

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1998 SESSION

FILED

August 5, 1998

Cecil W. Crowson
Appellate Court Clerk

THOMAS BRADEN,)
)
 Appellant,)
)
 VS.)
)
 STATE OF TENNESSEE,)
)
 Appellee.)

NO. 01C01-9705-CC-00184

MARSHALL COUNTY

HON. CHARLES LEE,
JUDGE

(Post-Conviction)

FOR THE APPELLANT:

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OPINION FILED: _____

AFFIRMED

**LEE MOORE,
SPECIAL JUDGE**

OPINION

The petitioner, Thomas Braden, appeals the dismissal of his petition for post-conviction relief. Petitioner was convicted of three (3) counts of aggravated rape and one (1) count of false imprisonment on July 26, 1993. On appeal, petitioner raises the issue of ineffective assistance of counsel as follows:

1. Failure of trial counsel to object to amendment of the original indictment.
2. Failure of trial counsel to secure a complete preliminary hearing transcript.
3. Failure of trial counsel to investigate the background of the victim.
4. Failure of trial counsel to obtain an independent serologist.
5. Failure to move to have the counts of the subsequent indictment merged.
6. Failure of trial counsel to prepare for the examination of witness, Jones.
7. Failure of trial counsel to properly *voir dire* jury.
8. Failure of trial counsel to inform petitioner of the effects of T.C.A. § 39-13-523.

After a review of the post-conviction record on appeal, argument of counsel, and the applicable law, we affirm the judgment of the trial court.

PROCEDURAL HISTORY

The petitioner was convicted by a jury in 1993 of three (3) counts of aggravated rape and one (1) count of false imprisonment. This Court affirmed the convictions on direct appeal. State v. Thomas Braden, No. 01C01-9403-CC-00098, Marshall County (Tenn. Crim. App. Filed December 15, 1995). Application

for permission to appeal to the Tennessee Supreme Court was denied April 8, 1996.

Petitioner filed a pro se petition for post-conviction relief on September 20, 1996. The petition alleged ineffective assistance of counsel as stated above. The Public Defender's office was later appointed to represent petitioner. There was no amended petition filed. On February 26, 1997, the trial court held an evidentiary hearing on the matter. The trial court made specific findings on the record denying the petition. A notice of appeal was timely filed on March 12, 1997. A written order denying the petition was filed on April 14, 1997.

INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner alleges the assistance rendered by trial counsel was ineffective for the reasons stated above.

The Court reviews the claim of ineffective assistance of counsel under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The petitioner has the burden to prove that (1) the attorney's performance was deficient, and (2) the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial. Strickland v. Washington, 466 U.S. at 687, 104 S.Ct. at 2064; Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). The petition must contain a clear and specific statement of all grounds upon which relief is sought. T.C.A. § 40-30-206. Proof upon petitioner's claims for relief shall be limited to the evidence of allegations of fact in the petition. Petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence T.C.A. § 40-30-219 (f). The trial court's findings after a post-conviction hearing are

conclusive unless the evidence preponderates against the judgment. Butler v. State, 789 S.W.2d 899. There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived. T.C.A. § 40-30-210.

The test in Tennessee in determining whether counsel provided effective assistance is whether his performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d at 936. The petitioner must overcome the presumption that counsel's conduct falls within the wide range of acceptable professional assistance. Strickland v. Washington, 466 U.S. at 689, 104 S.Ct. at 2065; Alley v. State, 958 S.W.2d 138, 149 (Tenn. Crim. App. 1997); State v. Williams, 929 S.W.2d 385, 389 (Tenn. Crim. App. 1996).

The various issues petitioner alleges as constituting ineffective assistance of counsel are stated above. They will be addressed in the same order as follows:

1. Petitioner states that trial counsel was ineffective by failure to object to the amendment of the original indictment. This issue was raised on direct appeal in this Court. This Court ruled that the nolle prosequi of the original indictment and the substitution of a multi-count indictment was appropriate. This issue has been previously determined by this Court.

2. Petitioner's next issue is that trial counsel was ineffective in failing to secure a complete preliminary hearing transcript. Although there was brief testimony concerning this issue, there was no showing that counsel was deficient. This issue is without merit.

3. Petitioner states that trial counsel was ineffective in failing to investigate the background of the victim. This issue also was not raised in the post-conviction petition filed or at the post-conviction hearing. This issue is, therefore, waived.

4. Petitioner next alleges that trial counsel gave ineffective assistance

in failing to obtain an independent serologist. This issue also was not raised in the post-conviction petition or at the post-conviction hearing and, therefore, the issue is waived.

5. Petitioner contends that trial counsel was ineffective in failing to move to have the counts of the subsequent indictment merged. This issue was not raised in the post-conviction petition nor at the hearing. This issue was not briefed on appeal. This issue is, therefore, waived.

6. Petitioner's next issue is that trial counsel gave ineffective assistance in that he failed to prepare for the examination of witness, Mike Jones. The evidence introduced at the hearing was clear that Mike Jones was one of four or five individuals who were present at the time the victim approached petitioner. Trial counsel's testimony shows clearly that he made many attempts to locate these five prospective witnesses. He also on numerous occasions asked petitioner to bring these prospective witnesses to his office. He made other independent efforts to locate these witnesses. He was unable to locate any of these witnesses. However, petitioner brought witness, Mike Jones, to trial. Trial counsel conferred with this witness and had him testify. The record is clear that Mr. Jones testified as expected on direct examination. Under cross-examination, however, he evidently seriously hurt petitioner's case. Trial counsel testified that Jones' testimony "crucified" Braden. During the hearing for post-conviction relief, the trial court concluded that trial counsel did, in fact, search for these five possible witnesses, but the trial counsel had no way of knowing what the testimony of these witnesses might be. The court concluded that petitioner failed to carry his burden of proof with regard to this issue. It is clear that trial counsel did diligently search for all of these prospective witnesses. It is also clear that he conferred with witness, Mike Jones, on the second day of trial and thereafter called him as a witness. The proof is further clear that Mr. Jones testified favorably under direct examination, but did not hold up under a rigid cross-examination. Trial counsel's conduct was within the range of competence demanded of attorneys in criminal cases in Tennessee.

Petitioner has failed to carry his burden of proof on this issue.

7. Petitioner next alleges ineffective assistance of counsel in that trial counsel failed to properly voir dire the jury. Petitioner produced no evidence of ineffective assistance of counsel regarding this issue. He simply stated that he did not feel comfortable with the jury. The post-conviction court found no evidence of ineffective assistance of counsel in the jury selection and dismissed this claim. Petitioner also introduced no evidence to indicate that he was in any way prejudiced by trial counsel's performance during voir dire. This issue has no merit.

8. Petitioner also alleges that trial counsel rendered ineffective assistance in failing to inform petitioner of the effects of T.C.A. § 39-13-523 dealing with multiple convictions of rape and serving the entire sentence without credits or parole. This issue was not raised in the post-conviction petition and is waived. There also was no evidence introduced at the post-conviction hearing that there was any plea bargain offer made by the State. Consequently, there is no showing that defendant was prejudiced.

_____ Other general issues raised in the post-conviction petition were not raised at the hearing nor raised or briefed on appeal. They are, therefore, waived. Accordingly, the judgment of the trial court is **AFFIRMED**.

LEE MOORE, SPECIAL JUDGE

CONCUR:

CURWOOD WITT, JUDGE

JOE G. RILEY, JUDGE

**IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE**

THOMAS BRADEN,)	
)	C.C.A. No. 01C01-9705-CR-00184
Appellant,)	
)	Marshall County No. 12966
vs.)	
)	(Post-Conviction)
STATE OF TENNESSEE,)	
)	AFFIRMED
Appellee.)	

JUDGMENT

Came the appellant, Thomas Braden, by counsel, and the state, by the Attorney General, and this case was heard on the record on appeal from the Circuit Court of Marshall County; and upon consideration thereof, this Court is of the opinion that there is no reversible error in the judgment of the trial court.

It is, therefore, ordered and adjudged by this Court that the judgment of the trial court is **AFFIRMED**, and the case is remanded to the Circuit Court of Marshall County for execution of the judgment of that court and for collection of costs accrued below.

It appears that appellant is indigent. Costs of appeal will be paid by the State of Tennessee.

Per Curiam

Lee Moore, Special Judge
Joe G. Riley, Judge
Curwood Witt, Judge