

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
AUGUST SESSION, 1999**

**FILED**  
November 17, 1999  
Cecil CROWS ON, Jr.  
Appellate Court Clerk

**REECE CALLOWAY** )  
**9810-CR-00352** )  
**LOUDERMILK,** )  
 )  
Appellant, )  
 )  
**VS.** )  
 )  
**STATE OF TENNESSEE,** )  
 )  
Appellee. )

**C.C.A. NO. 03C01-**  
  
**SULLIVAN COUNTY**  
  
**HON. LYNN W. BROWN**  
**JUDGE**  
  
**(Post-Conviction)**

FOR THE APPELLANT:

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

REVERSED AND REMANDED

JERRY L. SMITH, JUDGE

## OPINION

The petitioner, Reece Calloway Loudermilk, appeals the Sullivan County Criminal Court's order dismissing his petition for post-conviction relief. In 1992, the petitioner was convicted upon pleas of *nolo contendere* to four (4) counts of aggravated rape and two (2) counts of sexual battery. The petitioner filed a *pro se* petition for post-conviction relief in 1995, and counsel was subsequently appointed on the petitioner's behalf. Appointed counsel filed an amended petition for post-conviction relief alleging that the petitioner received ineffective assistance of trial counsel and that his pleas of *nolo contendere* were involuntary. The trial court summarily dismissed the petition without an evidentiary hearing. On appeal, the petitioner claims that (1) the trial court erred in dismissing the petition without a hearing; and (2) the trial court erred in refusing to consider interlineations in the amended petition alleging additional factual bases for his claim of ineffective assistance of counsel. After a thorough review of the record before this Court, we reverse the trial court's judgment and remand for an evidentiary hearing.

### I.

In October 1992, the petitioner entered pleas of *nolo contendere* to four (4) counts of aggravated rape and two (2) counts of aggravated sexual battery. Three years later, the petitioner filed a *pro se* petition for post-conviction relief claiming that he received ineffective assistance of trial counsel. Thereafter, the petitioner filed two *pro se* amendments to his petition, as well as numerous other motions, including a motion to appoint counsel.<sup>1</sup> In March 1998, the trial court appointed the Public Defender's Office to represent the petitioner.

Because the original petition and its subsequent amendments presented many different issues for the court's consideration, at a subsequent hearing the trial court instructed appointed counsel to draft a final amended petition which would limit the

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<sup>1</sup> During this time, the petitioner's family retained Randy Fallin to represent the petitioner in this matter. However, due to irreconcilable differences between the petitioner and Fallin, Fallin was allowed to withdraw as counsel.

issues to be determined. The court stated that it would “proceed only on the final amended petition.” Counsel then filed a final amended petition for post-conviction relief asserting that the petitioner received ineffective assistance of trial counsel and that his pleas of *nolo contendere* were involuntary. The final amended petition included interlineations which alleged additional factual bases in support of the petitioner’s claim of ineffective assistance of counsel.<sup>2</sup> Further, the final petition did not specifically allege that but for trial counsel’s actions, he would not have entered pleas of *nolo contendere* and would have insisted on going to trial.

In August 1998, the trial court held a hearing on the petition for post-conviction relief. However, prior to the petitioner introducing any evidence in support of his petition, the trial court ruled that it would not consider the interlineations in the petition because counsel did not initial nor approve of “their legal validity.” The trial court then observed that even though the petition alleged that trial counsel’s representation was deficient in numerous respects, the petition did not specifically allege that the petitioner was prejudiced as a result of counsel’s alleged deficiencies. The trial court found that because the petition did not allege prejudice, the petition was inadequate on its face. The trial court dismissed the petition as a result.

From the trial court’s ruling, the petitioner now brings this appeal.

## II.

The petitioner contends that the trial court erred in dismissing the post-conviction petition without an evidentiary hearing and in striking the interlineations in the petition. We must agree.

The trial court dismissed the petition because the petitioner did not specifically allege that but for trial counsel’s deficient performance, he would not have entered pleas of *nolo contendere* and would have insisted on going to trial. The court reasoned that under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), a petitioner claiming ineffective assistance of counsel must prove not only that trial counsel’s performance was deficient but also that the petitioner was prejudiced as

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<sup>2</sup> Apparently, when counsel presented the final petition to the petitioner for his approval, the petitioner added these additional factual grounds. Due to time constraints, counsel was unable to redraft the petition.

a result of the deficient performance. Thus, because the petition did not allege both prongs under Strickland, the trial court found that the petition did not sufficiently allege a constitutional claim. While we agree with the trial court's analysis of Strickland, we believe that dismissing the petition on this basis is elevating form over substance.

The petition alleges that the petitioner was denied the effective assistance of counsel under the federal and state constitutions. The petition further sets out the factual bases for the petitioner's claim of ineffective assistance of counsel. We conclude that the petition adequately presents a constitutional claim which would entitle the petitioner to an evidentiary hearing so that he may prove his claim. See Tenn. Code Ann. § 40-30-210.

Moreover, we believe that the trial court erred in striking the interlineations providing additional factual bases for the claim of ineffective assistance of counsel. The trial court was concerned that counsel did not initial nor approve the legal validity of each additional ground. However, by signing the bottom of the petition which included the handwritten interlineations, trial counsel implicitly, if not explicitly, approved of their legal validity.

### III.

We conclude that the petition for post-conviction relief was sufficient to raise a constitutional claim, and the petitioner is, therefore, entitled to an evidentiary hearing on the petition. Furthermore, we believe that the interlined portions of the petition should be considered by the trial court as part of the petition. Accordingly, the judgment of the trial court is reversed, and the case is remanded to the trial court for further proceedings consistent with this opinion.

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JERRY L. SMITH, JUDGE

CONCUR:

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DAVID H. WELLES, JUDGE

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JAMES CURWOOD WITT, JUDGE