IN THE CRIMINAL COURT FOR CARTER COUNTY, TENNESSEE

STATE OF TENNESSEE, Plaintiff	:	
vs.	:	Case No. S14939
CARL RAY NIDIFFER, Defendant	:	

MEMORANDUM IN SUPPORT OF IMPLIED CONSENT LAW VIOLATION

Comes the State of Tennessee by and through its duly appointed District Attorney General Pro Tempore, and in support of the Court finding that the Defendant failed to consent to a test to determine the alcohol content of his blood under the provisions of Tennessee Code Annotated, Section 55-10-406, would say:

FACTS

At the hearing held in this matter on September 12, 2003, the Court heard the testimony of Officer Mike Merritt and Jason Whitehead, and received into evidence the Defendant's medical records from Johnson City Medical Center, the Defendant's Patient Care Report from Carter County Emergency and Rescue Squad, the Implied Consent Form, and the testimony of Officer John Hardin from the preliminary hearing in this matter.

The State would submit that, based on the testimony and exhibits received, the facts in this matter are that about 7:00 pm on December 23, 1998, the Defendant, while operating a motor vehicle on Elk Avenue in the City of Elizabethton, Carter County, Tennessee, was

involved in a collision with another vehicle. Officers John Hardin and Mike Merritt responded to the scene and these officers, after talking with the Defendant and observing him for approximately 15 to 20 minutes at the scene, believed that the Defendant was under the influence of alcohol in violation of Tennessee Code Annotated, Section 55-10-401. Neither officer had any difficulty in communicating with the Defendant. Though the Defendant was injured, the injuries did not appear to have any effect on the Defendant's awareness of his surroundings. At the scene, the Defendant retrieved his driver's license at Officer Hardin's request and gave it to Officer Hardin.

The Defendant was examined at the crash scene by Jason Whitehead with the Carter County Emergency & Rescue Squad and then was transported on a backboard and with a cervical collar to the Johnson City Medical Center in Washington County, Tennessee, for treatment. Mr. Whitehead stated that the Defendant was oriented as to time and place. Mr. Whitehead observed that the Defendant smelled of alcohol and admitted to drinking beer. Mr. Whitehead also noted that the Defendant was combative and that he refused Mr. Whitehead's request to start an IV and Oxygen.

The Defendant arrived at Johnson City Medical Center at approximately 8:00 pm. He was taken to a treatment room. Officers Hardin and Merritt arrived at about the same time. At approximately 8:10 pm, Officers Hardin and Merritt went into the treatment room. The Defendant was still confined by a cervical collar, but no longer was being directly tended to by medical personnel. Based on his previous contact with the Defendant and the information that the officers had learned at the crash scene, Officer Hardin read him the Implied Consent Form.

The Form begins with the phrase "You are under arrest and there are reasonable grounds to believe you were driving or physical control of a motor vehicle while under the influence of alcohol . . ." . Both Officers Hardin and Merritt were in their police uniforms and were armed. Officer Hardin still had the Defendant's driver's license that Officer Hardin had been given by the Defendant at the crash scene. The Defendant stated that he would not consent to a test and when asked to sign the form as refusing the test, the Defendant told the officers that they should speak with his daughter, who was an attorney, and who was also at the hospital.

Officer Merritt testified that at the time of the request under the Implied Consent Law, he believed that the Defendant was under arrest. Officer Merritt also stated that if the Defendant had attempted to leave the treatment room he would have stopped him. Officer Merritt also testified that if he had questioned the witness he would have advised him of his Miranda rights.

After the Defendant refused a blood test, the officers spoke with the treating physician. The officers then determined from the treating physician that the Defendant, due to his injuries, was going to be kept at least overnight at the hospital. Officer Merritt testified that, after talking with the physician, the decision was made not arrest the Defendant that night nor to release him on a misdemeanor citation. Rather, Officer Merritt said that since the Defendant was a well-known Carter County businessman and resident and that it was unknown exactly when he was be released from the hospital that the officers decided to swear to a criminal affidavit at a later date. The court records show that Officer Hardin swore to the affidavit charging the Defendant with Driving Under the Influence on January 11, 1999, and that a criminal summons

was issued on that same date. The record also reflects that the Defendant's crash occurred on a Wednesday evening, 2 days before Christmas.

APPLICABLE LAW

Tennessee Code Annotated, Section 55-10-406(a)(3), provides that before a suspect can be charged with a violation of the Implied Consent Law for refusing to take a test requested by a law enforcement officer to determine the alcoholic content of blood, the suspect must be under arrest. The question the Court must determine is whether, at the time of the Implied Consent request, the Defendant was under arrest.

First, there should be no dispute as to whether the officers had the right to arrest the Defendant for Driving Under the Influence on December 23, 1998. It is undisputed that the officers observed the Defendant in the driver's seat of a motor vehicle at the scene of a crash on a public road in the City of Elizabethton, Carter County. Offices Hardin and Merritt observed the odor of alcohol about the Defendant and observed indicators of intoxication including blood shot eyes and slurred speech. Based on their training and experience both officers believed that the Defendant was driving in violation of Tennessee Code Annotated, Section 55-10-401.

Second, there is also no dispute as to whether the officers could legally make an arrest at the Johnson City Medical Center. Under Tennessee Code Annotated, Section 40-7-103(a)(8), an officer whose had probable cause to believe that someone has committed the offense of Driving Under the Influence can make an arrest the person at a health care facility

within 4 hours of the person being transported for emergency medical treatment. The officers testified as to their probable cause for an arrest, and the evidence is clear that the Defendant was transported to Johnson City Medical Center for treatment and the officers were with the Defendant at the hospital less than 30 minutes after his being transported.

Finally, as to the issue of whether an arrest had occurred for purposes of the Implied Consent law the Court should examine what Tennessee Courts have said about when someone has been arrested or taken into custody. To determine whether someone is in custody for purposes of giving the Miranda warning our Supreme Court has stated in State v. Anderson, 937 S.W.2d 851, 855 (Tenn.1996)

> the test is whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest.

The Anderson court further held that a court should consider a variety of factors in determining whether or not someone was in custody including the following:

> the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will. (at 855)

See also, State v. Walton, 41 S.W.3d 75 (Tenn.2001).

The Tennessee Supreme Court has also addressed the issue of what is an arrest by saying that

> 'An arrest is the taking, seizing, or detaining of the person of another, either by touching or putting hands on him, or by any act which indicates an intention to take him into custody and subjects the person arrested to the actual control and will of the person making the arrest.' 4 Am.Jur., Arrest, s 2, page 5; 6 C.J.S. Arrest s 1, page 570. West v. State, 425 S.W.2d 602, 605 (Tenn.1968)

Other Tennessee decisions have adopted the same or similar definition of arrest. See Robertson v. State, 198 S.W.2d 633 (Tenn.1947), and State v. Crutcher, 989 S.W.2d 295 (Tenn. 1999).

The State would submit that the actions of the officers at Johnson City Medical Center at the time they requested a blood sample from the Defendant satisfy the guidelines set out by cases discussing custody and arrest. There were two officers present in uniform. The officers were armed. A cervical collar restrained the defendant. Officer Hardin told the Defendant "[y]ou are under arrest". Officer Hardin also had possession of the Defendant's driver's license at the time of the Implied Consent request.

Possession of the license by law enforcement has been given significance by Tennessee courts as to whether someone has been seized. Our Supreme Court in State v. Daniel, 12 S.W.3d 420, (Tenn.2000) held the following discussion as to the fact that a seizure occurs when a person's identification is retained by an officer:

> Accordingly, we hold that a seizure within the meaning of the Fourth Amendment and Article 1, section 7 occurred when Officer Wright retained Daniel's identification to run a computer warrants check. *See Butler,* 795 S.W.2d at 685 ("When the officer conveyed an intent to detain Riggins until everything 'checked out,' the defendant was seized within the meaning of the Fourth Amendment"); *Cf. Royer,*

(holding that when officers took Royer to a small room, while retaining his ticket and identification, this show of authority was sufficient to transform the initial consensual encounter into a Fourth Amendment seizure); *United States v. Chan-Jimenez,* 125 F.3d 1324, 1326 (9th Cir.1997) (holding that defendant was seized when officer obtained and failed to return defendant's driver's license and registration); *United States v. Lambert,* 46 F.3d 1064, 1068 (10th Cir.1995) (stating that "when law enforcement officials retain an individual's driver's license in the course of questioning him, that individual, as a general rule will not reasonably feel free to terminate the encounter"); *United States v. Glover,* 957 F.2d 1004, 1009 (2d Cir.1992) (concluding that the officer's failure to return identification papers together with failure to tell defendant he was free to leave constituted seizure); *Jordan,* 958 F.2d at 1088 (holding that "what began as a consensual encounter ... graduated into a seizure when the officer asked [the defendant's] consent to a search of his bag after he had taken and still retained [the defendant's] driver's license"); *United States v. Winfrey,* 915 F.2d 212, 216 (6th Cir.1990) (holding that seizure occurred when officer retained defendant's keys, driver's license, and automobile registration); ***428** *United States v. Low,* 887 F.2d 232, 235 (9th Cir.1989) (holding that retention of airline ticket longer than necessary for a brief scrutiny constituted a seizure); *United States v. Battista,* 876 F.2d 201, 205 (D.C.Cir.1989) (stating that "once the identification is handed over to police and they have had a reasonable opportunity to review it, if the identification is not returned to the detainee we find it difficult to imagine that any reasonable person would feel free to leave without it"); *United States v. Cordell,* 723 F.2d 1283, 1285 (7th Cir.1983) (holding that encounter became a detention when officer obtained defendant's driver's license and airline ticket, handed them to another officer, and told defendant they were conducting a narcotics investigation); *United States v. Thompson,* 712 F.2d 1356, 1359 (11th Cir.1983) (holding that police officer's retention of identification is indicative of a Fourth Amendment seizure); *United States v. Elmore,* 595 F.2d 1036, 1041-42 (5th Cir.1979) (holding that seizure occurred when DEA agent carried defendant's airline ticket to the airline counter); *Rogers v. State,* 206 Ga.App. 654, 426 S.E.2d 209, 212 (1992) (expressing agreement "with appellant that when [the officer] retained appellant's license, the encounter matured into an investigative stop protected by the Fourth Amendment"); *State v. Frost,* 374 So.2d 593, 598 (Fla.Dist.Ct.App.1979) (holding that seizure occurred when officers retained possession of the defendant's airline ticket and driver's license); *State v. Godwin,* 121 Idaho 491, 826 P.2d 452, 454 (1992) (holding that seizure occurred when officer retained defendant's driver's license and told defendant to remain in the vehicle); *State v. Holmes,* 569 N.W.2d 181, 185 (Minn.1997) (holding that seizure occurred when officer retained possession of the defendant's college

> student identification card); *State v. Painter*, 296 Or. 422, 676 P.2d 309, 311 (1984) (holding that seizure occurred where officer retained defendant's license and credit card while making a radio check); *Richmond v. Commonwealth*, 22 Va.App. 257, 468 S.E.2d 708, 710 (1996) (holding "that what began as a consensual encounter quickly became an investigative detention once the [officer] received [appellant's] driver's license and did not return it to him"); *State v. Thomas*, 91 Wash.App. 195, 955 P.2d 420, 423 (1998) (stating that "[o]nce an officer retains the suspect's identification or driver's license and takes it with him to conduct a warrants check, a seizure within the meaning of the Fourth Amendment has occurred"). *See generally*, LaFave, § 9.3, at 103 n.74 (collecting cases where courts have held that retention of a person's identification papers or other property constitutes a seizure). (at 427)

The continued possession of Defendant's drivers license from the crash scene to the hospital would also support the fact that the Defendant had been seized and was under arrest at the time of the Implied Consent request.

Counsel for the Defendant submitted to the Court at the hearing on this matter the decision in State v. Crutcher, 989 S.W.2d 295 (Tenn.1999). However, it is clear that the facts in Crutcher are clearly distinguishable from the facts in this case and that the holding in the Crutcher decision supports the State's position that an arrest had taken place in this case at the time of the Implied Consent refusal by the Defendant. In Crutcher, the officer at the scene of a motorcycle crash (after a law enforcement pursuit) initially attempted to take the suspect into physical custody. However, the suspect was determined to have been injured in the crash and was transported for medical treatment a short time later. After the suspect's departure to the hospital, officers at the scene searched the suspect's motorcycle and found a weapon and drugs. While the majority acknowledged "that the facts in this case are close as to whether the [suspect] was under

arrest at the accident scene" Crutcher, at 302, the Court held that he was not under arrest. The majority in Crutcher, also held that

> If law enforcement officers intend to justify a search as incident to an arrest, it is incumbent upon them to take some action that would indicate to a reasonable person that he or she is under arrest. [FN11] Although formal words of arrest are not required, *see* 5 Am.Jur.2d *Arrest* § 2 (1995), some words or actions should be used that make it clear to the arrestee that he or she is under the control and legal authority of the arresting officer, and not free to leave. In this case, actions that would have accomplished this included, but were not limited to, accompanying the appellee to the hospital until the arrest warrant could be obtained and served, telling the appellee that he should consider himself in custody pending actual service of the arrest warrant, or any other words or actions that would have conveyed the same message. (at 302)

In the instant matter, the facts show that the Defendant was told that he was "under arrest". The State would submit that when the words "you are under arrest" are stated to a suspect, as is the present case, that fact should indicate to a reasonable person that he was under arrest. In addition, the officer's statement took place in a hospital while the Defendant was partially restrained by medical paraphernalia. The officers were in uniform and were armed. There is nothing to suggest that in the Crutcher facts the suspect was ever told he was under arrest and that immediately after the officer placed his hands on the suspect he was released and shortly thereafter transported for medical treatment. Thus at the time of the search, the suspect in Crutcher was not in custody or under arrest, nor was he present at the location where the search of the motorcycle was taking place. In this case, at the time of the officer's Implied Consent request, the Defendant had already been told he was "under arrest" and the Defendant was still in the presence of the officers.

The Court also raised the issue at the hearing as to whether there is any law on "unarresting" someone. The State has been unable to find any law in this area, but is personally aware of at least one type of circumstance where a release without charging someone following an arrest routinely occurs. In undercover drug operations, individuals are routinely arrested for illegal sale of drugs. These suspects are then advised of their Miranda rights and during an interview are given the opportunity to provide information to law enforcement in return for being released and later charged with less serious crimes (or no crime at all) if they can provide assistance in the apprehension of higher-level drug dealers. In these types of cases, just as in the instant case, the suspect is under arrest until released. While in custody, the arresting officer must comply with all constitutional protections afforded arrested persons, even though the suspect is later released and no charges are immediately filed.

CONCLUSION

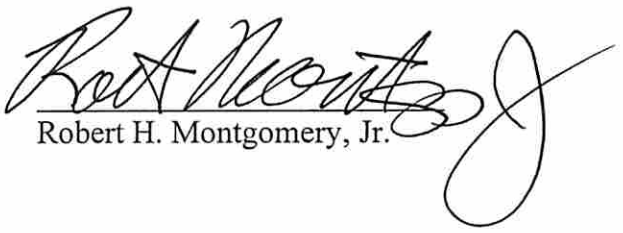
In light of the facts in this case and the applicable law, the State would submit that the Court should find that 1) on December 23, 1998, the Defendant was placed under arrest for Driving Under the Influence, Tennessee Code Annotated, Section 55-10-401, by Officer John Hardin with the Elizabethton Police Department at the Johnson City Medical Center; 2) that after being placed under arrest he was then asked by Officer Hardin to submit to a test for the purposes of determining the alcoholic or drug content of the Defendant's blood; and 3) that after being advised of the consequences of refusing to submit to the test refused the test. Upon the such a finding by the Court the State would also submit that the Court should suspend the Defendant's driving privileges for a period of 1 year.

Respectfully submitted,

ROBERT H. MONTGOMERY, JR.
DISTRICT ATTORNEY GENERAL
PRO TEMPORE

CERTIFICATE OF SERVICE

I do hereby certify that a copy of this Memorandum was faxed to William Byrd and sent to Judge Richard Baumgartner by Federal Express overnight on this the 18th day of September, 2003.



Robert H. Montgomery, Jr.

MINUTES, the 7th day of January, 20

IN THE CRIMINAL COURT FOR SULLIVAN COUNTY
AT BLOUNTVILLE, TENNESSEE

JEFFERY RATLIFF A/K/A JEFFERY ABSHER,	§	
Petitioner	§	
v.	§	**Post-Conviction No. C56,651** **(Re: Case No. S48,770)**
STATE OF TENNESSEE	§	
Respondent	§	

ORDER DENYING POST-CONVICTION RELIEF

This cause came to be heard by the Court on August 16, 2010, on a Petition for Post-Conviction Relief (Petition) to set aside the petitioner's conviction in Case No. S48,770. After hearing testimony, receiving evidence, reviewing the court filings and after hearing argument the Court, for the reasons set out below, denies post-conviction relief.

FACTS OF THE CASE

The Court finds the following procedural history of the case in question and the Petition for relief:

(1) The Petitioner was found guilty by a jury in Case No. S48,770 on March 28, 2006, for the offenses of six counts of rape of a child, one count of especially aggravated sexual exploitation of a minor, one count of aggravated sexual battery and six counts of incest. He received a total effective sentence of 112 years.

(2) The Petitioner appealed his conviction to the Court of Criminal Appeals which upheld the verdict in State v. Jeffery Ratliff a/k/a Jeffery Absher, Case No. E2006-01527-CCA-R3-CD, filed February 26, 2008. The Tennessee Supreme Court denied the Petitioner's application for permission to appeal on August 25, 2008.

(3) The Petitioner filed this pro-se Petition for Post-Conviction Relief to set aside his convictions on May 22, 2009.

(4) Attorney Myers N. Massengill II was appointed to represent the petitioner on September 2, 2009, and an Amended Petition for Relief from Conviction or Sentence was filed January 29, 2010.

(5) At a hearing on June 1, 2010, the Court heard evidence on petitioner's motion for the Court to recuse itself from hearing the post-conviction petition. The Court denied the motion and found that while the Court served as an Assistant District Attorney General with the Office of the District Attorney General for the Second Judicial District at the time the alleged offenses occurred and at the time of the trial and sentencing, the Court was not involved in prosecuting the case, had no knowledge of the case other than what is contained in the public record, did not supervise any of the assistant district attorneys involved in the case, nor did the Court advise law enforcement in the investigation and / or prosecution of the case. As a result, the Court was unaware of any conflict it had in hearing the Petition.

Further, the Court finds that a person of ordinary prudence, in the Court's position, would not find a reasonable basis to question the Court's impartiality based on his prior employment as an Assistant District Attorney General at the time of the prosecution of the case in question since the Court had no involvement, either directly, indirectly or supervisory, with the case.

(6) The post-conviction hearing was held August 16, 2010.

GROUNDS FOR RELIEF

The petitioner raises the following grounds for relief:

(1) Conviction was based on a violation of his Fifth Amendment right of protection against double jeopardy.

(2) Petitioner was denied his Sixth Amendment right to confront his accuser during the trial.

(3) The State's enhancement notice was deficient.

(4) Denial of effective assistance of counsel.

DOUBLE JEOPARDY

The petitioner contends that because the State did not elect offenses his six separate convictions for rape of a child and his six separate convictions for incest and his conviction for aggravated sexual battery were in violation of his right against double jeopardy, as he received multiple punishments for the same offense.

In this case, the State was not required to elect offenses that were alleged to have occurred prior to submitting the case to the jury. The primary evidence at trial was a video with a date and time stamp that showed each offense charged in the presentment as the offense was being committed. The State in its presentment set out the time that each act was alleged to have occurred based on the time stamp in the video.

As part of the post conviction proceeding, the Court reviewed the video that was introduced into evidence and finds that each act of rape of a child, incest and aggravated sexual battery alleged in the presentment and shown in the video was a separate and discrete act rather than a single continuous event. See State v. Phillips, 924 S.W.2d 662 (Tenn. 1996). As a result, there was no requirement for the State to elect prior to submission of the case to the jury and no double jeopardy violation occurred.

Relief on this issued is denied.

RIGHT OF CONFRONTATION

The petitioner contends that the video tape of the crimes committed in this case and introduced at trial and played for the jury without the victim testifying denied the petitioner the right to confront his accuser. It is the petitioner's contention that the video tape was hearsay.

Under the rules of evidence, the video in question is not hearsay. Rather, the video is a recording of the crimes in question as those crimes are being committed. At trial, as found by both the trial and appellate courts, the tape was properly authenticated and admitted into evidence. Since the video depicted the actual crimes, and the victim and the defendant were properly identified as being in the video, then there was no constitutional requirement that the victim testify. The petitioner's right to confrontation was not violated for the failure of the victim to testify.

Relief on this issue is denied.

DEFICIENT ENHANCEMENT NOTICE

Petitioner claims that the trial court used a prior forgery conviction and a prior felony theft conviction to enhance petitioner from a Range I to a Range II offender for each of the Class C felony offenses of incest, even though the felony theft was not included in the State's enhancement notice. The enhancement notice did list two prior forgery convictions that occurred on consecutive days, but there was no proof at the sentencing hearing that the offenses were committed at least 24 hours apart as required by the sentencing statute.

The record also reflects that the felony theft considered by the sentencing court was listed in the pre-sentence report. Trial counsel did not object to the use of the felony theft conviction for enhancement either at the sentencing hearing or on appeal.

First, the petitioner has failed to demonstrate why this issue was not raised on direct appeal and it is therefore waived. In addition, since each of the 12-year incest convictions were run concurrent with the corresponding 25-year rape of a child convictions, the fact that petitioner

was sentenced as a Range II offender for each incest count had no impact on the total length of petitioner's sentence.

While trial counsel may have been ineffective for his failure to challenge the use of the felony theft at the sentencing hearing or on appeal, the petitioner has failed to show to any way that his 112 year sentence would have been any different had the use of the felony theft conviction by the sentencing court had been challenged by trial counsel.

Relief on this issue is denied.

INEFFECTIVE ASSISTANCE OF COUNSEL

The petitioner raises several points alleging he was denied effective assistance of counsel.

First, the petitioner claims that he did not adequately meet with his trial counsel, Andrew Kennedy, prior to trial in preparation for trial.

The record reflects that Mr. Kennedy is an experienced public defender. The record also reflects that, in this case, Mr. Kennedy filed for and received discovery in a timely manner and provided copies of the discovery to the petitioner. The record also reflects that Mr. Kennedy filed a motion to recuse and a motion for a bill of particulars.

The petitioner was in the Sullivan County jail from the time of his arrest until his trial. Petitioner contends that because Mr. Kennedy never signed into the jail to meet with petitioner prior to trial, that he did not meet with Mr. Kennedy.

However, the petitioner was in court on more than ten occasions with Mr. Kennedy. Mr. Kennedy testified that on these occasions he would meet with the petitioner in the holding cell adjacent to the courtroom and discuss the case with petitioner.

In addition, even though the discovery rules did not require it, the state allowed Mr. Kennedy to review the statements of witnesses and potential witnesses, including the victim, prior to trial.

It is obvious from the fact that what appeared to be the petitioner's face could be seen on the video as the crimes were being committed that the key to the defense of the case was the suppression of the video. The record reflects that Mr. Kennedy properly filed and presented to the trial court the motion to suppress. The record reflects that the transcript of the suppression hearing contains 187 pages. At the suppression hearing, five witnesses testified for the state and 15 exhibits were filed. As a result of the suppression hearing, trial counsel had the opportunity to see and hear from many of the witnesses who testified at trial.

The Court accredits Mr. Kennedy's testimony that he met with petitioner on numerous occasions and discussed the discovery and trial strategy with the petitioner and that Mr. Kennedy was adequately prepared for trial. In fact, the officer testimony at the suppression hearing was very similar to the officer testimony at trial, thus providing trial counsel with a preview of the trial.

Trial counsel was not ineffective on this point.

Second, petitioner claims that trial counsel should have asked to continue the trial to investigate petitioner's claim that another adult (besides the co-defendant, Sherie Ratliff) was present and participating in the offenses. However, testimony at the post-conviction hearing reflects that petitioner did not disclose the name of the other person to his trial counsel prior to trial, only the allegation that there was another adult present. In order, for trial counsel to ask for a continuance and investigate the claim of another person participating he must have a factual basis for the continuance. The record reflects that petitioner would not disclose to trial counsel the identity of the alleged third participant making it impossible for trial counsel to have a basis for a continuance or for investigating petitioner's claim.

Trial counsel was not ineffective on this point.

Third, petitioner claims that since the state did not call the victim as a witness at trial, trial counsel should have called the victim as a witness for the defense. Mr. Kennedy testified

that he had reviewed the statements of the victim prior to trial and the victim's statements did not ever deviate from the state's theory of the case. Mr. Kennedy testified that there would not have been anything to gain from having the victim, a child of fifteen at the time of the trial, from testifying. Further, the victim could have been cross-examined by the state which could have included her prior statements if she had deviated from then in her testimony.

The Court finds that the decision to not call the victim was appropriate trial strategy and was not ineffective assistance of counsel. In fact, the decision to call the victim could have created significant problems for the petitioner's alternate theory of facilitation.

Trial counsel was not ineffective on this point.

Fourth, the petitioner claims that trial counsel should have called his co-defendant, who was also pictured in the video to testify for the defense.

At the time of petitioner's trial, the co-defendant had not been tried. Trial counsel had spoken with the co-defendant's attorney and was aware that the co-defendant would invoke her Fifth Amendment rights if she were called to testify. Further, the co-defendant had given a statement acknowledging her role in the offense, as well as the role of the petitioner.

The Court finds that the decision not to call the co-defendant was appropriate trial strategy and was not ineffective assistance of counsel. First, it is unlikely that the co-defendant would have agreed to testify, and second, if she did testify, the co-defendant's testimony could have been very damaging to the petitioner' case and the theory of facilitation.

Trial counsel was not ineffective on this point.

Fifth, the petitioner's counsel, after reviewing the trial transcript, submitted as Exhibit 4 of the post-conviction hearing a list of "irrelevant / prejudicial evidence" that was not objected to by trial counsel. The Court has reviewed the list and does not find that even if trial counsel had objected on any of these evidentiary issues either at trial or pre-trial as suggested by petitioner's counsel, there is no evidence in the record that trial outcome would have been any different.

Petitioner has failed to show by clear and convincing evidence that trial counsel was deficient in his performance at trial with regard to the alleged "irrelevant / prejudicial evidence". Further, petitioner has failed to demonstrate by clear and convincing evidence that even if trial counsel was deficient in his performance with regard to the "irrelevant / prejudicial evidence", the trial outcome would have been different.

Relief on this issue is denied.

THEREFORE, IT IS HEREBY ORDERED that the petition for post-conviction relief is denied.

ENTER this 30th day of December, 2010.

Robert H. Montgomery, Jr., Judge

CERTIFICATE

I hereby certify that a true and exact copy of this Preliminary Order has been mailed, postage prepaid to Jeffery Ratliff, #213364, HCCF, P.O. Box 549, Whiteville, TN 38075-0549, Myers N. Massengill II, Attorney for Petitioner, 777 Anderson Street, Bristol, TN 37620, the Tennessee State Attorney General, 450 James Robertson Parkway, Nashville, TN 37243 via U. S. Mail and to the Office of the District Attorney General, by placing a copy in its drop box located in the Office of the Sullivan County Circuit Court Clerk.

Shelia Simpson
Clerk

M NUTES, the 24th day of August, 20

IN THE CRIMINAL COURT FOR SULLIVAN COUNTY
AT BLOUNTVILLE, TENNESSEE

BRUCE STEVEN RISHTON,)
Petitioner)
vs.) Case Nos. C53,320 (S51,180-1)
)
STATE OF TENNESSEE,)
Respondent)

TONY R. KERNS, CLERK
CIRCUIT COURT
BLOUNTVILLE, TN

FILED
2010 AUG 24 P 4:49

ORDER

This matter came to be heard November 23, 2009, and December 2, 2009, before the Court on a Petition for Relief from Conviction or Sentence (Petition) filed by petitioner. The record reflects that on November 6, 2006, the petitioner entered a plea of guilty in the form of a best interest or Alford plea to 5 counts of attempted rape and 5 counts of incest in S51,180, and 1 count of attempted rape in S51,181. Five counts of sexual battery by an authority figure were dismissed by the State in S51,180. All counts in each case and the two cases ran concurrent with each other for a total effective sentence of 10 years, Range II, at 35% RED. A probation / alternative sentencing hearing was set for January 26, 2007, but on November 17, 2006, petitioner appeared in court and waived a probation /alternative sentencing hearing and agreed to serve his sentence in the Tennessee Department of Correction. The judgments were filed on November 17, 2006. The petitioner was represented at the plea and sentencing by attorney Michael LaGuardia.

On March 5, 2007, petitioner filed his pro-se Petition to set aside his plea. The Court filed a preliminary order on May 21, 2007, and on July 13, 2007, the Court found petitioner indigent and appointed attorney Randy Fleming as post-conviction counsel. Subsequently, the Court relieved Mr. Fleming and appointed attorney Howard Orfield, and later relieved Mr.

Orfield, and appointed Robbie Lewis to represent petitioner as post-conviction counsel. An amended petition for post conviction relief was filed on January 22, 2008, by then appointed counsel, Robbie Lewis. On February 25, 2008, Mr. Lewis filed a supplement to the amended post conviction petition.

On December 1, 2008, petitioner filed a waiver of counsel requesting that he be permitted to proceed pro-se on his Petition. On January 29, 2009, the Court allowed the petitioner to proceed pro-se, but designated attorney Robbie Lewis to serve as advisory counsel.

The petitioner claims as general grounds for relief:

1. He did not receive effective assistance of counsel.
2. His plea was not knowingly and voluntarily made as the petitioner believed, due to ineffectiveness of the public defender's office and plea counsel, as well as due process violations by the trial court and the district attorney, that petitioner had no way to mount a valid defense.
3. His due process rights were violated by the delay in his cases being heard by the grand jury and the failure of the trial court to hear a pro se request, filed by petitioner while represented by counsel, to dismiss the charges due to speedy trial violations.
4. Prosecutorial misconduct by the State's failure to provide a medical examination report of one of the alleged victims to the petitioner in a timely manner, and for the State adding charges to the presentment in S51,180 for which there was no evidence heard by the grand jury.

INEFFECTIVE ASSISTANCE OF COUNSEL

A defendant in a criminal case has a constitutional right to effective assistance of counsel under both the Sixth Amendment to the Constitution of the United States, Strickland v.

Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984), and Article I, Section 9, of the Constitution of the State of Tennessee. See Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975).

In a request for post-conviction relief for denial of effective assistance of counsel in a guilty plea, a petitioner has the burden of proving by clear and convincing evidence [Tennessee Code Annotated, Section 40-30-110(f), State v. Burns, 6 S.W. 3d 453, 462 (Tenn.1999)] that (1) the attorney's performance was deficient and (2) the deficient performance resulted in prejudice to a petitioner by demonstrating that, but for counsel's errors, the petitioner would have insisted upon going to trial. Hill v. Lockhart, 474 U.S 52, 106 S.Ct. 366 (1985), and Bankston v. State, 815 S.W.2d 213 (Tenn.Crim.App. 1991).

The records reflect that, after arrest, the General Sessions Court judge appointed the district public defender to represent petitioner. The petitioner waived a preliminary hearing in General Sessions Court on September 6, 2005, and the charges were bound over to Criminal Court. On October 25, 2005, the Criminal Court judge appointed the district public defender to represent petitioner in Criminal Court.

On November 17, 2005, a motion to reduce bond was filed by the district public defender. The district attorney general filed a motion to revoke bond. On December 8, 2005, the bond motions were heard and the Petitioner's bond was increased to $500,000 from $200,000. The petitioner was represented at the bond hearing by assistant public defender Leslie Hale.

On April 4, 2006, petitioner was arraigned in Case No. S51,181 after the grand jury's action on March 15, 2006, and a trial date was set for June 22, 2006. However, before the trial date of June 22, 2006, Case No. S51,181, was taken off the trial docket. On July 21, 2006, the

petitioner was arraigned in Case No. S51,180, after the grand jury's true bill action on July 19, 2006.

On April 12, 2006, eight days after arraignment in S51,181, the Petitioner's assigned assistant public defender, Leslie Hale filed a motion for discovery in both S51,180 - 81.

On July 21, 2006, the date of his arraignment in S51,180, petitioner filed a letter detailing his dissatisfaction with Ms. Hale, and on July 25, 2006, due to petitioner's claim of Ms. Hale's failure to communicate with Petitioner, the district public defender was relieved as counsel and Michael LaGuardia was appointed. With new counsel appointed, a trial date in S51,180 was set for December 6, 2006, and in S51,181 a new trial date of January 3, 2007, was set.

The court file also reflects that petitioner filed a motion to dismiss in both cases based on speedy trial issues. The motion was filed on July 20, 2006, at the time he was represented by Ms. Hale.

At the post-conviction hearing a transcript of the petitioner's guilty plea on November 6, 2006, in the form of an Alford or best interest plea was entered into the record. From a review of the transcript it appears that, on its face, the guilty plea was given voluntarily, understandingly and knowingly. When petitioner was asked by the Court at petitioner's plea if he was satisfied with Mr. LaGuardia's representation, petitioner's response was "absolutely".

In determining whether petitioner's counsel was effective, the Court accredits the testimony introduced at the post-conviction hearing that Mr. LaGuardia is an experienced attorney who met with the petitioner at the jail, spoke with the petitioner over the phone, filed for and obtained discovery, spoke with the prosecuting district attorney and was able to review witness statements that were not required to be turned over to the defense until after the witness' testimony at trial, as well as review sexual videos.. Exhibit 14 reflects case activity by Mr.

LaGuardia on 15 different days during the period of July to November of 2006. The Court also finds that Mr. LaGuardia prepared an ex parte motion and affidavit to obtain funds for an investigator, but after discussion with petitioner that motion was never filed.

In fact, the Petitioner conceded in his testimony at the post-conviction hearing that Mr. LaGuardia ". . . would show up. He would answer my phone calls. I could actually get through to somebody and ask somebody questions and he would come to visit me and talk about my case with me." (Transcript, page 290)

Petitioner claims, however, that Mr. LaGuardia advised petitioner that any motion for speedy trial would be unsuccessful since it was petitioner that had requested that the public defender be relieved as counsel thus causing delay. Petitioner further claims that Mr. LaGuardia stated that because so much time had elapsed since petitioner's arrest and Mr. LaGuardia's appointment as counsel (the record reflects that petitioner was arrested on August 29, 2005) there could not be an adequate defense investigation of the charges and, further, that in this type of case (i.e.: rape), the burden would be on the petitioner to prove his innocence at trial. Finally, Petitioner claims that he spoke with Mr. LaGuardia about withdrawing his guilty plea of November 6, 2006, but that Mr. LaGuardia told him that there was no basis to withdraw his guilty plea.

Petitioner further claims that as a result of Mr. LaGuardia's counsel, petitioner felt that he had no choice but to enter a plea to the charges and therefore he was denied effective assistance of counsel.

At the post-conviction hearing Mr. LaGuardia testified that it was petitioner that asked for a plea offer. Mr. LaGuardia also testified that petitioner told him that he had penetrated the

adult victim in Case No. S51,181, and that petitioner was aware of his prior felony conviction that could potentially be used for impeachment if petitioner testified at a trial.

Mr. LaGuardia also testified that he reviewed letters that petitioner had allegedly sent to the child victim in S51,180, and that had been introduced at the bond hearing. Mr. LaGuardia was also aware that petitioner had testified at the bond hearing and that one of the letters that petitioner had sent was made to appear that it had come from petitioner's brother. The court file reflects a bond order filed December 13, 2005, and signed by the judge hearing the bond motion finding that petitioner was a "deceptive, manipulative person".

Mr. LaGuardia testified that prior to the plea that he and petitioner had gone over the plea form line by line and that petitioner understood the plea agreement and that as a result of the plea he was receiving a 35% release eligibility and concurrent sentencing rather than risking the possibility of both a 100% sentence and consecutive sentencing.

Mr. LaGuardia denied that he ever told petitioner that it was too late to conduct a proper investigation and in fact prepared a motion to file asking the trial court to approve the funds to hire an investigator, however the motion was never filed as petitioner was considering hiring an investigator with family funds.

Mr. LaGuardia also denied that he had ever seen a speedy trial motion filed by the petitioner before Mr. LaGuardia's representation began. Mr. LaGuardia testified that he had not discussed a speedy trial motion with petitioner.

Mr. LaGuardia also testified that petitioner had admitted to the penetration of the victim in S51,181 and that fact was a key factor in the determination to enter into plea negotiations with the State on both cases.

Mr. LaGuardia also testified that Mr. Rishton was very familiar with the criminal justice system and that he was an intelligent and articulate individual.

Mr. LaGuardia also testified that he received the information regarding the medical examination of the child victim in S51,180 close to the time of the plea, but reviewed the information with petitioner prior to the plea. Mr. LaGuardia said that the results were inconclusive and that in his opinion the medical report would not have been a basis for an acquittal on the underlying charges at trial.

Mr. LaGuardia also had discussions with petitioner about the withdrawal of his guilty plea particularly with regard to the offenses of the child victim in S51,180. However, Mr. LaGuardia stated that the plea agreement was a package agreement with the adult victim in S51,181, a charge in which the petitioner had previously admitted to the penetration of the victim. As a result of the discussion with petitioner, Mr. LaGuardia did not file motion to withdraw and petitioner decided to waive a probation / alternative sentencing hearing.

The Court accredits the testimony of Mr. LaGuardia and finds that petitioner has failed to carry his burden that counsel was ineffective and his performance was deficient. The record reflects that Mr. LaGuardia was an experienced attorney, that he thoroughly investigated the case, met with his client on numerous occasions and provided exemplary representation. The Court also finds that the petitioner has failed to show that he would have proceeded to go to trial but for Mr. LaGuardia's performance as his attorney as the plea result was very advantageous to petitioner as compared to petitioner's potential exposure.

PLEA WAS NOT KNOWINGLY AND VOLUNTARILY MADE

Petitioner claims that due to ineffectiveness of the public defender's office and plea counsel, as well as due process violations by the trial court and the district attorney, the petitioner had no way to mount a valid defense.

The Court finds that the guilty plea was voluntarily, understandingly, and knowingly entered. The Court further finds that petitioner and his attorney, Mr. LaGuardia discussed the case in depth and that petitioner made the determination to accept the concurrent plea agreement encompassing both cases (as required by the state) rather than risk a trial in which he could receive consecutive sentencing at 100% rather the RED percentage of 35% he received with the plea. Since petitioner admitted to Mr. LaGuardia that he had penetrated the adult victim in S51,181, the concurrent plea at 35% was reasonable. In fact, the evidence of petitioner's correspondence with the victim and her family in S51,181 that was introduced at the bond hearing could have also been used at trial to petitioner's detriment.

While petitioner states that he felt abandoned by both counsel, it is clear from the records that when the public defender represented petitioner appropriate actions were taken. Ms. Hale filed a motion for a bond hearing that was heard by the trial court, and she filed for discovery as soon as the petitioner had been indicted. After Mr. LaGuardia was appointed, the record reflects, and the petitioner concedes, that Mr. LaGuardia was very active in corresponding and meeting with petitioner to review the evidence and discuss the case.

While there was an indictment delay of some 7 months in one case and 11 months in another case from petitioners August of 2005 arrest, the time period was not so extensive as to deprive the petitioner of due process. Detective Bobby Russell explained why the investigation took time to be completed due to the fact that videos had to be reviewed and other incidents that had to be investigated to determine if they had occurred in Sullivan County.

The petitioner has not shown that any delay after his arrest was done to gain any tactical advantage, or that petitioner was actually prejudiced by any delay. Further, when petitioner asserted his speedy trial right in July of 2006 it was in a pro se motion filed while he was represented by counsel. The judge replaced the public defender's office without hearing the motion in July of 2006 with Mr. LaGuardia and immediately set the cases for trial in December of 2006 and January of 2007.

The Court finds that petitioner has failed to carry his burden on this issue.

DUE PROCESS VIOLATIONS

The Court has previously found that petitioner has failed to demonstrate a speedy trial violation. Further, petitioner has failed to demonstrate that the delay in the two cases being presented to the grand jury was anything other than the time necessary to fully investigate the case. The petitioner has not demonstrated that he was prejudiced by the delay.

The Court finds that petitioner has failed to carry his burden on this issue.

PROSECUTORIAL MISCONDUCT

Petitioner alleges that the State purposely withheld and delayed releasing the results of a medical examination performed on the child victim in S51,180 shortly after petitioner's arrest in August of 2005.

Detective Russell testified that he was not aware that a medical examination had been conducted of the child victim in S51,180 until he was notified by the District Attorney's office of the fact that an examination had been conducted by a private practitioner and the detective was asked to obtain a copy. The record reflects that a copy of the medical record was obtained and provided to Mr. LaGuardia and that Mr. LaGuardia reviewed the medical report with petitioner

prior to the plea. Mr. LaGuardia testified that it was his opinion that the results were inconclusive.

While the records reflects that there was delay in the medical report being made available to the District Attorney, the petitioner has not shown that report was in the possession of the State, that the delay was purposeful or otherwise done to prevent the petitioner from having adequate time to consider the report prior to a trial or plea.

The petitioner has failed to carry his burden on this issue.

Petitioner also alleges that in S51,180, the charges in Counts 13, 14, and 15 involving an act or acts that occurred between on or about August 1, 2005 and August 29, 2005, were added by the District Attorney to the presentment without the grand jury hearing evidence of the offense, or without any evidence of those offenses existing.

The record reflects that the District Attorney's office prepared the presentment for the grand jury. Detective Russell testified that he was the only person to testify to the grand jury in the case and had no specific recollection of testifying to incidents occurring in August of 2005, but could not say he didn't testify to such incidents. There was also testimony from Detective Russell that while the initial affidavit that he prepared and filed in general session court did not refer to any offenses occurring in August of 2005, there was additional investigation that took place prior to presenting the case to the grand jury. The investigation included interviews of the victim by the staff at the Children's Advocacy Center and the District Attorney's office.

The record also reflects that in the statement of facts recited by the District Attorney at the plea that there was evidence that the sexual activity with the child victim in S51,180 continued until August 29, 2005.

The Court accredits the testimony of Detective Russell that while he has no specific recollection of testifying to the grand jury about offenses occurring in August of 2005, that the abuse of the victim in S51,180 continued until petitioner's arrest on August 29, 2005.

Also, the District Attorney at the plea set out that offense continued up until August 29, 2005. The petitioner acknowledged at the plea that the state would have that evidence if there were a trial. Since all the counts in S51,180 were concurrent with each other and with the other case there is nothing to indicate that petitioner would not have accepted the plea agreement under the circumstances of these cases and gone to trial in both cases.

The Court finds that none of the issues raised by petitioner merit post-conviction relief.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDICATED, that the Petition for Post-Conviction Relief filed in this matter is denied and dismissed.

ENTER this the 23rd day of August, 2010.

Robert H. Montgomery, Jr.
Criminal Court Judge

CERTIFICATE

I hereby certify that a true and exact copy of this Order has been mailed, postage prepaid to Bruce Rishton, #157803, Petitioner, S.T.S.R.C.F., 1045 Horsehead Road, Pikeville, TN 37367, Robbie Lewis, Advisory Counsel for the Petitioner, P.O. Box 946, Kingsport, TN 37662, the Tennessee State Attorney General, 450 James Robertson Parkway, Nashville, TN 37243, via U.S. Mail, and to Barry P. Staubus with the Office of the District Attorney General by placing a copy in the mail drop box located in the Office of the Circuit Court Clerk.

Clerk

MINUTES, the 10th of January, 201

IN THE CRIMINAL COURT FOR SULLIVAN COUNTY
AT BLOUNTVILLE, TENNESSEE

DAVID LAWRENCE HOLT, Petitioner	)	
	)	
vs.	)	Case No. C61,815
	)	
STATE OF TENNESSEE	)	

ORDER DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

On December 26, 2012, the Petitioner filed a Petition for a Writ of Habeas Corpus for the Purpose of Vacating Prior Conviction (Petition) in Case Nos. 12-950-B, 13-009-B, and 13-010-B out of the Criminal Court for Sullivan County, Tennessee.

A review of the files in the Sullivan County Circuit Court Clerk's Office reveals that on May 29, 1979, the Petitioner entered a plea of guilty to offenses contained within the three cases in question. Those offenses are Burglary III, Burglary I, and Attempt to Commit the Felony of Burglary I. A copy of forms entitled Waiver of Jury Trial, Plea of Guilty, and Submission of the Case to the Court in each of the cases in question and contained in the Clerk's files is attached to this Order.

On July 6, 1979, a probation hearing was held before Judge Edgar Calhoun and the Petitioner was order to serve a term of not less than 6 years or more than 8 years in the Tennessee state penitentiary. A copy of the Judgment contained in the Clerk's files is attached to this Order.

The Clerk's files reflect that nothing further has been filed on behalf of the Petitioner in these cases, other than this Petition, since the judgments were entered in 1979.

The Petitioner claims in his Petition that he is currently serving a sentence in the Federal Correction Inst. in Manchester, Kentucky. The Petitioner further claims that, as a result of the convictions from Sullivan County, he was considered under federal Armed Career Criminal Act (ACCA) to be a "Career Criminal" for being an ex-felon in possession of a firearm. Petitioner wishes to attack the prior convictions due to the fact that Petitioner claims he was denied effective assistance of counsel by his plea counsel, William Watson, and that Petitioner did not enter a knowing, intelligent and voluntary guilty plea.

Tennessee Code Annotated, Section 29-21-101, et seq., sets out the provisions for filing a writ of habeas corpus. After a review of the statutes and applying that law to the judgments in question, the Court finds that Petitioner has failed to set out a basis to grant habeas corpus relief for the following reasons:

1. The Petitioner is serving a federal sentence in federal custody. Tennessee Code Annotated, Section 29-21-102, says that a petitioner is not entitled to the benefits of a writ of habeas corpus under Tennessee law if detained by virtue of process issued by a court of the United States. As the Petitioner is serving a federal sentence in federal custody pursuant to a conviction for a violation of federal law he is not entitled to assert habeas corpus relief pursuant to Tennessee law
2. The sentences that the Petitioner received have expired. The Petitioner is not in custody as a result of his convictions in the cases in question and, as a result, is not entitled to assert habeas corpus relief as he is not restrained pursuant to the judgments in question.

3. The Petition fails to allege that the convictions in question are void on their face. The Petitioner alleges that the conviction are merely voidable due to violation of Petitioner's constitutional rights under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution. While the Petitioner has also failed to provide a copy of the judgments in question with the Petition, the Court has reviewed the judgments in question and does not find that they are voidable on their face.

The Petitioner is not eligible for habeas corpus relief.

While the Petitioner may not be eligible for habeas corpus relief for the reasons previously stated, Tennessee Code Annotated, Section 40-30-105 sets out that a petition for habeas corpus relief may be treated as a petition pursuant to the Post-Conviction Procedure Act, Tennessee Code Annotated, Section 40-30-105, et seq.

In his Petition, the Petitioner claims that he received ineffective assistance of plea counsel and that his guilty pleas in the cases in question were not knowingly and voluntarily made. These claims could arise to a deprivation of constitutional rights that could be addressed by a petition for post-conviction relief.

However, Tennessee Code Annotated, Section 40-30-102, requires that a petition for post-conviction relief must be filed within one year of the date that the judgments became final, or one year from the date of final action of the highest appellate court hearing the case. The judgment in the cases in question became final in 1979, over thirty years ago, and the Petitioner has failed to set out any applicable grounds under Tennessee law for a tolling of the statute of limitations.

The Petitioner is also not eligible for post-conviction relief.

THEREFORE, IT IS HEREBY ORDERED, that the Petition filed in this matter is dismissed without a hearing, costs are taxed to the Petitioner.

ENTER this the 9th day of January, 2013.

Robert H. Montgomery, Jr.
Criminal Court Judge

CERTIFICATE

I hereby certify that a true and exact copy of this Order has been mailed, postage prepaid to the Petitioner, David Lawrence Holt, 20568-074, Unit, Federal Correctional Inst., P.O. Box 4000, Manchester, KY 40962-4000, and the Tennessee State Attorney General, 450 James Robertson Parkway, Nashville, TN 37243, via U.S. Mail, and the Office of the District Attorney General for the Second Judicial District by placing a copy in the mail drop box located in the Office of the Sullivan County Circuit Court Clerk.

Shawn Malone
Clerk