

Appendix A

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 16, 2019

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Appellate Courts

LEE D. WATTS v. STATE OF TENNESSEE

Appeal from the Circuit Court for Montgomery County
No. 63CC1-2013-CR-712 Ross H. Hicks, Judge

No. M2018-01379-CCA-R3-PC

The petitioner, Lee D. Watts, appeals the denial of his petition for post-conviction relief, which petition challenged his 2015 convictions of first degree felony murder and especially aggravated robbery, alleging that he was deprived of the effective assistance of counsel. Discerning no error, we affirm the denial of post-conviction relief.

Tenn. R. App. P. 3; Judgment of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which D. KELLY THOMAS, JR., and CAMILLE R. McMULLEN, JJ., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, Lee D. Watts.

Herbert H. Slatery III, Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; John W. Carney, Jr., District Attorney General; and Arthur Bieber, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

A Montgomery County Circuit Court jury convicted the petitioner of alternative counts of the first degree felony murder and one count of the especially aggravated robbery of Ethel Adamson, the petitioner's mother. *State v. Lee Dewane Watts*, No. M2015-02404-CCA-R3-CD, slip op. at 7 (Tenn. Crim. App., Nashville, Jan. 19, 2017), *perm. app. denied* (Tenn. May 18, 2017). After a sentencing hearing, the trial court merged the first degree felony murder convictions and imposed a sentence of life imprisonment. The court ordered the petitioner to serve a 25-year especially aggravated robbery sentence consecutively to the life sentence for a total effective sentence of life plus 25 years' incarceration. *Id.*, slip op. at 7-8. On direct appeal, this court affirmed the petitioner's convictions and sentence. *Id.*, slip op. at 12, 15.

This court summarized the evidence at trial as follows:

Relevant to the victim's murder, the evidence . . . shows that on the night the victim was beaten, the [petitioner] came and went from her apartment multiple times to obtain money to buy drugs. Several witnesses smoking crack cocaine with the [petitioner] that night testified that he left their group and said he was going to his mother's house for more money. The [petitioner] and the victim were the only two people with access to her apartment and there were no signs of forced entry. The [petitioner] admitted to being at the victim's apartment sometime that night and eyewitnesses including the victim's neighbor saw the [petitioner] leaving the victim's apartment a short time before the victim was found by police and paramedics with serious injuries. The victim suffered blunt force trauma to her head, which caused her to lose brain function and die soon after. A hammer was found on the floor of her apartment, and medical experts testified that her injuries were consistent with being inflicted by a hammer. The victim's blood was found on the hammer, and the [petitioner's] blood was found on a shirt he was seen wearing the night before and the morning after the victim was beaten. The victim had several wounds classified by the medical examiner as "defensive." When questioned by police, the [petitioner] admitted to hitting the victim with the hammer multiple times, and he gave a written statement asking God for forgiveness.

Relevant to the robbery, witnesses testified that the [petitioner] left the group multiple times that night, saying he was going to the victim's apartment, and each time he returned with more money and purchased more drugs. In the past and in front of neighbors, the [petitioner] had discussed with the victim the fact that the victim had received a benefit check that the [petitioner] wanted the victim to share with him. A letter from the VA confirmed that the victim had received benefits of over \$6,000. The [petitioner] also discussed with the victim her life insurance policy, and asked the victim for money several times in front of her neighbor. On the morning the victim was found and while she was

being treated by paramedics, the [petitioner] asked the victim's neighbor for money as well. A hammer was found inside the victim's apartment with her blood on it, and she suffered life threatening injuries consistent with being beaten in the head by a hammer.

Id., slip op. at 11.

On June 21, 2017, the petitioner filed a timely pro se petition for post-conviction relief alleging that his confession was coerced, that his privilege against self-incrimination was violated, that the State failed to disclose certain evidence, that the composition of the jury was unconstitutional, that his trial counsel performed deficiently, and that newly discovered evidence existed. After the appointment of counsel, the petitioner filed an amended petition for post-conviction relief, reasserting the ineffective assistance of counsel claim and incorporating the pro se petition. Specifically, the petitioner alleged that trial counsel performed deficiently by failing to object to the admission of a recorded 9-1-1 call, failing to investigate the case properly, and failing to object to improper argument by the State.

At the April 13, 2018 evidentiary hearing, the petitioner testified that he was appointed an attorney at the inception of his case, but he moved for the substitution of counsel after two or three months and was appointed trial counsel, who handled the petitioner's case through appeal. The petitioner stated that trial counsel visited him “[e]very weekend” for approximately “[t]wo or three hours” while preparing for trial. The petitioner gave trial counsel the names of Victoria Hodges, Billy Wall, and James Brigham as potential witnesses, but, although trial counsel interviewed those individuals, he did not call any witnesses at trial. Although the petitioner acknowledged that none of those individuals were present at the crime scene, he contended that they would have testified that he would not have committed the offenses against his mother. The petitioner acknowledged that Ms. Hodges and Mr. Wall did not have information that would have been helpful to his case but later stated that, in reviewing discovery materials, he learned that Ms. Hodges had told police that the petitioner “was being set up” and that he had “never showed a violent side of him.” The petitioner stated that, had trial counsel called these witnesses at trial, he would have achieved a different outcome.

The petitioner testified further that he told trial counsel that, during his interview with Clarksville Police Department officers, he had said, “I would like to stop with the questioning, I need some legal guidance. I would like to talk to my pastor for some legal advice” but that the detective said “[Y]our preacher is not a lawyer. He can't help you now.” The petitioner contended that after that exchange, the detective “just kept

on pushing" him in the interview. The petitioner stated that he made no statement regarding hurting the victim or knowing who had done so until after he asked to speak to his pastor for legal advice, after which time he confessed to the crimes. The petitioner explained that he "kept denying it over and over and over again" during the interview but, after three-and-a-half hours and after asking to speak to his pastor, he "told [the detective] everything that he said to me" "basically repeat[ing] what he said." The petitioner was unaware whether trial counsel looked into the matter and could not recall whether trial counsel filed a motion to suppress his confession but stated that trial counsel did not object at trial to the playing of the recorded interview. The petitioner contended that, had trial counsel moved to suppress his confession, the outcome of his trial "would have changed dramatically."

Trial counsel testified that he spoke with Ms. Hodges "a lot" and determined that her testimony would not have been helpful at trial because "[s]he just didn't have anything to offer to overcome the confession." He also spoke with other potential witnesses but could not recall specifics of the conversations. Trial counsel contended that he watched the petitioner's recorded interview "many, many times because it was the absolute biggest problem of his case," and he considered the recording "from every angle" but concluded that the petitioner's request to speak to his pastor for legal advice "wasn't even close" to satisfying the requirement that the petitioner invoke his right to counsel with "absolute clearness." Although he did not believe there was a basis for suppressing the recording, he stated that he cross-examined the police officers about the interview "extensively." Trial counsel stated that he argued to the jury that the petitioner's confession was "somewhat coerced" because the detective continually crowded the petitioner during the four-and-a-half hour interview, "pushing forward towards him." He stated that he "[e]xtensively discussed with the petitioner whether the petitioner should testify but explained that he was doubtful that the petitioner could have presented the interview as coercive had he testified. He believed that, had the petitioner's confession not been played for the jury, the case would have turned out differently because the State "didn't have anything else."

Trial counsel testified that the defense theory at trial was that a drug dealer committed the crime in retaliation for the petitioner's no longer purchasing drugs from him. He acknowledged that the petitioner had an extensive criminal history of theft-based offenses and said that he filed a motion to prevent disclosure of those prior offenses. Trial counsel contended that, despite his efforts, the petitioner's confession was "impossible to overcome at trial."

On cross-examination, trial counsel testified that he "had extensive meetings" with the petitioner and had a phone line set up on which the petitioner could

contact him. Although he could not recall exact conversations with Ms. Hodges, trial counsel reiterated that she did not have any helpful information to offer. He recalled that only a portion of the petitioner's recorded interview was played for the jury. Trial counsel explained that he did not move to suppress the recording of the petitioner's 9-1-1 call because he "believed it was admissible" under the Tennessee Rules of Evidence. He stated that the trial court denied his motion to exclude the petitioner's prior criminal history, which decision he appealed. He acknowledged that this court denied review of the issue because he failed to submit a sufficient record for review. He contended, however, that even if the motion had been granted, and the petitioner had decided to testify, the "emotional . . . details that [the petitioner] goes through" during his recorded confession "would have still been insurmountable."

At the close of the hearing, the post-conviction court took the matter under advisement. In its June 21, 2018 written order denying relief, the post-conviction court found that the petitioner failed to establish any basis on which the recorded 9-1-1 call could have been suppressed. Furthermore, the court found that trial counsel did not perform deficiently by failing to move to suppress the recorded interview because the petitioner did not clearly invoke the right to counsel, and such a motion would not have been granted. As to the petitioner's assertion that trial counsel was ineffective for failing to investigate or call certain witnesses at trial, the post-conviction court denied relief because the petitioner failed to present these witnesses at the evidentiary hearing. The post-conviction court found all other issues waived for failure to present proof.

The petitioner filed an untimely notice of appeal; however, this court waived the timely filing requirement as permitted by Tennessee Rule of Appellate Procedure 4(a). In this appeal, the petitioner argues that the post-conviction court erred by denying post-conviction relief, reasserting that he was deprived of the effective assistance of counsel by trial counsel's failing to move to suppress the recorded police interview. The State contends that the petitioner waived this issue by failing to raise it in his pro se or amended post-conviction petition. Alternatively, the State argues that trial counsel's decision to not seek suppression of the statement did not constitute deficient performance.

We view the petitioner's claim with a few well-settled principles in mind. Post-conviction relief is available only "when the conviction or sentence 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. A post-conviction petitioner bears the burden of proving his or her factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f). On appeal, the appellate court accords to the post-conviction court's findings of fact the weight of a jury verdict, and these findings

are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). By contrast, the post-conviction court's conclusions of law receive no deference or presumption of correctness on appeal. *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).

Before a petitioner will be granted post-conviction relief based upon a claim of ineffective assistance of counsel, the record must affirmatively establish, via facts clearly and convincingly established by the petitioner, that "the advice given, or the services rendered by the attorney, are [not] within the range of competence demanded of attorneys in criminal cases," *see Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975), and that counsel's deficient performance "actually had an adverse effect on the defense," *Strickland v. Washington*, 466 U.S. 668, 693 (1984). In other words, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Should the petitioner fail to establish either deficient performance or prejudice, he is not entitled to relief. *Id.* at 697; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Indeed, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697.

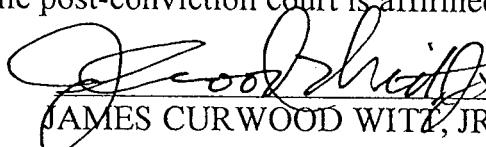
When considering a claim of ineffective assistance of counsel, a reviewing court "begins with the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all significant decisions," *Kendrick v. State*, 454 S.W.3d 450, 458 (Tenn. 2015) (citation omitted), and "[t]he petitioner bears the burden of overcoming this presumption," *id.* (citations omitted). We will not grant the petitioner the benefit of hindsight, second-guess a reasonably based trial strategy, or provide relief on the basis of a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

First, we address the State's contention that the petitioner has waived the issue. Post-conviction relief is unavailable for a claim that has been waived for failure "to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented." T.C.A. § 40-30-106(g). Instances of ineffective assistance of counsel are deemed to constitute a single rendering of ineffective assistance. *Thompson v. State*, 958 S.W.2d 156, 161 (Tenn. Crim. App. 1997) ("Ineffective assistance of counsel is generally 'a single ground for relief' under the post-

conviction statute.” (citing *Cone v. State*, 927 S.W.2d 579, 581-82 (Tenn. Crim. App. 1995))). Because the petitioner raised a broad claim of ineffective assistance of counsel in his original and amended petitions and, more importantly, specifically raised and presented proof on this specific alleged deficiency at the evidentiary hearing, it is not waived.

Turning to the merits of the petitioner’s claim, we conclude that he has failed to prove by clear and convincing evidence sufficient facts to support his claim that trial counsel’s representation was deficient. We agree with the post-conviction court that the petitioner’s request to speak with his pastor for legal advice was not an unequivocal invocation of his right to counsel. *See Davis v. U.S.*, 512 U.S. 452, 459 (1994) (holding that a suspect “must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney”); *State v. Climer*, 400 S.W.3d 537, 562 (Tenn. 2013). Here, the petitioner said, “I would like to stop with the questioning, I need some legal guidance. I would like to talk to my pastor for some legal advice.” The petitioner’s telling the officers that he wished to seek legal advice from his pastor rendered the statement ambiguous. Because the petitioner did not unequivocally invoke his right to counsel, no basis existed to suppress the statement, even if trial counsel had moved to do so. The petitioner has thus failed to show that trial counsel performed deficiently by failing to seek suppression of the statement or that he was prejudiced by trial counsel’s conduct.

Accordingly, the judgment of the post-conviction court is affirmed.



JAMES CURWOOD WITT, JR., JUDGE

Appendix B

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY DIVISION I

STATE OF TENNESSEE)
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 VS.)
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 LEE DEWANE WATTS)

6/21, 2018, 1:55 A.M./P.M.
FILED
CHERYL J. CASTLE, CLERK
CIRCUIT COURT CLERK
BY: *DeLoach* D.C.

CASE NO: 63CC1-2013-CR-712

ORDER DENYING/DISMISSING PETITION FOR POST CONVICTION RELIEF

This matter is before the Court on an Amended Petition for Post Conviction Relief. Having fully considered the *Pro Se* Petition, Amended Petition and the State's Response, the testimony presented at the PCR Hearing on April 13, 2018, argument of counsel and the entire record, the Court finds that the Amended Petition for Post Conviction Relief should be and the same is hereby DENIED and DISMISSED.

PROCEDURAL BACKGROUND

On June 21, 2017 Lee D. Watts ("Petitioner") filed a *Pro Se* Petition for Post Conviction Relief with the Court. Subsequently, having determined Petitioner was indigent and entitled to appointed counsel, the Court appointed attorney Gregory D. Smith ("PCR Counsel") to represent and assist Petitioner in the matter. On March 6, 2018 Mr. Smith filed on behalf of Petitioner an Amended Petition for Post Conviction Relief which came before the Court for hearing on April 13, 2018. The Court took the matter under advisement at that time. A transcript ("TR.") of the PCR hearing was filed with the Court on June 6, 2018.

On August 27, 2015, after a four day trial, a Montgomery County Jury convicted Petitioner on two counts of first degree felony murder and one count of especially aggravated robbery. The first degree murder convictions were merged and the Court subsequently sentenced Petitioner to serve a life sentence for first degree murder and a consecutive twenty-five (25) year sentence for

especially aggravated robbery. Petitioner appealed his convictions and sentencing (M2015-0240-CCA-R3-CD) and the trial court's judgments were affirmed. Permission to appeal to the Tennessee Supreme Court was denied (No. M2015-0240-SC-R11-CD) (2017 WL 21908 Tenn. Crim. App. 1/19/2017) on May 19, 2017.

ISSUES PRESENTED

In the Amended Petition for Post Conviction Relief, Petitioner asserted:

- 1) Petitioner respectfully asserts his trial counsel rendered ineffective assistance of counsel in violation of the VIth Amendment of the U.S. Constitution and/or Art. I § 9 of the Tennessee Constitution because counsel did not: **A)** object to the jury hearing a 911 tape; **B)** properly investigate the case; and **C)** object to improper/inflammatory jury argument by the State.
- 2) Other parts of the original pro se petition for post-conviction relief are hereby adopted by reference as if fully set out herein.

In his *Pro Se* Petition he contended that he was entitled to post conviction relief because his conviction was based on:

1. the use of a coerced confession.
2. a violation of the privilege against self-incrimination.
3. the failure of the prosecution to disclose to Defendant evidence favorable to Defendant.
4. the action of a grand or petit jury that was unconstitutional selected and impaneled.
5. that there was newly discovered evidence.
6. that he was denied effective assistance of counsel.

Privilege Against Self Incrimination, Failure to Disclose Favorable Evidence, Unconstitutional Grand or Petit Jury, Newly Discovered Evidence

At the inception of the April 13, 2018 hearing on the Amended Petition for Post Conviction Relief, counsel for Petitioner announced that the only ground for post conviction relief being

pursued by the Petitioner was that of ineffective assistance of counsel. TR. p. 6, ll. 11-13. Thus, all other grounds for post conviction relief asserted in the *Pro Se* Petition were waived. Additionally, there was no proof or argument presented regarding grounds 2-5 asserted in the *Pro Se* Petition. The Court finds grounds 2 through 5 to have been waived or abandoned and without merit.

Coerced Confession

The Petitioner and his trial counsel were the only witnesses called at the hearing. With regard to ground 1 of the *Pro Se* Petition, both Petitioner and trial counsel continued to complain that Petitioner's confession was coerced and should have not been allowed into evidence. The Court notes that those arguments were made, albeit unsuccessfully, before the trial court and before the Court of Appeals. While it is appropriate to consider such arguments in connection with Petitioner's asserted PCR ground of ineffective assistance of counsel, the Court finds the ground of the use of a coerced confession to have been considered and rejected by both the trial and appellate courts, to have been waived by Petitioner at the inception of the PCR hearing on April 13, 2018, to be unsupported by proof or argument at that hearing and therefore to have been abandoned and without merit.

Improper/Inflammatory Argument

With respect to paragraph 1 (C) of the Amended Petition for Post Conviction Relief, the Court finds that there was no proof submitted regarding trial counsel's failure to object to improper/inflammatory jury argument by the State. No such statements were identified and the Court heard no proof to support the allegation that inflammatory or improper statements were made to the jury by the State. This ground was also waived/abandoned and is without merit.

Remaining Grounds/Issues

Therefore, the Court finds that the sole remaining issues for determination by the Court is whether trial counsel rendered ineffective legal assistance to Petitioner because trial counsel did not: A) object to the jury hearing a 911 tape; or B) properly investigate the case as alleged in the Amended Petition. Although not identified as a separate particular ground for post conviction relief in either the Petitioner's original *Pro Se* Petition or the Amended PCR, the Court will consider and discuss the proof and argument presented regarding whether trial counsel's failure to file a motion to suppress Petitioner's confession constituted ineffective assistance of counsel. This was the main subject of the testimony of Petitioner and trial counsel at the PCR hearing and the main thrust of PCR counsel's argument at that hearing. The Court will also consider Petitioner's oral argument with respect to the denial of his Rule 609(Tenn Rules of Evidence) Motion and counsel's failure to investigate by talking to witnesses.

FACTUAL BACKGROUND

There is no need for the Court to discuss in detail the factual background in this case. Instead, the Court will discuss the factual background only as necessary to address the remaining issues fairly raised in the *Pro Se* Petition, Amended Petition or Petitioner's proof and argument at the hearing.

The 911 Call

With regard to the 911 call, Mr. Watts testified that he came home early in the morning of April 7, 2013, heard noises in his Mother's room, went in and discovered her on the bed bleeding. He then called 911 and the tape recording of that telephone call was played for the jury. Although Mr. Watts contended that his trial counsel should have filed a motion to suppress the tape recording and objected to the playing of the tape before the jury, he offered no reason to support that argument other than his belief that his Mother could be heard moaning in the

background. (TR. p.19, ll.10-20 l.3 and p. 25 l. 23-p.26 l.6.) Mr. Smith testified that he did not file a motion to suppress the 911 call and did not object to its admission because he believed it “was admissible under a defendant’s statement..” TR. p. 37, ll. 8-9. The Court finds that Petitioner has failed to show any basis upon which the 911 tape should have been excluded and has failed to show that had an objection been made or a motion to suppress filed regarding the 911 tape, either would have or should have been granted. The recorded call was simply Defendant’s out of court statement properly admissible in evidence. The Court therefore finds that trial counsel’s failure to object to the introduction of the tape at trial and/or to file a suppression motion does not constitute ineffective assistance of counsel.

The Police Interview

The main focus of Petitioner’s contention regarding ineffective assistance of counsel centers around his allegation that trial counsel was ineffective because he failed to file a motion to suppress the video tape of the police interview with Petitioner. A redacted copy of the interview was played before the jury at trial. The redaction was at least in part made necessary in order to eliminate references to Petitioner’s prior criminal record. TR. p.36, l.23-p.37, l.2. The interview was discussed at some length as part of the Court of Criminal Appeals decision affirming the judgments of the trial court:

Detective Eric Ewing testified that he was the lead detective on this case and that he interviewed the Defendant on April 12, 2013. A video recording of the interview was played for the jury. When asked to summarize the interview pertaining to the night before the victim’s death, Detective Ewing stated that the Defendant said he was at the victim’s apartment between 5:00 p.m. and 6:00 p.m. and remained there until the victim dropped him off at the warehouse at 8:00 p.m. The Defendant said that he worked for a couple of hours and then walked back to the victim’s apartment before returning to the warehouse at 11:45 p.m. Detective Ewing testified that the Defendant’s story was inconsistent about what happened after midnight. In one version, the Defendant remained at the warehouse all night. In a second version, he remained at the warehouse until 3:30 a.m. and then he left to call

his girlfriend on the phone. In a third version, after being confronted with the fact that the police knew he had gone to a hotel, the Defendant claimed to be at a hotel with a woman. The Defendant did not admit to drug use in the first two versions but admitted to using drugs at the hotel. Throughout the majority of the interview, the Defendant denied hurting his mother. At some point in the interview, the Defendant told Detective Ewing that the victim had given him money to buy drugs and that he returned to her apartment three or four times that night for money.

Later in the interview, the Defendant and Detective Ewing left the interview room to smoke a cigarette. Detective Ewing testified that, during the cigarette break, the Defendant admitted to Detective Ewing that he had hurt the victim and stated that he used a hammer to hit her, which he said would be found inside her apartment. Back in the interview room, Detective Ewing told the Defendant that he admired him for telling the truth. The Defendant stated that he had “no idea” why he hurt the victim. He stated that he hit the victim with a hammer “I don’t know how many times.” The Defendant wrote out a two-page statement which was admitted into evidence. In it, the Defendant asked God and his family to forgive him and stated that his mother had never loved him or met his needs as a child.

...Detective Ewing agreed that his interview with the Defendant took place in a small room and that he “crowd[ed]” the Defendant while he questioned him. He also agreed that he was bigger than the Defendant and dressed in black during the interview, that the interview lasted for five hours, and that the Defendant was not given any food during the interview. He denied trying to trick the Defendant into confessing to killing the victim.
2017 WL 219108 (Tenn. Crim. App. 1/19/2017) p. 5.

With regard to the interview and the playing of the video tape of the interview to the jury, Petitioner contends that trial counsel should have filed a motion to suppress based on a request that Petitioner sought “legal advice” during the interview. Petitioner testified that some three hours into what he described as a four and a half to five hour interview, that he

“looked at Detective Ewing and I said Detective Ewing, I would like to stop with the questioning, I need some legal guidance. I would like to talk to my pastor for some legal advice.” TR. p. 14 ll. 19-21.¹

When asked if his pastor was a lawyer, Mr. Watts replied “we’ve talked legal stuff during

¹ Neither the video tape of the interview nor a transcript thereof was introduced into evidence at the PCR hearing.

church services so I figured he had some knowledge of it." TR. p. 14 ll.23-24. He later acknowledged that he did not know whether his pastor was in fact a lawyer. Later in his testimony at the PCR hearing, the Petitioner stated that the way he phrased his request "exactly" was "I said I would like to talk to my pastor for legal advice." TR. p. 15 ll.12-13.

Petitioner's trial counsel acknowledged that he did not file a motion to suppress the video tape interview in which Petitioner confessed to murdering his mother. Petitioner indicated that he told trial counsel about his request for legal advice and that although he didn't remember ever watching the video together with trial counsel, he was advised by trial counsel that he (trial counsel) had watched the video. Trial counsel testified that:

"...I looked at that video and that statement over and over again and thought about it from every angle, but asking for a pastor to speak with, is not counsel and the Court of Appeals is pretty clear on the absolute clearness of invocation of counsel, what that has to be, and it did not meet those guidelines, it wasn't even close." TR. p. 30 l.22-p.31, ll.1-2.

After first testifying that Detective Ewing did not respond in any way to his request to speak to his pastor, Detective Ewing later testified that Ewing told him "your preacher is not a lawyer. He can't help you now." TR. p. 21 ll.22-23. Petitioner also testified that trial counsel cross-examined Detective Ewing about the interview and that he had no problems "with the way Mr. Smith did that argument on cross-examination." TR. p.22 ll.2-7. He also acknowledged that counsel brought up during the trial that Petitioner had been in the interview room for several hours before he took a break and then took a break and came back and confessed. TR. p. 23 ll.2-9.

Petitioner's counsel testified that he extensively cross-examined the State's witnesses regarding the video interview. TR. p. 31 l. 6. He also testified that in his opinion, Petitioner's

confession was the key evidence leading to his conviction. He opined that without the confession, the outcome of the case would have been different. When asked why, he replied:

“Because they didn’t have anything else. I had set up the theory that if Mr. Watts had done a significant amount of drugs that night with – there were two drug dealers and a known prostitute, I just know her as “Six” that testified. During my pretrial investigation, I saw that one of the drug dealers was upset that Watts had stopped buying crack cocaine from him and started buying it from somebody else. And that he was black Jamaican and Haitian I believe and that you didn’t screw him out of money. And at the trial, I was able to show that, I was able to get in through testimony there and that he knew where Watts lived and he went there to send a message and I firmly believe that if Watts would have just not said anything to the officers, based on his extensive experience with police officers and just said I don’t want to talk to you, I think I wouldn’t be sitting here today.” TR. p. 31 l. 13 – p. 32 l. 2.

Clearly, Petitioner’s confession was instrumental in his conviction. Petitioner contends that trial counsel’s failure to file a motion to suppress the confession was ineffective assistance of counsel. Trial counsel responds that he did not file such a motion because after looking “at that video and that statement over and over again and [thinking] about it from every angle” Petitioner’s request to meet with his pastor “wasn’t even close” to a request for legal counsel. Under those circumstances, trial counsel’s failure to file what he believed to be a non-meritorious motion to suppress cannot be construed as ineffective assistance of counsel. In this instance, the burden is on Petitioner to show by clear and convincing evidence that had a suppression motion been filed, it would have been granted. Here, the proof shows that the Petitioner did not make a clear request for legal counsel and had a motion to suppress been filed on that basis, it would not have been granted. The Court finds the Petitioner’s argument regarding ineffective assistance of trial counsel as to trial counsel’s failure to file a motion to suppress to be without merit.

609 Motion

Although not mentioned as a specific ground for Post Conviction Relief in either the *Pro Se* Petition or Amended Petition, Petitioner presented testimony regarding PCR counsel's filing of a Rule 609 (Tenn Rule of Evidence) Motion to exclude what both trial counsel and PCR counsel describe as Petitioner's "extensive criminal history." TR. p. 32 ll. 3-6. Trial counsel testified that he filed such a motion and that it was denied by the trial court. Petitioner contended on appeal that the trial court erred when it ruled that his prior convictions would be admissible as evidence if Petitioner chose to testify. The State responded on appeal that the Petitioner waived this issue by failing to include in the record a transcript of the evidentiary hearing on this issue or a record of the trial court's ruling. The Appellate Court agreed and found that this failure did indeed constitute a waiver to any challenge of the trial court ruling. In accordance with its procedure, the Appellate Court presumed the correctness of the trial court's ruling that the prior convictions were admissible for impeachment purposes. Appellate relief was denied.

At the PCR hearing, trial counsel was asked "if the 609 Motion had come out the other way...?" and Petitioner had testified, would there have been any difference. Trial counsel replied:

"I don't think so. I think even if Mr. Watts would have testified, that video, the emotional, the details that he goes through after taking that much time to reflect would have still been insurmountable."

Trial counsel testified that the effect of the confession when coupled with the gruesome photographs and gruesome medical testimony were simply too much to overcome even if the Defendant had testified on his own behalf.

In this instance, it is clear that trial counsel did file a 609 Motion and that Motion was denied. There is nothing in the record before this post conviction court that suggests or shows that trial

counsel was in any way ineffective at trial regarding the filing of the Rule 609 Motion or in responding to the Court's denial thereof. The record indicates that trial counsel fully informed the Petitioner regarding his right to testify or not testify and the effect that the use of his criminal background might have if he did choose to testify. Petitioner testified:

Q Did you decide or Mr. Smith or both of you that you wouldn't testify:

A I decided myself that I wouldn't. We talked about it and it was best that I didn't testify. That way my criminal background wouldn't be used against me during sentencing.

Q So you all had a discussion and then you decided, I don't want to testify?

A Yes, sir.

Q Did Mr. Smith tell you that might not play well in front of the jury in light of the 911 tape and the interview?

A Yes --

Q Did y'all have discussions like that?

A Yes sir, we did.

TR. p. 21 ll. 5-17.

The Court therefore finds that any suggestion that trial counsel was deficient or ineffective with regard to the filing of the 609 Motion or the exclusion of Petitioner's prior criminal record to be without merit.

Failure to Investigate

In paragraph 1(B) of his Amended Petition, Petitioner alleges that trial counsel was ineffective in failing to "properly investigate this case." Petitioner testified at the hearing that his complaint in this regard was that trial counsel failed to call witnesses on his behalf.

Petitioner testified that after Mr. Smith was appointed to represent him, it was some nine months or so before the case went to trial and that during that time Mr. Smith met with him "every weekend" for "two or three hours." TR. p. 10 ll. 12-15. Petitioner said that he gave trial counsel the names of three witnesses (Victoria Hodges, Pastor Billy Wall and James Brigham) and that he was "pretty sure" that Mr. Smith talked with the witnesses. TR. p. 11 l. 5. With

respect to these witnesses, Petitioner testified that trial counsel did everything that he asked him to do. Petitioner acknowledged that had these witnesses been called at trial, the only thing that they would have said was that he “would have never done that” to his mother. TR. p. l. 21. Petitioner also acknowledged that he was aware that his PCR counsel had spoken with the witnesses and that they “didn’t really think they had anything that they could offer today.” TR. p. 11 ll. 7-8. Trial counsel testified that he had talked to all of the witnesses in question and that he had specifically spoken to Vicky Hodges “a lot” and that she had nothing to say which would help. TR. p. 28 ll. 16-25.

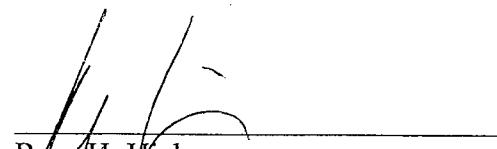
In summary, the testimony before the Court at the PCR hearing demonstrated that trial counsel consulted and visited with the Petitioner for more than 120 hours in the nine months leading up to trial, that he interviewed all the witnesses suggested by Petitioner and found nothing in their testimony that would be helpful. Therefore he did not call them as witnesses at trial. PCR counsel also interviewed each of these witnesses and found nothing which would be helpful to Petitioner. None of these individuals were called as witnesses at the PCR hearing. Petitioner has thus failed to provide any proof of trial counsel’s failure to investigate or to call witnesses who could have offered relevant or helpful testimony at trial.

CONCLUSION

For the reasons stated herein, the Court finds that Petitioner has failed to support his allegations regarding alleged deficiencies in trial counsel’s representation with clear and convincing evidence and to establish that the result of his trial would have been different but for the alleged deficiencies. The Amended Petition for Post Conviction Relief is therefore DENIED and DISMISSED.

The Petitioner having been found indigent, the costs of this cause are assessed against the State of Tennessee.

ENTERED this the 21st day of June, 2018.



Ross H. Hicks
Circuit Court Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was sent in the United States mail, postage prepaid, and/or place in Courthouse Mailbox to:

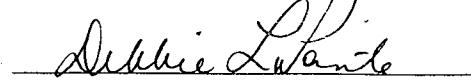
Greg Smith, Esq.
via Court Box 44

✓ Lee Dewane Watts Inmate #400816
1440 Union Springs Road
P. O. Box 679
Whiteville, TN 38075

DA John Carney
ADA Robert Nash
ADA Art Bieber
via Courthouse Mailbox

on this the 21st day of June, 2018.

Cheryl Castle, Clerk



Debbie L. Castle
Deputy Clerk

Appendix C

IN THE SUPREME COURT OF TENNESSEE AT NASHVILLE

FILED
12/05/2019
Clerk of the
Appellate Courts

LEE DEWANE WATTS v. STATE OF TENNESSEE

Circuit Court for Montgomery County
No. 63CC1-2013-CR-712, 41300705

No. M2018-01379-SC-R11-PC

ORDER

Upon consideration of the application for permission to appeal of Lee Dewane Watts and the record before us, the application is denied.

PER CURIAM