, there is a guard shack and a gate. The plant is also surrounded by a fence and employees must present identification cards to enter the premises. After entering the premises, the employee is required to record their time of arrival and a supervisor later verifies that the employee was present. She stated that based on her time sheet, there was no doubt in her mind that [the Petitioner] was at work on the evening of October 15, 1996, and the morning of October 16, 1996. However, on cross-examination, she admitted that there is no supervisor on third shift. She also verified a time sheet submitted from October 11, 1996, showing that [the Petitioner] worked second shift, from 3:00-11:00 p.m. She also confirmed that Kent Braden and Demetrius Martin worked the same shift that day.

[The Petitioner] testified and denied any involvement in the robberies on October 11 and 16, 1996. He stated that he became acquainted with Ms. Martin in 1996, through a high-school friend, Chris Davis. In February 1996, he used money that his mother had given him as a down payment and purchased a blue 1983 Oldsmobile 98. The car had a weekly payment of \$50.00. He stated that it remained in his name until it was repossessed in February 1997. The first week of October, he sold the car to Demetrius Martin. Although she was supposed to give him the

complete \$800.00 down payment for his new car, she only gave him \$600.00. Per their agreement, she was also supposed to assume the weekly payment on his blue car. He stated that he bought his new car, a 1979 model white Cadillac, on the same day she gave him the down payment. Later, he learned that his former car, the blue Oldsmobile, had been towed. When he went to pick up the car, the tow-lot instructed him that he had to speak with Detective Whitehurst before the car was released. When he arrived at the police station, Detective Whitehurst informed him that they discovered weapons and evidence of a robbery in the car. He denied knowing how the items got there. He then stated that he was aware that Ms. Martin was in his car. When asked to submit a fingerprint sample and also take a lie detector test, he refused and stated, "not without a lawyer." [The Petitioner] testified that Detective Whitehurst then stated "well, if you don't want to take it without a lawyer, then there's really nothing else I can do for you or you can do for me." When [the Petitioner] left and attempted to retrieve his car, they sent him back to Detective Whitehurst to get a signed release form. Detective Whitehurst refused to sign the release. He stated that by this time, the auto dealership had repossessed the car. His white Cadillac was later repossessed because he was unable to maintain a steady payment history.

He further testified that on October 11, 1996, he was at home at approximately 6:45 a.m. He stated that he had worked the night before on second shift, from 3:00-11:00 p.m. He stated that in October 1996, he babysat his little brother while his mother cared for his grandfather. He also testified that he worked a double shift on October 15, 1996, through the morning of October 16, 1996. He denied leaving the job premises that evening. He stated that although there was no direct supervisor during third shift, another supervisor monitored the entire plant. He further denied telling Detective Whitehurst that his car was broken down during the first half of October or that he let anyone borrow the car. Instead, he reiterated that Ms. Martin had purchased the car from him. Although requested, he was unable to produce any evidence of the Cadillac purchase. He claimed that the proof of purchase was in the Cadillac when it was repossessed. He stated that he was friends with Ms. Martin and spent time with her and his cousin, Kent Braden. He admitted that he helped Ms. Martin get her job at Defender Services.

State v. Barry F. Braden, No. M2001-00226-CCA-MR3-CD, 2002 WL 1732354, at *1-9 (Tenn. Crim. App., Nashville, July 26, 2002), perm. to appeal denied, (Tenn. Dec. 23, 2002).

The Petitioner was "ordered to serve consecutive ten year sentences for counts one, two, four, five and six, to be served concurrently with a ten-year sentence in count three, for an effective sentence of fifty years." Id. at *1. This Court upheld the Petitioner's convictions and sentences on direct appeal. Id. at *17.

B. Post-Conviction Hearing

The Petitioner filed a timely pro se petition for post-conviction relief, which was later amended by counsel. The amended petition contained thirteen allegations of ineffective assistance of counsel. The post-conviction court held a hearing on the petition on February 16, 2006.² Following the hearing, the post-conviction court denied the petition. The Petitioner's allegations and the post-conviction court's findings are summarized as follows.

1. Failure to File Motion to Sever

The Petitioner's first allegation was that trial counsel failed to file a motion to sever the offenses of October 11 and the offenses of October 16 for trial. The post-conviction court found that trial counsel "considered the possible benefits of filing such a motion" and "discussed this issue with Petitioner." However, the post-conviction court ultimately determined that the "Petitioner wished to rely on his alibi defense" and that trial counsel decided that "one jury's decision weighing the veracity of Petitioner's alibi would be no different than a subsequent jury's decision." The post-conviction court found this to be a "tactical decision" which was "reasonable" based upon the fact that the "Petitioner's defense would not be greatly improved if the offenses were severed." Therefore, the post-conviction court found that trial counsel was not ineffective for failing to file a motion to sever.

2. Failure to Investigate Testimony of Demetrius Martin

The Petitioner's second allegation of ineffective assistance of counsel was that trial counsel failed to adequately interview and investigate "the State's chief witness, Ms. Demetrius Martin." The post-conviction court found that trial counsel "discussed Ms. Martin's testimony with the State" and that the State "revealed to [trial counsel] the content of her testimony and [trial counsel] was able to adequately prepare for cross examination of Ms. Martin." Although the Petitioner alleged that trial counsel was not prepared to impeach Ms. Martin with prior inconsistent statements at trial, the post-conviction court found that trial counsel "did attempt to impeach Ms. Martin's testimony with prior inconsistent statements." Therefore, the post-conviction court found that trial counsel "conducted adequate investigations and competently cross examined Ms. Martin to the best of his ability and to the benefit of Petitioner" and was thus not ineffective.

3. Failure to Cross-Examine Mr. Roger Piper

The Petitioner's third allegation was that trial counsel should have cross-examined Mr. Roger Piper on whether he had previously identified "two different males" from a photographic line-up as "'looking like' the suspects." At trial, Mr. Piper stated that he was "unable to make an identification." With regard to whether trial counsel failed to cross-examine Mr. Roger Piper, the post-conviction court found that trial counsel "believed that Mr. Piper's testimony did not hurt

² We are able to determine that a post-conviction hearing was held based upon the post-conviction court's reference to the hearing in its order denying post-conviction relief.

Petitioner's case" and that he "made a tactical decision not to cross examine Mr. Piper because Mr. Piper conceded that he was unable to identify a suspect."

4. Failure to Object to Petitioner Standing Up at Trial for Identification

The Petitioner's fourth allegation of ineffective assistance of counsel was that trial counsel did not "object when Petitioner was asked to stand in front of a witness, Mr. John Piper, so as to be identified." The Petitioner argued that "his Fifth Amendment privilege against self-incrimination was violated by the order to stand in front of Mr. Piper." The Petitioner further argued that, after the in-court demonstration, trial counsel failed to cross-examine Mr. Piper about his earlier inability to identify the Petitioner as the suspect. The post-conviction court found that trial counsel did object to having the Petitioner stand in front of the witness and did "competently cross examine[] Mr. Piper on his inability to identify the Petitioner as the perpetrator." The post-conviction court also found that, as a matter of law, "the Fifth Amendment privilege against self-incrimination did not apply to acts non-communicative or non-testimonial in nature" and, as such, "the act of Petitioner standing before a witness did not violate Petitioner's Fifth Amendment rights."

5. Failure to Properly Examine Detective Whitehurst

The Petitioner's fifth allegation of ineffective assistance of counsel was that trial counsel failed to properly cross examine Detective Whitehurst "to emphasize" that "neither Mr. Roger Piper, nor Mr. John Piper, nor Mr. Donald Piper was able to identify Petitioner from a lineup." The post-conviction court found that trial counsel "conducted a thorough cross examination and re-cross examination of Detective Whitehurst" that was "actually quite beneficial to Petitioner's defense." The post-conviction court also found that, although the Petitioner wanted trial counsel to "attack[] the credibility of Detective Whitehurst[,] such a tactic "m[ight] have diminished his beneficial testimony." Furthermore, the post-conviction court found that trial counsel "was under no obligation to attempt to discredit every witness presented by the State[.]"

6. Failure to Move for Judgment of Acquittal

The Petitioner's sixth allegation of ineffective assistance of counsel was that trial counsel failed "to move for judgment of acquittal at the end of the State's proof." The Petitioner asserted that such a motion "could have been granted based on testimony that he was not an active participant in the robberies" and that it "could have resulted in a lesser included offense being offered to the jury for their consideration." The post-conviction court found that trial counsel "considered a motion for judgment of acquittal at the end of the State's proof" but that he did not "'think the Motion [he] would want to make would be well taken . . .'" The post-conviction court found that trial counsel "was under no obligation to pursue a motion he believed to be meritless" and that the "Petitioner's speculation that a motion for judgment of acquittal might have benefitted his defense did not rise to ineffective assistance of counsel."

7. Failure to Request Jury Instruction

The Petitioner's seventh allegation of ineffective assistance of counsel was that trial counsel "failed to request the alternative jury instruction as to witness credibility and bias." The Petitioner asserted that "Ms. Martin had a substantial interest in the outcome of the trial in that she not only

faced charges against her in the present case but also in two other cases in which she was the State's chief witness." The post-conviction court found that trial counsel "recognized Ms. Martin's bias and credibility issues" and "considered whether to request the alternative jury instruction." The post-conviction court found that trial counsel "concluded that the [c]ourt's jury instruction sufficiently addressed this matter" and that this decision "was rational and competent."

8. Polygraph Evidence

The Petitioner's eighth allegation of ineffective assistance of counsel was that trial counsel "failed to object or move for a mistrial when the State, in its closing argument, commented about Petitioner's refusal to submit to a polygraph test." The post-conviction court found that this issue had "been previously determined" and was not "properly before" the court.

9. Failure to Object to Statements About Victim

The Petitioner's ninth allegation of ineffective assistance of counsel was that trial counsel "failed to object when the State made prejudicial comments related . . . Mrs. Frances Piper." Specifically, the Petitioner asserted "that the State, in its opening statement, claimed that she was unable to testify due to declining health as a result of the robbery incident." Furthermore, the Petitioner asserted that "the State, during its closing argument, claimed that Petitioner entered Mrs. Piper's room, terrorized her, and stole some belongings." The Petitioner claimed that neither of these statements were supported by the evidence in the record. The post-conviction court found that, although trial counsel could not recall why he did not object to these statements, trial counsel "m[ight] not have objected . . . for strategic purposes, so as not to draw the jury's attention to the comment." The post-conviction court further found that trial counsel "did not have to attack every statement Petitioner disagreed with, especially if [trial counsel] believe such attacks would be detrimental to Petitioner's defense."

10. Failure to Object to Sentencing Enhancement Factors

The Petitioner's tenth allegation of ineffective assistance of counsel was that trial counsel "failed to object to the enhancement factors the State provided the [c]ourt for consideration at his sentencing hearing." The Petitioner asserted that the State "did not provide [trial counsel] with its Notice of Intent to Seek an Enhanced Sentencing at least ten days prior to the sentencing hearing, as statutorily mandated." The post-conviction court found that, although the State did not file its notice with the clerk ten days before the sentencing hearing, trial counsel "received notice at least ten days prior to the hearing and, therefore, this allegation is without merit." The Petitioner also briefly argued that trial counsel "should have objected to the State's use of enhancement factors in its argument for consecutive sentencing[.]" but the post-conviction court found that "this issue [had] been previously determined on appeal and was without merit."

11. Failure to Present Mitigating Evidence at Sentencing

The Petitioner's eleventh allegation of ineffective assistance of counsel was that trial counsel "failed to present any mitigating factors at his sentencing hearing." The Petitioner argued that two statutory mitigating factors existed—(1) he "acted under strong provocation" and (2) he "played a minor role in the commission of the offense." The Petitioner further stated that "non-statutory

factors could have been raised as well.” The post-conviction court found that trial counsel “probably did not offer any proof at the sentencing hearing because he did not believe any mitigating factors applied.” The post-conviction court found that trial counsel “was not bound to present factors that he believed to be without merit.”

12. Failure to Defend Against Consecutive Sentencing

The Petitioner’s twelfth allegation of ineffective assistance of counsel was that trial counsel “failed to present any defense as to the [c]ourt’s imposition of consecutive sentencing.” The Petitioner argued that trial counsel “should have argued that, since Petitioner did not have an extensive criminal background and was not a dangerous offender, he did not deserve consecutive sentencing.” The post-conviction court found that trial counsel “decided against arguing that Petitioner was not a dangerous offender after considering the extensive contradictory testimony presented at Petitioner’s trial.” The post-conviction court also found that “an argument that the Petitioner did not have an extensive criminal background would have had minimal impact due to the gravity of Petitioner’s convictions and the outrageous violence inherent therein.” The post-conviction court concluded that trial counsel “was under no obligation to make such arguments if he believed they were without merit.”

13. Failure to Explain Consecutive Sentencing to Petitioner

The Petitioner’s thirteenth allegation of ineffective assistance of counsel was that trial counsel failed to explain to him pre-trial that he faced the possibility of consecutive sentencing. The post-conviction court found that trial counsel “explained to Petitioner the sentencing range for each of Petitioner’s counts” and “discussed with Petitioner the possibility that he could be convicted of multiple counts and that each count would carry its own sentence of eight to twelve years.” The post-conviction court found that trial counsel “explained to Petitioner that the sentences could be served concurrently or consecutively, and that Petitioner ultimately could face a maximum sentence of seventy-two years.” Therefore, the post-conviction court found that the “Petitioner was fully aware of the possibility that he might receive consecutive sentences” and that this issue was “without merit.”

Analysis

The Petitioner appeals the post-conviction court’s denial of post-conviction relief. To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of 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 judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge’s findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

While the post-conviction court's comprehensive order denying post-conviction relief is part of the record on appeal, the Petitioner has failed to include in the record the transcript of the post-conviction hearing. The State argues that the Petitioner's failure to provide a complete and accurate record on appeal precludes appellate review of the issues raised. We agree with the State. "When an accused seeks appellate review of an issue in this Court, it is the duty of the accused to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues which form the basis of the appeal." State v. Roberts, 755 S.W. 833, 836 (Tenn. Crim. App. 1988) (citing Tenn. R. App. P. 24(b); State v. Bunch, 646 S.W.2d 158, 160 (Tenn. 1983)); see also State v. Hopper, 695 S.W.2d 158, 160 (Tenn. Crim. App. 1985); State v. Wallace, 664 S.W.2d 301, 302 (Tenn. Crim. App. 1983). Our court has considered the failure to include such a transcript to be wholly detrimental to a petitioner's case on appeal:

It is well-established that an appellate court is precluded from considering an issue when the record does not contain a transcript or statement of what transpired in the trial court with respect to that issue. Moreover, the appellate court must conclusively presume that the ruling of the trial judge was correct, the evidence was sufficient to support the defendant's conviction, or the defendant received a fair and impartial trial. In summary, a defendant is effectively denied appellate review of an issue when the record transmitted to the appellate court does not contain a transcription of the relevant proceedings in the trial court.

State v. Draper 800 S.W.2d 489, 493 (Tenn. Crim. App. 1990); see also State v. Groseclose, 615 S.W.2d 142, 147 (Tenn. 1981); State v. Locke, 771 S.W.2d 132, 138 (Tenn. Crim. App. 1988); State v. Miller, 737 S.W.2d 556, 558 (Tenn. Crim. App. 1987); State v. Cooper, 736 S.W.2d 125, 131 (Tenn. Crim. App. 1987).

Based upon the burden on the Petitioner to provide the transcript of the post-conviction hearing, see Tenn. R. App. P. 24(b), and the "well-established" law that an appellant waives his appellate issues if he fails to meet this burden, we conclude that the Petitioner has waived the issues brought forth in this post-conviction appeal. Therefore, we must presume that the post-conviction court properly determined that the Petitioner did not establish that he received the ineffective assistance of counsel.

Conclusion

Based upon the foregoing authorities and reasoning, the judgment of the post-conviction court is affirmed.

DAVID H. WELLES, JUDGE