IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
April 25, 2023 Session

KRIS YOUNG v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 109115 Scott Green, Judge

No. E2022-00235-CCA-R3-PC

The petitioner, Kris Young, appeals the denial of his petition for post-conviction relief, which petition challenged his convictions of aggravated kidnapping, aggravated robbery, and aggravated burglary, alleging that the trial court erred in the jury instructions, that the evidence was insufficient to support the aggravated kidnapping conviction, that the kidnapping statutes are unconstitutionally vague, that his aggravated kidnapping conviction violates the principles of double jeopardy, and that trial and appellate counsel performed deficiently. Discerning no error, we affirm the denial of post-conviction relief.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER, and TOM GREENHOLTZ, JJ., joined.

Drew Justice, Murfreesboro, Tennessee, for the appellant, Kris Young.

Jonathan Skrmetti, Attorney General and Reporter; Courtney N. Orr, Assistant Attorney General; Charme P. Allen, District Attorney General; and Kevin Allen and Nathaniel Ogle, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

A Knox County Criminal Court jury convicted the petitioner and two co-defendants, Larry Alston and Joshua Webb, of aggravated robbery, especially aggravated kidnapping, and aggravated burglary[1] for offenses against the victim, Carolyn Sue Maples.

---

[1] The jury also convicted the petitioner and co-defendants of the possession of a firearm with the intent to go armed during the comission of a dangerous felony, which conviction was dismissed by the trial court. *State v. Larry Jereller Alston, Kris Theotis Young, and Joshua Edward Webb*, No. E2010-00431-CCA-R3-CD, 2014 WL 585859, at *1 (Tenn. Crim. App., Knoxville, Feb. 13, 2014). This court affirmed the dismissal of that conviction. *Id.*

State v. Alston, 465 S.W.3d 555, 557-58 (Tenn. 2015). The evidence at trial showed that on April 15, 2010, the victim

> left her home to get into her car, which was parked on the street, and saw three men, later identified as the [petitioner and co-defendants], walking toward her. As she was getting into the car, one of the men asked if she knew a certain girl. The victim told him that she did not and turned to get into the car. She testified, "The next thing I know there were guns to my head." One of the men demanded that she give them her pocketbook and "get to the house." She recalled that two of the men had pistols and the other had a sawed off shotgun stuffed down his pants. As she put it, "the big one," later identified as [the petitioner], was the one who took her purse. After obtaining the purse, the men then "pushed [the victim] to go open the door to the house." The victim was frightened and shaking so badly that it was difficult to unlock the door, but once she did, the men pushed her inside.
>
> Once inside the house, the men pushed the victim onto the living room couch and told her "not to move." One of the men said, "Don't let her out," and they then began ransacking her home. As the victim recalled, "They wanted my money; they wanted my jewelry; they wanted anything I had." The men dumped the contents of her pocketbook onto a table, taking $140 cash and her bank card. One of the [d]efendants demanded that she give him her "bank number." Confined to the couch, she complied with his demands. Several minutes later, as one of the [d]efendants was carrying a flat-screen television out the front door, he noticed that the police had arrived. Upon seeing the police, the man shouted, dropped the television, and ran toward the kitchen. As he ran away, the victim escaped out the front door.

Id. at 558-59. "The trial court set aside the guilty verdicts for especially aggravated kidnapping and aggravated burglary, finding that these convictions, in conjunction with the aggravated robbery convictions, violated principles of due process." *Id.* at 557. This court reversed the ruling of the trial court and reinstated those verdicts. *Id.* On appeal, our supreme court remanded the case to this court "for consideration in light of our holding in *State v. Cecil*, 409 S.W.3d 599 (Tenn. 2014), which made our holding in *White* applicable to cases in the appellate process." *Alston*, 465 S.W.3d at 557 (referring to *State v. White*,

362 S.W.3d 559 (Tenn. 2012)). On remand, this court again reinstated the convictions of especially aggravated kidnapping and aggravated burglary and affirmed the aggravated robbery convictions. *Id.* Our supreme court affirmed this court's ruling, concluding that although "the trial court erred by not giving a *White* jury instruction based on the especially aggravated kidnapping and aggravated robbery charges, . . . the error was harmless beyond a reasonable doubt." *Id.* Upon remand, the petitioner received a 22-year sentence. *State v. Kris Theotis Young*, No. E2015-01908-CCA-R3-CD, 2016 WL 5210872, at *1 (Tenn. Crim. App., Knoxville, Sept. 20, 2016).

The petitioner filed a timely pro se petition for post-conviction relief, arguing that the evidence was insufficient to support his conviction of especially aggravated kidnapping, that the trial court erred by failing to properly instruct the jury, and that his trial counsel performed deficiently. After the appointment of counsel, the petitioner filed an amended petition, further fleshing out his claims of deficient performance by trial counsel. The petitioner then retained counsel and filed a second amended petition for post-conviction relief, arguing that his conviction for especially aggravated kidnapping violated principles of double jeopardy, that the evidence was insufficient to sustain his conviction for especially aggravated kidnapping, that the trial court erred in instructing the jury, that the especially aggravated kidnapping statute is unconstitutionally vague, and that trial and appellate counsel performed deficiently.

At the evidentiary hearing,[2] Alexander Brown, trial counsel for co-defendant Joshua Webb, testified that he represented Mr. Webb in the underlying case in the general sessions court and in criminal court but withdrew from representation before trial.

Mr. Brown's testimony from co-defendant Larry Alston's post-conviction evidentiary hearing was exhibited to his testimony. In that testimony, Mr. Brown said that he briefly represented Mr. Webb in the underlying trial case. He said that while the case was in the general sessions court, the State offered Mr. Webb "a six-year plea" agreement and that Mr. Webb "wanted to take that offer." He said that the petitioner and Mr. Alston, however, "were trying to raise the argument that the [victim] was a drug dealer," and they rejected the plea offer. Mr. Brown said that the State would not accept a plea from only Mr. Webb and insisted that all three co-defendants must agree to plead guilty. After the case was transferred to the criminal court, Mr. Brown tried to get the State "to honor that offer" made in the general sessions court, but instead, the State "made another offer" that put Mr. Webb "in the middle of the thing." Mr. Brown attempted to negotiate with the State, pointing out that Mr. Webb "already agreed to take six years" and "was willing to cooperate." He said that he and assistant district attorney Kevin Allen "kept on and kept

[2] Because much of the evidence was overlapping, the post-conviction court heard evidence on both the petitioner's and Mr. Webb's petitions for post-conviction relief in a single, bifurcated hearing on June 10 and November 19, 2021.

on arguing back and forth" about the plea offer and that Mr. Allen determined that "the facts were in his favor, . . . and he wasn't going to let [Mr. Webb] have a better deal." Mr. Brown also said that Mr. Allen would not allow Mr. Webb to have a better deal because Mr. Webb was white and the other two co-defendants were black and because Mr. Allen "wasn't going to let the white guy have a better deal than the black guys, [be]cause he didn't want it to look like he was being a racist." Mr. Brown said that ultimately, "the offers were withdrawn" by the State.

In the present evidentiary hearing, Mr. Brown testified that while the case was in the general sessions court, the State offered Mr. Webb a "very reasonable" plea agreement of approximately "six years to serve," which agreement was contingent on all three co-defendants accepting the offer. Mr. Brown said that the attorneys for the petitioner and Mr. Alston "didn't want to do anything that day, because they didn't feel comfortable that they knew enough about what was going on." Mr. Brown said that the State made a new offer after the case was bound over to the criminal court and that it "was an all or nothing" offer in which all three co-defendants had to plead guilty.

Robert Kurtz testified that he represented the petitioner on appeal. He said that after the petitioner and the two co-defendants were resentenced after the case was remanded by our supreme court, he filed a notice of appeal of the petitioner's final sentence. He said that in that appeal he did not challenge the sufficiency of the evidence or the jury instructions relative to the kidnapping conviction because he understood our supreme court's ruling that the trial court's failure to give a *White* instruction to be harmless error to have addressed both of those issues and rendered them "previously determined." He also said that he believed that this court had addressed the double jeopardy issue.

During cross-examination, Mr. Kurtz said that the petitioner and the two co-defendants were tried together and presented "a joint defense." He said that the petitioner's trial counsel, Vanessa Lemons, joined the motions made by the co-defendants' attorneys, including a motion seeking a jury instruction similar to that now required by *White*, which motion the trial court denied.

On redirect examination, Mr. Kurtz opined that Ms. Lemons did not represent the petitioner well "at all," stating, "I don't think she communicated with him. I don't think she advised him properly on the discovery and what this trial was going to be like. I don't think she spent the time that was necessary to spend with him." He also said that Ms. Lemons should have pursued plea negotiations more aggressively.

The petitioner testified that Ms. Lemons failed to inform him of any plea offer. He said that he did not learn that the State had made an offer while the case was in the criminal court until his first sentencing hearing. He said that he did not know that an

offer had been made while the case was in the general sessions court until his post-conviction counsel told him about it. He said that he "[o]f course" would have accepted a plea offer, explaining, "[W]e got caught at the scene. It wasn't a question about if we had did something wrong. The only question was, I guess, how bad it was and how bad it wasn't."

The petitioner said that Ms. Lemons was unavailable to him, noting, "I couldn't contact her at all. I only met with her one time, and that was when the discovery package came." He said that he and his mother "would try to reach out" to Ms. Lemons but that "[s]he never answered my calls. . . . It always seemed like she was too busy or occupied with something else." The petitioner said that he also never met with Mr. Kurtz and that Mr. Kurtz did not discuss with him the issues to be raised on appeal.

Michael Whalen testified that he took over the representation of Mr. Webb from Mr. Brown sometime after arraignment but "relatively early in the process." He said that by the time that he became involved in the case, "the plea offers had been rejected and we were going to trial." He understood that the plea offer had been a group offer that "some people knew about . . . and some people didn't." Mr. Whalen talked with the prosecutors and learned that "those offers are off the table. We don't have an offer." He said that he did not believe that the issue with the plea offer was "a valid issue to raise on appeal, because the answer is the State doesn't have to make you an offer at all."

Mr. Whalen said that he knew that the *White* case was being considered by the appellate courts at the time of the trial in this case and that he moved for a jury instruction consistent with what was being argued for in the *White* case but that the trial court denied the motion. As to the sufficiency of the evidence of the kidnapping conviction, Mr. Whalen said that it "was not really something that I thought was a valid issue given the facts in the case." Mr. Whalen testified that it never "crossed my mind" to challenge the constitutionality of the kidnapping statutes in this case.

During cross-examination, Mr. Whalen said that he and the co-defendants' trial attorneys did not discuss who was going to take the lead in crafting a defense strategy but that "I tend to be a bully, so I may have just taken it." His defense strategy was to argue "not that [they] were innocent of all of the charges, but that the State had overcharged." He said that he did not pursue a sufficiency of the evidence argument on appeal after remand because "given the way the Supreme Court ruled and the language in that ruling, I did not feel there was any room to argue sufficiency of the evidence." He said that in litigating whether the kidnapping was incidental to the robbery, the parties argued that the kidnapping statute was unconstitutionally vague.

Joshua Webb, a co-defendant in the underlying case, testified that he did not learn of any plea offer until Mr. Whalen joined the case at which point he learned that the plea offer was "off the table and we don't have a choice now." He said that had he received an offer of six years he "[a]bsolutely" would have accepted it. He also said that he would have accepted an offer of 12 years because "[w]e got caught doing something wrong. And . . . we really didn't have an argument against it."

The parties stipulated to the admission of testimony from Sherif Guindi, co-defendant Alston's trial counsel, given at Mr. Alston's post-conviction evidentiary hearing.[3] In that testimony, Mr. Guindi said that he was appointed to represent Mr. Alston in criminal court. He said that he "understood that in the general sessions court there was an offer made . . . to all three [co-d]efendants" and that "everyone takes it or no one takes it." He believed that each co-defendant had been offered an eight-year sentence in the plea offer. Mr. Guindi said, however, "when I got on the case there was no offer out there." He said that he asked the State to "please put some offers back on the table" and that Mr. Allen "did eventually speak to [the victim]" and determined that the three co-defendants bore "different levels of culpability" with Mr. Alston being "the least culpable." At that point, Mr. Allen "made an offer of eight years" to Mr. Alston, 10 years to Mr. Webb, and 12 years to the petitioner, with the offer still being "an all or nothing deal." Mr. Guindi could not remember if he "had a chance to tell [Mr. Alston] about it before it was off the table" because the State quickly rescinded the offer. Mr. Guindi said that Mr. Brown and Mr. Allen had a heated conversation about the plea offer and the culpability of the three co-defendant's and that after that conversation, the State immediately rescinded the offer. Mr. Guindi said that Mr. Alston would have accepted a plea offer.

Kevin Allen, the prosecutor in the underlying trial, testified that the State did not make any plea offers and the parties did not engage in plea negotiations while the case was in the general sessions court. Mr. Allen said that the State's case was strong and that he "never had any real apprehension about going forward in this case" until February 11, 2011, when the victim "was expressing some pretty serious anxiety over testifying." "We discussed the possibility of entering into a plea agreement at that time for the very first time." He discussed with the victim "the culpability of the three co[-]defendants in terms of how each co[-]defendant behaved during the robbery and . . . if I made an offer, how I would structure that offer." He said that the victim "indicated . . . that she felt like [the petitioner] was the leader of the offense" and "was the most culpable. She felt that Mr. Alston . . . didn't seem to be an active participant, but nonetheless was armed and nonetheless took items. And she felt like Mr. Webb was somewhere in the middle." Based on that information, Mr. Allen structured a plea offer in which "we would offer Mr. Alston the lowest, or eight years," "Mr. Webb would be offered 10 years," and the petitioner

[3] Mr. Guindi was incorecctly identified as Saree Gindy in the transcript of Mr. Alston's post-conviction hearing.

"would be offered 12 years." Mr. Allen said that the plea offer was structured so that "all three co[-]defendants must plea, an all-or-none plea so that it would avoid [the victim's] having to take the stand if the defendants accepted it." Mr. Allen said that his supervisor, the Deputy District Attorney, "was not happy with the possibility that we would resolve a case without some factual reason for resolving it, that the anxiety of the victim shouldn't be a factor in why we would reduce an especially aggravated kidnapping to agg[ravated] robbery."

Mr. Allen said that he conveyed the offer to Mr. Alston's and Mr. Webb's trial attorneys on February 15, 2011. Mr. Brown "had indicated that [Mr. Webb] was not willing to plea to anything that was in excess of what Mr. Alston received because he felt that" Mr. Webb was no more culpable than Mr. Alston. Mr. Allen said, "Mr. Brown was never able to accept the fact that the victim had informed me the culpability levels were the way they were." Mr. Allen said that he considered Mr. Brown's attempts at negotiation to be a counteroffer and consequently, a rejection of the State's offer. "[A]fter that conversation, I then withdrew the offer." He notified the other co-defendants' attorneys that he had withdrawn the offer. He reiterated that he made the offer on February 11 and withdrew it on February 15, 2011.

During cross-examination, Mr. Allen said that he was "testifying from my file." He said that he knew he did not make an offer while the case was in the general sessions court because the State did not need a plea agreement, noting, "The defendants were caught at the scene. There was an elderly victim. She was compelling. . . . [T]he evidence was overwhelming in this case. There was absolutely no reason for me to make any offer." He also said that the case was in general sessions court for only 11 days, which was not enough time to formulate an offer. Moreover, Mr. Allen said that it was his practice to record every offer made in general sessions court and that his file from this case indicated that no such offer was made. He said that a defendant's culpability "would be the primary factor that I'd look at" when considering a plea offer.

Mr. Allen acknowledged that Mr. Brown became angry with him while discussing the plea offer "because he felt like [Mr. Webb] should get equal to . . . what Mr. Alston got." He also said that Mr. Brown "wanted me to try Mr. Alston and Mr. Young and have Mr. Webb testify for me, [but] I didn't need anybody to testify for me. They were all caught in the house." Mr. Allen said that even if all three trial attorneys came to him wanting to take the plea offer, he would not have agreed to it, saying, "I couldn't have done it at that point" because his supervisor would not have allowed it.

In its written order denying post-conviction relief, the post-conviction court found that the State made a plea offer only after the case was transferred to the criminal court and not while the case was in the general sessions court. The post-conviction court

found that although the record did not clearly establish whether Ms. Lemons conveyed the State's "all or nothing" plea offer to the petitioner, "[w]hat is abundantly clear . . . is that the State withdrew the offer prior to acceptance by all three co-defendants." As to the allegation of counsel's failure to challenge the constitutionality of the kidnapping statute, the post-conviction court found that the statute "has already survived multiple challenges to its constitutionality." Finally, the post-conviction court concluded that the petitioner's claims relating to double jeopardy, jury instructions, and sufficiency of the evidence had been previously determined.

In this timely appeal,[4] the petitioner reasserts his arguments that the trial court erred in its instructions to the jury, that the evidence was insufficient to support his conviction of especially aggravated kidnapping, that the kidnapping statute is unconstitutionally vague, and that his especially aggravated kidnapping conviction violated the principles of double jeopardy. Relatedly, he argues that trial and appellate counsel performed deficiently by failing to challenge these issues below. The petitioner also argues that trial counsel performed deficiently by failing to convey a plea offer.

The State argues that the petitioner's claims of error in the jury instructions, unconstitutionality of the kidnapping statutes, and a double jeopardy violation have been waived or previously determined and that trial and appellate counsel did not perform deficiently by failing to raise those issues below. Additionally, the State argues that a claim of sufficiency of the evidence is not cognizable in a post-conviction proceeding and, alternatively, that the issue was previously determined or waived. Finally, the State argues that trial counsel did not perform deficiently by failing to convey a plea offer because the State withdrew the offer.

We view the petitioner's claim with a few well-settled principles in mind. Post-conviction relief is available only "when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. A post-conviction petitioner bears

[4] We note that the petitioner's brief crosses the line from zealous advocacy to disrespect and disparagement of the post-conviction court. For example, the petitioner's brief accuses the post-conviction judge of "failing to rule in any meaningful way" on one of his claims, "abus[ing]" case law because the judge "did not incorporate any arguments" from those cases into the order, and "not even read[ing]" certain cited cases because the petitioner's post-conviction counsel disagreed with the judge's reading of those cases. Most inappropriate among the several jabs at the post-conviction judge, the petitioner's counsel argues that because this court had remanded an unrelated case to this post-conviction judge for additional findings of fact, we should find that this judge has "an ongoing problem of refusing to rule on post-conviction claims." A remand of a case by this court to a trial or post-conviction court is not an indictment of a particular judge's way of doing his or her job but rather a determination of what the law requires in any given case. We admonish the petitioner's counsel to avoid making disparaging comments about a judge in his future pleadings to this court. *See* Tenn. Ct. Crim. App. R. 17.

the burden of proving his or her factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f). On appeal, the appellate court accords to the post-conviction court's findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). By contrast, the post-conviction court's conclusions of law receive no deference or presumption of correctness on appeal. *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).

Before a petitioner will be granted post-conviction relief based upon a claim of ineffective assistance of counsel, the record must affirmatively establish, via facts clearly and convincingly established by the petitioner, that "the advice given, or the services rendered by the attorney, are [not] within the range of competence demanded of attorneys in criminal cases," *see Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975), and that counsel's deficient performance "actually had an adverse effect on the defense," *Strickland v. Washington*, 466 U.S. 668, 693 (1984). In other words, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Should the petitioner fail to establish either deficient performance or prejudice, he is not entitled to relief. *Id.* at 697; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Indeed, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697.

When considering a claim of ineffective assistance of counsel, a reviewing court "begins with the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all significant decisions," *Kendrick v. State*, 454 S.W.3d 450, 458 (Tenn. 2015) (citation omitted), and "[t]he petitioner bears the burden of overcoming this presumption," *id.* (citations omitted). We will not grant the petitioner the benefit of hindsight, second-guess a reasonably based trial strategy, or provide relief on the basis of 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).

The petitioner has failed to establish that he is entitled to post-conviction relief. The petitioner argues that his claims of error in the jury instructions, sufficiency of the evidence, double jeopardy, and the constitutionality of the kidnapping statutes are not waived for the purpose of this post-conviction proceeding because his trial and appellate counsel failed to raise them. He contends that the issues are "unwaived" because counsel's

"failure to assert them" in a prior proceeding "was due to a violation of the Constitution," namely, deficient performance by counsel. We respectfully disagree.

It is well-settled that "[a] post-conviction petition is not a vehicle to review errors of law as a substitute for direct appeal." *Danny Santarone v. State*, No. E2018-01312-CCA-R3-PC, 2019 WL 6487419, at *8 (Tenn. Crim. App., Knoxville, Dec. 2, 2019) (quoting *French v. State*, 824 S.W.2d 161, 163 (Tenn. 1992)), *perm. app. denied* (Tenn. Apr. 16, 2020). Indeed, we have specifically recognized that "[o]ur procedure does not permit one the practice of deliberately withholding the timely assertion of his Constitutional rights upon his trial, to save them back for post-conviction attack in the event of a conviction." *Brown v. State*, 489 S.W.2d 268, 270 (Tenn. Crim. App. 1972). As such, because none of the petitioner's stand-alone claims were raised on direct appeal, these claims are waived. T.CA. § 40-30-106(g).

The petitioner's argument that his stand-alone claims are "unwaived" because he received the ineffective assistance of counsel with respect to these issues reverses the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *See e.g.*, *State v. Burns* 6 S.W.3d 453, 462 (Tenn. 1999) (citing *Strickland*, 466 U.S. at 689. In essence, he would have this court first presume ineffective assistance of counsel so that we may then reach the substantive merits of his stand-alone claims. This argument is without merit. Although we may consider "these alleged errors as the relate to the petitioner's claim of ineffective assistance of counsel," *Dennis Allen Rayfield v. State*, No. M2020-00546-CCA-R3-PC, 2021 WL 4205714, at *6 (Tenn. Crim. App., Nashville, Sept. 16, 2021), *no perm. app. filed*, the legal analysis is conducted through the lens of the Sixth Amendment. Accordingly, the petitioner is limited to our review of these issues only as they relate to the claim of ineffective assistance of counsel.

In our view, Mr. Kurtz did not perform deficiently by failing to argue on appeal that the evidence was insufficient to support his conviction of especially aggravated kidnapping or that his convictions of aggravated robbery and especially aggravated kidnapping violated principles of double jeopardy. Mr. Kurtz testified that he did not raise these issues in the petitioner's second appeal because he understood that they had been previously determined and did not deem them to be valid issues at that point. Generally, the issues to be raised on appeal are left to the discretion of appellate counsel. *Carpenter v. State*, 126 S.W.3d 879, 887 (Tenn. 2004). Here, Mr. Kurtz's decision to omit the issues in the second appeal is subject to deference, *id.* ("[A]ppellate counsel's professional judgment with regard to which issues will best serve the appellant on appeal should be given considerable deference."), and we will not second-guess that decision.

Moreover, we note that our supreme court had already determined that the

evidence was sufficient as to the especially aggravated kidnapping conviction. In affirming that the omission of the *White* jury instruction was harmless beyond a reasonable doubt, our supreme court determined that the evidence at trial was not subject to a different interpretation other than that the aggravated robbery of the victim's purse was complete before the actions giving rise to the especially aggravated kidnapping. *See State v. Cecil*, 409 S.W.3d 599, 610 (Tenn. 2013) ("[T]he touchstone of this inquiry" as to whether a failure to give a *White* instruction constitutes harmless error "is whether a rational trier of fact could interpret the proof at trial in different ways.").

The petitioner also asserts that the jury was wrongly instructed on the elements of especially aggravated kidnapping, arguing that *White* "modified the definition of kidnapping to include a time and distance component" and that the evidence did not sufficiently support his kidnapping conviction under his interpretation of *White*. Contrary to the petitioner's assertion, however, our supreme court in *White* explicitly said that the opinion "should not be construed as creating a new standard for kidnapping" and that it was "merely providing definition for the element of the offense requiring that the removal or confinement constitute a substantial interference with the victim's liberty." *White*, 362 S.W.3d at 578. Additionally, the *White* court stated that although the Model Penal Code required a time or distance component, "none of our kidnapping provisions require proof of a specific distance or period of time." *Id.* at 576. Consequently, a challenge to the sufficiency of the evidence by Mr. Kurtz would have failed, and the petitioner was not prejudiced by the omission of the issue on appeal.

Next, the petitioner asserts that his trial and appellate counsel performed deficiently by failing to argue that the kidnapping statutes are unconstitutionally vague. We disagree with the petitioner's assertion that the terms "substantially" and "liberty" as used in the false imprisonment statute and incorporated into the especially aggravated kidnapping statute are vague. *See* T.C.A. § 39-13-302(a), -305(a). It is clear from the plain language of the false imprisonment statute that the legislature intended the term "liberty" to refer to a person's physical freedom of movement as indicated by the prior phrase "removes or confines another." Moreover, our supreme court has interpreted the term "substantially" as used in this context to have the ordinary meaning of "considerable in quantity" or "significantly large." *White*, 362 S.W.3d at 576 (quoting Webster's Ninth New Collegiate Dictionary 1176 (1991)). Under this interpretation of the term, a "trivial restraint" would not satisfy the statute. *See id.* Because these terms are not vague on their face or as applied to the petitioner, counsel did not perform deficiently by failing to challenge the constitutionality of the especially aggravated kidnapping statute.

Finally, as to the petitioner's claim that Ms. Lemons failed to convey a plea offer while the case was in the general sessions court, the evidence supports the trial court's findings that the State made no offer in the general sessions court. Although other

witnesses testified that an offer was extended at that time, Mr. Allen testified that he did not extend such an offer, and the court as the finder of fact was free to accredit Mr. Allen's testimony over that of the other witnesses. Moreover, the record is devoid of evidence of whether Ms. Lemons represented the petitioner in the general sessions court; the only order in the record appointing her as counsel is from the Knox County Criminal Court, and the petitioner presented no evidence that Ms. Lemons' representation began in the general sessions court. To the extent that the petitioner alleges Ms. Lemons failed to convey the offer made in criminal court, the evidence showed that the State rescinded the offer and, consequently, the petitioner was not prejudiced by Ms. Lemons' conduct. *See Joshua E. Webb v. State*, No. E2022-00243-CCA-R3-PC, 2023 WL 1420592, at *5 (Tenn. Crim. App., Knoxville, Jan. 6, 2023) ("Because the State actually withdrew the offer, the petitioner cannot establish prejudice because he cannot establish that the State would not have withdrawn the offer."). This issue lacks merit.

Accordingly, the judgment of the post-conviction court is affirmed.

_____

JAMES CURWOOD WITT, JR., JUDGE