

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

Assigned on Briefs January 5, 2017

**DEMETRIUS ARMSTRONG v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Gibson County**  
**No. 9495     Clayburn Peeples, Judge**

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**No. W2016-00775-CCA-R3-PC**

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The Petitioner, Demetrius Armstrong, appeals the denial of his petition for post-conviction relief by the Gibson County Circuit Court. On appeal, the Petitioner argues that he received ineffective assistance of counsel and that his guilty plea was involuntary and unknowing. Upon review, we affirm the judgment of the post-conviction court.

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

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ALAN E. GLENN, JJ., joined.

Christie Hopper, Jackson, Tennessee, for the Petitioner, Demetrius Armstrong.

Herbert H. Slatery III, Attorney General and Reporter; Sophia S. Lee, Senior Counsel; Garry G. Brown, District Attorney General; and Hillary Lawler Parham, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

On November 12, 2013, the Petitioner was indicted for two counts of rape, aggravated statutory rape, domestic assault, and child abuse and neglect. On July 14, 2014, the Petitioner pled guilty to one count of attempted rape and, pursuant to a plea agreement, the State dismissed the remaining four counts. As a Range I, Standard Offender, the Petitioner received a sentence of eight years' incarceration at thirty percent.

**Guilty Plea Hearing.** At the July 14, 2014 guilty plea hearing, the State summarized the underlying facts as follows:

. . . [O]n August 18th[,] Humboldt Police investigated an alleged rape from 815 North 23rd Street. The investigation revealed that this man, the

[Petitioner,] was the boyfriend of a lady and had had sex with her 17 year old daughter. The 17 year old daughter suffered from cerebral palsy and was really nonverbal. Although there's a difference of opinion as to what her mental functioning was, physically she couldn't communicate beyond the level of a two or three year old is what the evaluation revealed. This [Petitioner] gave a statement to police admitting that he had had what he described as consensual sex with the victim, so we're dealing with a potential rape based on lack of consent because of her inability to give consent and a potential aggravated statutory rape based on the age differences in the parties.

When asked by the trial court if the State's recitation of the facts was correct, the Petitioner responded, "That's what on the paper; yes, sir." The court explained to the Petitioner the rights he would waive by pleading guilty, including his right to a jury trial, his right to confront witnesses, and his right to an appeal. The Petitioner indicated that he understood these rights and his plea agreement and that he was satisfied with his representation by trial counsel. The trial court also confirmed that the Petitioner understood he would be required to comply with the Tennessee Sexual Offender's Registry as well as community supervision for life. Upon concluding that the Petitioner's guilty plea was knowing and voluntary, the trial court accepted the Petitioner's guilty plea.

Two days later, on July 16, 2014, the Petitioner filed a pro se "Motion for Correction or Reduction of Sentence or Post[-]Conviction Relief" requesting that the trial court transfer him to a different institution with a treatment program for sex offenders. The Petitioner also filed a September 23, 2014 letter requesting the appointment of counsel to assist him in filing an ineffective assistance of counsel claim and requesting a new trial. After the appointment of counsel, an amended petition, which incorporated the Petitioner's prior pro se filings, was filed on October 8, 2015. The amended petition alleged, inter alia, that the State failed to provide exculpatory DNA evidence and that, if he had known about the absence of DNA evidence against him, he would not have entered into the plea agreement.

**Post-Conviction Hearing.** At the January 4, 2016 post-conviction hearing, trial counsel testified that he had practiced law in Gibson County since 2008 and represented the Petitioner in the instant case. Trial counsel recalled that he received the DNA results on the day the Petitioner pled guilty, prior to entering the plea. Trial counsel testified that he was not provided a copy of the results but that he and the District Attorney looked at them together. When asked whether he shared the results with the Petitioner, trial counsel testified that, "We did not specifically after I looked at the results sit down and say, okay, this is what the results said." Trial counsel stated that the Petitioner's plea

agreement was “tenuous” before they went to court. Trial counsel explained that the Petitioner “had an offer from the State quite some time prior to [trial counsel] seeing the [DNA] results” and that he had discussed the offer with the Petitioner. Trial counsel testified that he was expecting the DNA results and was not surprised that they were negative. Trial counsel explained that he had discussed with the Petitioner that a positive or negative DNA result was immaterial because “between the testimony that was given at the [p]reliminary [h]earing and the statement that he had given [to police] that we fully expected the State to play in their case[-]in[-]chief, that that would be sufficient to achieve a conviction whether or not the DNA results singled him out.” Furthermore, trial counsel testified that, based on his discussions with the Petitioner, he believed “that there may be more of a timeframe gap than what the State expected and that the DNA results may or may not show anything.” Trial counsel also testified that he reviewed the discovery from the State and that they had an “open file policy.” However, trial counsel also stated that he did “an independent investigation” by having one of his investigators go to the police department to talk to the State’s investigators and “get whatever materials they will provide.”

On cross-examination, trial counsel testified that he had discussed the State’s settlement offer with the Petitioner “more than twice and for more than a few minutes.” Trial counsel also acknowledged that the Petitioner’s eight-year sentence was outside the range for an attempted rape conviction. However, trial counsel confirmed that the Petitioner understood his decision based on the strengths and weaknesses of his case and that the sentence would be at thirty percent release eligibility instead of a possible one-hundred percent release eligibility if the Petitioner was convicted of rape. Trial counsel also acknowledged that the Petitioner was “very, very hesitant” to enter the plea agreement when they were in court “because there were a number of other inmates who were going to hear when the case was explained, and there were potentially going to be ramifications for him back at the jail.”

The Petitioner testified that he did not learn about the DNA results in his case on the day he entered his guilty plea. The Petitioner also testified that if he had known about the results it would have affected his decision to enter his guilty plea. On cross-examination, the Petitioner acknowledged that he had a trial date set and could have gone to trial but chose to plead guilty instead. The court then asked the Petitioner when he learned about the DNA results, to which the Petitioner responded:

To be honest with you, I just got a hard copy of -- not a hard copy, but I just got the real answer today from my lawyer. I didn’t know nothing [sic] about the DNA. My mom had told me that she had talked to my -- to the victim’s mother, which was my girlfriend at the time, and the victim’s

mother at the time had told my mom that they were negative and my mom told me that they were negative, and that was like after I signed the plea.

The State did not call any witnesses but introduced the Petitioner's guilty plea form, judgment forms, a transcript of the guilty plea hearing, and the DNA results as exhibits. The official forensic biology report indicated that the Tennessee Bureau of Investigation had tested the victim's underwear, as well as oral and vaginal swabs from the victim, and that all examinations did not indicate the presence of semen.

The post-conviction court denied the Petitioner relief, finding that the Petitioner was not prejudiced by the actions of trial counsel and that the Petitioner made a "knowing and intelligent decision to plead guilty." The court also found that there was no indication that the State delayed or withheld the DNA results. The post-conviction court subsequently issued a written order denying relief on January 15, 2016. In its order, the court found that the Petitioner's testimony that he did not receive the DNA results until after he pled guilty was not credible. The court also found that the Petitioner failed to present evidence that trial counsel's performance was deficient or that any prejudice occurred because "counsel met with the [P]etitioner and both had contemplated the possible [DNA] results prior to receiving this information in [c]ourt." Additionally, the court found that "[trial counsel] certainly met the standard enumerated in Strickland, in that he explored alternative theories and he correctly identified issues that placed the Defendant in jeopardy, i.e.[,] the statement to law enforcement and the effects on the trial."

On April 8, 2016, the Petitioner filed an untimely notice of appeal. On July 18, 2016, the Petitioner filed a motion requesting this court to accept the late-filed notice of appeal, which this court granted on August 4, 2016.

### ANALYSIS

The Petitioner asserts that he received ineffective assistance of counsel and that his guilty plea was involuntary and unknowing. He argues that trial counsel's performance was deficient based on his failure to share the DNA results with the Petitioner prior to entering his guilty plea. The Petitioner further contends that he "was on the fence with regard to the plea, two weeks out from trial, and was not informed that the lab results failed to incriminate him" and that, therefore, the Petitioner, "unaware of the full strengths and weaknesses of the State's case[,] could not enter a knowing and voluntary plea." The State responds that the Petitioner failed to establish that trial counsel's performance was deficient or that he would have rejected the guilty plea if he had known about the DNA results. Upon review, we agree with the State.

We begin our review of these issues by acknowledging that post-conviction relief is only warranted when a petitioner establishes that his or her conviction is void or voidable because of an abridgement of a constitutional right. T.C.A. § 40-30-103. The Tennessee Supreme Court has held:

A post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. When reviewing factual issues, the appellate court will not re-weigh or re-evaluate the evidence; moreover, factual questions involving the credibility of witnesses or the weight of their testimony are matters for the trial court to resolve. The appellate court's review of a legal issue, or of a mixed question of law or fact such as a claim of ineffective assistance of counsel, is de novo with no presumption of correctness.

Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006) (internal citations and quotation marks omitted); Frazier v. State, 303 S.W.3d 674, 679 (Tenn. 2010); see Felts v. State, 354 S.W.3d 266, 276 (Tenn. 2011). A post-conviction petitioner has the burden of proving the factual allegations by clear and convincing evidence. T.C.A. § 40-30-110(f); Tenn. Sup. Ct. R. 28, § 8(D)(1); Dellinger v. State, 279 S.W.3d 282, 293-94 (Tenn. 2009). Evidence is considered clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from it. Lane v. State, 316 S.W.3d 555, 562 (Tenn. 2010); Grindstaff v. State, 297 S.W.3d 208, 216 (Tenn. 2009); Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

**I. Ineffective Assistance.** In Vaughn, the Tennessee Supreme Court repeated well-settled principles applicable to claims of ineffective assistance of counsel:

The right of a person accused of a crime to representation by counsel is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. Both the United States Supreme Court and this Court have recognized that this right to representation encompasses the right to reasonably effective assistance, that is, within the range of competence demanded of attorneys in criminal cases.

Vaughn, 202 S.W.3d at 116 (internal quotations and citations omitted).

In order to prevail on an ineffective assistance of counsel claim, a petitioner must establish that (1) his lawyer's performance was deficient and (2) the deficient performance prejudiced the defense. Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). “[A] failure to prove

either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. 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).

A petitioner successfully demonstrates deficient performance when the clear and convincing evidence proves that his attorney’s conduct fell below “an objective standard of reasonableness under prevailing professional norms.” Id. at 369 (citing Strickland, 466 U.S. at 688; Baxter, 523 S.W.2d at 936). Prejudice arising therefrom is demonstrated once the petitioner establishes “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 370 (quoting Strickland, 466 U.S. at 694). In order to satisfy the “prejudice” requirement in the context of a guilty plea, the petitioner must show that, but for counsel’s errors, he would not have entered his guilty plea and would have proceeded to trial. Serrano v. State, 133 S.W.3d 599, 605 (Tenn. 2004) (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

We note that “[i]n evaluating an attorney’s performance, a reviewing court must be highly deferential 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) (citing Strickland, 466 U.S. at 689). Moreover, “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” Strickland, 466 U.S. at 688-89. However, we note that this “deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation.” House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (quoting Goad, 938 S.W.2d at 369).

The Petitioner contends that trial counsel provided ineffective assistance based on his failure to share the DNA results with the Petitioner prior to entering his guilty plea. The Petitioner argues in his brief that trial counsel’s performance was deficient because he “chose not to inform the [Petitioner] that crucial potential evidence that was outstanding just a couple weeks before trial did not, in fact, incriminate him.” Trial counsel admitted that he did not inform the Petitioner about the results when they were received in court on the day of the Petitioner’s guilty plea. However, trial counsel also testified that he had discussed that a positive or negative DNA result was immaterial to the Petitioner’s case. In denying relief, the post-conviction court credited trial counsel’s testimony and found that counsel had discussed all the possible results of the DNA test with the Petitioner before he entered his guilty plea and that the Petitioner was aware that the results would not have a meaningful impact on his case.

The record does not preponderate against these findings. At the post-conviction hearing, trial counsel's testimony established that he discussed the potential DNA results and their effect on the Petitioner's case. Trial counsel further established that DNA evidence was not an issue because, even if the negative DNA result did not "incriminate" the Petitioner further, as the Petitioner contends, trial counsel explained to the Petitioner that he was already incriminated by the statement he made to police admitting to having sex with the victim and his testimony at the preliminary hearing. Indeed, as the State recited at the guilty plea hearing, the issue in this case would not be identity but, rather, would primarily focus on consent and whether the Petitioner knew the victim was mentally challenged. Based on this testimony, we agree with the post-conviction court that trial counsel's conduct was within the range of competence demanded. Accordingly, we conclude that the Petitioner has failed to establish deficient performance or any resulting prejudice from trial counsel's decision not to share the DNA results with the Petitioner before he entered his guilty plea. Therefore, he is not entitled to relief.

**II. Guilty Plea.** The Petitioner next alleges that his guilty plea was not knowing and voluntary because he was "unaware of the full strengths and weaknesses of the State's case" since he did not know about the negative DNA results before entering his plea.

The validity of a guilty plea is a mixed question of law and fact that is reviewed de novo. Lane, 316 S.W. at 562. To be valid, a guilty plea must be entered knowingly, voluntarily, and intelligently. Id. (citing State v. Mackey, 553 S.W.2d 337, 340 (Tenn. 1977) superseded on other grounds by rules as stated in State v. Wilson, 31 S.W.3d 189, 193 (Tenn. 2000); North Carolina v. Alford, 400 U.S. 25, 31 (1970); Brady v. United States, 397 U.S. 742, 747 (1970); Boykin v. Alabama, 395 U.S. 238, 242-44 (1969)). "[T]he record of acceptance of a defendant's plea of guilty must affirmatively demonstrate that his decision was both voluntary and knowledgeable, i.e., that he has been made aware of the significant consequences of such a plea[.]" Mackey, 553 S.W.2d at 340; See Tenn. R. Crim. P. 11(b)(1). When determining whether a guilty plea was knowingly, voluntarily, and intelligently entered, the court must consider "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Lane, 316 S.W.3d at 562 (quoting Grindstaff, 297 S.W.3d at 218). If a guilty plea is not knowingly, voluntarily, and intelligently entered, then the defendant has been denied due process, and the guilty plea is void. Id. (citations omitted).

A plea is not voluntary if it is the result of "[i]gnorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats . . ." Blankenship v. State, 858 S.W.2d 897, 904 (Tenn. 1993) (quoting Boykin, 395 U.S. at 242-43). In determining

whether a guilty plea is voluntarily and intelligently entered, a trial court must look at a number of factors, which include the following:

- 1) the defendant's relative intelligence; 2) the defendant's familiarity with criminal proceedings; 3) the competency of counsel and the defendant's opportunity to confer with counsel about alternatives; 4) the advice of counsel and the court about the charges and the penalty to be imposed; and 5) the defendant's reasons for pleading guilty, including the desire to avoid a greater penalty in a jury trial.

Howell v. State, 185 S.W.3d 319, 330-31 (Tenn. 2006) (citing Blankenship, 858 S.W.2d at 904).

We have already established that trial counsel provided effective assistance of counsel to Petitioner in this case. Thus, we reject the Petitioner's claim that his guilty plea was involuntary and unknowing based on trial counsel's decision not to share the DNA results with the Petitioner before he entered his guilty plea. However, we also note that, at the guilty plea hearing, the trial court informed the Petitioner of the rights he would waive by pleading guilty and the Petitioner indicated that he understood those rights and the requirements of his guilty plea. As a result, the post-conviction court found that the Petitioner did knowingly and voluntarily enter his guilty plea based on the advice of counsel and that the plea was in his best interest. The record shows that the Petitioner conferred with trial counsel numerous times about the potential DNA results and the alternatives to the guilty plea, and that the Petitioner could have received a significantly greater penalty had he proceeded to trial. Accordingly, we agree with the post-conviction court and conclude that the Petitioner has failed to prove by clear and convincing evidence that his guilty plea was involuntary and unknowing. The Petitioner is not entitled to relief on this issue.

### **CONCLUSION**

Upon review of the record, we affirm the post-conviction court's judgment.

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CAMILLE R. McMULLEN, JUDGE