

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

APRIL SESSION, 1996

**FILED**  
June 24, 1996  
Cecil Crowson, Jr.  
Appellate Court Clerk

THOMAS EUGENE GRAHAM,)

Appellant,

VS.

STATE OF TENNESSEE,

Appellee.

C.C.A. NO. 03C01-9506-CR-00181

HAMILTON COUNTY

HON. STEPHEN M. BEVIL  
JUDGE

(Post-Conviction)

ON APPEAL FROM THE JUDGMENT OF THE  
CRIMINAL COURT OF HAMILTON COUNTY

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OPINION FILED \_\_\_\_\_

AFFIRMED

DAVID H. WELLES, JUDGE

# OPINION

The Petitioner, Thomas Eugene Graham, brings this appeal as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure. The Defendant filed a petition for post-conviction relief alleging ineffective assistance of counsel. After conducting an evidentiary hearing, the trial court denied relief. We affirm the judgment of the trial court.

The Petitioner was convicted by jury verdict of aggravated kidnapping, aggravated rape, and aggravated burglary, and he was sentenced as a Range I standard offender to concurrent terms of twenty-five years for each of the first two convictions and six years for the aggravated burglary. This court upheld his conviction, but reduced the length of the sentence for aggravated kidnapping from twenty-five years to twelve years.<sup>1</sup> The Tennessee Supreme Court denied his application for permission to appeal. The Petitioner then sought post-conviction relief, arguing that his constitutional right to counsel was violated by ineffective assistance of counsel.

After conducting an evidentiary hearing, the trial court rejected the Petitioner's post-conviction petition. The Petitioner now brings this appeal.

The Petitioner was convicted of aggravated burglary, and the aggravated kidnapping and aggravated rape of a six-year-old girl. Attorney Paul Bergmann of the Hamilton County Public Defenders Office was appointed by the Court to

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<sup>1</sup> State v. Thomas Eugene Graham, No. 03C01-9112-CR-00391, Hamilton County (Tenn. Crim. App., Knoxville, filed June 22, 1993), perm. to appeal denied (Tenn. filed Oct. 4, 1993).

represent the Defendant. Bergmann served as the Petitioner's attorney during the pre-trial and trial proceedings and in the motion for a new trial.

The Petitioner raised several issues in his petition for post-conviction relief, including: (1) That the trial court denied him a fair trial by refusing to allow him to present evidence that someone other than the Petitioner committed the crime; (2) that the trial court denied him a fair trial in that it charged the jury on ranges of punishment for each offense with which the Petitioner was charged; (3) that the trial court was biased against him and let the attorneys put the plea offer on the record; (4) that his attorney was ineffective by not calling three relevant witnesses, by failing to suppress two doctor's reports, by not objecting to the admissibility of certain evidence, by not objecting to a witness for the State testifying without being under oath, by failing to discuss with Petitioner all possible defenses and strategies, by failing to explore settlement possibilities, by refusing to allow the Petitioner to testify in his own behalf, and by not calling a crucial witness in the hearing on the motion for a new trial.

The trial court found each of the Petitioner's complaints to be without merit. After listening to their testimony at the sentencing hearing, he further found that the testimony of the Petitioner and the witnesses that the Petitioner wanted to call at trial to be lacking in reliability and credibility. The trial court found that the Petitioner failed to show that his trial counsel was deficient or that he rendered service or advice below the range of competence demanded of attorneys in criminal cases.

On this appeal, the Petitioner alleges that the trial court erred in dismissing his petition and asserts that his trial attorney rendered ineffective assistance of counsel by failing to interview and call defense witnesses to testify, by refusing to allow the Petitioner to testify in his defense, by not properly advising the Petitioner concerning trial strategy and defenses, and by not assisting the Petitioner in deciding whether to accept the State's plea offer.

The test to determine whether counsel provided effective assistance at trial is whether his performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). Under Strickland v. Washington, 466 U.S. 668, reh'g denied, 467 U.S. 1267 (1984), the United States Supreme Court set forth a two-prong test which places the burden on the appellant to show that (1) the representation was deficient, requiring a showing that counsel made errors so serious that he was not functioning as "counsel" as guaranteed a defendant by the Sixth Amendment, and (2) the deficient representation prejudiced the defense to the point of depriving the defendant of a fair trial with a reliable result. 466 U.S. at 687. To succeed on his claim, the appellant must show that there is a "reasonable probability," which is a probability sufficient to undermine confidence in the outcome that, but for the counsel's unprofessional errors, the results of the proceeding would have been different. Id. at 694. The burden rests on the appellant to prove his allegations by a preponderance of the evidence. Long v. State, 510 S.W.2d 83, 86 (Tenn. Crim. App. 1974). We also do not use the benefit of hindsight to second-guess trial strategy by counsel and criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

The Petitioner asserts that he told his attorney of several relevant witnesses, including a friend, Nancy Farris; Farris's mother, Frances Snyder; an alibi witness by the name of "Jay"; a neighbor by the name of "Badman" or "Batman"; and the Petitioner's mother, Shirley Teets.

At the sentencing hearing, Nancy Farris testified that the attorney never interviewed her to see if she had pertinent information. If she had been called at trial, she said that she would have testified that the victim's grandparents and aunt were so angry with the Petitioner that they would have lied about his guilt. However, attorney Bergman testified that he had talked with Farris by telephone on numerous occasions and decided that, despite the Petitioner's assertions, she was not a material witness.

Bergman also testified at the sentencing hearing that he interviewed the Petitioner's mother and the man called "Badman," and also determined that neither could offer any useful information. The Petitioner's mother would have only testified that "he could not have done this because he is a good boy." Bergman testified that he searched for the alibi witness, Jay, but could not find him. The Petitioner admitted that he did not know Jay's last name, but that he knew his address and gave it to the police and to Bergman. Neither Bergman nor the investigator for the public defender's office nor the Chattanooga Police Department could find Jay. The trial court found that the Petitioner had failed to show that his counsel was ineffective in not producing this witness for trial.

Frances Snyder would have testified that she saw the victim and the victim's grandfather walking together on the night the victim was attacked. The

Petitioner asserts that this testimony was crucial because one of their theories at trial was to show that the grandfather or someone else raped the child. However, the trial court had previously prohibited the defense from using this theory unless there was some evidence against the grandfather. Moreover, Frances Snyder did not give this information to anyone until months after the trial had ended. The Petitioner also contends that his counsel was ineffective in not subpoenaing Frances Snyder to testify at the hearing on the motion for a new trial. The attorney testified at the hearing that he never knew that Frances Snyder had any relevant information.

The trial court did not find the testimony of Nancy Farris or Frances Snyder to be credible or to have sufficient indicia of reliability. Furthermore, the court concluded that their testimony would merely have contradicted the testimony of one of the State's witnesses and would not have affected the outcome of the trial.

The Petitioner also argues that trial counsel was ineffective in not allowing him to testify at trial. The Petitioner said that he asked to testify, but his counsel refused to allow it. Bergman, however, testified that he explained the advantages and disadvantages of taking the stand to the Petitioner, who apparently understood; in light of the facts and evidence in the case, he advised the Petitioner not to testify. The Petitioner decided not to take the stand and testify on his own behalf. The trial court found that the Petitioner's testimony was lacking in credibility and that he did not adequately meet his burden of proving how counsel was ineffective on this issue.

We agree with the trial court that the evidence presented by the Petitioner does not show that the trial counsel was ineffective in failing to call or interview witnesses.

The Petitioner also contends that his trial counsel was ineffective by failing to discuss or advise him on trial strategy or the possibility of settling the case. At the hearing on the post-conviction petition, the Petitioner testified that his counsel talked to him only twice before trial, that counsel was not prepared to try the case, that counsel did not give him sufficient information upon which he could make an informed decision of whether to accept the State's plea agreement, and that had he known these things, he would have accepted the plea agreement.

The trial counsel testified that he had, in fact, met with the Petitioner on multiple occasions and was ready to go to trial. He testified that he had contacted numerous potential witnesses and had frequently discussed the case and possible strategies with the Petitioner. The attorney also testified that he had several plea negotiation meetings with the State and that he had related the substance of those discussions to the Petitioner, including the plea offer. He testified that he advised the Petitioner that the State had made a good offer, but that the Petitioner insisted on his innocence and wanted to go to trial rather than accept the plea offer. Again, the trial court found the Petitioner's testimony at the hearing not to be credible and that he had again failed to demonstrate that trial counsel had been ineffective.

The trial judge did not find the Petitioner or any of his witnesses to be credible. He did, however, find the trial counsel's testimony to have credibility.

We cannot conclude that the Petitioner has met his burden of proving his allegations by a preponderance of the evidence. The trial court found that the Petitioner's attorney adequately represented the Petitioner and fully advised him of his rights and options. The record supports the findings of the trial court.

We conclude that the Petitioner has not met his burden of showing either that his trial counsel was deficient in any of his assertions, or that the alleged deficient representation prejudiced the defense to the point of depriving the defendant of a fair trial with a reliable result. The judgment of the trial court in dismissing the petition for post-conviction relief is, therefore, affirmed.

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DAVID H. WELLES, JUDGE

CONCUR:

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GARY R. WADE, JUDGE

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WILLIAM M. BARKER, JUDGE