

IN THE
CIRCUIT COURT
MONTGOMERY COUNTY, TENNESSEE
DIVISION III

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2012 A.M./P.M.
CHERYL J. CASTLE
CIRCUIT COURT CLERK
BY: D. Whitehead D.C.

MARIO A. REED,)
Petitioner)

Case No. 40800325

v.)

(Post-Conviction)

STATE OF TENNESSEE,)
Respondent)

ORDER DENYING PETITION FOR POST-CONVICTION RELIEF

This matter came before the Court July 31, 2012, for a hearing on the Petitioner's pro se initial and amended petitions for relief. Having reviewed the record and the post-conviction petitions, 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

The petitioner was seventeen years old at the time of the offenses which led to this case. After a hearing, the Montgomery County Juvenile Court transferred the petitioner's case to Circuit Court. The Montgomery County Grand Jury then indicted the petitioner on offenses related to the rape and burglary of one victim, as well as other offenses. This Court severed offenses unrelated to the rape, and following a jury trial the petitioner was found guilty of two counts of aggravated rape and one count each of aggravated burglary and theft of property valued under \$500. The Court sentenced the petitioner as a Range I offender to

an effective sentence of forty years in the Department of Correction. The Court of Criminal Appeals affirmed the petitioner's convictions and sentences on appeal. See State v. Mario A. Reed, No. M2009-00887-CCA-R3-CD (Tenn. Crim. App. Aug. 31, 2010). The Tennessee Supreme Court denied permission to appeal January 13, 2011.

The Petitioner filed a timely pro se petition for post-conviction relief on September 2, 2011; thus, jurisdiction is properly before this Court. See Tenn. Code Ann. § 40-30-102(a) (2006). The petitioner filed an amended petition April 25, 2012. The Court appointed counsel (who did not file an additional amended petition), and an evidentiary hearing was held July 31, 2012.

II. ISSUES PRESENTED FOR REVIEW

The petitioner raises numerous grounds for relief in his petition. One of the petitioner's main assertions is that his trial attorney, Assistant District Public Defender Collier Goodlett, rendered ineffective assistance at trial. The petitioner's factual claims include, but are not limited to, assertions that Mr. Goodlett was ineffective in that he:

- (1) Failed to advise the petitioner of all the evidence against him;
- (2) Failed to prepare adequately for trial;
- (3) Failed to meet with and discuss the case with the petitioner before trial;
- (4) Failed to investigate certain evidence; and
- (5) Failed to empanel a fair and impartial jury

The petitioner also argues that his appellate counsel, District Public Defender Roger Nell and Assistant District Public Defender Sarah King, provided ineffective assistance on appeal.

The petitioner also raises numerous other issues in his petition. At the evidentiary hearing, the petitioner testified regarding these arguments:

- (1) The juvenile court erred in transferring his case to circuit court;
- (2) The trial court improperly instructed the jury that it could convict the petitioner of aggravated rape if it found the petitioner acted “recklessly”;
- (3) The trial court imposed an excessive forty-year sentence, improperly imposed consecutive sentences, and sentenced him outside a Range I sentence;
- (4) The police obtained a coerced confession;
- (5) The police obtained evidence via an unconstitutional search and seizure;
- (6) His arrest was unlawful;
- (7) The police violated his constitutional protection against self-incrimination;
- (8) The State withheld exculpatory evidence;
- (9) The State violated his protection against double jeopardy;
- (10) The State presented illegally-obtained evidence against him at trial;
- (11) The limitations period had run in this case;
- (12) The State engaged in prosecutorial misconduct at trial; and
- (13) Cumulative error.

III. EVIDENCE PRESENTED AT TRIAL

The Tennessee Court of Criminal Appeals summarized the procedural history of the case and the evidence presented at the juvenile transfer hearing, trial, and sentencing hearing:

A. Juvenile Transfer Hearing

The State presented evidence to the juvenile court that the Defendant, who was seventeen at the time of these offenses, had also committed aggravated burglary, a class C felony, against another victim, Daniel Marquiese. The State requested that the juvenile court transfer the case to the circuit court, where the State sought to indict the Defendant on other offenses, including those involving the victim At the hearing on this request, the juvenile court noted that the Defendant had undergone a mental evaluation and that the doctor performing the evaluation determined that the Defendant did not meet the criteria for committability either voluntarily or involuntarily.

Daniel Marquiese, with the Alpha Company of the 101st Division Special Troops Battalion, testified at the transfer hearing that he lived in an apartment located at 135 Westfield Court, Clarksville, Tennessee with two roommates, Brent Dalton and John Lee. One day, he returned home from work and found a number of his possessions were missing. Marquiese noticed the front door to the apartment was dead bolted, but the back door was unlocked. He said he and his roommates never left either door unlocked, and it appeared that the burglar entered the apartment through a window. Marquiese said the intruder had stolen a handgun, a laptop computer, two watches, a camera, and a West Point 2005 class ring. Since the burglary, the watches and class ring were returned to him by the Clarksville Police Department. Marquiese said he did not know the Defendant and had not given the Defendant permission to enter his apartment.

On cross-examination, Marquiese said he was the last roommate to leave the apartment in the morning, and he specifically recalled locking both doors before leaving. He was unsure, however, whether the windows were all locked. The items taken were mostly in plain view, but the handgun was underneath the bed and the ring was in a case on a desk. Marquiese said he first realized something was wrong at the apartment when the front door was dead bolted. He explained that the dead bolt could only be locked from inside, and no one answered when he knocked on the door. He then went to the back door, which he found unlocked. Upon entering the apartment, he immediately

noticed that his roommate's Playstation was missing, and he later noticed that several of his own items were also missing.

On redirect examination, Marquiese testified he owned a Springfield XD tactical model handgun, and his roommate had a sub-compact model. He said neither of the guns were assigned by their military unit.

Detective Desmoine Chestnut testified he investigated a burglary at Park Place Apartments, for which the Defendant was a suspect and was in custody. Detective Chestnut explained that the officer who responded to the call about the Park Place burglary found the Defendant fleeing from the scene when he arrived. He apprehended the Defendant at the scene and took him into custody. The detective testified that the officer read the Defendant his rights, with both the Defendant's parents present, and then the Defendant's mother and step-father provided the detective permission to search the Defendant's room. In the Defendant's bedroom, the police found several watches, a West Point ring, two firearms, some sneakers that fit the shoe print of another burglary, i-Pods[sic], an i-Pod base, cameras, and multiple other items the police suspected were stolen. Detective Chestnut testified he interviewed the Defendant, who confessed his complicity in these burglaries and told the detective where he could find the stolen property.

The juvenile court recognized that the Defendant had been adjudicated delinquent for aggravated sexual battery, theft of property, and evading arrest and was on probation from these crimes when he committed the crimes in this case. The court noted the Defendant was "previously committed by Juvenile Court for serious offenses, was committed to the State for treatment and was released by Circuit Court." The Juvenile Court then found "there is adequate probable cause to find that there was a burglary, this young man committed that burglary, and that he is not amenable to further treatment by Juvenile Court." The court then transferred the case to Circuit Court for the Defendant to be tried as an adult.

B. Trial

After the Defendant's case was transferred to the Circuit Court for Montgomery County, the grand jury indicted the Defendant for one count of burglary, one count of theft of property valued over \$500, two counts of aggravated burglary, two counts of aggravated rape, one count of theft of property valued under \$500, and one count of theft of property valued over \$1000. The trial court severed some of the counts, and a jury convicted the Defendant of aggravated burglary, two counts of aggravated rape, and theft of property valued under \$500. The facts presented at trial supporting these convictions are as follows:

The victim . . . arrived at her apartment after work on December 13, 2007, at around 7:30 p.m. When the victim entered her apartment, she noticed that her front door was locked and her lights were on. She took off her boots, placed her keys on the key ring by her door, placed on the counter a twenty dollar bill and her debit card, both of which she retrieved from her pockets, and began making soup. The victim took a brief shower, dressed in a sweat suit hanging on the back of her bathroom door, went to the living room, and then entered her bedroom.

When the victim entered her bedroom, where her bedroom lights were on, a man pushed a black, automatic pistol toward her face, knocking her back, and told her he would shoot her if she screamed. The victim described the man as “heavier set” and noticed he was wearing blue pants with an orange stripe, a sweatshirt, and a black ski mask with slits in the eyes and mouth. The man told the victim to stand in the corner by her bed and to turn off the light on her way, and she complied with his orders. The man asked her where her money was located, and she told him on the counter, and the man went to the kitchen and retrieved her money and debit card. He returned and told the victim to disrobe, which she did. He then told her to get on her bed, and she complied. At this point, she noticed the man, who was still brandishing the gun, was wearing gloves.¹

. . . .

The victim’s assailant took several items from her home: a debit card; money; an iPod; two Sony cybershot cameras; an i-Pod [sic] docking station; a Fuji camera still in the box; a video i-Pod, also still in the box; a computer; and a cell phone. The victim intended to give the boxed items as Christmas gifts.

When police responded to the victim’s call about her attack, they found dirty footprints on the floor and one dirty footprint on the bed. The victim’s bedroom window screen had been cut and the screen was folded down. Detectives assumed this was the attacker’s point of entry. Outside the apartment, police officers saw footprints containing a “tread” pattern in the mud outside the window and found a lock blade pocketknife lying open on the ground near the window. The footprints outside the victim’s apartment went

¹The petitioner did not challenge the sufficiency of the convicting evidence on appeal and makes no such challenges on post-conviction. Thus, the Court will omit certain portions of the Court of Criminal Appeals’ factual summary addressing the perpetration and immediate aftermath of the sexual assault about which the victim testified at trial.

across the rear of the apartment toward a wooded area behind her apartment complex.

Officers developed the Defendant as a suspect in this burglary and rape. When they attempted to apprehend him at the scene of another burglary, he ran. Officers chased and caught the Defendant. The Defendant admitted that he had gone into the victim's apartment through her window and that he had taken items from her home, but he denied having sex with her. When officers searched the Defendant's room, they found a firearm matching the victim's description of the firearm used by her attacker, the victim's i-Pod and i-Pod case, the victim's i-Pod docking station, muddy sneakers, a cybershot camera, and blue sweat pants with an orange stripe. The victim later identified the cybershot camera, her i-Pod, and her i-Pod docking station in a picture of items police confiscated during their search of the Defendant's room. The tread of the muddy sneakers appeared to match the footprints found near the victim's apartment. Police also found in the Defendant's room a Glock pistol designed to fire a .40 Smith and Wesson cartridge.

The victim underwent an examination shortly after this attack, where samples were taken in an attempt to obtain a DNA profile of her attacker. . . . [The victim's] injuries were not consistent with consensual sexual intercourse. The samples taken during the victim's examination revealed the presence of the Defendant's DNA on the samples taken from inside the victim's vagina.

C. Sentencing

At the sentencing hearing, the trial court admitted the Defendant's presentence report. The Defendant then testified that he was eighteen at the time of sentencing and seventeen at the time of these offenses. He acknowledged he had been adjudicated delinquent for assault in August of 2002, when he was eleven; theft of property and evading arrest in 2006, when he stole a BB gun from Walmart; and assault in May of 2007. The Defendant agreed he had also been adjudicated delinquent for another assault charge stemming from shooting a BB gun at a woman in a car. The Defendant denied he committed the shooting, saying that his female cousin actually shot the BB gun. He said he took the blame so his cousin would not get into trouble. The Defendant said in August of 2004 at age twelve he was adjudicated delinquent for aggravated sexual battery because he held a drill bit to a woman's throat and "felt on [her]." The Defendant said the court ordered him to see a psychologist, which he did for approximately two years. The Defendant recalled that, at one point, he was taken out of his parents' custody and placed in Middle Tennessee Mental Health Facility, where he learned that he had

ADHD, for which he was on medication, and that he comprehended things more slowly than others. The Defendant said he had also been to three other facilities, Clarksville Treatment, Dogwood, and Binkley Group Home. The Defendant resided in Clarksville Treatment for two years.

The Defendant said, if the trial court sentenced him to shorter sentence, he would try to live with a family member and get his “act together.” He anticipated receiving his high school diploma shortly, but he conceded that he did not have any job skills.

On cross-examination, the Defendant said he had a normal IQ and had been raised for the last couple of years in a nice home. He agreed that Dogwood was a facility for sex offenders that also offered anger management programs.

The trial court also considered the victim’s impact statement in which she stated that she was afraid to be alone and lived in fear of people who fit the Defendant’s description. She said she was scared of what lay behind closed doors and feared that her co-workers or friends would find out what had happened to her. She was also scared of the Defendant’s family finding her or hurting her again.

After taking the case under advisement, the trial court sentenced the Defendant to five years for the aggravated burglary conviction, twenty years for each of the two aggravated rape convictions, and to 11 months and 29 days for the theft conviction. It ordered that the two aggravated rape sentences run consecutively to each other and that the rest of the sentences run concurrently with those, for an effective sentence of forty years, at 100%.

Reed C.C.A. Opinion, slip op. at 2-7 (some alterations added).

IV. EVIDENTIARY HEARING TESTIMONY

At the evidentiary hearing, the petitioner presented his own testimony and the testimony of his trial attorney, Collier Goodlett. The Court accredits Mr. Goodlett’s testimony and finds the petitioner not credible. The Court will summarize both witnesses’ testimony to facilitate appellate review.

Mario Reed

The petitioner testified regarding several of his asserted claims for relief. Regarding his assertion that his case was improperly transferred to Circuit Court, the petitioner testified, “they didn’t give me a chance to say my part or . . . see the evidence or nothing like that.”

The petitioner acknowledged that Jeffrey Grimes was his attorney in Juvenile Court.

The petitioner also argued that the trial court erred by instructing the jury that it could find him guilty of aggravated rape if he acted recklessly. Accordingly, he insisted that the jury should not have been instructed on the charge of aggravated rape. The petitioner also insisted that his effective forty-year sentence, comprised of two consecutive twenty-year sentences, was excessive. Essentially, the petitioner claimed that the Court ignored the fact he was seventeen years old at the time of the offense and did not give him “a chance to rehabilitate myself. To me, in my opinion, that’s telling me to die in the penitentiary.” He also claimed the trial court sentenced him as a Range II offender rather than as a Range I offender.

The petitioner then detailed some of the many claims related to his assertion that he received the ineffective assistance of counsel at trial. The petitioner claimed that Mr. Goodlett did not advise him of all the evidence to be used at trial; the petitioner claimed he was “shocked to see some of the stuff” introduced at trial, although he could not recall any specific evidence about which he was unaware at trial.

Mr. Reed also asserted that Mr. Goodlett was not prepared to try the case. The petitioner claimed that counsel did not ask certain questions which the petitioner wanted asked, and the petitioner also claimed that Mr. Goodlett only met with the petitioner twice before trial. Mr. Reed claimed that one of those visits occurred the day before trial and lasted no more than ten to twelve minutes. The petitioner claimed that the last pretrial meeting mainly consisted of Mr. Goodlett talking about a plea agreement. The petitioner said that he did not want to plead guilty but that he also did not want to proceed to trial on the trial date because he was not prepared for trial in that he did not review all the evidence and had not discussed the case with his family.

The petitioner testified regarding his grievances over certain evidence that was introduced at trial. He claimed that counsel should have argued against the introduction of “fake evidence,” such as a knife and “three different pairs of shoes with supposedly one print.” The petitioner also argued that the police “coerced” his parents into suggesting that the petitioner talk to the police, and that police officers incorrectly testified at trial that the petitioner admitted entering the victim’s apartment and raping her. The petitioner asserted that he made no such admissions to the officers and that he was not carrying a backpack when he was arrested. The petitioner also claimed that the search of his parents’ house was illegal in that his parents told the police that they could not go inside the house, but that the police told them they would “mess up your whole house and everything if you don’t let us search your house.” He also asserted that the gun which police recovered from the house was

improperly taken because the search warrant only covered the petitioner's bedroom and not the part of the house from which the gun was recovered. He also argued that the blue pants with an orange stripe recovered from the petitioner's bedroom did not match the victim's description of the pants, which the petitioner claimed was blue pants with a white stripe.² The petitioner claimed that Mr. Goodlett never discussed a motion to suppress with him.

The petitioner also testified that his arrest was illegal in that "they were just looking for somebody, just trying to pick me up out of nowhere," and that they did not explain why they were arresting him.

Mr. Reed also testified regarding his claim that the State failed to disclose evidence favorable to him:

I kept telling them that they could have used like—I have a cell phone, they could have used GPS or something that stated that I wasn't near this particular place at this particular time. They didn't use none of that to help me or—like I was trying to get more paperwork, witnesses but they couldn't use none of it. I kept trying to tell them, you know, I got people who are saying I was here, I was here, doing this.

The petitioner also claimed that the State should have turned over the phone records of the person with whom he was supposedly speaking at the time these events occurred.

Regarding his claim that his conviction was based on a violation of his protection against double jeopardy, the petitioner claimed,

² At trial, the petitioner testified that the pants were "dark blue or black" with "an orange stripe up the leg." State v. Mario A. Reed, Montgomery County No. 40800325, trial transcript of Oct. 21, 2008, at 152.

I thought . . . they had charged me with like two separate charges, for the one burglary—they had charged me two separate times. . . . I think they said in my discovery or at the trial that I had went in the house twice or something and I wondered where that had came [sic] from so—I thought that was double jeopardy, to try me with the same crime twice.

The petitioner also claimed that counsel was ineffective in his handling of the jury selection process. Mr. Reed claimed that Mr. Goodlett never discussed jury selection with him before trial, and that during jury selection counsel did not answer his questions about picking a jury. He claimed that there “probably” was only one black person who served on his jury.

The petitioner also testified that he believed the statute of limitations had run before he was charged with the offenses at issue, and that the prosecuting attorneys committed prosecutorial misconduct because they “were just stating stuff that wasn’t true or stating . . . their opinions about things that wasn’t a fact and leading the jury to believe certain things that wasn’t true.” He also argued the existence of certain errors by the trial court and cumulative error. Finally, the petitioner claimed that appellate counsel did not meet with him during the pendency of his appeal.

On cross-examination, the petitioner acknowledged that appellate counsel raised issues regarding sentencing, jury instructions, and the juvenile transfer hearing on appeal, and that the Court of Criminal Appeals had found these issues without merit. The petitioner was unable to identify specific evidence about which he was surprised at trial or which counsel

should have introduced at trial, and he acknowledged that he did receive “a big old package of discovery” before trial.

Regarding counsel’s supposed failure to ask certain questions at trial, the petitioner said that Mr. Goodlett provided him a pad on which Mr. Reed could write questions, with counsel telling him that they would discuss these potential questions, but at trial Mr. Goodlett essentially ignored the petitioner’s questions. The petitioner initially was unable to recall specific questions he wanted Mr. Goodlett to ask, but upon additional questioning Mr. Reed said counsel should have asked why the petitioner was not given Miranda warnings or why the police were “saying stuff on the stand that I didn’t say.”

The petitioner argued that the police did not find wrapped Christmas gifts in his room; he said he knew nothing about any supposed Christmas gifts. Regarding the double jeopardy claim, the petitioner admitted that other offenses with which the petitioner was charged after his arrest were severed from the trial of the offenses related to the rape, but he claimed one of the State’s witnesses alluded to these other charged offenses at the trial of this case. The petitioner added,

[T]he way they made it look like, said y’all found one set of footprints, which y’all got three different pair of shoes, all muddy, made it look like I committed other crimes and the cop was talking about we wanted to question Mr. Reed about other crimes too that he’s in, but we[’re] bringing out a lot of stuff out of his room, that’s slick saying like well, he might have been doing other things too[.]

Collier Goodlett

Mr. Goodlett, an Assistant District Public Defender for the Nineteenth Judicial District, refuted most of the petitioner's assertions. Mr. Goodlett stated that he met with the petitioner more than the two times identified by the petitioner and explained all the State's evidence to the petitioner. He also said that his normal procedure was to copy all discovery at the beginning of his representation and present it to his client, and Mr. Goodlett said that he believed he did so in the petitioner's case. Regarding the petitioner's assertion that he and counsel met for only ten to twelve minutes the day before trial, Mr. Goodlett testified,

I'm sure we probably met the day before trial, I would say that it was longer [than ten to twelve minutes] but by the time you got your feet sort of on the doorstep of a trial, you had either talked about everything or it was basically ["I thought we could settle this, Mr. Reed. That is not going to happen. We are going to have to go to trial tomorrow,["] or something along those lines[.]

Counsel stated that his usual procedure in each new criminal case is to obtain discovery from the State upon appointment, review the discovery, and develop a plan for filing motions, including a motion to suppress if appropriate. Mr. Goodlett said he reviewed the discovery here and found no basis for filing a suppression motion. Were a suppression motion warranted in this case, he would have filed one. Mr. Goodlett insisted that he was prepared for trial.

Mr. Goodlett said that when representing a juvenile, he reviewed the juvenile transfer proceedings to see if anything could be appealed, although he said that the statutes were such that a defendant cannot appeal the transfer proceedings until direct appeal. Counsel testified

that he had represented juveniles before representing the petitioner, and that beyond transfer hearings, representing juveniles was not too different from representing adults.

Mr. Goodlett recalled that he and the State discussed a plea deal before trial. Counsel testified that he discussed the possibility of a plea agreement with the petitioner. Mr. Goodlett recalled that he and the State essentially agreed upon a proposed plea agreement, but before counsel could present the proposal to the petitioner the victim decided that she was opposed to the offer and “wanted her day in court.”

Mr. Goodlett was unable to recall the racial composition of the petitioner’s jury, but he said that because jury pools in Montgomery County tended to be “predominantly” Caucasian, the petitioner’s assertion that only one black juror served on the jury represented a situation that was not uncommon in his experience. Regarding the petitioner’s assertion that counsel did not ask the questions Mr. Reed wanted him to ask, Mr. Goodlett said that he provides his clients with a sheet of paper during trial so the defendant can write down proposed questions and Mr. Goodlett can remain focused on the witness’s testimony. Mr. Goodlett said that he does not ask every proposed question because an attorney, it is his job to refrain from asking questions that are impermissible under the rules of evidence or which would elicit an answer damaging to his client.

Regarding some of the petitioner’s other claims, Mr. Goodlett asserted that he had never heard the petitioner mention anything about a GPS-enabled cellular phone before this evidentiary hearing. Regarding the petitioner’s sentence, Mr. Goodlett stated that he believed

the petitioner was sentenced as a Range I offender, and that he had reviewed the petitioner's medical records and juvenile file in preparing for the sentencing hearing. Mr. Goodlett said that he believed his representation at trial to be effective under the Strickland standard, and that he did not represent Mr. Reed on direct appeal.

On cross-examination, Mr. Goodlett insisted that he was not surprised by any of the evidence presented at trial in this case. Counsel acknowledged that the State's case at trial was "extremely strong" and testified that he did not look forward to trying the case, but the victim's refusal to assent to a plea deal left him with no other option.

V. STANDARDS OF REVIEW

(A) Post-Conviction Proceedings

Pursuant to the Tennessee Post-Conviction Procedure Act, a petitioner is entitled to 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 (2006). 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. Tenn. Code Ann. § 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, 368-372 (1993). In other words, 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. 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). Such 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, PART I: INEFFECTIVE ASSISTANCE OF COUNSEL

At the evidentiary hearing, the petitioner raised several claims regarding his assertion that he received the ineffective assistance of counsel at trial. One such claim was that counsel failed to advise him of all the evidence related to this case. However, the Court concludes that counsel’s performance in advising the petitioner of the evidence against him was not deficient. Mr. Reed said that he was “shocked” when certain evidence was introduced against him at trial. However, Mr. Reed’s claim is weakened by his inability to recall specific evidence about which he was unaware at trial. The petitioner also acknowledged at the

evidentiary hearing that he did receive a considerable amount of discovery before trial. Additionally, the Court accredits the testimony of Mr. Goodlett, who testified that he received discovery from the State, met with the petitioner before trial, and explained fully the evidence to be used against the petitioner at trial. Accordingly, the Court concludes that counsel did not render ineffective assistance as to this claim.

The petitioner also argues that Mr. Goodlett was ineffective for failing to prepare adequately for trial. As part of this assertion, the petitioner claims that Mr. Goodlett only met with the petitioner twice before trial. However, the Court does not find this testimony to be credible. The Court accredits the testimony of Mr. Goodlett, who testified that he met with the petitioner more than the twice, and that he was prepared to try this case. The Court finds this claim to be without merit.

The petitioner also faults trial counsel's participation in jury selection. However, the petitioner presented no evidence (apart from his generalized testimony regarding the issue) concerning the composition and selection of the jury pool and the petit jury that deliberated in this case. The Court must therefore conclude that the petitioner has not established that counsel's performance in jury selection was deficient.

The petitioner also faults counsel for not asking witnesses certain questions the petitioner suggested. In the Court's view, Counsel's not asking every question proposed by the petitioner to avoid asking a question that could damage the petitioner's case represents

a reasoned trial strategy, one this Court will not second-guess on post-conviction. Counsel's tactic therefore did not constitute deficient or prejudicial performance.

Finally, the petitioner argues that he received the ineffective assistance of counsel on appeal. However, neither Mr. Nell nor Ms. King, who represented the petitioner on appeal, testified at the post-conviction hearing. The only evidence regarding the appellate ineffective assistance claim is the petitioner's own testimony. As stated earlier in this order, the Court does not find the petitioner's testimony credible. Thus, the Court concludes that the petitioner has not established that appellate counsel rendered ineffective assistance.

In conclusion, this Court finds that the petitioner has failed to establish that he received the ineffective assistance of counsel in this case.

VII. PETITIONER'S CLAIMS FOR RELIEF, PART II: OTHER ISSUES

(A) Previously-Presented Claims

The petitioner has raised numerous grounds for relief apart from his ineffective assistance of counsel claim. Appellate counsel raised three of these claims—that the juvenile court erred in transferring his case to circuit court, that this Court improperly instructed the jury as to the “reckless” mental state in its instruction on aggravated rape, and that the Court imposed an excessive sentence—on direct appeal. The Court therefore concludes these claims are previously determined and are therefore barred from additional consideration. See

Tenn. Code Ann. § 40-30-106(f) and (h). To any extent the petitioner argues that appellate counsel rendered ineffective assistance in addressing these claims on appeal, appellate counsel did not testify at this evidentiary hearing, so the petitioner cannot establish either prong of the Strickland standard regarding this issue.

Regarding sentencing, the Court notes that contrary to the petitioner's assertions, the record reflects that the petitioner was sentenced as a Range I, standard offender in this case. The Court also imposed twenty-year sentences for the petitioner's Class A felony convictions for aggravated rape, below the twenty-five-year maximum possible for these offenses, so to any extent the petitioner argues that trial counsel was ineffective for not arguing certain mitigating factors at the sentencing hearing, such actions by counsel did not prejudice the petitioner.

Regarding the jury instruction claim, this Court notes that the Court of Criminal Appeals treated the issue as waived for appellate counsel's failure to include the jury instructions in the record on appeal. Reed C.C.A. opinion, slip op. at 17. Nevertheless, the petitioner was not prejudiced by counsel's failure in this regard. The Court of Criminal Appeals has concluded that no reversible error occurs when a trial court instructs the jury that aggravated rape may be accomplished recklessly and there is no evidence in the record that the defendant's act of penetration was accomplished recklessly. See State v. Maddin, 192 S.W.3d 558, 562 (Tenn. Crim. App. 2005). No evidence of potentially reckless penetration appears in the record of this case, so appellate counsel's failure to preserve the issue on

appeal did not prejudice the petitioner. Counsel's treatment of the issue, therefore, did not constitute ineffective assistance.

(B) Remaining Claims

Regarding the petitioner's remaining non-ineffective assistance claims (including his arguments regarding a coerced confession, an unconstitutional search or seizure, an unlawful arrest, a violation of his Fifth Amendment rights, a Brady violation, a Double Jeopardy violation, illegally obtained evidence, prosecution of this case beyond the limitations period, and prosecutorial misconduct), the Court notes that the petitioner had the opportunity to present these issues on direct appeal, but he did not do so. These claims are not based upon a constitutional right not recognized as existing at the time of trial, and there is no evidence that the petitioner's failure to present the ground was the result of state action in violation of the federal or state constitution. Thus, the issues are waived. See Tenn. Code Ann. § 40-30-106(g)(1)-(2).

To any extent that the petitioner argues that Mr. Goodlett rendered ineffective assistance regarding his handling of these issues at trial, the Court notes that the petitioner has presented no evidence, other than his own testimony, to support his assertions. The only other witness to testify at the evidentiary hearing, Mr. Goodlett, offered credible testimony that thoroughly rebutted the petitioner's claims. The lack of evidence presented at the post-

conviction hearing, standing alone, would be sufficient for this Court to reject these claims, but the Court will offer additional analysis on certain claims.

Regarding those issues related to the collection of evidence and the petitioner's statements, the police officers who collected physical evidence and interviewed the petitioner did not testify at the hearing. The petitioner argues that his parents were coerced into giving consent to search the victim's room, but his parents did not testify at the evidentiary hearing. The Court also accredits the testimony of Mr. Goodlett, who testified that upon reviewing the discovery he found no basis for filing any motions to suppress. The Court will not second-guess counsel's conclusions. The petitioner also argued that the State did not provide the petitioner with phone records of an individual with whom the petitioner claims he was engaging in a phone conversation at the time of the victim's attack, but this individual did not testify at the hearing, and Mr. Goodlett stated that he had never heard of this supposed evidence before the post-conviction hearing. Accordingly, the Court finds that trial counsel's performance did not violate either Strickland prong, and therefore counsel did not render ineffective assistance as to these issues.

Regarding the petitioner's assertion that the case was prosecuted beyond the limitations period, the Court notes that the petitioner was indicted well within the limitations periods established by Tennessee Code Annotated section 40-2-101. Regarding the petitioner's assertion that his convictions should be vacated because he was not tried within 180 days of the indictment, the Court notes that no such provision applies in most criminal

cases. The 180-day limit applies only to cases tried pursuant to the Interstate Agreement on Detainers³ and trials where the defendant is charged as a repeat violent offender.⁴ Neither situation applied to the petitioner's case, so this assertion is clearly without merit.

Regarding the petitioner's prosecutorial misconduct claim, the Court of Criminal Appeals has concluded that "issues [of prosecutorial misconduct] are more properly the subject of direct appeal; as such, they are waived in the post-conviction setting." John C. Johnson v. State, No. M2004-02675-CCA-R3-CO, Davidson County, slip op. at 19 (Tenn. Crim. App. Mar. 22, 2006); see also Robby Lynn Davidson v. State, No. M2005-022700-CCA-R3-PC, Pickett County, slip op. at 10 (Tenn. Crim. App. Dec. 4, 2006). The petitioner did not raise these claims on direct appeal; thus, the Court finds that these claims are waived pursuant to Tennessee Code Annotated section 40-30-106(g). To any extent that the petitioner argues that counsel rendered ineffective assistance regarding prosecutorial misconduct, at the post-conviction hearing Mr. Goodlett was not asked about potential prosecutorial misconduct, so this Court can only speculate as to the reasons behind counsel's actions. In reviewing the transcript of the trial, the Court has been unable to find any specific actions by the State that were unduly prejudicial toward the petitioner or flagrantly violated statutes, case law, or procedural and evidentiary rules. Thus, trial counsel did not render ineffective assistance as to this issue.

³Tenn. Code Ann. § 40-31-101, art. III(a) (2006).

⁴Tenn. Code Ann. § 40-35-120(i)(1)(A) (2006).

Finally, to any extent that the petitioner argues that appellate counsel rendered ineffective assistance for not raising the majority of the petitioner's non-ineffective assistance claims on appeal, the petitioner's appellate attorneys did not testify at the evidentiary hearing, so the petitioner would be unable to establish either prong of the Strickland claim. Thus, the Court concludes that counsel did not render ineffective assistance as to these issues.

In short, the petitioner's non-ineffective assistance claims are without merit.

VIII. OTHER CLAIMS

The Court has also reviewed those claims which the petitioner raised in his petition but did not address at the evidentiary hearing. All claims not specifically addressed in this order, after full consideration by the Court, have been concluded to be without merit. The petitioner's failure to address these claims at the evidentiary hearing leads this Court to conclude that the petitioner has failed to establish these factual claims by clear and convincing evidence. The Court's declining to address such claims in writing does not reflect a failure by the Court to review those claims, but rather reflects an effort by the Court to be judicially efficient.

IX. CONCLUSION

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

IT IS SO ORDERED this the 24th day of September, 2012


John H. Gasaway, III
Circuit Court Judge