

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs May 2, 2023

FILED

07/19/2023

Clerk of the  
Appellate Courts

**TONY THOMAS v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Shelby County**  
**No. 08-07876      Lee V. Coffee, Judge**

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**No. W2022-00851-CCA-R3-PC**

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Petitioner, Tony Thomas, appeals the Shelby County Criminal Court's denial of post-conviction relief. On appeal, Petitioner argues that the post-conviction court erred in denying relief. Finding that the issues presented for our review are without merit, waived, previously determined, or a combination thereof, we affirm the judgment of the post-conviction court.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JOHN W. CAMPBELL, SR., and KYLE A. HIXSON, JJ., joined.

Tony Thomas, Whiteville, Tennessee, Pro Se.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

*Trial and Direct Appeal*

Petitioner was convicted after a jury trial in 2010 of aggravated sexual battery. *See State v. Tony Thomas*, No. W2012-00413-CCA-R3-CD, 2013 WL 12181754, at \*1 (Tenn.

Crim. App. Sept. 6, 2013), *perm. app. denied* (Tenn. Jan. 12, 2014). He received a twenty-year sentence as a Range III offender to be served at 100 percent. *Id.* at \*3.

Trial counsel withdrew before the hearings on the motion for new trial because Petitioner raised an ineffective assistance of counsel claim in his motion. *Id.* The trial court appointed new counsel for purposes of the motion for new trial. *Id.* At one of the hearings on the motion, Petitioner called Memphis Police Department (“MPD”) Officer Roger Pike, one of the responding officers to the 911 call regarding the incident. He testified as to his interactions with the victim. *Id.* at \*3. Officer Pike recalled that there were some inconsistencies between the victim’s statements to him and the victim’s statements to other officers, but he could not specifically recall how the statements were inconsistent. *Id.* According to Officer Pike, the victim “always maintained” that Petitioner had raped and sodomized her. *Id.* Petitioner argued in the motion for new trial that trial counsel was deficient in part for his failure to call Officer Pike, whose testimony Petitioner contended was favorable.

Petitioner was appointed another attorney (“appellate counsel”) following the trial court’s denial of his motion for new trial. Petitioner, through appellate counsel, argued on direct appeal that the evidence was insufficient to support his conviction and that trial counsel was deficient for his failure to file a motion under Tennessee Rule of Evidence 412 and failing to call certain witnesses. *Id.* at \*5. A panel of this Court affirmed Petitioner’s conviction on direct appeal, concluding that trial counsel was not deficient and that the evidence was sufficient to support Petitioner’s conviction. *Id.* at \*7.

### *Post-Conviction Proceedings*

Petitioner timely filed a pro se petition for post-conviction relief on August 12, 2014.<sup>1</sup> *See Tony Thomas v. State*, No. W2017-02221-CCA-R3-PC, 2018 WL 3993320, at \*1 (Tenn. Crim. App. Aug. 17, 2018), *no perm. app. filed*. In this petition, Petitioner asserted that he was

deprived of the effective assistance of counsel at trial, at the motion for new trial, and on appeal; that the trial court abused its discretion by admitting certain hearsay evidence and by denying [Petitioner] an opportunity to present evidence of prosecutorial misconduct; that the petit jury was unconstitutionally composed; that the State failed to disclose evidence

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<sup>1</sup> The original petition is not included in the record here, only Petitioner’s amended petitions. However, we take judicial notice of the record from Petitioner’s direct appeal as well as from the previous post-conviction proceeding. *See Harris v. State*, 301 S.W.3d 141, 147 n.4 (Tenn. 2010) (noting that an appellate court may take judicial notice of its own records).

favorable to him prior to trial as required by *Brady v. Maryland*, 37[3] U.S. 83 (1963); and that the prosecutor engaged in a variety of actions that equated to prosecutorial misconduct.

*Tony Thomas*, 2018 WL 3993320, at \*1. Finding that all of Petitioner's claims were previously determined, the post-conviction court summarily dismissed the petition and Petitioner appealed to this Court.<sup>2</sup> *Id.* A panel of this Court determined that all claims related to the ineffective assistance of trial counsel had been previously determined and affirmed that portion of the post-conviction court's judgment. However, the panel remanded the case for an evidentiary hearing on those issues that were not previously determined, including Petitioner's claims relative to the quality of the representation that he received at the hearing on the motion for new trial and on appeal. *Id.* at \*2.

Petitioner subsequently filed two amended pro se petitions. On March 21, 2019, the post-conviction court again appointed counsel which Petitioner chose to use as elbow counsel. Petitioner proceeded with self-representation.

Petitioner's appellate counsel was the sole witness at the post-conviction evidentiary hearing. Appellate counsel testified that he raised Petitioner's ineffective assistance of trial counsel claim on direct appeal at Petitioner's insistence, despite appellate counsel's reservations about doing so. Appellate counsel testified that the State's withholding evidence of the victim's medical records "could" be raised on direct appeal. Petitioner questioned appellate counsel about a perceived confrontation issue that appellate counsel did not raise on direct appeal. Appellate counsel testified that had the issue been presented in Petitioner's motion for new trial, he would have raised it on direct appeal.

On cross-examination, appellate counsel testified that he had handled "dozens upon dozens" of appeals and tried serious criminal cases before handling Petitioner's direct appeal. He testified that he had successfully argued "plain error review" before, and would have "no hesitation" in raising an issue under plain error if warranted. Appellate counsel agreed with the prosecutor's statement that he focused in Petitioner's case on the issues that had the greatest chances of success.

The victim's medical records were made an exhibit to the post-conviction hearing. The records indicate that the victim came to the hospital "stat[ing] that she was raped rectally, [had] obvious scratches and bruising . . . all over [her] body, chest, elbows, hands, [and] knees." The records further indicate that the victim was "very tearful and anxious."

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<sup>2</sup> After expressing his displeasure with a series of court-appointed attorneys, Petitioner knowingly and voluntarily asked to proceed pro se on appeal. See *Tony Thomas*, 2018 WL 3993320 \*n.1.

The victim told hospital staff that “she was kicked several times and [her] hair [was] falling out because she had her hair pulled and she was dragged up [the] stairs of a vacant house[.]”

The post-conviction court found that the victim’s medical records, which Petitioner argued were withheld in violation of *Brady*, were not in the State’s control, and thus were not subject to disclosure. *See* Tenn. R. Crim. P. 16(f). The post-conviction court found that there was “nothing about the[] records that are arguably exculpatory.” The post-conviction court also found that the information in the medical records would only have been more damaging to Petitioner because the medical records corroborated the victim’s testimony at trial. The post-conviction court further found that any alleged withholding by the State of the victim’s medical records did not amount to prosecutorial misconduct because both the State and Petitioner had equal access to the records.

The post-conviction court found that appellate counsel’s decisions not to challenge the State’s alleged *Brady* violation and the testimony of either Officer Pike or Officer Amanda Wakham, were reasonable strategic decisions. The post-conviction court found that raising those issues on appeal would have been frivolous and that appellate lawyers have no obligation to raise frivolous issues on appeal. The post-conviction court found that the issues of which Petitioner complained “would not have made a difference” on direct appeal had appellate counsel raised them.

The post-conviction court found that Petitioner waived his claim as to the deficiencies of counsel at the motion for new trial because Petitioner presented no proof on the claim at the evidentiary hearing.

The post-conviction court found that the other issues raised by Petitioner were ultimately attempts to relitigate his ineffective assistance claims regarding trial counsel, and thus were previously determined. *See Tony Thomas*, 2018 WL 3993320, at \*2 (finding that all issues regarding deficiencies of trial counsel were previously determined).

The post-conviction court issued a written order denying relief incorporating the above findings. The Petitioner appeals.

## ANALYSIS

On appeal, Petitioner argues that the post-conviction court erred in denying relief. He argues that: (1) the trial court abused its discretion by prohibiting him from introducing evidence of prosecutorial misconduct at the hearing on the motion for new trial and by allowing hearsay testimony; (2) the State violated *Brady* by withholding the victim’s medical records; (3) the trial court violated the Sixth Amendment’s Confrontation Clause by allowing hearsay testimony; (4) counsel on the motion for new trial was ineffective for

failing to litigate a *Brady* claim at the hearing on the motion for new trial; and (5) appellate counsel was ineffective for failing to raise “meritorious” claims on direct appeal, namely (a) a *Brady* claim, (b) a Confrontation Clause claim as to Officer Pike, and (c) a Confrontation Clause claim as to Officer Wakham.<sup>3</sup> Any other issues included in Petitioner’s post-conviction petition and not included in his appellate brief are not properly before this Court and are thus waived. *See* T.C.A. § 40-30-106(g).

Tennessee Code Annotated section 40-30-103 allows a petitioner to request post-conviction relief “when [his] conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” At the post-conviction stage, a petitioner must prove factual allegations by clear and convincing evidence. T.C.A. § 40-30-110(f); *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999). “Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998). On appeal, the post-conviction court’s factual findings are binding on this Court unless the evidence preponderates otherwise. *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006). For this reason, questions of witness credibility, the weight of the evidence, and the factual issues raised by the evidence are properly resolved by the post-conviction court, and this Court will not substitute its own inferences for those of the post-conviction court. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001). We review the post-conviction court’s conclusions of law and application of the law to the facts *de novo*, with no presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

A petitioner waives an issue for future consideration if he “personally or through an attorney failed to present [the issue] for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.” T.C.A. § 40-30-106(g). “A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing. A full and fair hearing has occurred when the petitioner is afforded the opportunity to call witnesses and otherwise present evidence, regardless of whether the petitioner actually introduced any evidence.” T.C.A. § 40-30-106(h).

### *Trial Court Errors*

Petitioner asserts that the trial court abused its discretion in prohibiting Petitioner from introducing evidence of “prosecutorial misconduct” at the hearing on Petitioner’s motion for new trial and in admitting hearsay testimony at trial. The State argues that the

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<sup>3</sup> For the sake of organization and clarity, we have reordered and reorganized the issues presented by the parties in their appellate briefs. We have done our best to discern all the issues Petitioner raises.

post-conviction court properly denied relief on these issues. We conclude that the “prosecutorial misconduct” issue is both waived and previously determined, and the hearsay issue is not a cognizable basis for post-conviction relief.

#### Prosecutorial Misconduct

In Petitioner’s appellate brief, he cites to a portion of the transcript of the hearing on his motion for new trial in which Petitioner raised to the trial court his belief that the prosecutor in his case had committed misconduct by withholding evidence, though what evidence Petitioner sought to introduce is unclear. Petitioner also addressed this issue in his pro se motion for new trial. In denying Petitioner’s motion, the trial court considered each ground Petitioner raised in his pro se motion and explained why Petitioner was not entitled to relief. Petitioner did not raise this issue on direct appeal, nor did he offer any proof at the post-conviction evidentiary hearing in support of this claim. We accordingly conclude that this issue is both previously determined and waived. *See* T.C.A. § 40-30-106(g), (h). Petitioner is not entitled to relief on this issue.

#### Improper Admission of Hearsay

Petitioner contends that the trial court abused its discretion in admitting hearsay testimony, stating that Officer Wakham improperly relied on an incident report at trial that she did not prepare. Petitioner failed to raise this issue on direct appeal or present any proof on this claim at the post-conviction evidentiary hearing, thus it is waived. *See Hollis v. State*, No. M2013-01509-CCA-R3-PC, 2017 WL 588204, at \*21 (Tenn. Crim. App. Feb. 14, 2017), *perm. app. denied* (Tenn. June 7, 2017) (noting that a petitioner is not entitled to post-conviction relief when he fails to put on proof for a claim at a post-conviction hearing). In any event, an evidentiary error is not a cognizable claim for post-conviction relief. *See* T.C.A. § 40-30-103 (“Relief under this part shall be granted when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.”); *see also Wilson v. State*, No. E2018-00299-CCA-R3-PC, 2019 WL 1513833, at \*8 (Tenn. Crim. App. Apr. 8, 2019), *no perm. app. filed*. Petitioner is not entitled to relief on this issue.

#### *Brady Violation*

Petitioner also raises a stand-alone claim that the State withheld the victim’s medical records in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The State argues that the post-conviction court properly denied relief on this ground because this claim was previously determined. We agree with the State.

Petitioner raised this very issue in a pro se motion for new trial filed with the trial court. The trial court held hearings on the motion for new trial on three separate days, at which several witnesses, including Petitioner, testified. The trial court's written order denying Petitioner's motion for new trial demonstrates that the trial court considered this issue, finding that no proof had been offered as to the existence of the records, that the State ever possessed them, that the records were material to the defense, or that the records were favorable and unavailable to the defendant via a subpoena.

The trial court was certainly a court of competent jurisdiction to hear Petitioner's claim. Petitioner had the opportunity to call witnesses and present evidence as to this claim at the hearing on the motion, but he did not do so. In its written order denying Petitioner's motion for new trial, the trial court noted that it considered this issue and found it without merit. As such, we find that the alleged *Brady* violation of which Petitioner complains has been previously determined. See T.C.A. § 40-30-106(h). In any event, the evidence does not preponderate against the trial court's and the post-conviction court's findings that this issue is without merit. Petitioner is not entitled to relief on this issue.

#### *Confrontation Clause Violation*

Petitioner asserts that the trial court violated his rights under the Confrontation Clause when it allowed MPD Officer Wakham to refer to an incident report prepared by Officer Pike. The State argues that this claim was waived. We agree with the State.

A petitioner waives an issue if he "personally or through an attorney failed to present [the issue] for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." T.C.A. § 40-30-106(g). Petitioner neither objected to this issue at trial nor raised it on direct appeal. Additionally, there was not sufficient proof on this issue presented at the post-conviction evidentiary hearing. This issue is waived.

#### *Ineffective Assistance of Counsel at Motion for New Trial*

Petitioner next asserts that counsel on the motion for new trial was ineffective for (a) failing to prove that trial counsel was ineffective, and (b) failing to litigate the *Brady* claim at the motion for new trial. The State argues that the post-conviction court properly denied relief on this ground.

As described above, counsel at the motion for new trial did not testify at the hearing on the post-conviction petition, and Petitioner has offered no proof as to how counsel was deficient besides his conclusory allegations (without citations to the record in any form) in his appellate brief. This issue is thus waived. See *Hollis*, 2017 WL 588204, at \*21; see

also Tenn. Ct. Crim. App. R. 10(b) (“Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court.”). Petitioner is not entitled to relief on this issue.

### *Ineffective Assistance of Appellate Counsel*

Petitioner argues that appellate counsel was deficient for his failure to raise three issues on appeal: (1) a Confrontation Clause violation as to Officer Pike’s testimony at the hearings on the motion for new trial; (2) a Confrontation Clause violation as to Officer Wakham’s testimony at trial; and (3) a *Brady* claim regarding the victim’s medical records. The State argues that the post-conviction court properly denied relief on these claims. We agree with the State.

To succeed on a claim of ineffective assistance of counsel; a petitioner must show that he was effectively denied the assistance of counsel afforded him by the federal and state constitutions. *See* U.S. Const. amend. VI; Tenn. Const. art. 1, § 9; *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984); *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975). A petitioner must prove (1) deficient performance by counsel, and (2) that counsel’s deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. If a petitioner fails to satisfy either prong, the claim fails. *Id.*

Counsel’s performance is deficient if it “[falls] below an objective standard of reasonableness,” *Strickland*, 466 U.S. at 688; stated differently, if “the advice given, or the services rendered by the attorney, are [outside] the range of competence demanded of attorneys in criminal cases.” *Baxter*, 523 S.W.2d at 936. The prejudice prong of the *Strickland* test is satisfied if a petitioner shows 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.” *Strickland*, 466 U.S. at 694.

Appellate counsel’s performance is measured with the same rod. *See Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004). This Court will not second-guess strategic choices or measure counsel’s performance through hindsight’s 20-20 lens. *See Cooper v. State*, 849 S.W.2d 744, 746 (Tenn. 1993). Appellate counsel is not constitutionally required to argue every possible issue: indeed, “‘experienced advocates have long emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue, if possible, or at most a few key issues.’” *Carpenter*, 126 S.W.2d at 887 (quoting *Cooper*, 849 S.W.2d at 747) (other internal quotations omitted). Decisions regarding which issues to raise on appeal are within the professional judgment and discretion of appellate counsel. *Carpenter*, 126 S.W.3d at 887. Ultimately, though, “[i]f



an issue has no merit or is weak, then appellate counsel’s performance will not be deficient if counsel fails to raise it.” *Id.*

As required of us by *Carpenter*, we examine the merits of each of these claims in turn.

#### Confrontation Clause Violation as to Officer Pike

First, Petitioner argues that appellate counsel was deficient for his failure to raise on direct appeal a Confrontation Clause violation as to Officer Pike’s testimony at the hearings on Petitioner’s motion for new trial.

Officer Pike was not an adverse witness. Petitioner called Officer Pike to testify at the hearing on Petitioner’s motion for new trial. There can be no confrontation violation when the witness is not adverse: the Confrontation Clause applies only to witnesses “*against* the accused.” *Crawford*, 541 U.S. at 51 (emphasis added). This issue is without merit, and appellate counsel was not required to raise a meritless issue on direct appeal. As such, there can be no ineffective assistance of counsel and Petitioner is not entitled to relief. *See Carpenter*, 126 S.W.3d at 887.

#### Confrontation Clause Violation as to Officer Wakham

Second, Petitioner argues that appellate counsel was deficient for his failure to raise on direct appeal a Confrontation Clause violation regarding Officer Wakham’s testimony at trial. This issue was waived in the trial court. The trial court nevertheless considered this issue in Petitioner’s motion for new trial, finding it meritless. As stated above, we likewise concluded that this issue is without merit, and appellate counsel cannot be deficient for failing to raise it. Petitioner is not entitled to relief.

#### Brady Violation

Petitioner argues that appellate counsel was deficient for failing to raise a *Brady* issue on direct appeal. As described above, we conclude that this issue has been previously determined; in any event, it is meritless. Appellate counsel was not deficient for his failure to raise this issue and Petitioner’s ineffective assistance claim fails as to this issue.

We find, like the post-conviction court, that appellate counsel’s decision to omit these issues on direct appeal was a reasonable strategic decision that is entitled to our deference. Appellate counsel determined that these issues were frivolous, and appellate lawyers are not required to raise frivolous issues. *See Carpenter*, 126 S.W.3d at 893 n. 11. In any event, as to the medical records, Petitioner has failed to show any prejudice as

required by *Brady* when the records were equally available to Petitioner and to the State. *See Stickler v. Greene*, 527 U.S. 263, 281-82 (requiring prejudice as a component of a successful *Brady* claim). Appellate counsel was not deficient for failing to raise these issues and the post-conviction court did not err in so finding. *See Carpenter*, 126 S.W.3d at 887. Petitioner is not entitled to relief on this issue.

### CONCLUSION

Having reviewed the record, the briefs of the parties, and the applicable law, we conclude that the issues Petitioner raises are waived, previously determined, without merit, or a combination thereof. Accordingly, we thus affirm the judgment of the post-conviction court, in all respects.

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TIMOTHY L. EASTER, JUDGE