

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs February 1, 2023

**FILED**  
02/08/2023  
Clerk of the  
Appellate Courts

**MAKYLE J. LOVE v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Shelby County**  
**No. 16-06589 Paula L. Skahan, Judge**

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**No. W2022-00655-CCA-R3-PC**

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Makyle J. Love, Petitioner, appeals the denial of his petition for post-conviction relief. On appeal, he alleges that the post-conviction court improperly denied post-conviction relief because trial counsel provided ineffective assistance of counsel. After a thorough review, 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 ROBERT L. HOLLOWAY, JR., and KYLE A. HIXSON, JJ., joined.

Josie S. Holland, Memphis, Tennessee, for the appellant, Makyle J. Love.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; and Eric Walton, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

Petitioner met the victim on Plenty of Fish, a dating website. *State v. Makyle J. Love*, No. W2018-00738-CCA-R3-CD, 2019 WL 1411200, at \*1 (Tenn. Crim. App. Mar. 28, 2019), *perm. app. denied* (Tenn. July 18, 2019). On April 4, 2016, around 11:00 p.m., Petitioner drove to the victim's house, picked her up, and then drove to an abandoned house. *Id.* Once there, they drank and listened to music in the car. *Id.* Petitioner pulled out a weapon and threatened the victim. *Id.* Petitioner told the victim to get into the backseat and Petitioner followed. *Id.* He then forced the victim to perform fellatio and afterwards penetrated the victim's vagina with his penis. *Id.* Petitioner cleaned himself

with napkins, put them into a Wendy's bag, and threw the bag out of the car. *Id.* He dropped the victim back off at her house. *Id.*

The victim called the police and reported the rape. *Id.* Police arrived and took a statement from the victim. *Id.* The officers drove to the abandoned house and found the Wendy's bag containing the napkins. *Id.* The officers then drove the victim to the Shelby County Crime Victims & Rape Crisis Center for a full examination. *Id.* As part of the examination, vaginal swabs were taken from the victim. *Id.* at \*3. An agent from the Tennessee Bureau of Investigation tested one vaginal swab and found the presence of sperm cells which were later determined to match Petitioner's DNA. *Id.* at \*3. Approximately one week after the rape, the victim identified Petitioner as the perpetrator in a photographic lineup. *Id.* at \*2.

Screenshots of messages from the dating website between Petitioner and the victim were admitted at trial which indicated Petitioner was supposed to give the victim money in exchange for sexual intercourse. *Id.* One of the messages said, "40 for head 80\$ for both." *Id.* At the conclusion of the trial, Petitioner was convicted of aggravated rape and sentenced to 23 years in incarceration. *Id.* at \*3. Petitioner challenged the sufficiency of the convicting evidence on direct appeal and a panel of this Court affirmed his conviction. *Id.* at \*4. The Tennessee Supreme Court denied Petitioner's permissive appeal on July 18, 2019.

Petitioner delivered a pro se petition for post-conviction relief to prison officials on July 16, 2020. The petition was erroneously delivered to this Court, rather than the post-conviction court. Petitioner subsequently sent his petition to the post-conviction court on September 8, 2020, and it was filed on September 21, 2020. Petitioner was appointed counsel. Through counsel, he filed an amended petition, alleging multiple claims of ineffective assistance of counsel.<sup>1</sup>

The post-conviction court held an evidentiary hearing on January 28, 2022. Trial counsel and Petitioner both testified at the hearing. Trial counsel testified that he had practiced law since 2000, and 99 percent of his practice involved criminal defense. Trial counsel recalled the jury's verdict of guilty being a surprise to everyone. Trial counsel recounted the facts of Petitioner's case and said that his trial theory was based upon consent. Trial counsel explained his strategy stating, "That she was a prostitute and he had

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<sup>1</sup> Petitioner raised other claims of ineffective assistance of counsel in his amended petition for post-conviction relief and at the hearing that are not raised on appeal. Those claims are abandoned and we accordingly limit our summary of the facts to the one issue on appeal. *See Ronnie Jackson, Jr. v. State*, No. W2008-02280-CCA-R3-PC, 2009 WL 3430151, at \*6 n.2 (Tenn. Crim. App. Oct. 26, 2009) ("While the Petitioner raised additional issues in his petition for post-conviction relief, he has abandoned those issues on appeal."), *perm. app. denied* (Tenn. Apr. 16, 2010).

sex with her consensually, didn't pay her, and then she made a false allegation of rape." Trial counsel recalled messages between Petitioner and the victim concerning an agreement for an exchange of money for sex.

Trial counsel did not recall saying "[w]e all know prostitutes can be raped[.]" but admitted that if it was in the filings, he could "definitely see why [he] would have said that." Trial counsel reasoned that he might have said the statement to control the victim's testimony and "stop[] her [testimony] from running [on]." Trial counsel disagreed that the statement was an admission of Petitioner's guilt.

On cross-examination, trial counsel testified that he had represented thousands of defendants, tried hundreds of cases, and handled at least 10 rape cases. Trial counsel agreed his strategy was to show that the victim, being a prostitute, had consensual sex with Petitioner and was not paid. Trial counsel reiterated that the most likely reason for asking the victim, "You know prostitutes can be raped?" was "to stop a runaway witness[.]" Trial counsel denied admitting or even suggesting Petitioner's guilt.

Petitioner testified that he was unsatisfied with trial counsel's services. He wanted trial counsel to share images of cellphone screenshots containing messages between Petitioner and the victim with the State, but trial counsel did not share the screenshots. When asked how Petitioner thought trial counsel handled the question of consent, he said trial counsel "stayed in the line of saying, like, he was trying to prove that she was a prostitute[.]" However, Petitioner thought trial counsel should have attacked the victim's entire description of the evening. Petitioner said that trial counsel "did a good job, exceptionally well" when cross-examining the victim during jury-out hearings. Petitioner admitted that he was soliciting a prostitute. On cross-examination, Petitioner claimed that trial counsel did not provide him with discovery and only met with him three times before trial.

The post-conviction court entered a written order denying post-conviction relief. Regarding whether trial counsel admitted Petitioner's guilt during the cross-examination of the victim, the post-conviction court found that based on the context of the question, "[y]ou understand that prostitutes can get raped?", trial counsel "was working towards impeachment of the victim[.]" The court found that trial counsel asked the question because the victim "continuously expressed throughout her examination that no prostitution had occurred[.]" Trial counsel sought to elicit testimony from the victim that the victim and Petitioner participated in consensual sex. The court found that trial counsel "in no way implicated Petitioner's guilt" when he asked this question to the victim. The post-conviction court concluded that Petitioner failed to show trial counsel performed deficiently or that trial counsel's representation prejudiced Petitioner. Petitioner now appeals.

## *Analysis*

Petitioner contends that the post-conviction court erred in denying post-conviction relief because trial counsel provided ineffective assistance of counsel when he “admitted his client’s guilt.” The State first responds that Petitioner’s appeal should be dismissed as untimely. The record reflects that Petitioner handed his petition to prison officials on July 16, 2020. Pursuant to the prison “mailbox rule,” a post-conviction petition prepared by an incarcerated pro se litigant is deemed timely “if the papers were delivered to the appropriate individual at the correctional facility within the time fixed for filing.” A petitioner has the burden “to establish compliance with this provision.” Tenn. R. Sup. Ct. 28 § 2(G). A post-conviction petitioner has one year from “the date of the final action of the highest state appellate court to which an appeal is taken” to file a petition for relief. T.C.A. § 40-30-102(a). Petitioner’s judgment became final on July 18, 2019. Therefore, Petitioner was required to file his petition on or before July 18, 2020, which it appears he did.<sup>2</sup> The State also responds that the post-conviction court properly denied relief. As to this argument, we agree with the State.

Post-conviction relief is available for any conviction or sentence that 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. In order to prevail in a claim for post-conviction relief, a petitioner must prove his 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, a post-conviction court’s findings of fact are conclusive unless the evidence preponderates otherwise. *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006). Accordingly, questions concerning witness credibility, the weight and value to be given to testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction court, and an appellate court may not substitute its inferences for those drawn by the post-conviction court. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001). However, the post-conviction court’s

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<sup>2</sup> The State argues in its brief that the post-conviction court could have dismissed the Petition for “Lack of Timeliness.” While the record is not entirely clear as to dates of filing, it does plainly appear from the face of the petition on page 15, item 20, that the petition was given to prison authorities for mailing on July 16, 2020. It is more than odd that the sworn notary date is July, 2, 2020, 14 days before Petitioner executed the Petition. These oddities and timeliness issues were not pointed out by the State in the post-conviction court. In fact, the assistant district attorney general noted in her response to the Petition that the “petitioner’s filing meets the threshold requirements of Tenn. Code Ann. § 40-3-106,” and the “petitioner’s pro-se petition appears to be filed within the time set forth in the statute of limitations.”

conclusions of law and application of the law to the facts are reviewed under a purely de novo standard, with no presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Both the Sixth Amendment to the Constitution of the United States and article I, section 9 of the Tennessee Constitution guarantee the right of an accused to the effective assistance of counsel. See *Davidson v. State*, 453 S.W.3d 386, 392-93 (Tenn. 2014). In order to sustain a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Under the two-prong test established by *Strickland v. Washington*, 466 U.S. 668, 687 (1984), a petitioner must prove that counsel's performance was deficient and that the deficiency prejudiced the defense. See *State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel applied in federal cases also applies in Tennessee). Because a petitioner must establish both elements in order to prevail on a claim of ineffective assistance of counsel, "failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). "Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component." *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 697).

The test for deficient performance is whether counsel's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688; *Henley*, 960 S.W.2d at 579. This Court must evaluate the questionable conduct from the attorney's perspective at the time, *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982), and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *State v. Burns*, 6 S.W.3d 453, 462 (Tenn. 1999).

Even if a petitioner shows that counsel's representation was deficient, the petitioner must also satisfy the prejudice prong of the *Strickland* test in order to obtain relief. The question is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). A petitioner must show that there is a reasonable probability "sufficient to undermine confidence in the outcome" that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Burns*, 6 S.W.3d at 463 (quoting *Strickland*, 466 U.S. at 694).

At the heart of this appeal is the question trial counsel posed to the victim during cross-examination: "You understand that prostitutes can get raped?" The post-conviction

court found that trial counsel's question to the victim was for the purpose of impeachment. Trial counsel's strategy was to show that the victim was a prostitute and engaged in consensual sex with Petitioner. We agree with the post-conviction court. Trial counsel pursued a reasonable strategy to establish that Petitioner and the victim engaged in consensual sex, but that the victim was not paid. We will not second-guess trial counsel's strategic decision. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Moreover, there was ample evidence to support Petitioner's conviction and trial counsel's question to the victim did not prejudice Petitioner in light of the overwhelming evidence. The evidence does not preponderate against the findings of the post-conviction court and Petitioner is not entitled to relief.

*Conclusion*

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

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TIMOTHY L. EASTER, JUDGE