

THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs March 7, 2023

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**ALVIN STEWART v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Shelby County  
No. 13-01980 John W. Campbell, Sr., Judge**

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**No. W2022-00521-CCA-R3-PC**

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The Petitioner, Alvin Stewart, appeals from the Shelby County Criminal Court’s denial of post-conviction relief from his convictions for aggravated rape, aggravated assault, and domestic assault and his effective twenty-year sentence. On appeal, the Petitioner contends that the post-conviction court erred by denying relief on his ineffective assistance of counsel claim. We affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and CAMILLE R. MCMULLEN, JJ., joined.

Roberto Garcia, Jr., (on appeal) and Bailey Ehrenpreis (at post-conviction hearing), Memphis, Tennessee, for the appellant, Alvin Stewart.

Jonathan Skrmetti, Attorney General and Reporter; Brent C. Cherry, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The Petitioner’s convictions relate to a 2013 domestic incident in which he sexually assaulted his then-fiancée. The facts of the case were summarized by this court in the Petitioner’s previous appeal:

**State’s Proof**

The victim testified that she first met the defendant in March 2010 when they both worked as truck drivers at the same company and started

dating. She said that initially their relationship was “good” but subsequently became “chaotic,” with the couple often arguing “about the way [the defendant] wanted [the victim] to be quiet and let him finish what he had to say and then [the victim] was allowed to speak.” The defendant also argued with her when she received phone calls from her brother because he believed she was talking to a boyfriend. The victim said the defendant did not like her dog and was jealous of the dog, telling the victim that she loved her dog more than him. They broke off their relationship in April 2011 but got back together in February or March 2012 and became engaged.

The victim said that in February 2013 she and the defendant were living together but that she had started having doubts as to whether she wanted to marry him. They were both still employed as truck drivers but for different companies. They made plans for both of them to be home the weekend of February 9-10, 2013, so they could spend time together. The victim said she drove for eleven hours on February 9 and arrived home between 10:30 and 11:00 p.m. The defendant was still up when she got home, and she sat down on the couch and dozed off because she was exhausted. She later woke up, went upstairs to their bedroom, put on her nightgown, and lay across the bed. The defendant then came upstairs and wanted to be intimate, but she told him no because she was tired. The defendant, who was not happy, went downstairs, came back upstairs, flipped the light on, went through the closet, and kept repeating this process as the victim was trying to sleep.

The victim said that she heard her car starting, ran downstairs, opened the door, and asked the defendant where he was going with her car. The defendant came back inside the residence, and they started arguing. The defendant’s “whole expression in his face changed,” causing the victim to back away from him. The defendant then grabbed the victim by her throat, hit her, and threw her into the wall, telling her to “shut the f\*\*\* up.” The victim fell down, and the defendant got on top of her and started hitting her in the face, further loosening her already loose tooth. The defendant told her he would make her be quiet and then choked her until she lost consciousness, causing her to urinate on herself. When the victim regained consciousness, she crawled up the stairs to the bedroom to get her phone but could not get it to work. The defendant then came upstairs as her dog was barking, and she begged the defendant not to hurt her any more. The defendant told her to get her “mother\*\*\*\*\* ass over here,” and when he touched her, she passed out again. When she awakened, she was on the bed and her dog was barking and “going after” the defendant. The defendant then slammed her dog into a wall,

and the dog began yelping. The victim said she knew her dog was hurt, but she could not afford to take her to a veterinarian to be examined.

The defendant then told the victim he wanted to talk about what had happened, and they went downstairs to the living room. The defendant asked the victim if she wanted to go to the hospital, and she replied, “[W]ell, if I go to the hospital and they see me in my condition, do you think I’m going to lie to them?” The defendant then apologized for his actions and told the victim she “made him do it because all [she] had to learn was listen and this wouldn’t have happened if [she] had listened to what he had to say and . . . learned how to be quiet and shut [her] mouth.” The victim said she and the defendant talked for hours, and she told the defendant she no longer wanted to marry him. The defendant then told the victim she was “[his] woman,” stood up, and started removing his clothes. The victim ran to the kitchen trying to get away from the defendant because “he wanted to have sex.” The victim told the defendant, “[N]o, I’m not doing this. I said no, you’re not going to do this to me. No.” The defendant kept coming after her, and they tussled back onto the couch. The victim said as she was fighting with the defendant, he bit her arm and ripped off her underwear. The defendant tried to penetrate her vagina with his penis but could not. The victim said she repeatedly begged the defendant not to rape her. The defendant then forced her upstairs, pushed her down on the bed, and told her, “[Y]ou better not mother\*\*\*\*\* move like that.” After the defendant unsuccessfully tried to penetrate her vagina again, he lubricated himself, got on top of the victim, and held her by her throat. He then flipped her over and penetrated her vagina as she was lying on her stomach, ejaculating inside her.

The victim said she was “numb” after the assault, and the next thing she remembered was talking to the defendant downstairs on the couch. The victim told the defendant if he stayed at the residence, she was going to call the police. The defendant then gathered his belongings and left. The victim called a friend and told her what had happened. Her friend told her to call the police, but she was afraid to do so and “wasn’t thinking straight.” The victim called another friend and told him what had happened, and he called the police on her behalf.

The victim said that when the police arrived, she told them what had happened, and a female officer subsequently arrived to help “calm [her] down.” The victim then went to the police station, where she gave a statement, and to the rape crisis center, where she was examined. The victim acknowledged that initially she did not want to prosecute the defendant because she “didn’t want to ruin his career” and believed that the assault was

her fault. However, after receiving counseling, the victim realized it was not her fault. The victim said that she was distraught, confused, and scared when she gave her statement to the police and that she “just signed the paper” without reading it. She acknowledged that she told the police she did not want the defendant to go to jail but receive counseling for his anger issues instead. The victim said she sustained bruising on her face, neck, shoulder, back, and buttocks and a bite mark on her arm and identified photographs depicting her injuries.

Officer Kcbena Cash of the Memphis Police Department testified that he responded to a disturbance call at 9:22 a.m. on February 10, 2013, at the defendant and victim’s residence. The victim, who was “obviously shaken up” and crying, allowed Officer Cash inside the residence where he noticed a wall by the staircase that was “kind of caved in and it was pretty fresh.” He said that he knew the wall was freshly caved in because of the paint chippings at the bottom. As Officer Cash started up the stairs to check to see if anyone else was present, the victim told him to watch his step because she had urinated on the floor in that area. Upstairs, Officer Cash observed that the bedroom was in disarray as if a struggle had occurred. The victim told him she had been raped, and Officer Cash called for a female officer to come to the scene.

On cross-examination, Officer Cash said that the victim reported to him that she was awakened at 3:00 a.m. and that the defendant forced her arm behind her back, forced her to the couch in the downstairs living room, tore off her panties, punched her on the cheek until she cooperated with him, had sexual intercourse with her while holding her down on the couch, forced her off the couch and threw her into a wall by the stairs, choked her while she was lying on the floor, which caused her to urinate on herself, forced her up the stairs to the bedroom and threw her across the bed, choked her again as he had sexual intercourse with her a second time, threatened to kill her if she told anyone what had happened, removed her torn panties from the living room floor, and then left the residence.

Officer David Galloway of the Memphis Police Department testified that he responded to the scene of the crime at 10:45 a.m. on February 10, 2013. He took photographs of the scene and the victim’s injuries and collected into evidence the victim’s nightgown and bedding.

Memphis Police Officer Angela Collins testified that she was called to the crime scene to transport the female victim to the rape crisis center. En route to the rape crisis center, the “hysterical” victim told Officer Collins that

the defendant had awakened her earlier that morning and wanted to have sex. When the victim told him “no,” the defendant choked her, forced her against the couch, ripped off her underwear, and forced her to open her legs. The victim also said that the defendant had hit her more than once in the face, forced her upstairs, and threw her dog against a wall.

Tammy Keough, a nurse examiner at the Memphis Sexual Assault Resource Center, testified that she examined the victim on February 10, 2013. The victim was very upset, crying, and very tense and reported that her fiancé had beaten and sexually assaulted her. A rape kit was collected and sent to the Tennessee Bureau of Investigation (“TBI”) for testing. Nurse Keough’s examination of the victim revealed contusions to her right and left jaw, abrasions on the back of her neck and shoulder, multiple abrasions and contusions on the front of her neck, a laceration to her left earlobe, bruising on her lips, bruising and abrasions on both arms, a round area consistent with a bite mark on her right forearm, purple bruising and a laceration on her left buttock, bruising on her right buttock and both legs, swelling and bruising on her left ankle, and a loose tooth. She said the victim’s injuries appeared to be “very new” and estimated they were inflicted within twenty-four hours of her examination. While the victim did not have any vaginal injuries, Nurse Keough noted that less than ten percent of the victims examined at the sexual assault center had such injuries.

Robert Durham, a criminal investigator with the Shelby County District Attorney General’s Office, testified that he collected a DNA sample from the defendant, which was sent to the TBI.

TBI Special Agent Donna Nelson testified that she was a crime laboratory regional supervisor and that the TBI received the victim’s sexual assault kit and the defendant’s DNA sample for testing. The vaginal swabs collected from the victim revealed the presence of sperm, and the DNA profile obtained after testing was consistent with the mixture of at least two individuals. The major contributor profile matched the defendant, and the minor contributor profile was consistent with the victim. Special Agent Nelson noted that the probability of the profile belonging to anyone other than the defendant “exceeded the world’s population.”

### **Defendant’s Proof**

The victim, recalled by the defense, testified that she gave a handwritten and a typed statement on February 11, 2013, which were admitted as exhibits.

The defendant testified that he did not rape or assault the victim and denied throwing her dog into a wall. He said that the victim called him on February 9, 2013, and told him she had fallen out of her truck. He arrived home from his truck driving job later that evening, and the victim subsequently arrived. The victim showed him the injuries from her fall, including bruising on her buttock, hip, and arm and a scratch on her back. The defendant recalled another incident where the victim had called him, saying she had knocked out a tooth while operating her truck. Later that evening, around 7:30-8:00 p.m., he left to go pick up some food for their dinner and returned home about an hour later. After they ate dinner, they went upstairs to bed and had sex twice. The defendant said he then went to sleep and woke up between 1:00 and 2:00 a.m. He went downstairs to check on his clothes in the dryer and heard the victim's phone receiving text messages in rapid succession. He began reading the text messages and discovered "a booty call" from a man named Summerall, as well as nude photographs of the victim. He said there were several text messages between the victim and Summerall, professing their love for each other. The defendant said he felt "[h]urt, dumbfounded, betrayed" by the text messages.

The defendant said he then went upstairs and woke up the victim to confront her about the text messages. The victim denied knowing Summerall, and when the defendant showed her the text messages, the victim "went ballistic," hitting, punching, kicking, and chasing the defendant around the room trying to get her phone away from him. He denied seeing the victim's dog or hearing the dog bark. He left the bedroom to go downstairs, with the victim "right on [his] he[e]ls." He told the victim, "[F]\*\*\* your phone, b\*\*\*," and the victim pushed him, causing his head, shoulder, and hand to hit the wall by the stairs. The defendant said the fall caused a lump on his head which turned into a mole. The defendant got up and told the victim if she put her hands on him again, he would "knock the sh\*\*\*" out of her. According to the defendant, the victim provoked him and told him to hit her, but he denied doing so. As he was walking toward the door to go outside to "cool off," the victim spat on him twice. The defendant turned around and "flinched at" the victim. The victim ran to the side of the couch, and realizing he only had on his underwear, the defendant went upstairs and got dressed. The defendant said he then went outside and sat in his truck to clear his head. He put some alcohol on the lump on his head. He decided that his relationship with the victim was over and went back inside the house to gather his belongings. The victim was sitting in the floor, crying, and started apologizing to him, but he told her she had cheated on him. The victim followed him through the house as he packed his clothing and told

him he was not going to leave her. He finished packing his belongings, gave the victim her key back, and asked for the engagement ring back. He said he had to “wrestle” the ring off the victim’s finger but denied hitting or choking her. The defendant admitted he had received training in fighting and had been an amateur boxer.

*State v. Alvin Stewart*, No. W2014-01517-CCA-R3-CD, 2015 WL 5683095, at \*1-4 (Tenn. Crim. App. Sept. 25, 2015), *perm. app. denied* (Tenn. Feb. 18, 2016).

On March 3, 2016, the Petitioner filed a pro se petition for post-conviction relief, alleging, in relevant part, that his conviction was based upon evidence obtained pursuant to an unlawful arrest and that he received the ineffective assistance of counsel. On March 9, 2016, counsel was appointed to represent the Petitioner. On February 14, 2017, the Petitioner filed a pro se motion for the dismissal of counsel. Counsel was permitted to withdraw due to a conflict of interests, and subsequent counsel was appointed on October 30, 2017. However, on March 7, 2018, the Petitioner filed a pro se motion seeking the dismissal of subsequent counsel, complaining that counsel had failed to communicate and had not provided sufficient legal representation. On the same day, the Petitioner filed a pro se amended petition for relief, alleging additional grounds of the ineffective assistance of counsel. On October 31, 2018, the Petitioner filed a second pro se motion for the dismissal of subsequent counsel, reiterating his previous grievances. On January 25, 2019, subsequent counsel filed an amended petition for relief, incorporating the allegations from the pro se petition filed on March 7, 2016, and alleging ineffective assistance of trial counsel because counsel failed to present Kion Summerall as a defense witness and to conduct adequate cross-examination of the victim and the responding police officer.

On July 17, 2017, during the pendency of the post-conviction proceedings, the Petitioner filed a complaint against the post-conviction judge with the Tennessee Board of Judicial Conduct on the basis that the judge had not addressed his motions seeking the removal of subsequent counsel. The post-conviction hearing was scheduled on July 25, 2017, but before the hearing could begin, the Petitioner filed a pro se motion requesting recusal of the judge. The post-conviction court denied the motion on July 31, 2019, finding that the delay in the proceedings was primarily the result of the Petitioner’s inability to “cooperate with counsel.” The Petitioner appealed, and this court dismissed the appeal because the Petitioner was represented by counsel. *See Alvin Stewart v. State*, No. W2019-01540-CCA-T10B-CO (Tenn. Crim. App. Sept. 5, 2019) (order) (citing *State v. Burkhardt*, 541 S.W.2d 365, 371 (Tenn. 1976); *State v. Cole*, 629 S.W.2d 915, 917-18 (Tenn. Crim. App. 1981)), *perm. app. dismissed* (Tenn. Sept. 27, 2019). On April 27, 2021, subsequent counsel was permitted to withdraw, and post-conviction counsel was appointed.

The post-conviction hearing was held on November 4, 2021, and on March 31, 2022. The Petitioner testified that trial counsel seldom communicated with him before the

trial, that they met three times before the trial, and that the meetings lasted forty-five minutes to one hour each, which the Petitioner thought was insufficient. He described his relationship with counsel as confrontational, argumentative, antagonistic, and toxic. He said that he “needed her to pursue certain issues and she just wasn’t concerned[.]”

The Petitioner testified that trial counsel obtained a portion of the discovery materials but that documents related to his extradition, “waivers,” and “statements people made” were not included. He said counsel did not obtain the missing documents. He said counsel did not review the discovery with him. He said that counsel discussed generally his exposure if convicted at a trial and that counsel negotiated a plea agreement, which he thought was ten to fifteen years. He said he told counsel that he would not plead guilty to any charge because he did not do anything wrong.

The Petitioner testified that he and trial counsel did not discuss possible defenses and that, to his knowledge, counsel did not interview any potential defense witnesses. He said that counsel prepared the case for trial based upon the materials provided by the State and that counsel did not hire an investigator. He said that counsel did not want to challenge his extradition and what he called “a false affidavit.” He said that he did not think counsel cared about his welfare, that counsel said she was going to do what she wanted, and that she did not care about his “issues.”

The Petitioner testified that the affidavit of complaint was used to obtain the arrest warrant, which he said was “defective” because it contained a “reckless deliberate false misrepresentation of material facts.” He said that he told trial counsel about his concerns but that counsel and counsel’s supervisor were not concerned. He said that he and counsel never discussed trial strategy before the trial began, although he told counsel how he wanted the trial to be handled. The Petitioner said counsel dismissed his instructions.

The Petitioner testified that during the trial, he attempted to speak with trial counsel about an improper chain of custody related to Robert Durham and that counsel “hushed” him. The Petitioner recalled that Mr. Durham obtained a DNA sample from him a few months after his DNA was first obtained at the jail. The Petitioner said counsel did not explain to him that Mr. Durham was a State’s witness to establish the chain of custody of the DNA sample. The Petitioner explained that TBI Special Agent Donna Nelson testified at the trial that Memphis Police Officer Markita Gardner submitted the sample to Agent Nelson’s office, which troubled the Petitioner. He said he wanted counsel to challenge Mr. Durham’s testimony because it was inconsistent with Agent Nelson’s testimony. The Petitioner said that counsel did not do anything he wanted done in his case and that counsel lacked professionalism. The Petitioner said his family members attempted to contact counsel.

The Petitioner testified that he wanted trial counsel to call defense witnesses at the trial. The Petitioner said that he wanted counsel to present Kion Summerall, who placed the 9-1-1 call. The Petitioner said that he and counsel “had a real confrontation about it” because he did not understand why counsel did not want to call Mr. Summerall as a witness. The Petitioner said that if Mr. Summerall was important enough to call 9-1-1, Mr. Summerall was important enough to testify at the trial. The Petitioner stated that he likewise wanted counsel to present Detective Anderson because the Petitioner alleged that Detective Anderson had “falsified so much information” in the affidavit of complaint. The Petitioner also wanted counsel to present the neighbors who lived at the complex where the offenses occurred. The Petitioner said that the neighbors knew him and “would have heard anything that was going on.” He said that counsel did not investigate these potential witnesses and did not subpoena any defense witnesses.

The Petitioner testified that Mr. Summerall called 9-1-1 and accused the Petitioner of “this heinous crime.” The Petitioner said that Mr. Summerall and the victim had exchanged text messages and that Mr. Summerall sent the victim sexually explicit photographs. The Petitioner said he saw the messages and photographs. The Petitioner said that he told trial counsel multiple times to call Mr. Summerall as a defense witness and that counsel did not subpoena him. The Petitioner said that counsel did not explain anything counsel did but that counsel said “specifically she didn’t care for [his] concerns; she didn’t care for [his] issues.” He said that counsel did not subpoena the victim’s and Mr. Summerall’s cell phone records in order to establish their relationship and to show the photographs the Petitioner saw on the victim’s phone.

The Petitioner testified that he still did not understand how he was extradited from Illinois to Tennessee without waiving his rights and that he raised his concerns with trial counsel. The Petitioner said counsel never told him the reason he was extradited.

The Petitioner testified that after the trial, he retained appellate counsel for the sentencing hearing, the motion for a new trial hearing, and the appeal. The Petitioner said that he spoke to counsel briefly and that they met at the courthouse once to discuss the motion for a new trial. The Petitioner said that he corresponded with counsel through letters, stating his desire to raise appellate issues regarding his concerns with the affidavit of complaint, the chain of custody, and his extradition. The Petitioner said counsel never responded to his letters and did not provide him with a copy of the appellate brief. The Petitioner said he told counsel that Mr. Durham was the person to “submit this chain of custody to TBI” and that Agent Nelson testified at the trial that Mr. Durham “wasn’t the one who emphatically submitted it.” The Petitioner did not know why counsel did not raise issues related to the chain of custody and the affidavit of complaint. The Petitioner did not “approve of anything” counsel wrote in the brief.

On cross-examination, the Petitioner testified that Pennsylvania released him from custody and that he was not extradited from Pennsylvania. After reviewing a copy of the waiver of extradition from Bingham County, Pennsylvania, he agreed that it reflected his signature but stated that he had never seen the document. He stated that Pennsylvania wanted Tennessee to pay the costs for extradition, that Tennessee did not pay the costs, and that Pennsylvania released him from custody. He said that he was transported to Tennessee from Illinois by “a CCA van officers or whoever.” The Petitioner thought that his extradition was illegal and that he had been “kidnapped.”

The Petitioner did not recall reviewing discovery materials related to the DNA analyses and to the chain of custody of the evidence. He said that his trial began six months after his return to Tennessee because the State had a limited amount of time to proceed with the prosecution. He did not recall appearing in court before the trial and answering the trial court’s questions about his wanting to proceed to a trial and his rejecting the State’s plea offer of concurrent service of fifteen years for aggravated rape and three years for aggravated assault. He did not recall the offer but said that he might have considered it if he had an attorney who would have “sat down and helped [him] understand . . . the cons and pros of whatever was going on, it’s a possibility that [he] might have . . . take[n] this plea.” He recalled that trial counsel reviewed his potential sentencing exposure and that she mentioned fifteen or sixty years but said that he was uncertain of the details. The Petitioner agreed that he and counsel discussed his version of the events and that he testified at the trial about his version of the events.

The Petitioner testified that he did not recall testifying at the trial about his belief that the victim and Mr. Summerall had been romantically involved at the time of the offenses and his having seen text messages on the victim’s cell phone. The Petitioner agreed, though, he had testified that he read text messages on the victim’s phone and discovered what the Petitioner referred to as a “bootie call from a man named Summerall.” The Petitioner agreed that the jury heard evidence of the alleged relationship and photographs on the victim’s phone, which culminated in his confronting the victim at the time of the offenses.

On redirect examination, the Petitioner clarified that he would not have accepted a plea offer under any circumstances.

A November 19, 2013 trial court transcript was received as an exhibit and reflects that trial counsel requested an opportunity to voir dire the Petitioner. The Petitioner stated that he understood the charges against him. He agreed that at his previous court appearance, he requested a speedy trial, that the trial was scheduled for February 18, 2014, and that the State had extended a plea offer. The Petitioner did not dispute that the offer would have required him to plead guilty to aggravated rape, aggravated assault, and domestic assault in exchange for concurrent service of fifteen years for the rape, three years

for the assault, and eleven months, twenty-nine days for the domestic assault. The Petitioner said that he had received the initial and subsequent discovery materials, which included crime scene photographs and a transcript of the 9-1-1 call. The Petitioner agreed that trial counsel had provided him with a partial report regarding the defense's ongoing investigation. When asked if the Petitioner intended to accept the offer or proceed to a trial, the Petitioner said he wanted a trial. The Petitioner said that he was freely and voluntarily proceeding to a trial, that he did not suffer from any type of mental illness, and that he had not been previously diagnosed with a mental illness.

The Petitioner stated that he understood that if he were convicted of aggravated rape, he faced a possible sentence of fifteen to sixty years at 100% service and that he was knowingly rejecting the plea offer. The Petitioner stated that he understood aggravated assault required a sentence of three to fifteen years. When asked if he wanted to represent himself, the Petitioner said that he wanted to talk to the trial judge "about a few things." After the Petitioner confirmed that he did not have any questions about the offer, the trial court permitted the Petitioner to ask his questions.

The Petitioner requested information related to his pro se motions to dismiss and for a speedy trial. The trial court informed the Petitioner that he could not file pro se motions when represented by counsel and that trial counsel could file any appropriate motions. The Petitioner stated that counsel had refused to file a motion for a speedy trial, and the trial court said that the trial could not be scheduled any sooner than the already scheduled date.

Trial counsel testified that she had been an assistant district public defender for twenty-six years, which included defending against sexual assault and rape allegations. Her policy, which she followed in this case, was to communicate in writing with her clients. She said that when she received discovery materials, she wrote the client a letter, which would include the indictment, the applicable statutes, and the discovery materials. She said that in the letter, she requested the client review the materials and outline any points the client believed were incorrect or missing. She said that after the client had sufficient time to review the materials and to take any necessary notes, she met with the client to discuss the materials in order for her to focus her investigation. She recalled that the time she represented the Petitioner, the Public Defender's Office employed multiple licensed legal investigators, that she submitted two investigation requests in the Petitioner's case, and that she provided the Petitioner with a summary of what the investigator learned. Counsel said that her last appearance as the Petitioner's attorney was when the jury returned its verdicts and that by the next court date, the Petitioner had retained appellate counsel, who represented the Petitioner at the motion for a new trial hearing, at the sentencing hearing, and on appeal.

Trial counsel testified that her letter to the Petitioner regarding discovery was dated September 20, 2013. She said the letter reflected that she had not yet received the discovery

materials but that she provided the Petitioner with a copy of the indictment, the relevant statutes, and the motions she had filed in the case. She stated that in the letter, she explained that aggravated rape was a Class A felony, along with the sentencing range, and that the offense was not eligible for probation. Likewise, the letter discussed the offense classifications and possible sentences for aggravated assault, domestic assault, and animal cruelty. Trial counsel stated that after she received the discovery materials, she hand delivered the documents to the Petitioner at the jail on October 3, 2013, and that she interviewed the Petitioner again. She said that her initial meeting with the Petitioner occurred on August 29, 2013, at which time they spoke at length after the Petitioner's arraignment. She said she had more than two pages of notes from the meeting, during which the Petitioner provided the history of his relationship with the victim, his employment, and his family.

Trial counsel testified that after she received the State's discovery materials and plea offer, she and the Petitioner discussed the terms of the offer at the October 3, 2013 meeting. She said that she told the Petitioner to consider his options and to discuss the options with any family members to assist him in his decision. She said that at the end of their meeting, she understood that the Petitioner was not interested in accepting the offer. Counsel said that, as a result, she continued to prepare the defense. She said that she had the recording of the 9-1-1 call transcribed, which was provided to the Petitioner, and that on October 25, 2013, she sent the Petitioner a letter, which included copies of the crime scene photographs that were provided to the defense in a subsequent discovery package. Counsel said the next court appearance was on November 19, 2013, at which time the Petitioner was questioned by the trial court and counsel about his rejecting the offer.

Trial counsel testified that on October 28, 2013, she requested additional investigation. She said that as a result of her request, the 9-1-1 call was transcribed, and the investigator interviewed the victim, the victim's "girlfriend," and Mr. Summerall. Counsel recalled that the investigator's report was provided to her on December 2, 2013. Counsel said that, based upon the information provided by Mr. Summerall to the investigator, she concluded that Mr. Summerall "would not present any evidence that would lead to an exoneration[.]" Counsel said, though, that she was able to present information about an alleged relationship between the victim and Mr. Summerall during the Petitioner's trial testimony. Counsel stated that during his interview, Mr. Summerall said that he and his brothers were also truck drivers and that "they used to sit around along with [the victim] . . . and trade stories" but that the victim had not participated since the offenses. Counsel said that Mr. Summerall reported that the offenses had "messed [the victim] up mentally" and that she appeared uncomfortable around him, his brothers, and men, generally. Counsel said that, based upon Mr. Summerall's statements, she concluded that Mr. Summerall would not have been beneficial to the defense and could have potentially become a State's witness regarding the victim's state of mind after experiencing a trauma, which counsel concluded would have bolstered the victim's credibility.

Trial counsel testified that she did not know how the Petitioner came into custody. She said that the booking and indictment numbers, ending in 136, indicated that he was not in Shelby County when the indictment was returned. She said that during her investigation of the affidavit of complaint, she learned that the Petitioner “had a hanging charge” and that her office had the “affidavit of complaint [in general sessions] withdrawn so that he would not have multiple cases pending . . . on his record.” Counsel said that the Petitioner wanted to attack the affidavit of complaint and that she explained to him multiple times the affidavit was “really of no effect” after the indictment was returned. She said the Petitioner “could not understand” that the affidavit could not be used to impeach the victim because she was not the affiant and that the affidavit could not be used as a basis for a motion to dismiss.

Trial counsel testified that she and the Petitioner discussed his concerns about the extradition and recalled that “every conversation was about his extradition” because he believed he had “beaten” the charges. She said, though, that the Petitioner could not articulate any basis to show how his constitutional rights had been violated by being in Tennessee and that her research did not reveal any potential issues.

Trial counsel testified that the plea offer was for an effective fifteen-year sentence for aggravated rape and aggravated assault and that she and the Petitioner discussed the offer multiple times. She said the Petitioner “never wanted an offer.”

Trial counsel testified that her office received an email from an Indiana woman, who claimed to be the Petitioner’s wife and who requested that counsel be removed from the case. Counsel said that as a result of the email, she, the Petitioner, and counsel’s supervisor met at the courthouse. Counsel recalled that the Petitioner was “insistent upon it being his way and . . . if you didn’t think or say what he wanted you to say, you were wrong.” Counsel said that she had previously worked with “difficult clients” who might not like her advice. She said that her usual practice with a difficult client was to explain the law and the client’s options. She said she would tell the client that the client did not have to like the options but that the client had to make a choice, otherwise the trial court would schedule the case for trial. Counsel said she followed this practice with the Petitioner. Counsel said she never told the Petitioner that she did not care about his case or his concerns. She said that although the Petitioner might have disagreed with her advice, she was capable of moving forward, preparing for the trial, and representing the Petitioner adequately.

Trial counsel testified that there was not a “major break” between her and the Petitioner until the middle of the trial when it was time for him to testify. She said that she purchased new clothes for the Petitioner and that she and the Petitioner had a verbal argument in lockup because he thought the pants were the wrong size based upon the length of the inseam. She said that the Petitioner refused to wear the pants, although she had

bought three pairs of pants and shirts in order for the Petitioner to look presentable in business attire. She recalled that the Petitioner testified before the jury while wearing “jailhouse” pants and shoes with a “button-down shirt” and that he “fought . . . when [she] was trying to put him on for direct examination.” She said that despite the Petitioner’s behavior, she was prepared for the Petitioner’s trial testimony and that she prepared eight pages of questions in order for “his story to be told.” Counsel agreed that whether the jury believed the Petitioner or the victim was critical to the case and that the DNA evidence was explained by the fact that the victim and the Petitioner were in a romantic relationship.

Trial counsel testified that the only potential defense witnesses that the Petitioner proposed were Mr. Summerall and the victim’s friend, Tammy, and that the defense spoke to them. Counsel said that her file did not contain the discovery materials but thought she gave the materials to appellate counsel. She did not recall any chain of custody issues but said she would have reviewed the TBI documents before the trial and raised any issues. Counsel said, though, that this case was not “a stranger rape” because the victim and the Petitioner were in a relationship, that the victim identified the Petitioner at the trial, and that the Petitioner admitted having sex with the victim twice on the day of the offenses.

Trial counsel testified that she did not recall discussing with the Petitioner the text messages exchanged between the victim and Mr. Summerall but agreed that if she had obtained the records and the records were inconsistent with the Petitioner’s trial testimony, the evidence would have been damaging to the defense in the event the State requested reciprocal discovery. Counsel said that she had to weigh uncovering harmful proof, which was the reason she did not call Mr. Summerall as a defense witness.

On cross-examination, trial counsel testified that she learned about the 9-1-1 call, Mr. Summerall, and the victim’s friend from the Petitioner and that the defense investigator interviewed the Petitioner in order to obtain additional information to locate Tammy. She said that after the Petitioner raised an issue with his extradition, she obtained documents related to his Pennsylvania arrest, that this arrest occurred one year before the present offenses, and that the arrest was unrelated to the Petitioner’s being brought to Tennessee. Counsel said that if she had believed a motion to dismiss the indictment were warranted, she could have filed the motion. She said she would have challenged the extradition if she thought the Petitioner’s constitutional rights had been violated. She recalled that the trial court advised the Petitioner at the November 2019 court appearance that counsel could not file frivolous motions. Counsel did not know the reason for the Petitioner’s fixation on the affidavit of complaint and extradition.

Trial counsel testified that the Petitioner’s case originated with the affidavit of complaint but that the case proceeded to the grand jury without first holding a preliminary hearing in general sessions court. She said that the affidavit of complaint was “withdrawn” or dismissed in order to prevent a hold on the Petitioner.

Trial counsel testified that she made a strategic decision not to call Mr. Summerall as a defense witness because his testimony would have been beneficial to the State. Counsel said that she spoke with the Petitioner at his arraignment on August 29, 2013, that she interviewed him at the jail on October 3, and that she spoke with him again on November 6. She said that the Petitioner was questioned on the record by counsel and the trial court on November 19, and that counsel and her supervisor met with the Petitioner on December 4. She said that she spoke with the Petitioner on January 18, 2014, and again before the trial. Counsel objected to the Petitioner's testimony that she did not speak with him, that she did not prepare, that she did not "do anything about his case," and that she did not know what was going on with his case. Counsel said that the Petitioner's personality was that "women are to be submissive and to listen to what he says and to follow his rules. That was the whole attitude the entire time [she] represented him. And even when [she] cross-examined him and it came across . . . you need to sit down, shut up and listen to what [he was] saying." Counsel said that despite the Petitioner's personality, she was "able to have a defense" and to cross-examine witnesses and that the Petitioner was acquitted of the animal cruelty charge. Counsel recalled that during the Petitioner's testimony, "he made his case to the jury with an attitude," was arrogant, and was condescending to the jury, all of which was not "captured" by the trial transcript. She said that after the verdict, the Petitioner was "hot," livid, and yelled for a period of time.

Trial counsel testified that it was abnormal for her not to be involved with sentencing and the motion for a new trial when she represented a client at the trial. Counsel said that after consultation with her office, her representation of the Petitioner ended when appellate counsel was retained. She said she did not seek to withdraw from the Petitioner's case.

Appellate counsel testified that he was contacted by someone who knew the Petitioner and wanted counsel to represent the Petitioner on appeal. Counsel said that the Petitioner paid a small fee for the appellate work and that counsel was appointed by the trial court to work on the motion for a new trial, which was pending at the time he was appointed. Counsel said he offered to assist trial counsel with the motion hearing but that trial counsel said her relationship with the Petitioner had deteriorated and that she did not want to work on the case any further.

Appellate counsel testified that he and the Petitioner discussed the issues the Petitioner wanted raised on appeal. Counsel thought a number of those issues were not viable. Counsel recalled that the Petitioner wanted to raise what counsel believed was an ineffective assistance claim against trial counsel and said that he advised the Petitioner of the hazard of raising ineffective assistance on appeal from the conviction proceedings. Counsel said that he told the Petitioner about the process of the motion for a new trial, the appeal, and the application for permission to appeal to the supreme court. Counsel said that after the motion for a new trial hearing was denied, he filed a notice of appeal. He said

that he and the Petitioner met twice at the prison to discuss the case and that he explained to the Petitioner that any appellate issues were limited to what was contained in the trial court record and to the issues raised in the motion for a new trial. Counsel said that he listened to the Petitioner's views but that counsel chose which issues to raise on appeal. Counsel noted that the Petitioner wanted to raise issues that were prohibited by professional ethics and the rules. Counsel believed he raised all of the viable issues.

Appellate counsel testified that his relationship with the Petitioner was "pretty bad" and that the Petitioner was a person who liked to be in control and did not "like to be told no." Counsel said that despite the relationship, he represented the Petitioner to the best of his ability and noted that treating people badly did not result in new clients in private practice and that he was ethically obligated to represent any client to the best of his ability.

Kion Summerall testified that he worked as a truck driver. He said that he "barely remember[ed]" this case. He did not recall calling 9-1-1. When provided a transcript of the 9-1-1 call, Mr. Summerall said, "I don't remember this."

Mr. Summerall testified that the victim was his mother's friend and that he and the victim did not have a personal relationship. He said that he saw the victim at his mother's home. He denied having a romantic relationship with the victim. He did not recall speaking to a defense investigator. When asked if the victim discussed any trauma associated with this case, Mr. Summerall stated that he overheard the victim discussing the offenses with his mother but that he did not know the Petitioner's name.

On cross-examination, Mr. Summerall testified that the victim was like a sister because of the victim's relationship with his mother. He said that if he had testified at the trial, he would have testified that he and the victim did not have a romantic relationship.

The parties stipulated that the transcript of the 9-1-1 call reviewed by Mr. Summerall was prepared by the District Attorney's Office before the trial and provided to the defense in the discovery materials. The transcript was received as an exhibit and reflects that on February 10, 2013, at 8:42 a.m., the caller told the operator that the caller needed the police at the victim's duplex. When asked what occurred, the caller stated, "What happened, my sister, I just got off the phone with my sister and her boyfriend named, uh, uh, Alvin Stewart, earlier this morning he went over trying to have sex with her and she wouldn't have sex with him and he jumped on her and raped her." The caller said that the caller needed to take the caller's mother to church before going to the victim's home. The caller repeated the Petitioner's name, identified the victim, and provided a description of each. When asked if the Petitioner was still at the victim's home, the caller said that the Petitioner was gone. The caller said that the victim did not want to call the police because she did not want to go through the humiliating process with the police. The caller said that the victim reported being bruised and choked and that the victim needed an ambulance.

When the operator asked for the caller's name, the caller stated, according to the transcript, "Keon Sumlaw."<sup>1</sup>

Upon this evidence, the post-conviction court denied relief. The court credited trial counsel's testimony and noted that she corroborated her testimony with documentation from her case file. The court, likewise, credited appellate counsel's testimony. The court discredited the Petitioner's testimony, finding that his testimony was "marked by fuzzy memory and opinion as a substitute for facts" and that his statements were contradicted by the proof. The court noted that although the Petitioner testified that he was never told about his potential sentencing exposure when trial counsel discussed the plea offer, the Petitioner was questioned on the record about the offer on November 19, 2013. The court found that at this court appearance, the Petitioner stated that he was aware of the sentencing range for the charged offenses and wanted to proceed to a trial.

The post-conviction court determined that the Petitioner failed to prove his ineffective assistance allegations by clear and convincing evidence. The court determined that trial counsel was prepared for the trial, had reviewed the discovery materials, and had crafted a reasonable trial strategy based upon her investigation and the discovery materials. The court found that trial counsel met with the Petitioner several times, that she did not litigate the Petitioner's extradition for the lack of a legal basis, and that she explained to the Petitioner the affidavit of complaint used for extradition did not impact the validity of the indictment. The court determined that the Petitioner did not present evidence showing that trial and appellate counsel forfeited "a viable legal issue." The court determined, based upon trial counsel's testimony, that the Petitioner "demanded" counsel do what he wanted and would not listen to her explanations. The court noted that the Petitioner's "uncooperative attitude was evident through the petitioner's interaction with the court as well as the attorneys who were representing the petitioner during the trial and post-conviction proceedings."

The post-conviction court found that trial counsel did not present Mr. Summerall as a defense witness based upon Mr. Summerall's damaging statement to the defense investigator. The court credited trial counsel's testimony that her strategy was to present evidence of the victim's alleged relationship with Mr. Summerall and any text messages exchanged between them through the Petitioner's testimony. The court found that trial counsel's concerns were correct based upon Mr. Summerall's testimony at the evidentiary hearing that he did not recall placing the 9-1-1 call and that he and the victim were not romantically involved.

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<sup>1</sup> The record reflects that the recording of the 9-1-1 call was not received as an exhibit at the post-conviction hearing or at the trial.

The post-conviction court determined that the Petitioner failed to establish his claim that trial and appellate counsel were ineffective by not challenging the extradition and the chain of custody of the DNA evidence. The court found that the Petitioner failed to show any legal basis to object or any factual basis that would have shown success at the trial. This appeal followed.

On appeal, the Petitioner contends that the post-conviction court erred by denying relief on his ineffective assistance of trial counsel allegations.

Post-conviction relief is available “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 (2018). A petitioner has the burden of proving his factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f) (2018). A post-conviction court’s findings of fact are binding on appeal, and this court must defer to them “unless the evidence in the record preponderates against those findings.” *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *see Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court’s application of law to its factual findings is subject to a de novo standard of review without a presumption of correctness. *Fields*, 40 S.W.3d at 457-58.

To establish a post-conviction claim of the ineffective assistance of counsel in violation of the Sixth Amendment, a petitioner has the burden of proving that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). The Tennessee Supreme Court has applied the *Strickland* standard to an accused’s right to counsel under article I, section 9 of the Tennessee Constitution. *See State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner must satisfy both prongs of the *Strickland* test in order to prevail in an ineffective assistance of counsel claim. *Henley*, 960 S.W.2d at 580. “[F]ailure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.” *Goard v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). To establish the performance prong, a petitioner must show that “the advice given, or the services rendered . . . are [not] within the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); *see Strickland*, 466 U.S. at 690. The post-conviction court must determine if these acts or omissions, viewed in light of all of the circumstances, fell “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. A petitioner “is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision.” *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); *see Pylant v. State*, 263 S.W.3d 854, 874 (Tenn. 2008). This deference, however, only applies “if the choices are informed . . . based upon adequate preparation.”

*Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). To establish the prejudice prong, a 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.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

#### **A. Failure to Present Mr. Summerall as a Defense Witness**

The Petitioner argues that trial counsel provided ineffective assistance by failing to present Mr. Summerall as a defense witness to refute the victim’s testimony, noting witness credibility was critical to this case.

The record reflects that trial counsel requested additional defense investigation on October 28, 2013. As a result of her request, the defense investigator interviewed, in relevant part, Mr. Summerall. On December 2, trial counsel received the investigator’s report, which reflected that Mr. Summerall and his brothers were truck drivers, that “they used to sit around along with [the victim] . . . and trade stories,” but that the victim had not participated since the offenses. Mr. Summerall reported that the offenses had “messed [the victim] up mentally” and that the victim appeared uncomfortable around men. Counsel concluded, based upon this statement, that Mr. Summerall’s potential testimony would not have led to an exoneration and would not have been beneficial to the defense. Counsel, likewise, concluded that Mr. Summerall could have potentially become a State’s witness relative to the victim’s state of mind after experiencing a trauma, which would have bolstered the victim’s credibility. Counsel’s credited testimony reflects that she made a strategic decision not to present Mr. Summerall as a defense witness after investigating Mr. Summerall’s potential testimony before the trial.

Furthermore, Mr. Summerall testified at the post-conviction hearing that he “barely remember[ed]” the offenses and that he did not recall calling 9-1-1, even after reviewing a transcript of the recording. Mr. Summerall denied having a romantic relationship with the victim and said the victim was like a sister to him. He stated that if he had testified at the Petitioner’s trial, he would have testified that he and the victim did not have a romantic relationship. As a result, the record supports the post-conviction court’s determination that the Petitioner failed to prove his ineffective assistance allegation by clear and convincing evidence. The Petitioner is not entitled to relief on this basis.

#### **B. Failure to Communicate**

The Petitioner argues that trial counsel failed to communicate with him. He points to their “antagonistic” relationship and that, as a result, he was not properly prepared to testify.

Although the Petitioner asserts that trial counsel failed to communicate with him about his case, the record reflects otherwise. Counsel's credited testimony reflects that she and the Petitioner initially met on August 29, 2013, at which time they spoke at length after the Petitioner's arraignment. Counsel had more than two pages of notes from this meeting in her case file, which included the Petitioner's history of his relationship with the victim, his employment, and his family. On September 20, counsel corresponded by letter with the Petitioner and provided him with the indictment, the relevant statutes, and the motions she had filed. In the letter, counsel explained the felony classifications and potential sentences for the offenses. After receiving the discovery materials, counsel hand delivered the materials to the Petitioner at the jail on October 3, at which time counsel interviewed the Petitioner again. At the October 3 meeting, counsel and the Petitioner discussed the State's fifteen-year plea offer. Counsel advised the Petitioner to consider his options and to consult his family. Counsel provided the Petitioner with a transcript of the 9-1-1 call, and on October 25, she corresponded by letter, providing the Petitioner with crime scene photographs, which were provided to the defense in a subsequent discovery package.

Based upon the Petitioner's concerns, trial counsel investigated the Petitioner's extradition to Tennessee and concluded that the Petitioner's constitutional rights had not been violated. The Petitioner did not present any evidence at the evidentiary hearing contrary to counsel's determination. Counsel, likewise, explained to the Petitioner that the affidavit of complaint could not be used to impeach the victim's credibility because she was not the affiant and that the validity of the indictment was not impacted by any alleged false statement in the affidavit. The Petitioner was questioned by the trial court and counsel on November 19, 2013, at which time the Petitioner stated that he understood the charges against him and the possible sentences, that he understood the terms of the fifteen-year plea offer, that he had received the initial and subsequent discovery materials, including the crime scene photographs and a transcript of the 9-1-1 call, and that he had received a report from the defense investigator, although the investigation was ongoing. The Petitioner rejected the offer and wanted to proceed to trial, which he said was a voluntary and free choice. Afterward, trial counsel and her supervisor met with the Petitioner on December 4, 2013. Counsel met with the Petitioner again on January 18, 2014, and again before the February 18, 2014 trial date.

Trial counsel prepared for the Petitioner's trial, despite the contentious relationship. She prepared eight pages of questions for the Petitioner's direct examination, during which the Petitioner testified about the alleged romantic relationship between the victim and Mr. Summerall and the text messages they allegedly exchanged. The Petitioner was acquitted of the animal cruelty charge. As a result, the record supports the post-conviction court's determination that the Petitioner failed to prove his ineffective assistance claim by clear and convincing evidence. The Petitioner is not entitled to relief on this basis.

To the extent that the Petitioner alleges that his contentious relationship with trial counsel resulted in counsel's failure to prepare the Petitioner for the trial, the record reflects that counsel was not questioned about her specific efforts to prepare the Petitioner to testify. However, the record contains considerable evidence of counsel's efforts to prepare the Petitioner's case for trial. The record does not preponderate against the post-conviction court's determinations that the Petitioner failed to establish that counsel provided deficient performance resulting in prejudice. The Petitioner is not entitled to relief on this basis.

In consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

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ROBERT H. MONTGOMERY, JR., JUDGE