

IN THE  
CIRCUIT COURT  
MONTGOMERY COUNTY, TENNESSEE  
DIVISION III

FILED  
2/11, 2013, 11:55 A.M. P.M.  
CHERYL J. CASTLE, CLERK  
CIRCUIT COURT CLERK  
BY: *H. Poland* D.C.

JUSTIN B. CONRAD, )  
Petitioner )  
 )  
v. ) Case No. 40501125  
 )  
 ) (Post-Conviction)  
STATE OF TENNESSEE, )  
Respondent )

**ORDER DENYING PETITION FOR POST-CONVICTION RELIEF**

This matter came before the Court November 8, 2012, for a hearing on the petitioner's pro se petition for post-conviction relief. Having reviewed the record and the post-conviction petition, and having conducted an evidentiary hearing, the Court finds that the Petitioner is not entitled to relief and therefore denies the petition.

I. PROCEDURAL HISTORY

In December 2005 the Montgomery County Grand Jury indicted the petitioner on one count each of first degree premeditated murder, first degree felony murder, and theft of property valued over \$1,000. A Montgomery County jury found the petitioner guilty as charged on all counts; the court merged the two first degree murder convictions and imposed a sentence of life in prison. Hugh Poland, who represented the petitioner at trial, filed a timely motion for new trial on the petitioner's behalf. Mr. Poland was allowed to withdraw, and the Court appointed J. Runyon to represent the petitioner in all subsequent proceedings.

*2/11/13 copy to H. Poland + DA. *[Signature]**

After a delay for the preparation of transcripts and to allow Mr. Runyon to familiarize himself with the case, the Court denied the new trial motion. On direct appeal, the Court of Criminal Appeals affirmed the petitioner's conviction and sentence. See State v. Justin Brian Conrad, No. M2008-01342-CCA-R3-CD (Tenn. Crim. App. Sept. 20, 2009 (hereinafter "C.C.A. Opinion"). The Tennessee Supreme Court denied the Petitioner's application for permission to appeal on February 22, 2010.

The Petitioner filed a pro se petition for post-conviction relief on June 21, 2010; thus, jurisdiction is properly before this Court. See Tenn. Code Ann. § 40-30-102(a) (2012). After changes in post-conviction counsel, the Court appointed Springfield attorney Garth Click to represent the petitioner in these proceedings.<sup>1</sup> An evidentiary hearing was held November 8, 2012.

## II. ISSUES PRESENTED FOR REVIEW

The petitioner's chief assertion is that he received the ineffective assistance of counsel at trial.<sup>2</sup> Mr. Conrad argues that Mr. Poland rendered ineffective assistance in that counsel:

- (1) Failed to move to suppress evidence taken from the petitioner's home;
- (2) Failed to prepare for trial, including failing to meet with the petitioner and failing to discuss the petitioner's testimony with him;

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<sup>1</sup> Mr. Click did not file an amended petition on Mr. Conrad's behalf.

<sup>2</sup>The petitioner makes no complaints regarding Mr. Runyon's representation.

(3) Failed to initiate discovery and file other pretrial motions in a timely manner;

(4) Failed to investigate adequately the criminal histories of the codefendants for impeachment purposes; and

(5) Failed to inform the petitioner of a plea agreement.

In his petition, the petitioner also argues that the trial court erred in refusing to grant a mistrial when a witness mentioned that the petitioner had been incarcerated, that the evidence produced at trial was insufficient to sustain his conviction, and that he is entitled to relief based on cumulative error.

### III. EVIDENCE PRESENTED AT TRIAL

The Tennessee Court of Criminal Appeals summarized the evidence presented at trial:

On September 29, 2005, Patrick Summers was found dead in his home on Barton's Creek Road in Montgomery County, Tennessee, from a single gunshot wound to the back of the head. The bullet entered the right side of the back of the head, transecting the high cervical spinal cord and exiting through the left side of the face. The victim was discovered by his best friend, Donald Painter,<sup>3</sup> who went over to the house after being unable to reach Mr. Summers by telephone. Mr. Summers was discovered "sitting there in the chair, leaned over on the floor" in his house. The two men had known each other for about forty years, since attending high school together in Joliet, Illinois. Mr. Painter moved to Tennessee in 1997, and Mr. Summers moved down a few years later. Mr. Painter called 911 to report "a man down." When emergency medical personnel arrived, it was clear that the victim was deceased.

According to friends and neighbors, Mr. Summers was somewhat of a weapons collector who "kept plenty of knives and guns" in his home. Mr.

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<sup>3</sup>Mr. Painter died of lung cancer prior to trial, but his testimony was preserved pursuant to Rule 15 of the Tennessee Rules of Criminal Procedure. (Original footnote, C.C.A. Opinion, slip op. at 2 n.2)

Summers was known to have several sabres, a .22 pistol, a .38 pistol, and a 9mm Rueger. Mr. Summers' neighbor, Peggy Harrell, cleaned house for Mr. Summers. She regularly saw at least five guns scattered throughout the house and remembered seeing two sabre swords on a shelf. Mr. Summers also regularly carried a large roll of money in his front pocket.

Mr. Summers and Mr. Painter had another friend, Tony Conrad, who had moved to Tennessee from Illinois. Mr. Conrad had two sons, Jason and Appellant. Mr. Painter was aware that one of Mr. Conrad's sons had visited Mr. Summers several times in the year prior to the victim's death.

As the investigation progressed, evidence was collected at the victim's house. Investigator Billy Batson located a box for a laptop computer and several spent shell casings-six from a .38, four from a .22, and six from a 9mm. The spent shell casings were located on the victim's back deck. Investigators also located a bullet hole in the wall near the front door just above the recliner and discovered a bullet lodged in the headboard of a bed on the opposite side of the same wall. When the bullet was removed, Sergeant Brian Prentice of the Montgomery County Sheriff's Department could see directly into the kitchen area where the table was located. The victim was found partially sitting in a chair in the kitchen area.

On September 29, Appellant called a man named Bobby Brown to ask if he or his father were interested in buying guns. Appellant met the men at the old Wal-Mart parking lot in Lexington, near Appellant's home. Mr. Brown and his father were selling pit-bull puppies. Appellant was accompanied by Paul Gilbert Sanders and Nicholas Cruz.<sup>4</sup> Robert Brown, Bobby Brown's father, bought a .22 from Appellant for \$50. The next day, he turned the gun over to the Lexington Police Department. The gun matched the description of one of the guns owned by the victim at the time of his death. Appellant, Mr. Sanders, and Mr. Cruz, were identified as suspects in the victim's death.

Sergeant Prentice visited the apartment that Mr. Sanders shared with Jeffrey Wood in Lexington, Tennessee. When questioned, Mr. Wood turned over a .357 pistol and a Taurus .38 from the sofa seat cushions. When the

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<sup>4</sup> Nicholas Cruz was originally charged with these offenses as a codefendant. His charges were severed from the petitioner's following a motion by the State. (Original footnote, C.C.A. Opinion, slip op. at 2 n.2)

apartment was searched, Sergeant Prentice located a 9 mm pistol, two swords and several knives. Subsequently, a search warrant was obtained for Appellant's residence. Officers found a shotgun, a laptop computer and charger, binoculars, and night vision goggles when the search warrant was executed. Officers later learned that the laptop was registered to "Patrick" but were unable to confirm the owner's last name or address.

Ralph Lane, a resident of Clarksburg, Tennessee, was a friend of Appellant's. The two men had worked together at a gas station in Jackson, Tennessee. In late September of 2005, Appellant contacted Mr. Lane and asked if he could borrow Mr. Lane's .380 cal. weapon. Mr. Lane agreed, and Appellant drove to his house to get the gun. Two other men accompanied Appellant. Appellant returned the gun the next evening.

According to testimony elicited at trial from Mr. Wood, on the day prior to the murder, Appellant was at the apartment shared by Mr. Wood and Mr. Sanders. He was accompanied by Mr. Cruz. Appellant, Mr. Cruz, and Mr. Sanders left the apartment to have dinner with Appellant's relatives in Clarksville. They returned just prior to midnight and brought several guns and swords into the apartment with them. The men had a .38 special, a .357 Magnum, a shotgun, a .22, a .380, some swords, and some other items. The items were taken into Mr. Wood's bedroom because it was larger. Appellant informed Mr. Wood that the items came from a man in Clarksville that owed Appellant money. Mr. Wood drove Appellant to Clarksburg the next day to deliver a .380 to Mr. Lane. On the way there, Appellant told Mr. Wood that he had killed the man because he had stolen some money from his family. When Appellant returned the gun, Mr. Lane asked if it worked "okay." Appellant responded that "it worked fine." Mr. Lane turned the gun over to a Montgomery County Sheriff's Deputy several days later.

According to Mr. Sanders, he was with Appellant and Mr. Cruz on September 28, 2005, at his apartment when Appellant suggested that they go to Clarksville to eat dinner with his aunt. The men left the apartment and stopped at Mr. Lane's house in Clarksburg where Appellant picked up a pistol. When they got back into the car, Mr. Sanders found out that they were not going to Clarksville to visit Appellant's aunt. Instead, Mr. Sanders overheard Appellant tell Mr. Cruz that they were going to see someone "to get some money back" and that Appellant was going to shoot the man in the back of the head.

The three men drove to a mobile home off of a two-lane road in a rural area near Clarksville. Appellant parked to the right of the residence near the air conditioning unit. Mr. Sanders stayed in the back seat of the car while Appellant and Mr. Cruz went inside. Mr. Sanders “didn’t want to be a part of” the activities. While Mr. Sanders sat in the car, he saw Appellant come out of the house three or four times talking on a cell phone. After about thirty or forty-five minutes, Mr. Cruz and Appellant came “running out with bags and some other stuff and [Appellant] was yelling at [Mr. Sanders] to put a bag in the trunk.” Appellant was also carrying a laptop computer that he threw in the backseat with Mr. Sanders. When Appellant got into the car, Mr. Sanders heard Appellant say that the blood came out the victim’s head looking like devil horns.

Mr. Sanders confirmed that Appellant drove the trio back to Mr. Sanders’s apartment where they carried everything in and placed it in Mr. Wood’s bedroom. Mr. Sanders saw “some knives, a bunch of bullets, and some swords and a pair of night vision goggles” along with two revolvers, an automatic gun, a computer and a .22 pistol. Mr. Sanders saw Appellant leave the residence with the computer, the .22, the goggles, a shotgun, and a bunch of knives.

Mr. Cruz accompanied the men to the victim’s home.<sup>5</sup> According to Mr. Cruz, they stopped at Mr. Lane’s house in Clarksburg. Mr. Cruz thought that they were going to Mr. Summer’s home. Mr. Cruz had been to the victim’s home a few weeks prior to the incident when Appellant borrowed \$200 from Mr. Summers. While they were riding in the car that night, Appellant told Mr. Cruz that the victim “screwed [Appellant’s] grandparents over eighty thousand dollars” and that he was going to kill Mr. Summers. When they got to Mr. Summers’s house, Mr. Cruz went inside with Appellant. The men sat around the table and were talking about Appellant’s family when, according to Mr. Cruz, Appellant “pulled the gun and shot Mr. Summers.” Mr. Cruz heard the “pop” of the gun and saw Mr. Summers fall over backward in the chair. Mr. Cruz did not hear the victim consent to the removal of the guns, knives, or swords from the house. On the way out the door, Appellant instructed Mr. Cruz to pick up a bag and take it to the car. Appellant came out of the house

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<sup>5</sup>Mr. Cruz testified at trial that he had reached an agreement to receive a fifteen-year sentence as a Range I offender for facilitation of first degree murder. (Original footnote, C.C.A. Opinion, slip op. at 4 n.3)

with two bags. When they arrived back in Lexington at the apartment, Mr. Cruz carried a laptop computer and some night vision goggles inside that had been taken from the victim's house. Several guns were "dumped" from the bags onto the floor.

At trial, Special Agent Don Carmen of the Tennessee Bureau of Investigation testified that the bullet found in the headboard of Mr. Summers's bed was fired from the .380 owned by Mr. Lane. The cartridge cases that were found on the back deck of the home matched the weapons found at Mr. Wood's apartment.

Appellant took the stand in his own defense. At the time of trial he was almost twenty-seven years old and had lived in Lexington his entire life. He admitted that he had a prior conviction for commercial burglary and had served time in the penitentiary when he was eighteen. Appellant admitted that the men stopped at Mr. Lane's house on the way to the victim's house to get a .380. The three men were going to go target shooting the next morning. Appellant admitted that he went to see the victim on the day of the incident and was accompanied by Mr. Cruz and Mr. Sanders but denied that he was the shooter. Appellant had a relationship with the victim and felt like the victim treated him like a grandson.

Appellant first testified that he heard a gun shot when he was outside the victim's residence by the car. He claimed that, at the time, he was talking to Mr. Sanders. Appellant then testified that he was on the phone in the driveway when he heard a loud pop, hung up the phone, and ran around the house to see what had happened. He saw Mr. Sanders coming out of the house and Mr. Cruz standing in the living room with a pistol in his hand. At that time, Appellant grabbed the duffel bag and the .22 pistol off the shelf. Appellant claimed that the victim had asked him to sell the guns and had discussed an estimate of how much he wanted for each item prior to his death. Appellant did not stop to check on the victim and admitted that he "messed up" by taking the things, including the guns and a computer from the victim's house.

Appellant admitted that he had borrowed money from the victim in the past and had told the victim that he was having money problems. Mr. Summers invited Appellant back to his house to talk about it. Appellant denied going to Mr. Summers's house to settle a dispute about \$80,000.

On cross-examination, Appellant admitted that he was a convicted felon that was not supposed to be in possession of a firearm. Appellant also admitted that the victim did “not give [the .22] to me to sell” but that he thought the computer, worth \$1,500, was given to him by the victim. Appellant also admitted that the victim did not give him the knives that were taken from the residence. Appellant acknowledged that he sold the stolen .22 pistol to Mr. Brown at Wal-Mart the next day.

Appellant called Rorey Mullins to testify. Mr. Mullins claimed that he did not remember telling investigators that Mr. Cruz confessed to the murder of the victim while the two were cellmates at the county jail. Mr. Mullins was an evasive witness and refused to answer many of the questions asked by counsel. The trial court allowed the recording of his interview to be played for the jury. Mr. Cruz testified in rebuttal that he had never spoken to Mr. Mullins. Additionally, Mr. Cruz’s attorney testified that Mr. Mullins told him that Appellant had bribed him to give a statement implicating Mr. Cruz in the murder.

C.C.A. Opinion, slip op. at 2-5.

#### IV. POST-CONVICTION HEARING TESTIMONY

At the post-conviction hearing, the petitioner presented the testimony of two witnesses: himself and Mr. Poland. The Court finds the petitioner’s testimony not credible. Although Mr. Poland testified that he remembered little about his representation of the petitioner, the Court nonetheless finds his testimony to be credible.

Justin Conrad

The petitioner recalled that Mr. Poland was appointed after his General Sessions Court arraignment, and he claimed that counsel did not meet with him between the arraignment and

the preliminary hearing date. The petitioner stated that his then-girlfriend, Cindy McAfee, hired Mr. Poland to represent the petitioner in Circuit Court. The petitioner claimed that after the preliminary hearing, he next met with counsel briefly after his Circuit Court arraignment; during that meeting Mr. Poland “just br[ought] me a copy of my true bill to make sure that I had received a copy of it, to let me know what I was actually being charged with[.]” The petitioner claimed that counsel did not meet with him again before trial and sent him only one or two letters before trial in response to the numerous letters the petitioner claimed he sent counsel.

The petitioner claimed that counsel did not discuss trial strategy or the evidence to be presented at trial, nor did Mr. Poland communicate any potential plea offers. The petitioner also said that he did not receive any discovery in this case. The petitioner claimed that he did not learn of Mr. Cruz’s plea deal or the fact that he would testify against the petitioner until the morning of trial. The petitioner also claimed that counsel did not discuss the motion to suppress with him before trial; the petitioner testified that he did not even see the search warrant until the suppression hearing. Mr. Conrad also claimed that he and counsel did not discuss the petitioner’s right to testify until the Court addressed it with him. According to the petitioner, Mr. Poland said that the petitioner “needed to testify” given the evidence against him, but counsel did not prepare him for his testimony.

The petitioner claimed that he wrote “so many letters [to counsel] about so many issues that I felt would help” but was unable to specify which “issues” were addressed in the

letters. The petitioner said he filed pro se motions during the course of the case but did not specify the content of those motions. When asked whether he asked Mr. Poland for investigative services, the petitioner replied that he “recall[ed] asking did he need help from family, not specifically private investigator, but family assistance.”

### Hugh Poland

Mr. Poland, who testified that he had been licensed to practice law in Tennessee approximately forty years, recalled that he was hired by the petitioner’s girlfriend to serve as the petitioner’s trial attorney, and upon being showed a claim form, he recalled that he was appointed to represent the petitioner in General Sessions Court. Mr. Poland admitted that he remembered little about the petitioner’s case, stating that “once I try a case, I usually forget about it. I always have, except usually the result or somewhere about the result.” He added, “When I try a case, after probably six or seven months, I don’t try to even think about them.” Mr. Poland said that he did not recall his specific communications with the petitioner before trial, but he was “sure” he visited the petitioner while he was incarcerated before trial.

Mr. Poland said that he was unable to recall any motions he filed before trial, except for a motion to suppress those items found at the petitioner’s house. Mr. Poland recalled,

I think that the weekend before trial, of course, I was reviewing the file and making my notes, and I believe sometime that evening . . . it occurred to me that maybe the deputy that had the warrant issued to him was a Montgomery County deputy rather than - - I believe it was Henderson County, down in Paris - - I don’t remember where that was[.] And I addressed the Court that morning

of [trial] and the Court was kind enough to let me express myself regarding my feelings on that.

Mr. Poland said that he was “sure” he researched the issues associated with the search warrant before arguing the motion.

Mr. Poland acknowledged that the request for discovery he filed in this case was filed March 14, 2007, about a week before the trial began. Counsel said that he had “never” had a problem obtaining discovery from Mr. Bieber, the prosecuting attorney in this case. He also said that he routinely gave his clients copies of discovery but was unable to recall whether he did so in this case.

Mr. Poland also did not recall any specific communication with potential witnesses, but he was “sure” that he contacted them. He said he did not recall when he first learned the petitioner’s codefendants would testify against the petitioner. He said he did not recall whether he investigated the backgrounds of the codefendants, particularly Mr. Cruz.

Counsel said he “suppose[d]” he talked about trial prep with the petitioner before trial. Mr. Poland said he did not recall whether he received any plea offers in this case.

On cross-examination, Mr. Poland acknowledged that Mr. Sanders, one of the codefendants, testified at the preliminary hearing, and that Mr. Sanders’ preliminary hearing testimony indicated that he (Sanders) had no prior criminal record. Counsel denied that Mr. Sanders was a “surprise” witness at trial, and he was “sure” he inquired about Mr. Sanders’ record with the State. Counsel said that he “assumed” he knew before trial that Mr. Cruz had

reached a plea agreement with the State but that he did not believe the State told him the terms of the agreement before trial. Mr. Poland acknowledged that he received “full discovery” from the State in that he received the State’s “whole file” before trial. Mr. Poland denied that there were any “surprises” at trial.

When asked that if the State had offered the petitioner twenty years at 100%, whether he would have communicated this offer to the petitioner, Mr. Poland replied, “I would have conveyed it to my client, and . . . I would give them their options and what their chances are.” However, he repeated that he did not recall whether any offers were made in this case. Regarding the search warrant, Mr. Poland acknowledged that the police took items from locations other than the petitioner’s house.

When asked about whose decision it was to testify at trial, counsel said, “The defendant would always have to do that, I would never force that.” Mr. Poland said that he always advised each client about the positive and negative implications of testifying and offered his advice about whether the client should testify—even if the client insisted on testifying.

During cross-examination, Mr. Poland was shown a copy of his General Sessions Court claim form (i.e., the time during which he was appointed by the court rather than retained by the petitioner). The claim form reflected that Mr. Poland claimed four hours of in-court work and 1.7 hours of out-of-court work on the defendant’s case. Counsel said that he would have spend “much more” time on the petitioner’s case in circuit court.

## V. STANDARDS OF REVIEW

### (A) Post-Conviction Proceedings

A petitioner is entitled to post-conviction relief if the petitioner can establish that “the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. § 40-30-103 (2012). The burden in a post-conviction proceeding is on the petitioner to prove the factual allegations contained in his petition by clear and convincing evidence. *Id.* § 40-30-110(f); Dellinger v. State, 279 S.W.3d 282, 296 (Tenn. 2009). “Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998) (citing Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.3 (Tenn. 1992)).

There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived. Tenn. Code Ann. § 40-30-110(f). A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless: (1) the claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or (2) the failure to present the ground was the result of state action in violation of the federal or state constitution. *Id.* § 40-30-106(g)(1)-(2). Previously determined claims are also precluded

from post-conviction review. See id. § 40-30-106(f). A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. Id. § 40-30-106(h). A full and fair hearing has occurred where the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence. Id.

(B) Ineffective Assistance of Counsel

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show that (1) counsel's performance was deficient and (2) the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-72 (1993). A showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). Failure to satisfy either prong results in the denial of relief. Strickland, 466 U.S. at 697. "Indeed, a court need not address . . . both [Strickland components] if the

[petitioner] makes an insufficient showing of one component.” Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996) (citing Strickland, 466 U.S. at 695).

The performance prong requires a petitioner raising a claim of ineffectiveness to show that the counsel’s representation fell below an objective standard of reasonableness or “outside the wide range of professionally competent assistance.” Strickland, 466 U.S. at 690. In Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975), the Tennessee Supreme Court held that attorneys should be held to the general standard of whether the services rendered were within the range of competence demanded of attorneys in criminal cases.

The prejudice prong requires a petitioner to demonstrate that “there is a reasonable probability that, but for counsel’s professional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. “A reasonable probability means a probability sufficient to undermine confidence in the outcome.” Id. “The probable result need not be an acquittal. A reasonable probability of being found guilty of a lesser charge, or a shorter sentence, satisfies the second prong in Strickland.” Brimmer v. State, 29 S.W.3d 497, 508-09 (Tenn. Crim. App. 1998).

On claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. Adkins v. State, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Deference to

the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

## VI. PETITIONER'S CLAIMS FOR RELIEF

### (A) Petitioner's Assertions Regarding Sufficiency of Evidence and Trial Court's Failure to Declare Mistrial

In his pro se petition, Mr. Conrad argued that the evidence produced at trial was insufficient to sustain his convictions, and that the trial court erred by failing to declare a mistrial when a witness mentioned that the petitioner had spent time in the penitentiary. Appellate counsel raised these issues on direct appeal, and the Court of Criminal Appeals denied relief on these issues. See C.C.A. Opinion, slip op. at 6-7 (mistrial), 7-11 (sufficiency of evidence). These previously-determined issues are not appropriate for post-conviction review, and the Court accordingly denies relief as to these issues. See Tenn. Code Ann. § 40-30-106(f), (h).

### *Ineffective Assistance of Counsel Claims*

### (B) Trial Counsel's Failure to File Suppression Motion

In his petition, Mr. Conrad argues that he “was denied his Fourth, Sixth, and Fourteenth Amendment rights to the effective assistance of counsel when counsel failed to move to suppress the evidence taken from the petitioner’s home.”

The record reflects that on the morning the petitioner's trial began, Mr. Poland made an oral motion to suppress the evidence seized from the petitioner's home based upon the fact that the officer who executed the search warrant, then-Montgomery County Sheriff's Deputy Aaron Fabor, had no jurisdiction to serve a search warrant in Henderson County, where the petitioner's residence was located. Testimony by Mr. Fabor and Lexington Police Department Officer Brad Wilson established: (1) Mr. Fabor, Officer Wilson, and other Lexington Police officers composed an affidavit in support of a search warrant, which Mr. Fabor signed; (2) Mr. Fabor, Officer Wilson, and possibly another Lexington police lieutenant went to the office of a Henderson County General Sessions Court Judge; (3) the judge signed the warrant, which was addressed to Henderson County authorities but listed as "delivered" to Mr. Fabor; (4) Mr. Fabor, accompanied by three other Lexington police officers, went to the petitioner's residence; and (5) Mr. Fabor and Officer Wilson executed the warrant, entering the petitioner's residence and retrieving certain items therefrom.<sup>6</sup> This Court, finding that "Mr. Fabor was legally justified in swearing to the accuracy of the affidavit portion of the search warrant" and that the Montgomery County deputy "was in the presence of and assisted by the Henderson County Sheriff's Office [sic] during the execution of the search warrant,"<sup>7</sup> denied Mr. Poland's motion.

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<sup>6</sup> See trial transcript, March 20, 2007, at 10-20 and 35-54

<sup>7</sup> Id. at 55.

In denying Mr. Poland's motion, the Court cited to the Tennessee Supreme Court's opinion in State v. Smith, 868 S.W.2d 561, 572-73 (Tenn. 1993). In that case, a Metropolitan Nashville Police Department homicide detective sought a search warrant for a suspect's residence in Robertson County. The defendant in that case sought to suppress the results of that search on several grounds, including that defendant's assertion that the Metro detective "had no authority to execute the warrant in Robertson County." Id. at 572. The supreme court rejected that argument, noting that the warrant, which was certified as being delivered to the Metro detective, was addressed to "any Peace Officer" within Robertson County. Id. at 573. A Robertson County deputy accompanied the Metro detective in obtaining and executing the warrant, and the Robertson County deputy executed the return on the warrant. Id. The court concluded that the Metro detective's "participation in procuring the warrant and executing it does not invalidate the warrant." Id.

The petitioner's argument regarding this issue ultimately turns into an argument that the conclusion reached by this Court in the instant case—and by the Tennessee Supreme Court in Smith—was incorrect. The petitioner's arguments include: (1) an assertion that "the issuing of a search warrant to an officer who lacks jurisdiction to serve such a warrant, is tantamount to a magistrate[']s improper designation of an officer, and, is no less fatal to it's [sic] validity"; (2) the language of Tennessee Rule of Criminal Procedure 41(c) and (e)(1) "is clear that the warrant may only be *executed* when directed *to an officer of the county*" (emphasis in original); (3) Rule 41 and the applicable statutory provisions regarding search

warrant do not “create[] an exception for law enforcement authorities, allowing them to escape the jurisdictional mandates imposed by law so long as the officer of the requesting county is accompanied by an officer of the receiving county”; (4) Smith and two other cases cited in support of this issue “are all factually divergent in numerous respects, thereby making the application of the law inconsistent”; and (5) Mr. Fabor had no statutory jurisdiction to participate in any part of the obtaining and executing of this warrant, nor could he have done so as a private citizen.

The petitioner’s arguments are ultimately unavailing to him. This Court cannot reexamine the validity of the search warrant itself after having done so at trial. And although it certainly would have been preferable for Mr. Poland to file a written suppression motion before trial, had Mr. Poland advocated any of the positions outlined by Mr. Conrad in his petition, this Court would have been bound by the Tennessee Supreme Court’s opinion in Smith and would have denied the petitioner’s motion. Furthermore, the petitioner has not identified any alternative grounds for attacking the validity of the search of his residence, and the petitioner did not present any evidence regarding the warrant apart from his own testimony and the transcript of the suppression hearing. None of the persons involved in procuring the warrant testified at the post-conviction hearing, and the warrant was not introduced into evidence at the post-conviction hearing.

In short, the petitioner has not established that Mr. Poland's handling of the suppression motion prejudiced him. The Court therefore concludes that counsel did not render ineffective assistance as to this issue.

(C) Counsel's Failure to Meet with Petitioner Before Trial and Advise Him of Trial Testimony

The petitioner asserts that Mr. Poland rendered ineffective assistance by failing to meet with him before trial, apart from "two (2) appearances at the jail . . . each visit lasting approximately 5 to 10 minutes," and by failing "to prepare him for the possibility of testifying, ultimately prejudic[ing] the petitioner by allowing him to incriminate himself on direct-examination."

Mr. Poland failed to recall the substance of any pretrial meetings with the petitioner or any discussions regarding the petitioner's potential testimony. However, the Court finds the petitioner's assertions that Mr. Poland did not (for all practical purposes) meet with him or discuss his potential testimony before trial to be entirely incredible. Mr. Poland testified that he typically would advise any client pondering whether to testify about the "pros and cons" of such testimony, and in light of the petitioner's incredible testimony, the Court has no reason to find that Mr. Poland did not do so in this case. Furthermore, the record reflects that on the afternoon of March 21, 2007, Court conducted a Momon hearing<sup>8</sup> in which the

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<sup>8</sup> See trial transcript, March 21, 2007, at 559-61.

petitioner acknowledged that he had discussed his right to testify with Mr. Poland, including the reasons for and against testifying. The petitioner also acknowledged that the choice whether to testify was his alone. The Court advised the petitioner that he could change his mind overnight and refuse to testify; the petitioner advised the Court that he was aware of that option, and the next day the petitioner testified. In light of the record, the Court finds the petitioner has failed to establish either prong of the Strickland test, and accordingly the Court concludes that counsel did not render ineffective assistance as to this issue.

(D) Counsel's Failures Regarding Discovery and Pretrial Motions

The petitioner faults Mr. Poland for not filing a “Request for Discovery, Inspection, and Notice of Intent to Use Evidence” until March 14, 2007—six days before the trial in this case began. The entirety of the petitioner’s argument in his petition regarding this issue states: “Based on the timing of counsel’s discovery request, his request only gave the State a day to respond, and no time for the defense to prepare before the trial began. This too could not be viewed as a [sic] reasonable.” Although the Court agrees with the petitioner that Mr. Poland should have filed his discovery motion earlier, the petitioner has not established that counsel’s actions prejudiced him relative to this issue. At the post-conviction hearing the petitioner did not identify specific items of discovery that he did not receive and how the absence of this evidence prejudiced him, nor has he identified potential motions that Mr. Poland should have filed on the petitioner’s behalf. Accordingly, the Court concludes that

the petitioner has not established that he received the ineffective assistance of counsel regarding this issue.

(E) Counsel's Failure to Investigate Codefendants' Criminal Histories

The Petitioner faults Mr. Poland for not investigating the criminal histories of codefendants Sanders and Cruz before trial, and for being unaware of the plea agreements that had been offered the codefendants before trial. In the petitioner's view, Mr. Poland's failings left him "completely unprepared to effectively cross-examine the witnesses."

As an initial matter, the petitioner did not introduce evidence regarding the codefendants' prior criminal records and plea agreements at the post-conviction hearing. Regarding the codefendants' plea agreements, the record reflects that the jury was made aware of this impeachment information at trial. During Mr. Sanders' direct examination testimony, the following exchange occurred between the State's attorney and the witness:

Q: Now, you have agreed to testify for the State?

A: Yes, sir.

Q: And what are you supposed to do?

A: Testify.

Q: All right. And if you testify truthfully, what do you get out of it?

A: I have no earthly idea.

Q: Do you have any plea agreement ingrained?

A: I do, but I do not know what it is.

Q: Do you know how many years it might entail?

A: No, sir.

Q: Do you know what the charge is?

A: No, sir.<sup>9</sup>

On cross-examination, the following exchange occurred between Mr. Poland and the witness:

Q: You were brought back to the Montgomery County Jail and then you had a preliminary hearing, did you not?

A: I sure did.

Q: You were originally on a "no bond", is that correct?

A: Yes, sir.

Q: And your bond was reduced to fifty thousand dollars?

A: I believe so.

Q: When was that bond reduced to fifty thousand dollars?

A: I have no idea.

Q: You don't have any idea?

A: No, sir, sometime when – some time period when I was up here.

Q: Well – did you testify in the preliminary hearing?

A: Yes, I did.

Q: Were you released on bond after that?

A: Yes, sir.

Q: How long after that?

A: A week or so.

Q: It was on a fifty thousand dollar bond?

A: Yes, sir.

Q: Who made that bond for you?

A: My father.

Q: And since that time, what have you been doing?

A: Working for my uncle.

Q: Doing what?

A: Trim work, interior wood work.

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<sup>9</sup> Trial transcript, March 21, 2007, at 432-33

- Q: All right, where does your uncle have his business?
- A: Memphis, Tennessee.
- Q: Have you been living in Memphis with your uncle?
- A: With my grandparents.
- Q: With your grandparents, okay. Now, who paid your bond?
- A: My father.
- Q: And you are still on bond as we speak?
- A: Yes, sir.
- Q: Now, you alluded to some type of settlement that you have gotten for your testimony?
- A: Yes, sir.
- Q: And what type of settlement was that?
- A: I do not know.
- Q: You haven't discussed that with your lawyer?
- A: No, sir. I left everything up to him.
- Q: So you don't know how your bond was reduced; you don't know what the settlement is, but there is one?
- A: Yes, sir.
- Q: And you know you are supposed to give truthful testimony to comply with whatever arrangements you have made with the District Attorney's Office?
- A: Yes, sir.
- Q: Have you met with the District Attorney's Office with your lawyer before?
- A: No, sir.<sup>10</sup>

Similarly, the following exchange between Mr. Bieber and Mr. Cruz occurred during Mr.

Cruz' direct examination testimony:

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<sup>10</sup> Id. at 464-66.

Q: Do you have an agreement with the State for your testimony?  
A: I was agreed (sic) to take fifteen years at thirty percent.  
Q: Fifteen years is to be served where?  
A: In the state penitentiary.  
Q: In the state pen for fifteen years?  
A: Yes, sir.  
Q: And you are not a lawyer, but do you know what the thirty percent [means]?  
A: That's when I would be eligible for parole.  
Q: Okay, that's eligible for parole?  
A: Yes, sir.  
Q: Do you know the charge that you would enter a plea to to get the fifteen years at thirty percent?  
A: Facilitation to commit first degree murder.  
Q: What is your understanding of what happens to that agreement if you are found to be a liar this afternoon?  
A: The agreement would not be no good.  
Q: It would be null and void basically?  
A: Yes, sir.  
Q: If you know, when did you reach this agreement with the State?  
A: On Thursday at 3:30.  
Q: When you say Thursday, you mean about six or seven days ago, something like that?  
A: Yes, sir.<sup>11</sup>

On cross-examination, Mr. Poland asked Mr. Cruz the following questions:

Q: Okay, now you told Mr. Bieber that you and your lawyer and the District Attorney's Office struck an agreement for truthful testimony here today?  
A: Yes, sir.

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<sup>11</sup> Id. at 507-09.

- Q: And you are to receive fifteen years at thirty percent?
- A: Yes, sir.
- Q: So thirty percent, roughly of that is about four and half years before you are eligible for parole?
- A: Yes, sir.
- Q: And you have been at the Montgomery County Jail how long?
- A: Seventeen or eighteen months, sir.
- Q: So you will be eligible for parole in the next two and a half years, something like that?
- A: Yes, sir.<sup>12</sup>

The jury therefore knew that Cruz and Sanders' testimony resulted from favorable treatment by the State,<sup>13</sup> and Mr. Poland illustrated just how favorable Mr. Cruz' deal was by eliciting testimony that Mr. Cruz would be eligible for release less than three years from the trial date. The petitioner appears to take issue with Mr. Poland's being unaware of the details of Mr. Sanders' proposed plea agreement, but the jury was still aware that Mr. Sanders would benefit from his testimony. Additionally, the jury may have found it hard to believe that Mr. Sanders was unaware of the exact terms of his plea agreement, thus placing Mr. Sanders' credibility in doubt. Any supposed failure of trial counsel regarding this impeachment information did not prejudice the petitioner.

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<sup>12</sup> Id. at 532-33.

<sup>13</sup> "A defendant has the right to examine witnesses to impeach their credibility or to establish that the witnesses are biased. This includes the right to examine a witness regarding any promises of leniency, promises to help the witness, or any other favorable treatment offered to the witness." State v. Sayles, 49 S.W.3d 275, 279 (Tenn. 2001).

Regarding the codefendants' prior criminal histories, the petitioner has not produced any evidence that Mr. Sanders had a criminal record before this incident. Regarding Mr. Cruz, the record reflects that before he testified, the parties held a jury-out hearing regarding his criminal record:

Mr. Bieber: One other thing, as long as we are here, Judge. I have obviously gone the extra mile on Mr. Cruz's record, it reflects that he was arrested in Henry County in the NCIC for aggravated burglary and it reflects that that entry was later nulled. For the record, I am going to ask that Mr. Poland not be allowed to ask him about that on the grounds of relevancy[.]

Mr. Poland: That wasn't an expungement?

Mr. Bieber: I don't think that it was expunged[.] It is showing up in the database and they are not suppose[d] to show up if they are expunged[.] And he has some misdemeanors

....

The Court: Well I think Rule 608(b) addresses this situation[.] It is when you want to attack someone's credibility by asking them about a particular incident of conduct other than convictions. In other words, you can ask somebody about conduct that didn't result in a conviction, if it goes to truthfulness and you comply with Rule 608 procedure here.

Mr. Bieber: So you are ruling that he can say isn't it true that you burglarized a house in Henry County –

Mr. Poland: No, all that I would ask—

Mr. Bieber: He's bound by the answer.

The Court: I think he can ask it and I think he is bound by the answer.

Mr. Bieber: I think that's right. I don't think you can ask about—

The Court: But if he says no, you can't prove it by extrinsic evidence.

Mr. Poland: Right.

The Court: But the fact that it was nulled doesn't mean that the conduct didn't occur[.]

Mr. Bieber: It could also mean that they realized they had the wrong guy, Mr. Poland[.]

The Court: It could be complete innocence, or it could be nolle for strategic reasons[.] I mean, he may be guilty of it, I don't know.

Mr. Bieber: So he can ask isn't it true you burglarized a house in Henry County in 1997—

The Court: Sure, I think he can ask that, but I think you are bound by the answer.<sup>14</sup>

The record reflects that Mr. Poland did not ask Mr. Cruz about the supposed Henry County incident. Given the possibility that Mr. Cruz could have answered that he had not burglarized a house and Mr. Poland would have been unable to ask a follow-up question, Mr. Poland's treatment of the issue appears a tactical decision that this Court will not reexamine on post-conviction. The petitioner has also not presented any additional evidence regarding Mr. Cruz's prior record or whether that information was available to Mr. Poland before trial. Accordingly, the petitioner has not established deficient performance or prejudice regarding Mr. Poland's addressing Mr. Cruz's prior record.

Accordingly, the Court concludes that counsel did not render ineffective assistance as to this issue.

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<sup>14</sup> Trial Transcript, March 21, 2007, at 473-75.

(F) Counsel's Failure to Inform Petitioner of Potential Plea Agreement

The petitioner argues that Mr. Poland rendered ineffective assistance by not advising the petitioner of a proposed plea agreement. The Court disagrees.

Although Mr. Poland certainly should have communicated any proposed agreement to the petitioner, the petitioner has not presented clear and convincing evidence that an offer existed. In his petition, the asserts that “[a]fter trial, Cindy McAfee, a friend of the petitioner’s informed him about a conversation that she had with the petitioner’s counsel, Mr. Hugh Poland, regarding a twenty-year plea agreement at 85%.” The petitioner also cites to an affidavit Ms. McAfee supposedly completed regarding this conversation. However, Ms. McAfee did not testify at the post-conviction hearing, no affidavit was introduced into evidence at the hearing, and Mr. Poland testified that he did not recall whether such an offer was made.

Perhaps more importantly, the petitioner has not provided any evidence that he would have accepted a plea agreement had he known about one. The petitioner does not make such a statement in his petition for relief, and at the post-conviction hearing the petitioner offered no testimony regarding whether he would have accepted a plea deal. Perhaps it can be assumed or implied that he would have accepted the offer outlined in his petition, but a post-conviction petitioner must prove his factual allegations by clear and convincing evidence. Absent any such evidence, the petitioner cannot establish that he was prejudiced by Mr.

Poland's supposed failure to communicate a proposed plea agreement to the petitioner. The petitioner is therefore not entitled to relief on this issue.

(G) Cumulative Error

Finally, the petitioner argues that he is entitled to relief based upon the cumulative effect of errors identified in his petition. This Court has considered each of the petitioner's issues and found them to be without merit; thus, the Court need not consider the cumulative effect of the alleged errors. See State v. Hester, 324 S.W.3d 1, 77 (Tenn. 2010) ("To warrant assessment under the cumulative error doctrine, there must have been more than one actual error committed.").

VII. CONCLUSION

For the reasons stated above, the petition for post-conviction relief is DENIED.

IT IS SO ORDERED this the 11<sup>th</sup> day of February, 2013

  
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John H. Gasaway, III  
Circuit Court Judge, Division III