

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs May 21, 2014

**LANCE THOMAS SANDIFER v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County  
No. 2007A591 Steve R. Dozier, Judge**

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**No. M2013-00723-CCA-R3-PC - Filed October 31, 2014**

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Petitioner, Lance Thomas Sandifer, was convicted of aggravated robbery, aggravated burglary, especially aggravated kidnapping, and aggravated rape. He was sentenced to an effective sentence of one-hundred and eight years in confinement. Petitioner appealed his convictions and sentence, and this court affirmed the judgments of the trial court. *State v. Lance Sandifer, et al.*, No. M2008-02849-CCA-R3-CD (Tenn. Crim. App., Dec. 21, 2010) *perm. app. denied* (Tenn., May 26, 2011). A detailed summary of the facts underlying Petitioner's convictions can be found in that opinion. Petitioner now appeals the trial court's denial of his petition for post-conviction relief, in which he alleged that his trial counsel was ineffective. Having reviewed the record before us, we affirm the judgment of trial court.

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

THOMAS T. WOODALL, P.J., delivered the opinion of the court, in which D. KELLY THOMAS, JR., J., joined. JEFFREY S. BIVINS, J., not participating.

Scott Wilder, Nashville, Tennessee, (on appeal), and Ryan Caldwell, Nashville, Tennessee, (post-conviction hearing), for the appellant, Lance Thomas Sandifer.

Herbert H. Slatery, III, Attorney General and Reporter; Clark B. Thornton, Senior Counsel; Victor S. Johnson, III, District Attorney General; and Rachel Sobrero, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Background

#### *Post-conviction hearing*

Petitioner testified that he met with trial counsel on court dates, and they met at the jail one time. Petitioner said that he made both an oral and a written request to trial counsel to have an investigator appointed to his case but trial counsel told Petitioner that he was not “going to do it.” He claimed that trial counsel did not do anything on his case concerning the interviewing of witnesses. Petitioner testified that the following witnesses would have helped in his case:

Ms. Susan Brooks, who came to my sentencing hearing, my mother, my resource coordinator from state custody, my old therapist. This, several different people. [Trial counsel] was offered help from my old attorney, who is now associate dean at a law school, he was offered her assistance, whatever she could do. He didn’t reach out to her at all.

Petitioner testified that he had taken medication since the age of six for “[a]nxiety, childhood mental traumas, [and] emotional disorder.” He claimed that he had not been taking the medication during the months leading up to trial. He could not give the name of the medication. Petitioner testified that his head was not clear during trial due to the fact that he was under a “whole lot of stress being locked up.”

Petitioner testified that trial counsel failed to file a motion for speedy trial as Petitioner had requested. He said that trial counsel also failed to file “a motion to obtain samples, statements and other evidence in the State’s possession[.]” Petitioner testified: “The coverage from the interviews with myself, my charge partners, the interviews with the victims, all of that. I ain’t seen none of it.” Petitioner testified that although trial counsel filed a motion to suppress his statements, he did not file a motion to suppress the out-of-court identifications.

Petitioner testified that he tried to communicate with trial counsel during jury selection, but trial counsel did not discuss the strategy with Petitioner. Petitioner claimed that trial counsel failed to strike certain jurors. He said that one juror in particular worked at Middle Tennessee Mental Health Institute. When asked how that prejudiced his case, Petitioner replied: “For the simple fact that she probably worked around those type people, so she might feel like somebody’s accountable for their actions, regardless of their mental stability or whatnot.” Petitioner also acknowledged that the juror could also be more

sympathetic to those with mental instability. Petitioner testified that trial counsel did not allow him to have input in the opening statement. He said, “[Trial counsel] didn’t say nothing [sic] that I ask[ed] him to say.”

Petitioner testified that trial counsel advised him “to an extent” of the “pros and cons” of testifying during trial. He said that trial counsel told him that “any statements that were made or anything that could be withheld or not, something like that. That all could be brought up or whatever, if I was to testify.” Petitioner ultimately did not testify at trial.

Petitioner did not believe that trial counsel had his best interest in mind and that the trial strategy was faulty. When asked what his trial strategy would have been, Petitioner testified:

To address the issues with them, first of all. Like for example the victim trying to play as though she was a saint. And on the stand herself, she mentioned that she, for example, smokes marijuana, communicated and keeping with people, cat thugs and whatnot. So therefore, how can you be such a great person if you [sic] on the stand, admitting that you broke the law yourself or whatnot. Not only that, the statements of what I did and didn’t do, he didn’t address that, he didn’t address certain evidence that was put on. For example, the expert, TBI expert witness said like, contradicting that he was trying to address, and I was telling him to address those things.

Petitioner testified that trial counsel did not call enough witnesses at his sentencing hearing. He said that he wanted the following people called: “Former employee, I mean, former employers, my mother, the person who supervised me when I used to do teens, young kids, mentoring young kids, where I worked at, all of that.”

On cross-examination, Petitioner testified that he wanted trial counsel to investigate everything. He said, “The fact that so many statements were contradicting, the victims would say one thing to one investigator, say something else at preliminary hearing, all of that.” Petitioner wanted an investigator to look into the statements of witnesses “and the fact that they didn’t admit their role in the robberies.” He also wanted an investigator to speak with the victims.

Petitioner testified that he wanted trial counsel to call his mother as a witness at trial because she was the person he called when he was “trying to leave.” He said that his mother would have testified that he was not present for the kidnapping. Petitioner agreed that he and the others left the house where the offenses occurred in two cars, and the victim who was kidnapped was in one of the cars. Petitioner also testified that he wanted his resource

coordinator called “because that’s who I was with the day before and supposed to have been with that day.”

Concerning his mental health issues, Petitioner testified that his anxiety clouded his mind and caused him to make some bad decisions. He claimed that trial counsel did not put forth his best effort or do what Petitioner “told him to do.” When asked how he wanted his trial to be different, Petitioner testified:

I wanted him to have all, to just tap all resources period. I mean, as far as mental health, as far as getting professional opinions from people with doctorates in psychology and whatnot, professional opinions on every level. Investigating whatever may or may not be investigated, I’m not sure on what could have been investigated specifically. I’m pretty sure there’s a thing that I don’t see because I am not a professional in that field. But he’s supposed to be and he didn’t even put forth the effort is what I’m saying.

Petitioner testified that there were contradictions between the testimony of the Tennessee Bureau of Investigation (TBI) witness and the victim’s testimony. Petitioner also wanted trial counsel to obtain samples of the physical evidence in his case.

Trial counsel testified that he has been licensed to practice law since 1994, and ninety-five percent of his practice has been criminal defense work. He was appointed to represent Petitioner after Petitioner’s arraignment in criminal court in 2007. The trial was held in 2008. Trial counsel did not recall Petitioner requesting an investigator for his case. Trial counsel said that an investigator was not necessary. He testified:

I essentially knew the facts of the case. I didn’t have any witnesses that I needed to be located and interviewed. I knew what the victims were going to say, I had been through their preliminary hearing testimony. Essentially I didn’t need one.

Trial counsel testified that he had many discussions with Petitioner. According to his records submitted to the Administrative Office of the Courts (AOC), trial counsel met with Petitioner four times at the Criminal Justice Center and they met several other times “when we would have court appearances and discuss his case and settlement negotiations at that time.” Trial counsel did not believe that Petitioner was unable to comprehend their discussions.

Trial counsel was aware that Petitioner had some “mental health issues in his life,” and he obtained Petitioner’s mental health records and reviewed them. He said:

I just couldn't articulate why I needed to have him evaluated. I never got the impression that he wasn't understanding what I was telling him, what we were going to possibly pose as a defense, or that he was in anyway, not really communicating with him and not hearing what I was telling him about the case.

Trial counsel testified that Petitioner did not like what trial counsel told him. Trial counsel said that if he had gotten the impression that Petitioner did not understand anything, he could have gotten Petitioner evaluated "in an attempt to raise some sort of evidentiary issue with regard to his competence."

Trial counsel testified that Petitioner did not have much of a defense at trial. He hoped to impeach the female victim to a certain extent because she had made some statements that were "not in line with the evidence." She had also made some contradictory statements with regard to whether Petitioner anally raped her. Trial counsel pointed out that the jury obviously agreed with him because Petitioner was not convicted of the charges involving anal rape. Trial counsel testified:

But as far as the other charges went, you know, had very little defense because these victims were prepared to come into court and identify him as the perpetrator of these crimes. Yes, I brought out the fact that they had used marijuana, but that didn't, apparently discredit their testimony sufficiently in front of the jury to acquit him of these charges.

Trial counsel testified that his opening statement was brief because he did not have a lot to say, and it was his strategy not to make a lengthy opening statement. He said, "Well, I didn't want to belabor a lot of points. I didn't want to try to look incredible in front of a jury by [saying] a lot of stuff that I wasn't later going to be able to back up."

Trial counsel did not recall if Petitioner asked him to call witnesses at trial. He was not aware of witnesses who would come into court and testify that Petitioner was not present during the crimes or that he did not commit them. Trial counsel did not remember having a specific conversation with Petitioner about his right to testify but it was his practice to discuss those rights with his clients. He said:

I advise them exactly what the law is. That they have the right to testify in their own behalf if they want to do so. Nobody can prevent them from testifying if they want to, nobody can compel them to testify if they don't want to. In his case, since he was so young, I would probably have advised him that there was not, that there were probably no impeaching criminal

convictions that the State would be using against him, but that he would be subject to cross-examination if he did testify. I don't have any specific recollection of that conversation however.

Concerning Petitioner's sentencing hearing, trial counsel testified that he contacted a woman, who traveled to Tennessee from out of state, who had been a mental health or Department of Children's Services worker and had previously worked with Petitioner. Trial counsel testified that the woman addressed Petitioner's "mental condition and the conditions of his life." He said that Petitioner had a difficult childhood because he had no father figure and had been abandoned by his mother. Trial counsel testified that he did not call Petitioner's mother to testify at the sentencing hearing, and he did not recall why he did not call her as a witness.

### **Analysis**

Petitioner argues that trial counsel was deficient for (1) failing to adequately meet with him and review his case in detail; (2) failing to investigate all facts of the case; (3) failing to have Petitioner evaluated by a mental health professional; (4) failing to file proper pretrial motions; (5) failing to call certain witnesses at the sentencing hearing; and (6) failing to allow him to participate in his own defense relating to jury selection, opening statements, and the right to testify. The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. *See* Tenn. Code Ann. § 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).

To establish entitlement to post-conviction relief via a claim of ineffective assistance of counsel, the post-conviction petitioner must affirmatively establish first 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 second that his counsel's deficient performance "actually had an adverse effect on the defense[.]" *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (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." *Id.* at 694. Should the petitioner fail to establish either deficient performance or prejudice, he is not entitled to relief. *Id.* at 697; *Goard v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Indeed, "[i]f it is easier to dispose of an ineffectiveness claim on the

ground of lack of sufficient prejudice, that course should be followed.” *Strickland*, 466 U.S. at 697.

When reviewing a claim of ineffective assistance of counsel, we will not grant the petitioner the benefit of hindsight, second-guess a reasonably based trial strategy, or provide relief on the basis of a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Claims of ineffective assistance of counsel are mixed questions of law and fact. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). When reviewing the application of law to the post-conviction court’s factual findings, our review is de novo, and the post-conviction court’s conclusions of law are given no presumption of correctness. *Fields*, 40 S.W.3d at 457-58; *see also State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000).

Concerning Petitioner’s claims of deficient performance, the trial court held:

The petitioner alleges that trial counsel failed to adequately investigate his case. Specifically, he alleges that counsel failed to secure an investigator to contact Petitioner’s witnesses. The Court accredits the testimony of trial counsel that there were no witnesses at the post-conviction hearing or proof to support this allegation. The Court finds the petitioner has failed to prove this allegation by clear and convincing evidence, and he has not demonstrated any prejudice, therefore the issue is without merit.

The petitioner asserts that trial counsel failed to file a motion for speedy trial after he requested it. The Court finds that the defendant received a speedy trial. Further, the result would have been the same even if the motion was filed. The Court finds that the petitioner has failed to prove this allegation by clear and convincing evidence, and he has not demonstrated any prejudice, therefore the issue is without merit.

The petitioner claims that trial counsel did not confer with him and only saw him on a limited basis prior to trial which resulted in a failure to present a defense that coincided with the proof adduced at trial. The Court has reviewed the time sheets submitted by trial counsel, and accredits trial counsel’s testimony that he met with the petitioner multiple times to discuss the case and

had lengthy discussions with him. The petitioner also admitted that he had multiple meetings with trial counsel to discuss the case. The petitioner failed to provide proof as to what defense he thought should have been presented and how it would have changed the outcome. The Court finds the petitioner has failed to prove this allegation by clear and convincing evidence, and he has not demonstrated any prejudice, therefore the issue is without merit.

The petitioner asserts that trial counsel was ineffective during jury selection by not striking certain jurors that had ties to law enforcement and other jurors who were government employees who brought their own prejudices into deliberations. Jury selection is an inexact science, and there are plausible strategic explanations for trial counsel's decisions. This Court will not second guess trial counsel's tactical decisions during the selection process without sufficient proof. Further, petitioner presented no proof as to how his case was prejudiced by the failure to strike specific jurors. The Court finds the petitioner has failed to prove this allegation by clear and convincing evidence, and he has not demonstrated any prejudice, therefore the issue is without merit.

The petitioner also alleges that trial counsel was ineffective for failing to allow him to have input in the opening statement. The Court accredits the testimony of trial counsel who stated his brief opening statement was a strategic decision to keep it simple for the jury and to not belabor a lot of points. Further, petitioner presented no proof as to what the substance of his input was or how he was prejudiced by the fact that his input was not utilized by counsel during the opening statement. The Court finds the petitioner has failed to prove this allegation by clear and convincing evidence, and he has not demonstrated any prejudice, therefore the issue is without merit.

The petitioner claims that trial counsel failed to call material witnesses in his defense. During the post-conviction hearing, the petitioner was asked to specifically state who the exculpatory witnesses were that he wished his attorney would have called to testify at trial. He could not provide any names or witnesses that would have been favorable to his defense at trial. The Court finds the petitioner has failed to prove this allegation by clear and convincing evidence, and he has not demonstrated any prejudice, therefore the issue is without merit.

The petitioner also alleges that trial counsel failed to file a motion to suppress out of court identifications. The petitioner did not provide any proof as to the basis of the motion to suppress the out of court identifications, and there was



no proof to show it would have been granted if it was filed. The Court finds the petitioner has failed to prove this allegation by clear and convincing evidence, and he has not demonstrated any prejudice, therefore the issue is without merit.

The petitioner asserts that trial counsel failed to adequately advise him with regarding [sic] his right to testify at trial. The court accredits the testimony of trial counsel who stated that he discussed the strengths and weaknesses of testifying with the defendant. Further, the Court conducted a *Momon* hearing at trial to ensure the petitioner understood his rights. *Momon v. State*, 18 S.W.3d 152 (Tenn. 1999). The Court finds the petitioner has failed to prove this allegation by clear and convincing evidence, and he has not demonstrated any prejudice, therefore the issue is without merit.

The petitioner alleges that trial counsel failed to properly look into his mental health issues and failed to facilitate a mental health evaluation. The Court accredits the testimony of trial counsel that he saw no reason to get the petitioner evaluated. He stated that he seemed lucid, and he understood their discussions. The Court finds the petitioner has failed to prove this allegation by clear and convincing evidence, and he has not demonstrated any prejudice, therefore the issue is without merit.

The petitioner alleges that trial counsel failed to call any witnesses on his behalf at the sentencing hearing. At the hearing, the defendant stated that he wanted his attorney to call Susie Brooks, his mother, and the resource coordinator from the state department to ask for leniency and inform the Court about his mental health issues. At the sentencing hearing, Susie Brooks did testify on the petitioner's behalf. She testified as to his mental health issues and his upbringing, and she covered all of the matters that he wanted to be discussed. The Court finds the petitioner has failed to prove this allegation by clear and convincing evidence, and he has not demonstrated any prejudice, therefore the issue is without merit.

We conclude that the evidence does not preponderate against the trial court's findings that trial counsel was not deficient in any of the areas alleged by Petitioner. Petitioner did not prove any of his claims by clear and convincing evidence, and he has failed to demonstrate that he was prejudiced by any alleged deficiencies in trial counsel's performance.

As for trial counsel's alleged failure to adequately meet with him and review his case in detail, Petitioner admitted that trial counsel met with him on court dates and that they met at the jail one or two times. Trial counsel testified that he had many discussions with petitioner, and records submitted to the AOC indicated that trial counsel met with Petitioner four times at the Criminal Justice Center, as well as several other times during court appearances and settlement negotiations to discuss the case. This issue is without merit.

Trial counsel testified that he did not request funds for an investigator in Petitioner's case because he did not feel that one was necessary. He also testified that Petitioner did not ask him to hire an investigator. Petitioner offered no evidence as to what further investigation by an investigator would have uncovered, and Petitioner never indicated that there were any witnesses who could rebut the facts of his participation in the crimes. As pointed out by the State, the trial court accredited trial counsel's testimony that "there were no witnesses to find that would have changed the outcome of the case." Therefore, he cannot demonstrate any prejudice by the failure to hire an investigator.

As for trial counsel's alleged failure to have petitioner evaluated by a mental health professional, petitioner again did not present any evidence of his mental health other than his own testimony that he had some problems with anxiety, childhood mental traumas, and an emotional disorder. Trial counsel was aware that Petitioner had some "mental health issues in his life," and he obtained Petitioner's mental health records and reviewed them. He could not "articulate" why he needed to have Petitioner evaluated, and he did not get the impression that Petitioner was unable to comprehend their conversations. Petitioner has not proven this allegation by clear and convincing evidence.

Petitioner also failed to demonstrate that trial counsel failed to file the proper pretrial motions in that trial counsel did not file a motion for speedy trial or a motion to suppress eyewitness out-of-court identification. The record does not preponderate against the trial court's finding that Petitioner's right to a speedy trial was not denied. Petitioner was arrested soon after the commission of the offenses on November 7, 2006. *Lance Sandifer, et al.*, 2010 WL 5343202, at \*2-3. A jury trial with co-defendants was held on August 11-15, 2008. The twenty-one month period between petitioner's arrest and the trial was not unreasonable considering that there were multiple co-defendants and charges in this case. *See State v. Vickers*, 985 S.W.2d 1, 6 (Tenn. Crim. App. 1997)(complexity of the case and the need for judicial economy are valid reasons for delay).

Concerning a motion to suppress out-of-court identifications, trial counsel did not see any grounds to file such a motion. There was no proof presented at the post-conviction hearing for such a motion, and the post-conviction court correctly found that there was no proof to show that the motion would have been granted if it were filed. As noted by the

State, when there is an allegation that trial counsel was deficient by failing to file a motion to suppress, petitioner must demonstrate actual prejudice by proving that the motion has merit. See *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)(when failure to litigate suppression is the basis for an ineffectiveness claim, a petitioner must also prove that the claim is meritorious and that there was a reasonable probability that the verdict would have been different absent the excluded evidence). This issue is without merit.

Petitioner's allegation that trial counsel failed to call certain witnesses at the sentencing hearing is likewise without merit. It is well settled that "[w]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Neither the post-conviction court nor the reviewing court may speculate on "what a witness's testimony might have been if introduced by defense counsel." *Id.* Petitioner failed to present any potential trial witnesses at the post-conviction hearing. Therefore, he did not prove this claim by clear and convincing evidence. Finally, as pointed out by the trial court, trial counsel called Susie Brooks, a witness mentioned by petitioner, to testify concerning petitioner's mental health issues and his upbringing, and she "covered all of the matters that [Petitioner] wanted to be discussed."

Finally, Petitioner argues that trial counsel failed to consult with him during jury selection and failed to strike certain jurors who had connections to law enforcement or who might otherwise be biased against him. However, Petitioner presented no proof at the post-conviction hearing concerning this matter other than his testimony that someone who worked at the Middle Tennessee Mental Health Institute was on the jury. He did not prove this claim by clear and convincing evidence nor did he demonstrate any prejudice whatsoever to his case. As for Petitioner's claim that trial counsel failed to consult him during opening statement, Petitioner has not demonstrated any prejudice. Trial counsel testified that he made a strategic decision to give a short opening statement because he did not want to "belabor a lot of points" or lose credibility with the jury by making statements that he would not be able to support during trial. This Court will not second-guess trial counsel's strategic decision. Petitioner also claims that trial counsel inadequately informed him about the risks and benefits of testifying at trial. The trial court accredited the testimony of trial counsel who said that although he did not recall a specific conversation with Petitioner about his right to testify, it was his practice to advise clients "exactly what the law is." Moreover, the trial record reflects that a hearing was conducted at trial to ensure that Petitioner had consulted with counsel and understood his rights. *Momon v. State*, 18 S.W.3d 152, 162 (Tenn. 1999). During that hearing, Petitioner indicated that after consulting with trial counsel, he had decided not to testify at trial. This issue is without merit.

For the reasons stated above, we affirm the judgment of the trial court.

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THOMAS T. WOODALL, JUDGE