

IN THE
CIRCUIT COURT
MONTGOMERY COUNTY, TENNESSEE
DIVISION III

FILED
4/16, 2012, 1:08 A.M./P.M.
CHERYL J. CASTLE, CLERK
CIRCUIT COURT/CLERK
BY: R. K. K. D.C.

RANDY LYNN SHELBY,
Petitioner

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Case No. 40500128

v.

(Post-Conviction)

STATE OF TENNESSEE,
Respondent

ORDER DENYING PETITION FOR POST-CONVICTION RELIEF

This matter came before the Court on March 1, 2012, for a hearing on the petitioner's pro se and amended petitions for post-conviction relief. In his petitions, Mr. Shelby argues that he received the ineffective assistance of counsel at trial. Having reviewed the record and the post-conviction petition, and having conducted an evidentiary hearing, the Court finds that the petitioner has failed to establish that he received ineffective representation. Accordingly, the Court denies the petition.

I. PROCEDURAL HISTORY

A Montgomery County jury found Mr. Shelby guilty of two counts of aggravated burglary and one count of especially aggravated kidnapping. The Court sentenced the petitioner, who was sentenced as a career offender, to concurrent sentences of fifteen years for each aggravated burglary conviction and sixty years for the especially aggravated kidnapping conviction. On direct appeal, the Court of Criminal Appeals affirmed the

petitioner's convictions.¹ See State v. Randy Lynn Shelby, No. M2006-02582-CCA-R3-CD (Tenn. Crim. App. Mar. 8, 2011) (hereinafter "Shelby C.C.A. Opinion"). The Tennessee Supreme Court denied the Petitioner's application for permission to appeal on June 2, 2011.

The Petitioner filed a pro se petition for post-conviction relief on August 17, 2011; thus, jurisdiction is properly before this Court. See Tenn. Code Ann. § 40-30-102(a) (2006). The Court appointed counsel, who filed an amended petition on March 1, 2011, the same day as the evidentiary hearing.

II. ISSUES PRESENTED FOR REVIEW

The petitioner raised the following claims in his pro se petition:

- (1) Reid Poland, the petitioner's trial counsel, rendered ineffective assistance by not filing a motion to suppress the petitioner's various statements to police, and by not objecting at trial to the reading of the transcript from the first statement;
- (2) Mr. Poland rendered ineffective assistance by failing to introduce the petitioner's mental health records, either at a suppression hearing or at trial;
- (3) Mr. Poland rendered ineffective assistance by failing to challenge the introduction of a "purported transcript" of a statement the petitioner gave to police while in the Montgomery County Jail—a statement which the petitioner asserts was taken while the petitioner was on suicide watch;
- (4) Mr. Poland rendered ineffective assistance by failing to object to a District Attorney staff member's "cutting out portions of Mr. Shelby's redacted statement during the trial";
- (5) Mr. Poland rendered ineffective assistance by failing to object to testimony by a TBI agent regarding an unknown male's blood found in the petitioner's

¹The petitioner did not challenge his sentences on appeal.

truck, and by failing to request an applicable jury instruction; and

(6) Mr. Poland rendered ineffective assistance by failing to object to testimony by a TBI agent regarding tire tracks found on a terra cotta pot, and by failing to request an applicable jury instruction;

In his amended petition, the petitioner raised one additional claim:

(7) Mr. Poland rendered ineffective assistance by failing to raise Miranda-based challenges to the petitioner's statements to police.

III. EVIDENCE PRESENTED AT TRIAL

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

Viewed in the light most favorable to the State, the proof at trial showed that, in the early morning hours of November 28, 2004, the victim Baker ("Mr. Baker") was at his North Ford Street home, along with his wife, four children, and thirteen-year-old cousin. Mr. Baker was in his master bedroom playing on the computer, and his cousin was in the living room watching television. Sometime between 3:00 and 3:30 a.m., Mr. Baker turned his head and saw an intruder in his house (later identified as the Defendant). According to both Mr. Baker and his cousin, who also viewed the intruder, the Defendant was wearing a white shirt and blue jeans and had a red bandana over his face and a rag in his hand. Upon seeing the the [sic] Defendant, Mr. Baker jumped up and grabbed a [B]owie knife he kept nearby and went after the man. The Defendant "bolted" from the residence, knocking over the kitchen table on his way out the back door. Mr. Baker then shut and locked the door and called the police. After examining the house, Mr. Baker noticed some "pry marks" around the back door. He was also later informed that the phone line and cable lines to his residence had been cut. Mr. Baker confirmed that he did not give the Defendant permission to be inside his home.

The Defendant then drove to the victim Schall's ("the victim") mobile home on Gip Manning Road. On that evening, the victim was alone; her husband and young child were not at home. The victim went to her bedroom around 12:30 or 1:00 a.m. that evening and began watching a movie. About thirty minutes or so later, she fell asleep. After hearing several loud noises, the victim, who was lying on her back, was awakened by a man in her room (later identified as the Defendant). According to the victim, the Defendant, who was wearing a red bandana and armed with a box-knife, jumped on top of her. She

began screaming, saying “take anything you want, please don’t hurt me. I have a son.” The Defendant asked where her son was, but she refused to tell him.

The Defendant then placed a rag over the victim’s nose and mouth, which rag she believed was soaked in ether. The victim testified that she fought with the Defendant for approximately eight to ten minutes, using her quilt to cover herself for protection. During the struggle, the victim was cut on her right thumb and chin. The Defendant then ordered the victim to turn over on her stomach. Believing she would be raped and killed, she acted like she was rolling over, but instead shoved the Defendant and fled from the residence.

After running outside, the victim hid behind her rental car, and it was about five minutes later when the Defendant emerged from inside the home. Believing it was her opportunity to escape, the victim began to run. The Defendant followed. She lost sight of the Defendant when she arrived at a neighbor’s house. Jerry Mealer, the victim's neighbor, testified that, around 4:30 a.m. in the morning, he and his wife were awakened by the doorbell ringing and “pounding” on the front door. After hearing the terrified victim's cries for help, he let her come inside, and they called the police.

At trial, the victim elaborated that her attacker was Caucasian and was wearing blue jeans, a hooded sweatshirt, and tennis shoes. The victim confirmed that she did not give the Defendant permission to be inside her residence.

Upon subsequent examination of the house, the victim believed the intruder came in through the window in her son's play room—the screen was ripped and the window was open. The back door also “looked like a screw driver tried jimmying up the opening of the door[.]” Nothing was missing from the victim's residence. It was determined that the phone lines to the victim's home had been severed. Forensic paint analysis later placed the Defendant's truck near the scene of the victim's mobile home. The Defendant also gave inculpatory statements admitting his involvement in these crimes.

Shelby C.C.A. Opinion, slip op. at 2-3 (footnotes omitted, alterations added).

IV. EVIDENTIARY HEARING TESTIMONY

At the evidentiary hearing, the petitioner presented the testimony of the following witnesses:

- Randy Lynn Shelby, petitioner; and
- Reid Poland, petitioner's trial counsel.

The Court accredits Mr. Poland's testimony and does not find the petitioner to be a particularly credible witness. However, the Court will summarize the testimony of both witnesses to present the evidence completely and facilitate appellate review.

Randy Shelby

The petitioner testified that during the time Mr. Poland represented him, he "only" saw counsel in court, except for one time when counsel visited him on the eve of trial. The petitioner claimed he sent "about six" letters to Mr. Poland, who did not respond to the letters. The petitioner claimed that the meeting the day before trial lasted only about fifteen minutes and that counsel told the petitioner, "it's about time I'm hearing your side of the story." The petitioner also claimed he did not see Mr. Poland at some of his pretrial court appearances.

The petitioner said that among counsel's failings was the failure to file motions to suppress his various statements to police. The petitioner claimed that on November 28, 2004, the police searched his truck, would not let him return to his house, and would not answer his questions regarding why the police were searching his truck "without a warrant." The petitioner also claimed he was unaware Montgomery County investigators were audio-recording his conversation with police inside the police car after the officers arrested him and placed him there. When asked why counsel should have objected to the transcript of this

conversation being read to the jury rather than having the audio recording played for the jury, the petitioner replied,

If that tape would have been played to the jury—things were left out of the transcript. You know, things like why are you cutting this tape-recorder on and off; and he said—Detective Hodge said quit asking me that question; and I said well, why you even taping this because you ain't read me my rights. . . . You barged into the residence I was staying, you and Detective Prentis, you know, because I was—only had on a pair of shorts, boxers, and they let me go in to get dressed and next thing I know they're pushing in the door. Prentis went into a bedroom, and Detective Hodge stayed in the living room watching me get dressed, and he was picking up items putting it in his pockets.

And my grandfather wanted to call . . . my father, [who] owned the home and he told him, he said if you pick up the phone, if you even get up out of that recliner I'm going to arrest you. My grandfather said I ain't done nothing; why are you taking these items from the home? . . . And he said—he just said look, old man, you just sit there and be very quite [sic] and we're going to do what we want to do.

. . . .

If that tape-recorder . . . would have been played to the jury you would have heard animal sounds like cows, you would of heard a dog that—the dog hated Hodge so much the dog jumped up on his hind legs and was at Hodge's throat. . . . And that should have been in the tape, because when we went halfway to the driveway you had cows mooing and you had the dog scratching at the passenger side trying to get to Hodge. And that's never—that's not in the transcript nowhere.

The petitioner also asserted that the police did not advise him of his Miranda rights before any of his statements. He also claimed that he told the police that he wanted to talk to an attorney the day of his arrest.

Regarding his assertion that counsel was ineffective for not introducing his mental health records or retaining a mental health expert, the petitioner stated that he had been evaluated at Clover Bottom “for about 30 days” and was on medication for “hearing voices and different stuff,” and was also evaluated at Centerstone. He claimed that he suffered from

memory lapses and “couldn’t really remember stuff very well.” He asserted that Arthur Bieber, the Assistant District Attorney who prosecuted this case (and represented the state at this evidentiary hearing), “didn’t want [the petitioner’s mental health history] to be known.” He also said that Mr. Poland did not file a motion regarding the petitioner’s mental health issues because, in the petitioner’s opinion, counsel “was running to be a judge and he was too busy campaigning to be a judge to effectively represent me.” The petitioner claims that counsel did not discuss the possibility of retaining a mental health expert. When asked about the relevance of the mental health information to the admissibility of the petitioner’s statements, the petitioner said, “if anybody would hear that tape they would think . . . this man is not in his right mind, you know.”

The petitioner also faulted trial counsel for not filing a motion to suppress the petitioner’s statement to Clarksville Police Department Detective Alan Charvis, taken December 9, 2004, at the Montgomery County Jail. The petitioner claims that Montgomery County Sheriff’s Investigator Larry Hodge “came and got me from suicide watch and told me that . . . a city detective [Charvis] wanted to talk to me.” The petitioner claimed Detective Charvis “had it all [written] out; all he wanted me to basically do is initial it, and if I did go along with it . . . he was going to tell the District Attorney to add more charges,” which concerned “the little 14-year-old boy that was in the living room . . . [who] was going to say that I tried to do something to [him].” The petitioner said that Mr. Poland “didn’t want to talk about” the petitioner’s concerns regarding this statement.

The petitioner also recalled that Lee Cairra, a District Attorney’s Office victim-witness

coordinator, sat at the state's table cutting out something during trial. The petitioner testified that he did not know what this woman was cutting, and that he looked at the jury and saw one of the jurors shrugging his shoulders "trying to figure out who she was." The petitioner stated that this episode was "addressed with the Court" but that the woman (who the petitioner claims was quite upset over the incident) "and her deadly scissors stayed in the courtroom." The petitioner said he would have preferred to have the woman removed from the courtroom.

Regarding his assertion that counsel was ineffective for not challenging the introduction of evidence regarding an "unknown male's" blood found in the petitioner's truck, the petitioner acknowledged that one of the detectives who searched his truck "kept holding one of his fingers, and it was bleeding, and that's where the blood came from." He also acknowledged that the TBI laboratory testing indicated that the blood did not come from the victim in this case. However, the petitioner said that Mr. Poland should have done more to discover the identity of the contributor of the blood. The petitioner raised a similar contention regarding tire tracks discovered on a terra cotta pot. He claimed "the TBI specialist 100 percent said it wasn't my tire tracks", but he said that trial counsel should have done more to discover the identity of the truck that left these impressions.

On cross-examination, the petitioner acknowledged that he had six prior felony convictions, not counting this case. He also acknowledged spending approximately eighteen years in prison before these convictions and was well aware of the "Miranda rights requirement[.]" The petitioner also said that he had "no idea" whether Mr. Poland was aware

of the unknown male's blood inside the truck. The petitioner said that he worked at Townsend Tree Service about four months before his arrest, and that he was able to understand the instructions given by his foreman and was able to communicate with others.

Reid Poland

Mr. Poland recalled that he saw the petitioner more than once before trial, although he could not recall the exact number of times he met with the petitioner. When asked about his pretrial investigation, Mr. Poland said that he "talked to a couple of the witnesses, State's witnesses; I believe we sent [the petitioner] to Middle Tennessee Mental Health to get him mentally evaluated." Counsel recalled that the petitioner was found competent to stand trial and competent at the time of the offenses. Mr. Poland said that the petitioner's trial was his (counsel's) first jury trial, although counsel denied that this fact presented him difficulty in preparing for the petitioner's trial.

Mr. Poland acknowledged that he did not file a motion to suppress any of the petitioner's statements to police. Counsel recalled having "some" discussion with the petitioner regarding playing the audio recording of the petitioner's statement to Montgomery County Sheriff's investigators rather than having the transcript read to the jury. Mr. Poland said, "I think I asked the Court if we could play the tape, but it was read instead[.]" Counsel said that the content of the recorded statement and the transcript were "basically the same." He acknowledged that the petitioner's inculpatory statements were "critical" in the case against him.

Mr. Poland said that he did not recall when the petitioner was evaluated at Clover Bottom. Counsel recalled having some discussion with the petitioner regarding his mental state, but counsel denied that the petitioner's mental capacity was ultimately an issue regarding his statements to police. Mr. Poland also denied that the petitioner expressed any concern about his mental capacity at the time the petitioner spoke with police. Counsel said that if he believed the petitioner's mental status was at issue, counsel would have filed a motion to suppress, and he would have retained a mental health expert.

Mr. Poland also claimed that the petitioner was advised of his Miranda rights before both his statement the day of his arrest and his statement in the Montgomery County Jail in December 2004. Counsel claimed that the petitioner signed a written admonition and waiver before his first statement,² and he also testified that he "had no evidence" that the petitioner did not understand his Miranda rights. Mr. Poland also did not recall whether the petitioner was on suicide watch at the time of his December 2004 statement.

Mr. Poland recalled the incident with the victim-witness coordinator. Counsel testified that upon noticing Ms. Caira cutting out items, he asked the Court for a bench conference and asked that the Court instruct her to stop cutting things out. Mr. Poland recalled that the Court instructed Ms. Caira to "take her stuff and go into one of the anterooms and finish doing . . . whatever it was she was doing." Counsel recalled that the woman complied with the Court's request. Mr. Poland denied that these actions had any

² Mr. Poland's recollection conflicts with Investigator Hodge's pretrial testimony, in which the investigator testified that the petitioner did not sign any waiver form because he was handcuffed in the back of a police car at the time he was advised of his Miranda rights.

significant impact on the jury.

Regarding the unidentified blood found in the petitioner's truck, Mr. Poland recalled that the blood evidence "wasn't relevant to what was going on in the case." He denied that identifying the source of the blood was critical or relevant to the petitioner's case. Counsel recalled having some discussions with the petitioner regarding the tire tread evidence, although he did not recall the substance of these discussions. Mr. Poland recalled that the tire tracks did not belong to the petitioner's truck, and answered affirmatively when asked if "that [was] as far as you felt that you needed to go at that point in time[.]"

On cross-examination, Mr. Poland testified that he had received discovery in this case and had reviewed Detective Hodge's investigative file from the Montgomery County Sheriff's Office. He reiterated that the petitioner never indicated to counsel that he (the petitioner) had been advised of his Miranda rights before his interrogations. Mr. Poland also said that he had no reason to believe that the petitioner did not understand the Miranda warnings. Counsel therefore considered filing a motion to suppress "a moot point[.]"

Mr. Poland also said that he did not recall the petitioner being diagnosed with any mental disorder before trial. Counsel also disputed the petitioner's assertion that he never visited the petitioner before trial and never answered the petitioner's correspondence. Counsel acknowledged that he did run for a judgeship during the pendency of the petitioner's trial, but he insisted that his campaign did not affect his duties in representing the petitioner. Had the campaign created a problem, counsel would have asked the court for a continuance or would have asked to be replaced as the petitioner's attorney.

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

(A) Trial Counsel's Alleged Failures Regarding Statements to Police (Issues 1, 2, 3 and 7 above)

Evidence of two custodial statements made by the petitioner to law enforcement was introduced at trial. The petitioner made the first statement to Montgomery County Sheriff's Department Investigators Brian Prentice and Larry Hodge on December 8, 2004, while Hodge and Prentice transported the petitioner in a police car to the Montgomery County Jail. Although this interview was audio-recorded, a transcript of the relevant portions of the interview (rather than the audio recording itself) was introduced into evidence per the agreement of the parties' attorneys. Investigator Hodge also read the transcript into the record during his trial testimony. The petitioner made the second statement to Clarksville Police Department Detective Alan Charvis the next day at the jail. A handwritten statement, signed by the petitioner, was introduced into evidence at trial, and Detective Charvis read the statement into the record during his trial testimony.

The petitioner argues that Mr. Poland rendered ineffective assistance by not filing a motion to suppress these statements to police. Before addressing the petitioner's specific assertions regarding this stated issue, the Court notes that on the morning of jury selection, Mr. Poland told the Court:

Your Honor, we were sitting here getting ready with other settlements and that type of thing and my client [the petitioner] gave me a note and said ["something I forgot, while I was in the police car with Detective Charvis [sic], he threatened to charge me with more serious offenses if I didn't make a statement about one of these burglaries.["] This is the first I [Mr. Poland] have heard of it and I had him sign something that this is the first time I have heard of it and so I am kind of at a loss on how to proceed[.] Something I need

to do to attack this confession, I don't know?

(alterations added) In light of this development, the Court held a brief hearing in which both Investigator Hodge and Detective Charvis testified regarding their interactions with the petitioner. Both officers testified that they advised the petitioner of his Miranda rights before speaking to the petitioner. Investigator Hodge was not asked about any supposed threats toward the petitioner, but Mr. Poland did ask Detective Charvis the following questions on cross-examination:

Q [Mr. Poland]: So if Mr. Shelby were to testify that you threatened him that you would go to the D.A., threatened—tell them that he raped that little boy and charge him with that, that would not have been part of your interrogation technique to get him to make a statement?

A [Det. Charvis]: The little boy at the house?

Q: At North Ford Street?

A: No, that never happened.

At the close of the hearing, the Court concluded that relative to the petitioner's assertion to trial counsel that Detective Charvis may have coerced him, "it does not appear to this Court that any such conversation took place, so I don't see any basis for any sort of delay in the trial of this case . . ."

Mindful of this context, the Court now addresses the petitioner's specific assertions.

Evidence of Petitioner's Mental Illness

The petitioner argues that Mr. Poland rendered ineffective assistance by failing to

“investigate and submit mental health records,” which the petitioner asserts could have been used to challenge the admissibility of his two statements to police at a pretrial motion to suppress and at trial. The Court concludes that the petitioner has failed to prove this allegation by clear and convincing evidence.

Although the petitioner asserted in his petition and at the evidentiary hearing that he had been treated at several mental health facilities, he did not introduce any records relating to his mental health at the evidentiary hearing. Nor did he introduce any expert testimony at the evidentiary hearing relative to his mental health history. The petitioner also could have called the police investigators at issue to testify at this evidentiary hearing regarding the petitioner’s mental state and other factors that could have led to a conclusion that the petitioner’s statements were coerced, but the petitioner failed to do so.

In addition to this lack of evidence, Mr. Poland testified at the evidentiary hearing that he did not consider the petitioner’s mental state to be an issue at trial, and that if he had believed a motion to suppress based on the petitioner’s mental status would have been warranted, he would have filed such a motion. As stated above, the Court has found Mr. Poland to be a credible witness. In light of these findings, the Court concludes that the petitioner has not established either that counsel rendered deficient performance by not introducing the petitioner’s mental health records or that counsel’s declining to do so prejudiced the petitioner.

Miranda Warnings

The petitioner also argues that counsel was ineffective for failing to challenge his statements to police in that the petitioner was not advised of his Miranda rights prior to the statements. The Court disagrees. The transcript of the petitioner's interview with Investigators Hodge and Prentice establishes that Hodge advised the petitioner of his Miranda rights at the beginning of the interview and that the petitioner indicated that he waived his rights and was willing to speak to police. Investigator Hodge testified at trial that the petitioner did not sign a written Miranda waiver because he was handcuffed in the back seat of a police car when the interview took place. Furthermore, Detective Charvis testified at trial that he advised the petitioner of his Miranda rights before taking a statement from the petitioner at the Montgomery County Jail. The petitioner has offered no evidence to counter these officers' testimony, so the Court must conclude that the petitioner was not prejudiced by trial counsel's not filing a motion to suppress on Miranda grounds.

Failure to File Motion to Suppress First Statement

The petitioner argues that trial counsel was ineffective for filing a motion to suppress the petitioner's statement given to Investigators Hodge and Prentice. The petitioner's assertions regarding failure to challenge on Miranda grounds and coercion are addressed above and will not be revisited here. Additionally, the petitioner faults counsel for agreeing to have the transcript of the statement introduced into evidence rather than the audio

recording of the interview between the petitioner and the detectives.

As an initial matter, it is unclear whether the audio recording of the interview still exists. If the recording does exist, the petitioner did not seek to introduce it into evidence at the evidentiary hearing. At the hearing the petitioner asserted that the audio recording would have provided the jury with a more accurate depiction of the circumstances surrounding the petitioner's statement to the Montgomery County investigators because the audio recording would have captured such sounds as cattle lowing and a dog reacting in an agitated manner toward one of the investigators. Because the petitioner provided neither the audio recording itself or the testimony of a witness who could have spoken to the content of the audio recording, the Court cannot be certain that the petitioner's assessment of the audio recording is accurate. Even if the petitioner's assessment of the audio recording is correct, it is unclear to this Court how evidence of various animal noises would have aided the petitioner. The only relevant detail to this Court regarding the transcript is that both at trial and at the evidentiary hearing Mr. Poland asserted that the transcript of the interview accurately reflected the content of the audio-recorded interview. Thus, the petitioner has not established that he was prejudiced by counsel's failure to challenge introducing the transcript of the first statement in lieu of the audio recording.

Failure to File Motion to Suppress Second Statement

The petitioner also faults counsel for not filing a motion to suppress his statement to Detective Charvis at the Montgomery County Jail. The petitioner asserts that counsel

improperly allowed the petitioner's "purported" written statement to be introduced into evidence and rendered ineffective assistance by not challenging the statement in that the petitioner "was taken out of suicide watch in the medical section of the Montgomery County Jail" at the time Detective Charvis interviewed him. The Court disagrees.

At trial, Detective Charvis testified that he wrote a statement based on his interview with the petitioner. After he finished writing the statement, Detective Charvis had the petitioner review the statement, initial each page, and sign the statement. Detective Charvis testified that the statement accurately reflected his conversation with the petitioner; the petitioner has offered no evidence that the statement Detective Charvis composed did not reflect the petitioner's words accurately. The petitioner also has offered no evidence (beyond his own assertion) that the petitioner was on suicide watch at the time he gave the statement. Furthermore, the Court has found the petitioner's assertions regarding Miranda and the petitioner's mental state at the time of the statement to be without merit, and shortly before trial the Court found that the petitioner's assertion that he was coerced into giving his statement to Detective Charvis was without merit. Accordingly, the Court concludes that Mr. Poland did not render ineffective assistance by not filing a motion to suppress the petitioner's statement to Detective Charvis.

(B) Trial Counsel's Alleged Failure to Object to District Attorney Staff Member Cutting Paper During Trial (Issue 4 above)

The petitioner argues that Mr. Poland ineffective assistance "by failing to object and motion the court to hold a hearing to determine the amount of undue and extraneous

influence had on the jury” when Lee Cairra, a victim-witness coordinator with the District Attorney’s Office, was seen cutting out portions of the petitioner’s statement during trial. The Court disagrees.

The record reflects that during the testimony of Montgomery County Sheriff’s Deputy Steve Heise, Mr. Poland asked for a bench conference, where the following exchange occurred:

MR. POLAND: I can’t believe Ms. Cairo [sic] sitting over there redacting that statement sitting right—

MR. BIEBER: We need to get here out of there, I didn’t know she was doing that until I turned around.

THE COURT: Do wonders ever cease?

MR. POLAND: I cannot believe it. Could we have the jury step out before she walks out? They will see it again.

MR. BIEBER: I told her to get out.

THE COURT: They are not going to put all that together.

MR. POLAND: Okay, I just—it kind of—

THE COURT: From your perspective, you think that they know—they don’t know anything. They might get curious if you were sitting there cutting—you know.

MR. BIEBER: I have gotten the impression that they are watching the witness.

THE COURT: Well, some things just don’t have to be said.

Thus, despite the petitioner’s assertion to the contrary, Mr. Poland did object to Ms.

Caira's actions. Although the petitioner testified at the evidentiary hearing that Ms. Caira remained in the courtroom after the above exchange, Mr. Poland testified that she left the room after the bench conference, and the Court has no reason to doubt Mr. Poland's testimony. The petitioner asserts that Ms. Caira's actions constituted improper jury tampering, but the Court does agree with this assessment. As the Court stated at trial, there was no need to address the situation beyond those actions which were ultimately initiated by Mr. Poland. Accordingly, the Court concludes that trial counsel did not render ineffective assistance in addressing the Caira matter.

(C) Forensic Evidence (Issues 5 and 6 above)

The petitioner argues that the testimony of TBI Agents Margaret Bash (who testified regarding blood found in the petitioner's truck) and Sandra Poltorak (who testified regarding tire tracks found in the dirt and on a terra cotta pot across the road from the female victim's residence) was irrelevant, confusing, and misleading to the jury. Accordingly, the petitioner argues that Mr. Poland rendered ineffective assistance by not objecting to the introduction of these experts' testimony at trial. The petitioner also asserts that counsel rendered ineffective assistance by not requesting jury instructions concerning each expert's testimony.

Blood Evidence

At trial, Agent Bash testified that the TBI Crime Laboratory tested blood that was found in several locations inside the petitioner's truck, including on a sweatshirt, on a

steering wheel, and in the truck bed. Agent Bash testified that the blood did not belong to Karen Schall but instead belonged to an unknown male. The petitioner argues that “this evidence was highly prejudicial for the jury to hear as inferences could have been made that Mr. Shelby had committed another violent crime against yet another male [of which] the jury was not made aware.” However, it appears unlikely that the jury would have reached that conclusion. Proof of the blood evidence was introduced, presumably, to establish the extent of the forensic investigation of the petitioner’s truck. Because there was no evidence that the blood belonged to either of the identified victims in this case, the petitioner was ultimately not prejudiced by the introduction of this evidence.

The petitioner also faults counsel for not seeking a special instruction regarding Agent Bash’s testimony. The petitioner argues that the Court “failed to give the pattern jury instructions on expert testimony concerning the DNA evidence admitted at trial” and that the jury “was not instructed fairly on the legal issues concerning DNA evidence,” including the jury being the judge of the facts and law; the presumption of innocence; the burden of proof; the reasonable doubt standard; how to weigh circumstantial evidence; witness credibility; and witness impeachment. Specifically, the petitioner asserts that the Court should have instructed the jury

That jurors alone have the final responsibility to decide the weight to be given to DNA random match probability statistics—particularly with the weight to be given the blood found in the bed of Mr. Shelby’s truck belonging to an unknown male.

Ultimately, the petitioner's assertions are without merit. The Court instructed the jury on expert witness testimony via the applicable pattern jury instruction. See T.P.I. (Crim.) 42.02 (10th ed. 2006). That instruction informs the jury that jurors are to determine whether they believe the expert's testimony, whether the expert's training and experience were sufficient for the expert to give the opinion, whether the expert's testimony was based on sound reasoning, judgment, and information, and that jurors "are to give the testimony of an expert witness such weight and value as you think it deserves with all the other evidence in the case." The trial court also instructed the jury on those issues which the petitioner asserts no instruction was given. See T.P.I. (Crim.) 1.08³ (jury as judge of facts and law); 2.01⁴ (presumption of innocence); 2.02⁵ (burden of proof); 2.03⁶ (reasonable doubt); 42.03(a)⁷ (direct and circumstantial evidence); 42.04(a)⁸ (witness credibility); 42.06⁹ (impeachment of witnesses). The petitioner has provided no evidence or argument suggesting that these pattern instructions did not properly inform the jury of the law. The petitioner, therefore, has not established that counsel rendered ineffective assistance regarding the blood evidence.

³ State v. Randy Shelby, Montgomery Co. No. 40500128, jury instructions at 4.

⁴ Id. at 5.

⁵ Id.

⁶ Id.

⁷ Id. at 21-22.

⁸ Id. at 17-19.

⁹ Id. at 20-21.

Tire Track Evidence

Similarly, the petitioner argues that Mr. Poland rendered ineffective assistance by not objecting to the introduction of testimony by TBI Agent Sandra Poltorak regarding tire tracks found on a terra cotta flower pot across the road from the female victim's residence. Counsel also argues that counsel was ineffective for not seeking a jury instruction regarding Agent Poltorak's testimony, which "revealed inconclusive results concerning tread on a tire."

In support of his argument, the petitioner asserts that the Court expressed "misgivings" over Agent Poltorak's testimony, quoting some comments made by the Court after Agent Poltorak testified. Ultimately, though, the State made clear that its concern dealt with the admission of physical exhibits introduced during the agent's testimony, rather than the admissibility of the testimony itself:

THE COURT: Mr. Bieber, I am a little perplexed about how you want the Court to deal with the testimony of Ms. Poltorak[.] You say you don't wish to offer that into evidence; in fact, do you want it to be considered as evidence or not?

MR. BIEBER: We want it to be considered, Your Honor, but quite frankly, it's filthy and—

THE COURT: I understand that, but then again, we can probably clean up her—what she identified as her exhibit 5 and make it—at least we could put it in a bag?

MR. BIEBER: The State would offer then her exhibit 5.

THE COURT: I feel like if you don't want to offer it into evidence, I feel like I need to just strike her testimony[.]

MR. BIEBER: Well, we don't want that, Your Honor.

THE COURT: All right—

MR. BIEBER: We will offer it and I will look for a gallon plastic bag .

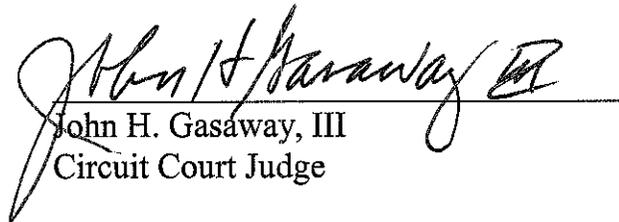
...

Agent Poltorak's testimony at trial established that the tire tracks found on the terra cotta pot and the tires on the defendant's truck were "consistent with respect to size and tread design. However, there were no individual characteristics to say conclusively that these tires did make that design." Mr. Poland testified at the evidentiary hearing that the fact that TBI testing on the flower pot tracks was ultimately inconclusive was "as far as [he] needed to go" regarding the issue is a reasoned conclusion. There is no evidence that additional testing would have conclusively identified the vehicle that left the impressions. Furthermore, the fact that the tire track testing was inconclusive related to the weight of Agent Poltorak's testimony, not its admissibility. A motion to exclude the testimony would not have been successful, so the fact that counsel did not seek to exclude the testimony was not deficient performance or prejudicial to the petitioner. Mr. Poland therefore did not render ineffective assistance as to this issue.

VII. CONCLUSION

For the reasons stated above, the petitioner's application for post-conviction relief is DENIED.

IT IS SO ORDERED this the 16th day of April, 2012



John H. Gasaway, III
Circuit Court Judge