

II. ISSUES PRESENTED FOR POST-CONVICTION RELIEF

The Petitioner raises four issues with regard to his request for post-conviction relief: (1) the alleged violation of his right to a speedy trial; (2) the alleged ineffective assistance of his trial and sentencing counsel; (3) the alleged invalidity of a written waiver he filed regarding his right to appeal; and (4) the Trial Judge's alleged misapplication of certain enhancement factors in connection with his sentencing determination.

III. FACTS

A. Speedy Trial

With regard to the Petitioner's speedy trial complaint, the Petitioner is specifically challenging the time between the jury verdict and the sentencing hearing. No formal motion for a speedy trial was ever filed. The jury returned its verdict on September 28, 2012. The sentencing hearing occurred on April 18, 2013. During this interval, two major events occurred: (1) the Trial Judge retired, and the undersigned Judge was appointed by the Governor to fill the vacancy in office on October 29, 2012; and (2) the Petitioner's trial attorney, Brian Jackson, fell ill and died on January 27, 2013. The Trial Judge's retirement caused a delay, because the undersigned Judge determined that the Trial Judge was better equipped to preside over the sentencing hearing, having recently presided over the trial; an Order was formally issued to that effect on December 17, 2012. Mr. Jackson's illness and death caused a delay, because he missed some Court hearings, and the Public Defender's Office was appointed in his stead on January 9, 2013. Ms. Zimmerman learned that the case had been assigned to her on February 8, and immediately began preparing for the hearing.

B. Ineffective Assistance of Counsel

With regard to the ineffective assistance of counsel, the Petitioner is critical of both Mr. Jackson and Ms. Zimmerman. Although the Petitioner believes that Mr. Jackson did a "pretty

good job” overall, he complains that Mr. Jackson failed to comply with T.R.E. 615 (exclusion of witnesses), resulting in the Petitioner’s sister not being allowed to testify; indeed, Mr. Jackson failed to instruct the Petitioner’s sister to step out of the courtroom when T.R.E. 615 was invoked, so she was present for all of the testimony, and the Trial Judge did not allow her to testify. However, the Petitioner acknowledged that he has no idea as to what his sister would have said, had she been permitted to testify. Furthermore, the Petitioner acknowledged that his sister was not present at the time of the assault. The Petitioner believes, however, that his sister could have testified that he and the victim were still in a relationship at the time of the assault, and that there was ongoing bickering between him and the victim at that time.

With regard to Ms. Zimmerman, the Petitioner insists that she did not adequately prepare for the sentencing hearing, in that she did not meet with him enough, and further failed to obtain a transcript of the trial. The Petitioner testified that he was unsure of exactly how many times Ms. Zimmerman met with him at the jail, but he believes that it was only twice. Ms. Zimmerman, who has been a licensed attorney and Assistant Public Defender since 2004, testified from copious notes in her case file, which reflected that she met with the Petitioner at the jail four times before the sentencing hearing, and twice afterwards, including two “long visits” of at least an hour each, and one Sunday visit. The Court specifically finds Ms. Zimmerman to be more credible than the Petitioner on this point. With regard to the trial transcript, Ms. Zimmerman did not file a motion requesting a copy of the transcript, and never reviewed the same, because she viewed sentencing as a purely legal analysis, with the facts having already been determined at trial. Ms. Zimmerman did, however, review the victim’s medical records, and cross-examined the victim at the sentencing hearing. Additionally, the Petitioner testified at the sentencing hearing.

From the outset of Ms. Zimmerman's representation, the Petitioner told her that he did not plead guilty to certain prior charges in Madison County. The Petitioner insisted that he was in federal custody at the time of the Madison County conviction, and was not present in Madison County when the plea was entered. Based upon these representations (which turned out to be false), Ms. Zimmerman made numerous telephone calls to various individuals and agencies, including a local probation officer, the federal Public Defender's office in Nashville, the federal prisons bureau, the Madison County Court Clerk, the Petitioner's Madison County attorney, the Madison County probation office, and a Court Clerk in Illinois, all in an effort to locate some proof that the Petitioner was not in Madison County when his plea was entered. Had such proof existed, Ms. Zimmerman planned to present it to the Trial Court, as she believed that absent the Madison County conviction, the Petitioner would have qualified as a Range I offender in this case. Ms. Zimmerman discussed this strategy with the Petitioner during their February 12, 2013 meeting, and he agreed with the strategy. Unfortunately for the Petitioner, the end result of this "wild goose chase" was Ms. Zimmerman's procurement of a booking photograph of the Petitioner from Madison County, along with a bond receipt from Madison County bearing the Petitioner's signature, and a copy of the Madison County judgment.

In addition to her efforts with regard to the Madison County conviction, Ms. Zimmerman explored other avenues of defense for Mr. Lee's sentencing hearing, including researching the limitations period for holding a sentencing hearing, as well as researching sentencing statistics published by the Administrative Office of the Courts. Further, at Mr. Lee's request, Ms. Zimmerman drafted a Motion for Probation, and after reading the same out loud to him during their March 13, 2013 meeting, filed the same with the Court. Additionally, Ms. Zimmerman filed a Motion to Reduce Bond at Mr. Lee's request.

C. Waiver of Right to Appeal

With regard to the waiver of his right to appeal, the Petitioner alleges that Ms. Zimmerman spent only five minutes or so reviewing that document with him. The Petitioner knows how to read, has a G.E.D., and attended one year of college; however, he did not read the waiver form before signing it. Although the Petitioner does not claim to have been coerced into signing the waiver, he was under the impression that waiving his right to appeal would enable him to make parole after serving only eighteen months in prison. Ms. Zimmerman testified that she met with the Petitioner on April 22, 2013 for at least an hour, during which time she explained his options with regard to filing an appeal. Ms. Zimmerman informed the Petitioner that, based on input from her supervisor (who handles appeals for the Public Defender's Office), she believed that an appeal of his case could take 1-2 years. Ms. Zimmerman further informed that Petitioner that, once he was transferred to TDOC, the Trial Court would lose jurisdiction over any possible suspended sentence application; furthermore, Ms. Zimmerman opined that it is contradictory to ask for a suspended sentence while asserting on appeal that the Trial Court erred. In addition, Ms. Zimmerman explained that the Parole Board would not hear an application for parole while an appeal was pending. Ms. Zimmerman does not know where the "eighteen months" referenced by the Petitioner came from; in fact, Ms. Zimmerman did not even know for certain when the Petitioner would see the Parole Board, and often tells clients that they will most likely be denied on their first application. After this lengthy April 22 meeting, the Petitioner indicated that he would probably waive the appeal.

On April 30, 2013, Ms. Zimmerman returned to the jail with the typewritten waiver form, and read it to the Petitioner, word for word. The Petitioner repeatedly told Ms. Zimmerman that he did not want a new trial or an appeal, so both he and Ms. Zimmerman signed the waiver form

that day, with neither party noticing a typographical error on the form (the date of the sentencing hearing was listed as May 18 instead of April 18).

The Court specifically finds that Ms. Zimmerman's version of the events of April 22 and April 30, 2013 is more credible than the Petitioner's version.

D. Application of Enhancement Factors

With regard to the enhancement factors applied by the Trial Judge, the Petitioner claims that the second and third factors relied upon by the Trial Judge were identical and did not apply to him, and that Ms. Zimmerman should have addressed this issue with the Court. The record reflects, however, that Ms. Zimmerman successfully argued for concurrent sentencing, over the State's objection. Additionally, upon receipt of the Sentencing Order and Findings of Fact, Ms. Zimmerman noticed a typographical error (the sentence was listed as 20 years instead of 10 years), and contacted the Trial Judge's office to arrange for an Amended Order to be issued.

IV. LAW

Relief pursuant to a post-conviction proceeding is available only where the petitioner demonstrates that his or her "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. In a post-conviction relief evidentiary hearing, the petitioner has the burden of proving the allegations of fact by "clear and convincing evidence." T.C.A. § 40-30-110(f). Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. Grindstaff v. State, 297 S.W.2d 208, 216 (Tenn. 2009). There is a rebuttable presumption that a ground for relief not raised before a Court of competent jurisdiction in which the ground could have been presented is waived. Id.

The Sixth Amendment of the U.S. Constitution and Art. I, Section 9 of the Tennessee Constitution both guarantee the right to “reasonably effective” assistance of counsel, which is assistance that falls “within the range of competence demanded of attorneys in criminal cases.” Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also* Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must establish two prongs: (1) that counsel’s performance was deficient; and (2) that the deficient performance prejudiced the defense. Strickland, *supra*, at 687. The petitioner’s failure to establish either prong is fatal to a claim of ineffective assistance of counsel. Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

To establish the first prong of deficient performance, the petitioner must demonstrate that the attorney’s “acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms.” Vaughn v. State, 202 S.W.3d 106, 116 (Tenn. 2006) (internal quotation marks and citation omitted). Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law. Baxter, *supra*, at 934-35. A reviewing court “must be highly deferential and must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” State v. Honeycutt, 54 S.W.3d 762, 767 (Tenn. 2001) (internal quotations and citation omitted). Counsel will not be deemed ineffective merely because a different strategy or procedure might have produced a more favorable result. Rhoden v. State, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991).

To establish the second prong of prejudice, the petitioner must prove a reasonable probability that, but for counsel’s errors, the result of the proceedings would have been different. Vaughn, *supra*, at 116. A “reasonable probability” is a probability that is sufficient to undermine confidence in the outcome. Strickland, *supra*, at 694.

V. ANALYSIS

A. *Speedy Trial*

With regard to his speedy trial claim, the Petitioner relies primarily on T.C.A. § 40-35-209, which provides that the Court “shall conduct a sentencing hearing without unreasonable delay, but in no event more than forty-five (45) days after the finding of guilt...” However, this statute specifically permits the Court to continue the sentencing hearing beyond 45 days “when either party shows good cause for further postponement or unless these time constraints will unduly prejudice the position of either party.” *Id.* In the case at bar, the sentencing hearing was initially set for November 26, 2012, which would have been 59 days after the finding of guilt. In the interim, however, Judge Ash retired and the undersigned Judge was appointed to fill the vacancy; due to this transition in the office of Circuit Judge, the November 26, 2012 hearing was continued so that the undersigned Judge could determine whether Judge Ash should preside over this case to its conclusion. An Order to that effect was entered on December 17, 2012, and the sentencing hearing was set for January 9, 2013 before Judge Ash. However, attorney Jackson fell ill and was unable to appear for the hearing. The Public Defender was appointed as stand-by counsel that day, and the sentencing hearing was continued until February 22, 2013. Mr. Jackson passed away on January 27, 2013. An Agreed Order was entered on February 8, 2013, continuing the hearing to March 22, 2013. A subsequent Agreed Order continued the hearing to April 18, 2013, at which time the hearing was held.

This Court finds that the unusual circumstances of this case, i.e., the retirement of the Trial Judge and death of the trial attorney, constituted “good cause” for the continuances beyond the 45-day deadline set forth in the statute. Moreover, the Petitioner has failed to show how the initial 14-day delay, or the subsequent unavoidable delays, unduly prejudiced him. *See Id.* Furthermore, the general rule in Tennessee is that statutory provisions which relate to the mode

or time of doing an act to which the statute applies are not to be mandatory, but directory only. State v. Jones, 792 S.W.2d 683, 685 (Tenn. Crim. App. 1986).

The Petitioner also asserts that his constitutional right to a speedy trial was violated in connection with his sentencing hearing. *See* U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In that regard, a delay of one year or longer marks the point at which courts deem the delay unreasonable enough to trigger further inquiry. State v. Bates, 313 S.W.3d 265, 270-71 (Tenn. Crim. App. 2009), *citing* Doggett v. United States, 505 U.S. 647, 651 (1992). In the case at bar, the delay between the finding of guilt and the sentencing hearing was less than seven months; accordingly, no further inquiry is required. In any event, no prejudice has been shown, and there is no proof of any malicious intent by the State. *See* Bates, *supra*, at 270. This issue is without merit.

B. Ineffective Assistance of Counsel

This Court finds that the Petitioner has failed to meet his burden of showing, by clear and convincing evidence, that either Mr. Jackson's or Ms. Zimmerman's performance was deficient. This Court finds that both attorneys met and exceeded all standards of competency for criminal defense attorneys in Tennessee and any other state.

The Petitioner's only complaint with regard to Mr. Jackson is that he failed to instruct a witness (Petitioner's sister) to leave the courtroom when T.R.E. 615 was invoked, thereby resulting in the witness not being permitted to testify. However, the Petitioner acknowledged that he does not know what his sister would have said, had she been permitted to testify. Furthermore, the Petitioner acknowledged that his sister was not present at the time of the assault. Moreover, the Petitioner's sister was not called to testify at the post-conviction hearing. When a petitioner contends that trial counsel failed to call a known witness in support of the defense, the witness "should be presented by the petitioner at the [post-conviction] evidentiary

hearing.” Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). “[T]his is the only way the petitioner can establish that...failure to...call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner.” Id. The Petitioner has therefore failed to meet his burden of proof on this issue.

With regard to Ms. Zimmerman, the Court finds that the Petitioner has failed to prove, by clear and convincing evidence, that her performance was deficient. While the most prudent course would have been for Ms. Zimmerman to obtain the trial transcript, this omission, when viewed in light of her overall strategy, was not “so serious as to fall below an objective standard of ‘reasonableness under prevailing professional norms.’” See Vaughn, supra, at 116. The thrust of Ms. Zimmerman’s strategy was to attack the Petitioner’s Madison County conviction, and thereby persuade the Court that the Petitioner qualified as a Range I offender. Mr. Lee approved of this strategy, and Ms. Zimmerman made every possible effort to succeed in that regard. Counsel will not be deemed ineffective merely because a different strategy or procedure might have produced a more favorable result. Rhoden, supra, at 60. Moreover, Ms. Zimmerman explored other potential avenues of defense for the sentencing hearing, and fully apprised herself of the facts and law applicable to the Petitioner’s case. Finally, it bears mentioning that Ms. Zimmerman obtained a good result for the Petitioner under the circumstances, inasmuch as she successfully argued for concurrent sentencing, over the State’s objection.

As the Petitioner has failed to meet his burden under the first prong of the Strickland test, it is unnecessary to examine the second prong, and the Petitioner’s claim for ineffective assistance of counsel must fail. See Goad, supra, at 370.

C. Waiver of Right to Appeal

To the extent that the Petitioner’s complaint regarding the waiver of his right to appeal is based upon allegations that Ms. Zimmerman provided ineffective assistance of counsel in

connection therewith, the Court disagrees. The Court has found Ms. Zimmerman to be more credible than the Petitioner regarding the content and duration of their April 22 and April 30, 2013 meetings concerning the waiver, and specifically finds that the Petitioner made a reasoned, informed decision to sign the waiver after having over a week to weigh his options. In essence, based on information provided by Ms. Zimmerman regarding the likely timetable for an appeal and the Petitioner's inability to pursue parole and an appeal simultaneously, Mr. Lee decided that waiving his right to appeal would provide him with the earliest opportunity to get out of prison. Mr. Lee was not coerced into signing the waiver. Ms. Zimmerman read the waiver form to Mr. Lee, word for word. Mr. Lee's failure to read the form himself prior to signing it does not defeat its validity. The Petitioner has again failed to meet his burden under the first prong of the Strickland test, and it is unnecessary to examine the second prong. *See Goad, supra*, at 370.

As for the waiver form itself, the typographical errors do not undermine the actual substance of the waiver, or the fact that the form reflects a voluntary, knowing decision made by the Petitioner. The Petitioner has failed to carry his burden of proof on this issue.

D. Application of Enhancement Factors

With regard to the Trial Judge's application of enhancement factors, the Petitioner has not articulated any constitutional basis upon which post-conviction relief could be granted. *See* T.C.A. § 40-30-103 (providing for post-conviction relief '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').

VI. CONCLUSION

For the foregoing reasons, the Petition for post-conviction relief in the above-captioned cause is not well-taken, and the same is hereby DENIED.

IT IS SO ORDERED.



M. KEITH SISKIN
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the foregoing Order has been mailed, postage prepaid, to the following:

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This the _____ day of _____, 20____.

Deputy Clerk