

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs June 21, 2022

FILED

06/23/2022

Clerk of the  
Appellate Courts

**HENRY RUSSELL v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County  
No. 2007-C-2066 Monte Watkins, Judge**

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**No. M2021-00774-CCA-R3-PC**

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The petitioner, Henry Russell, appeals the denial of his petition for post-conviction relief, which petition challenged his 2012 Davidson County Criminal Court Jury convictions of three counts of rape and three counts of statutory rape by an authority figure, arguing that he was deprived of the effective assistance of counsel. Discerning no error, we affirm.

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

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, and J. ROSS DYER, JJ., joined.

Nathan Cate, Nashville, Tennessee, for the appellant, Henry Russell.

Herbert H. Slatery III, Attorney General and Reporter; Katharine K. Decker, Assistant Attorney General; Glenn R. Funk, District Attorney General; and Roger D. Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The Davidson County Grand Jury charged the defendant with three counts of rape and three counts of statutory rape by an authority figure for offenses committed against the foster daughter of his girlfriend. A Davidson County Criminal Court Jury convicted the defendant as charged, and the trial court merged the convictions for statutory rape by an authority figure into the convictions for rape and imposed a total effective sentence of 30 years' incarceration, to be served at 100 percent by operation of law. The petitioner appealed, and this court affirmed both the convictions and the accompanying sentence. *See State v. Henry Wayne Russell*, M2013-00166-CCA-R3-CD, 2014 WL 1704953 (Tenn. Crim. App., Nashville, Apr. 29, 2014). Our supreme court denied the petitioner's application for permission to appeal but designated the opinion as "Not For

Citation” on April 10, 2015. This court summarized the evidence in our analysis of the sufficiency of the convicting evidence:

Viewing the evidence in a light most favorable to the State, the proof showed that [the petitioner] and [the victim’s] foster mother were dating, and [the victim’s] foster mother had planned to adopt her. [The victim] testified that she considered [the petitioner] an “authority figure” over her because when her foster mother was not present “or just if we was all out somewhere and [the petitioner] told me to do something, I was expected to do it.” [The victim’s] foster mother acknowledged that when her mother could not care for [the victim] and the other children, [the petitioner] would stay with them at night. However, [the victim’s] foster mother did not consider [the petitioner] to be [the victim’s] caretaker or supervisor when the foster mother was present. During his interview with Detective Zoccola, [the petitioner] said that [the victim] considered him to be an authority figure, someone that she would talk to when in trouble, and someone that she would confide in. [The petitioner] also referred to himself as “a friend, a father figure, someone in an authoritative position.”

During each of the three incidents in this case, [the victim] was in [the petitioner’s] care. [The victim] testified that the first incident of sexual contact with [the petitioner] occurred in [the petitioner’s] truck after he had picked her up after school. [The petitioner] was supposed to take [the victim] home, but he drove her to the Taco Bell near Hickory Hollow Mall to buy some food. After receiving the food, [the petitioner] pulled into the parking lot and told [the victim] to perform oral sex on him, and [the victim] complied.

The second incident of sexual contact between [the petitioner] and [the victim] occurred at the home [the petitioner] shared with his sister. [The victim] had spent the night at the residence with [the petitioner’s] niece. [The victim] testified that as she walked out of the shower and into the room to get dressed, [the petitioner] opened the door and asked what she was doing. He then told her to give him oral sex. When [the victim] told [the petitioner], “I don’t like doing this[,]” [the petitioner] said, “It won’t take that long.” [The

victim] then performed oral sex on [the petitioner], and he ejaculated into the towel that she had been using.

During the third incident that occurred sometime during February 22-23, 2007, [the victim's] foster mother left [the petitioner] in charge of her two sons and [the victim], who was fourteen at the time, while the foster mother went to work. [The victim] testified that [the petitioner] came into the room that she shared with her two foster brothers and woke her up. He then led her into the foster mother's bedroom and told her to remove her clothing. [The victim] stood there for a moment, and [the petitioner] again told her to remove her clothing. [The victim] took off her clothes, and [the petitioner] sat on the bed and unbuttoned his pants and unzipped his pants. [The victim] testified that [the petitioner] told her to perform oral sex on him, and she said, "No." [The petitioner] again told her to perform oral sex on him, and she complied. After that, [the petitioner] told her to lay on top of him, and he performed oral sex on her while she performed oral sex on him. [The victim] testified that [the petitioner's] tongue and fingers touched her vagina. She said that this continued for three to five minutes until [the petitioner's] cell phone rang. When [the petitioner] answered the phone, [the victim] gathered her clothes and left the room. At trial, [the victim] testified that she had removed her clothes "[b]ecause [the petitioner] told me to. And he used to tell me that if I told anybody, that I would be taken away from [her foster mother]."

*Id.*, 2014 WL 1704953, at \*11-12.

On January 25, 2016, the pro se petitioner filed a petition for post-conviction relief, alleging, among other things, that he was deprived of the effective assistance of counsel at trial. Following the appointment of counsel, the petitioner filed an amended petition for post-conviction relief that further refined his claims of ineffective assistance of counsel.

At the evidentiary hearing, the petitioner testified that he was represented by another attorney when the charges were first levied in this case in 2007 and that trial counsel took over his case in 2011. The petitioner said that he did not meet with trial counsel at any point from the time trial counsel was assigned to his case until the trial. He claimed that he met with trial counsel's investigator one time and maintained that he did

not ever speak with either the investigator or trial counsel himself at any court date “other than trial.” The petitioner said that trial counsel did not review the discovery materials with him but acknowledged that his first attorney had provided him with a copy of the discovery materials. He also admitted that he had reviewed the victim’s recorded statements with his first attorney. The petitioner said that he “was really unsure” what trial strategy trial counsel intended to employ.

The petitioner testified that the State made plea offers while he was represented by his first attorney and that that attorney had “said he would reserve the right for us to go back and explore it.” The petitioner said that he told trial counsel “about a possible offer, and he said that he would get with the DA and ask them about it.” The petitioner claimed that trial counsel told him that the State “would offer me [12] years, but I would do [18] months after getting released from federal custody” and that he told trial counsel that “I would consider taking it.” The petitioner said that when trial counsel approached the State, however, “he said that they could no longer give me that plea because it was against Tennessee law.” As a result, the petitioner had no opportunity to “accept the plea.” At that point, “I figured it was over with. There was no offer that was going to be made, no negotiations.”

During cross-examination, the petitioner conceded that he was in federal custody until 2011, when he “was returned to state custody” and held in the Davidson County Jail. He admitted that trial counsel spoke with him in person at the jail two times “at most.” The petitioner said that, if given the chance, he would have accepted the plea offer initially made by the State.

Trial counsel testified that he began representing the petitioner “some time in 2011.” Initially, most of their communication occurred by mail because the petitioner “was in federal custody and he was being housed in Yazoo City, Mississippi.” With regard to plea negotiations, trial counsel recalled that “there had been an offer and it was either rejected or . . . we deferred whether we were going to accept or not.” Closer to the petitioner’s trial, trial counsel approached the prosecutor about the offer, and the prosecutor told him “that the offer the State had made would create an illegal sentence.” The issue was created by the fact that the petitioner was serving a federal sentence. Trial counsel explained that “[i]f the offer went from being [12] years concurrent with his federal sentence to [12] years consecutive to his federal sentence, I don’t think [the petitioner] was interested in accepting that offer.” Trial counsel could not recall the petitioner’s asking him to make a counter offer to the State.

At the conclusion of the hearing, the post-conviction court took the matter under advisement. The post-conviction court later denied post-conviction relief in a written order, ruling, as is relevant to this appeal, that trial counsel did not perform deficiently

during plea negotiations with the State. The court implicitly accredited counsel's testimony that he had "communicated with [the] petitioner regarding his initial plea offer, but [the] petitioner was not interested at the time. There were no further successful plea negotiations made to discuss with [the] petitioner." The court further found that the petitioner had failed to demonstrate any prejudice flowing from his counsel's "allegedly deficient conduct."

In this timely appeal, the petitioner reiterates his claim that trial counsel "failed to effectively negotiate on his behalf" and asserts that the post-conviction court erred by denying relief on this basis. The State contends that the court did not err because the petitioner failed to establish that counsel performed deficiently.

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 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.

The petitioner is not entitled to relief. The record establishes that the State made an offer that the petitioner did not immediately accept. At some point close in time to the petitioner's trial, the petitioner asked trial counsel to approach the State about his

accepting the previous offer. At that point, the prosecutor rescinded the offer on grounds that the offer included an illegal sentence. No further negotiations took place because the petitioner had not asked trial counsel to make a specific counter offer. Additionally, trial counsel indicated that, in his experience, the prosecutor involved in the petitioner's case would not have made a lower offer, and the petitioner would not have accepted a higher offer. The State is under no obligation to enter into plea negotiations, *see State v. Head*, 971 S.W.2d 49, 50 (Tenn. Crim. App. 1997) (citations omitted), and counsel cannot be faulted for the State's unwillingness to engage in such negotiations, *see Shanda Alene Wright v. State*, No. M2010-00613-CCA-R3-PC, slip op. at 6 (Tenn. Crim. App., Nashville, Apr. 8, 2011) (citing *Head*, 971 S.W.2d at 50).

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

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JAMES CURWOOD WITT, JR., JUDGE