IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs July 30, 2008

ALLEN P. BLYE v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Sullivan County
No. C50328 R. Jerry Beck, Judge

No. E2007-02091-CCA-R3-PC - Filed November 24, 2008

The petitioner, Allen P. Blye[1] (hereinafter "the petitioner"), was originally convicted by a jury of aggravated burglary and aggravated rape. He now appeals from the Criminal Court for Sullivan County's denial of post-conviction relief. The petitioner's issues, as stated in his brief, are as follows: "(1) The Sullivan County Criminal Court erred by incorrectly applying the law to the facts of Appellant's Petition for Post-Conviction Relief, in regards to the issue of his guilty plea being entered into knowingly and intelligently; (2) The Sullivan County Criminal Court erred by denying the Appellant's Motion for permission to further Amend Post-Conviction Petition, in light of the United States Supreme Court's ruling in Gomez v. Tennessee, 127 S.Ct. 1209, (2007); (3) The Sullivan County Criminal Court erred in its refusal to grant Appellant's oral Motion to Recuse, due to an apparent preconception or bias by the Court, which was made on December 6, 2006 and December 11, 2006; (4) The Sullivan County Criminal Court erred by denying the Appellant's Petition for Post-Conviction Relief based upon the issue of ineffective assistance of counsel, in regards to the violations of the Appellant's rights under the Miranda decision; and (5) The trial court erred by denying his Petition for Post-Conviction Relief based on the ground that trial counsel failed to adequately protect the Appellant's interest at the sentencing phase of his original prosecution." After conducting an evidentiary hearing, the post-conviction court dismissed his petition. Following our review of the record, we affirm the judgment of the post-conviction court.

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

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and JERRY L. SMITH, J., joined.

C. Brad Sproles, Kingsport, Tennessee and Kenneth F. Irvine and Julie A. Rice, Knoxville, Tennessee (on appeal) and Terry L. Jordan, Blountville, Tennessee and Mark A. Toohey, Kingsport, Tennessee (at trial), for the appellant, Allen P. Blye.

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[1] Throughout the record, the petitioner's name has been spelled "Allan P. Bly," "Allen P. Blye," "Allen Prentice Bly," and "Allen Prentice Blye." We will spell the petitioner's name consistently with the style of the post-conviction petition.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; H. Greely Wells, Jr., District Attorney General; Joseph E. Perrin, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The facts of the underlying convictions, as outlined by this court in the petitioner's direct appeal, are described below:

> The Defendant, Allen P. Blye, was convicted by a jury of aggravated burglary and aggravated rape. The trial court sentenced the Defendant as a Range III, persistent offender to fifteen years for the aggravated burglary, and as a Range II, violent offender to forty years for the aggravated rape. The sentences were ordered to be served consecutively in the Department of Correction, for an effective sentence of fifty-five years. . . .
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> . . . .
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> The victim in this case, R.C., testified that she was awakened from her sleep on the night of June 19, 1998, when she felt someone in bed with her. The person put his hands around her neck, and R.C. noticed that he was wearing loose-fitting gloves. She asked the intruder, "[w]ho are you and what are you doing in my house?" The intruder's only response was to start choking R.C.
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> R.C. began fighting, and the choking increased. The two fell off of the bed and onto the floor, with R.C. on her stomach and the man on her back. The choking stopped and the victim pleaded with her attacker to leave. She reached back for his head, but it was covered with some kind of soft material. The man reached down and removed her panties, pulled his pants down, and raped her. Afterwards, he wrapped her in a comforter, put a pillowcase over her head, and dragged her into the bathroom. There, he ran hot water into the sink and tried to force R.C. to sit in the sink. When she struggled, he put her on the floor and rinsed her genital area with water from the sink. He then left the bathroom and R.C. escaped through the bathroom window.
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> R.C. ran to a neighbor's house, wearing only the tee-shirt she had been sleeping in, and called the police. After the police arrived, Officer David Samples accompanied R.C. back to her house. They entered through the side door, which was open. Inside, they found a pair of nylon jogging pants in the kitchen sink with water running over them. These pants were subsequently determined to have gasoline and kerosene on them. Officer Samples also noticed a bedroom lamp and table knocked over, bedding on the floor, and water running in the bathroom sink. R.C. also found many of her photographs in disarray, and later discovered that a sweater vest and a

dress were missing; she testified that the covering over her attacker's head felt like her sweater vest.

R.C. went to the hospital, where a rape kit was performed, including vaginal swabs. Dr. Keith Byrd, the treating physician, testified that the victim had bruises on her neck, a large hematoma on her left buttock, and abrasions on her left flank. The police collected the tee-shirt and panties R.C. had been wearing during the attack. R.C. was unable to identify her attacker or describe him, but she estimated that he was five feet, ten inches to six feet tall. She also smelled the odor of gasoline or kerosene about him.

Detective David Joe Cole of the Kingsport Police Department testified that he spoke with the Defendant on July 12, 1998. The Defendant informed Det. Cole that he was in the lawn care business. Det. Cole testified that the Defendant is five feet, ten inches tall. Det. Cole also testified that, in February 2000, he met with Deborah McDowell at the Tennessee Women's Prison, where she turned over to him a letter and envelope. The envelope had the Defendant's address on it, with which Det. Cole was familiar. Det. Cole also recognized the Defendant's signature on the bottom of the letter contained in the envelope. Det. Cole turned the envelope over to the TBI laboratory. Det. Cole testified that he was present when blood was subsequently drawn from the Defendant, which was also turned over to the TBI lab.

Officer Timothy Horne testified that he came into contact with the Defendant on August 9, 1998, and noticed the smell of gasoline about the Defendant.

Dr. Michael Alexander Turbeville testified as an expert witness in serology and DNA. As a forensic scientist with the TBI lab, Dr. Turbeville examined and analyzed the rape kit and tee-shirt recovered from the victim, as well as the envelope recovered from Ms. McDowell and the blood drawn from the Defendant. Dr. Turbeville testified that he found sperm present in the vaginal swabs taken from R.C. and on the tee-shirt she had been wearing during the attack, and was able to obtain a DNA profile from these deposits. He was also able to obtain a DNA profile from saliva recovered from the envelope. All of these DNA profiles were consistent with one another, and all of them matched the DNA profile obtained from the Defendant's blood. Dr. Turbeville testified that the chance of the Defendant's blood being a random match to the other samples was one in a number greater than the population of the earth.

State v. Allen P. Blye, No. E2001-01227-CCA-R3-CD, 2002 WL 31086314, at *1-2 (Tenn. Crim. App., Knoxville, Sept. 19, 2002) (footnote omitted), aff'd, 130 S.W.3d 776 (Tenn. 2004).

On March 1, 2005, the petitioner filed a one-hundred-page pro se petition for post-conviction relief which consisted of handwritten as well as typed arguments and law, random excerpts of case

law, and newspaper clippings. Instead of dismissing the petition for failing to conform with the Post-Conviction Act, the trial court appointed counsel on May 4, 2005, and instructed him to amend the petition "setting out . . . 'a clear and specific statement of all grounds.'" See T.C.A. § 40-30-106(d) (2006). Appointed counsel subsequently filed three amendments to the petition on November 23, 2005, December 15, 2005, and February 17, 2006.

A. First Hearing. The first amendment to the petitioner's original petition for post-conviction relief (hereinafter "the petition") was filed on November 23, 2005. The State responded, and the first post-conviction hearing was held on December 6, 2005. During this hearing, the post-conviction court resolved all of the petitioner's preliminary motions, distinguished between "conclusionary" and viable issues, and identified twenty-five post-conviction issues, twelve of which were waived, withdrawn, or prohibited as a matter of law. The petitioner waived, among other things, all pro se motions not raised at the hearing. Finally, although the petitioner was represented by the same trial counsel in the theft matters, he chose not to challenge any pre-trial negotiation issues on the theft cases. After a full day of determining the issues, the hearing was continued. A second amendment to the petition, which incorporated the first petition, was filed on December 15, 2005. After the post-conviction court extended the motion deadline, the petitioner filed his third amended petition on February 17, 2006, and the State filed its response on April 7, 2006.

B. Second Hearing. At the December 11, 2006 post-conviction hearing, the post-conviction court limited the proof to the theft cases only. We include portions of this hearing in the facts of our case only because background information of trial counsel was presented for the purpose of both cases. The petitioner as well as Terry Jordan and Mark Toohey, petitioner's trial counsel, testified. Terry Jordan, an attorney practicing criminal law for twenty-eight years, testified that he was employed with the Public Defender's Office and had been appointed to represent the petitioner in the theft and the aggravated burglary and aggravated rape matters at the trial level. He stated he met with the petitioner several times and described him as a "demanding" client. Mark Toohey, an attorney with twenty-four years' experience, testified that he dedicated at least 50% of his practice to criminal law. He stated that the petitioner's family retained him on both the theft cases and the aggravated burglary and aggravated rape cases. All other testimony at the December 11, 2006 hearing was not relevant to this appeal.

C. Third Hearing. A third post-conviction hearing on the aggravated burglary and aggravated rape convictions was held on January 29, 2007. Before any proof in the hearing began, petitioner's counsel attempted to "supplement and clarify the record." He stated, "the original third amendment to the petition included language that this violation would have occurred at the Northeast Correctional Complex. And that was not correct." The State adamantly objected to counsel's attempt to alter the record on the grounds that it was untimely and without a legal basis. After a lengthy discussion, the post-conviction court allowed proof to be presented on the issue. Petitioner's counsel then moved the post-conviction court to recuse itself based on "certain statements regarding the truthfulness of the petitioner." The post-conviction court inquired, "What exactly did I say?" Petitioner's counsel replied, "Judge, I can't say word-for-word. . . . I don't recall exact words." With nothing else said in support of the motion, it was denied.

The proof at the January 29, 2007 hearing began with the petitioner stating that his complaint "goes more to do with Terry Jordan . . . than it does with Mark Toohey. Because Mark Toohey only handled the DNA." The petitioner further testified at length regarding trial counsel's failure to suppress his statement and the fruits thereof. The State interrupted the petitioner by objecting a second time to this issue because (1) no statements by petitioner were introduced at trial and (2) the State and the petitioner stipulated that no statements would be used at trial. The petitioner then directed the post-conviction court's attention to a motion to suppress, filed pre-trial by Jordan, moving the court "to suppress his statements, the fruits thereof, [and] the results of the statements in any criminal proceeding." The petitioner clarified his comment and stated, "Far as the statements, cool, yeah, I wanted – they got the statements suppressed. But I didn't get the fruit suppressed, you know." Based on the petitioner's reasoning, because the State agreed to Jordan's motion to suppress his statement, it also agreed to suppress all evidence obtained as a result of his statement. The petitioner complained that, even though his statement was suppressed, Jordan "never did say anything else more about the fruits."

The State objected again to the petitioner's narrative and introduced the search warrant used to obtain the petitioner's DNA, the results of which were ultimately introduced at trial. The prosecutor explained:

> [The original search warrant] makes no reference whatsoever to any of the statements of the [petitioner]. There is no fruit – there's no fruit of the poisonous tree. And as far as the statements that we're stipulating to, those were the statements [that] Detective Cole took [sic] [from the petitioner] at Northeast Correctional that didn't come in. That search warrant has gone all the way to the Tennessee Supreme Court and they've affirmed it, and it should not be a further issue.
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> That we would tender to the Court after [petitioner's counsel] looks at this, the original search warrants, so we can just put this issue to rest."
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> For clarity, the post-conviction court recalled the history of the case and stated: The case was originally brought in the General Sessions Court at Kingsport, was before Judge Duane Snodgrass . . . . Judge Snodgrass issued a search warrant . . . . I can't see where he makes any mention that [the petitioner] said anything in the police officer's sworn testimony in the search warrant affidavit. . . .
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> . . . [T]he problem with Judge Snodgrass's warrant was [he] is a county judge. His jurisdiction lies within Sullivan County. And evidently they served it out of county, which brought the district attorney before this Court after the case was bound over, and they sought DNA here in an adversarial situation with the Defendant present with his attorney. The Court declined that.
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> Later on the proof reveals the State got further evidence in the nature of a letter the Defendant had sent to a girlfriend or lady friend in the penitentiary. This

is after I denied the warrant here. They got a saliva test of the letter he sent to the friend and they matched him up there.

Then the State, because at this time the Defendant's over in Johnson County, Tennessee, they get a warrant. And I don't have it before me, but seems like they [used] the letter [and] DNA from the lady down in the women's penitentiary as the basis for getting the search warrant.

The post-conviction court then inquired whether petitioner's counsel was alleging that the DNA introduced at trial was the fruit of the poisonous tree. Petitioner's counsel responded affirmatively but added, "the fruit is because agreeing to give the DNA then withdrawing that agreement, that focused Detective Cole's investigation." After a lengthy discussion, the post-conviction court recited the history of the case again, determined there was no fruit of the poisonous tree, and concluded this was a "non-issue."

D. Fourth Hearing. At the beginning of the March 12, 2007 hearing, the post-conviction court noted the parties were proceeding on the "third amendment to the post-conviction petition." The petitioner testified that trial counsel failed to timely file a motion to have medical and psychological experts evaluate him for mitigation purposes at sentencing. The petitioner stated the report would have shown, "the many times probably I've been incarcerated, [and] the trouble I've been having with law enforcement in the past. And – I as a kid I was hit in the head with a rock. And just to them circumstances [sic] that would show a pattern of behavior probably that I had no control of." The petitioner further "objected to" conducting the two sentencing hearings for the theft and aggravated burglary and aggravated rape convictions on the same day. He initially stated he was prejudiced because "it was so confusing far as the record," but later admitted that he agreed to the procedure when trial counsel discussed it with him prior to sentencing. In denying relief, the post-conviction court found there was no confusion in the record by conducting both sentencing hearings on the same day.

The petitioner further stated that both trial counsel discussed a plea offer and explained his sentencing range and classification with him. He admitted that he did not know what his proper sentence range was because "there were too many [convictions]." Regarding the aggravated rape charge,[2] the petitioner explained that both trial counsel advised him that he would be sentenced as

[2] As noted by the sentencing court in its "Findings of Fact and Conclusion of Law In Regard To Sentencing," the petitioner's "range sentencing structure is somewhat complicated in this case due to the fact that the defendant has a felony record embracing the pre-1982 Sentencing Act, the 1982 Sentencing Act, and the November 1, 1989 Sentencing Act." In short, the petitioner's sentencing range was complicated by the age of his prior convictions, some of which were based on statutes that have long since been repealed. The sentencing court utilized a conversion table to determine the classification of the prior convictions based on the repealed statutes. Only two of the petitioner's eighteen prior convictions qualified to enhance the aggravated rape conviction; thereby, increasing the petitioner's range. The petitioner's attorneys vehemently disagreed with the trial court's conclusion that the petitioner was in fact a Range II offender for the aggravated rape conviction.

a Range I offender, but in reality he was sentenced as a Range II offender. He recalled "[the State's offer] as around about [sic] 18 years . . . . And all the reason why I didn't take the offer was due to the fact that I was told I probably couldn't get no more from 15-25 years no way [sic]. . . . I felt that I might as well go on and go to court." The petitioner stated that had he known his true sentence exposure was up to sixty years, "I wouldn't have took [sic] that chance." Although the petitioner initially equivocated and stated that "I might not have went [sic] to trial," when the post-conviction court asked him directly whether he would have accepted the 18-year offer had he been properly advised, the petitioner replied, "Right. Yes, sir."

Terry Jordan testified that he requested funds for the assistance of a mental health expert to determine the petitioner's sanity and competency before going to trial. The report determined the petitioner was competent to stand trial and did not include anything of further assistance. Jordan observed the petitioner to be "very intelligent" and was without impairment from any prior injury. Despite his observations, Jordan filed another motion for expert mental health services for sentencing because the petitioner requested it. Jordan read into the record portions of a prior mental health report which stated that the expert was "[n]ot aware of any diagnosis of any mental illness. [The petitioner] had been referred to them for stalking girls in Maryville and that was the reason for his referral to their counseling. . . . He'd had – gone through a treatment plan. He attended four sessions then asked the case to be – then they had asked the case to be closed." Jordan concluded this type of information would not benefit the petitioner at sentencing.

Jordan also testified that the petitioner maintained his innocence and never wished to engage in plea negotiations with the State. Although Toohey handled the plea negotiations, Jordan admitted that he told the petitioner that he would be sentenced as a Range I offender on the aggravated rape charge. He did not learn until sentencing that the petitioner was in fact a Range II offender. Jordan further testified that (1) he filed a motion to suppress to exclude all statements and evidence of an incriminating nature, (2) the motion was heard and fully litigated, and (3) he preserved the issue for appellate review. Significantly, Jordan did not intend for the DNA to be included in his motion to suppress because the State obtained it "through a separate procedure, separate from the information that was [obtained] from the [petitioner's] statement." Additionally, Jordan stated that he could not think of any legal basis to exclude the actions of law enforcement after the petitioner chose not to give blood for DNA purposes. In other words, Jordan did not believe legal grounds existed to exclude the other sample from the letter, the second search warrant, or the ultimate finding that the petitioner's DNA was a match.

Mark Toohey testified that "in terms of impairment [or] mental acuity, [he] found [the petitioner] to be [an] intelligent[,] smart guy" despite a lack of formal education. Although the petitioner insistently maintained his innocence, he allowed Toohey to pursue plea negotiations with the State when Toohey "brought [it] up." A note with sentencing calculations written by Toohey during his discussion with the State about its offer was introduced at the hearing. Toohey interpreted the offer on the aggravated rape to be twenty-five years, at 100%, as a Range I offender and not subject to negotiation. Toohey acknowledged that he did everything he could within his knowledge and experience to prevent the jury from hearing the DNA evidence including filing a number of

motions to suppress and litigating the issue at every stage. When asked if there was anything that he failed to do to the best of his legal abilities, Toohey stated:

> Well, I wish I'd come up with the right range of sentencing. I told Allan he was Range 1. It was a complicated issue and my – you know, the extent of my involvement in it . . .
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> And I was not really supposed to be involved in it in the beginning. But I had some conversations with Terry about it, and I fault myself for not giving him the right sentencing range. Other than that, I did everything in the world I could do.

On June 28, 2007, the petitioner filed a motion for permission to further amend his post-conviction petition in light of State v. Gomez. On August 23, 2007, the post-conviction court filed a written order denying the petition for post-conviction relief and the fourth motion to amend as a matter of law.

Standard of Review. Post-conviction relief is only warranted when a petitioner establishes that his or her conviction is void or voidable because of an abridgement of a constitutional right. T.C.A. § 40-30-103 (2006). Our supreme court has held:

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

Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006) (internal quotations and citations omitted). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. Id., see also T.C.A. § 40-30-110(f) (2006). Evidence is clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from it. Vaughn 202 S.W.3d at 116 (citing Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998)).

Vaughn further repeated well-settled principles applicable to claims of ineffective assistance of counsel:

> [T]he right of a person accused of a crime to representation by counsel is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. Both the United States Supreme Court and this Court have recognized that this right to representation encompasses the right to

> 'reasonably effective' assistance, that is, within the range of competence demanded of attorneys in criminal cases.

Vaughn, 202 S.W.3d at 116 (internal citation and quotation omitted).

In order to prevail on an ineffective assistance of counsel claim, the petitioner must establish that (1) his lawyer's performance was deficient and (2) the deficient performance prejudiced the defense. Id. (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984) and Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). "[A] failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim[, and] a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component." Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

A petitioner successfully demonstrates deficient performance when the clear and convincing evidence proves that his attorney's conduct fell below an objective standard of "reasonableness under prevailing professional norms." Id. (quoting Strickland, 466 U.S. at 688). Prejudice arising therefrom is demonstrated once the petitioner establishes "a reasonable probability that but for counsel's errors the result of the proceeding would have been different." Id. "A 'reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Id. (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068).

I. Failure to Enter a "Knowing and Intelligent Guilty Plea." Petitioner claims the post-conviction court erred because he was advised of the wrong sentencing range and did not knowingly and intelligently decline the State's offer to plead guilty. Had he been advised that his true sentencing range was Range II, with a maximum sentence of sixty years, and not Range I, with a maximum sentence of twenty-five years, the petitioner insists he would have accepted the State's offer rather than proceed to trial. The State concedes deficient performance by trial counsel but argues the petitioner has failed to prove that he was prejudiced by counsel's error because he maintained his innocence throughout the case. We agree.

As an initial matter, we must address the basis upon which the post-conviction court denied relief on this issue. Mark Toohey testified at the post-conviction hearing that he initiated plea discussions with the petitioner. Toohey stated that he discussed a non-negotiable offer with the State which he recalled was twenty-five years at 100%, Range I, on the aggravated rape charge. Toohey memorialized the discussion with the State with his notes, which were introduced at the hearing. Toohey stated that he discussed the offer with the petitioner at the time, but it was rejected. Other than this discussion, the petitioner maintained his innocence throughout the case and insisted on a trial. The post-conviction court credited Toohey's testimony but denied the petitioner relief, finding that the State did not extend a formal offer to the petitioner. We conclude the evidence preponderates against the post-conviction court's finding regarding the wrong sentencing range; however, the offer is not dispositive of the issue.

On appeal, the State rightfully concedes deficient performance by trial counsel due to the erroneous sentencing advice regarding his range. The critical determination now becomes "whether, but for trial counsel's error, the petitioner would have insisted on trial." Dedrick Patton v. State, No. M2003-00126-CCA-R3-PC, 2003 WL 22999443, at *6 (Tenn. Crim. App., Nashville, Dec. 23, 2003); see also Teague v. State, 772 S.W.2d 932, 939 (Tenn. Crim. App. 1988)(quoting Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985)). At the hearing, the petitioner recalled "[the State's offer] as around about 18 years . . . . And all the reason why I didn't take the offer was due to the fact that I was told I probably couldn't get no more from 15-25 years no way [sic]. . . . I felt that I might as well go on and go to court." However, later in the petitioner's testimony, he stated that "I might not have went [sic] to trial," had he been advised of the proper sentencing range. Toohey candidly admitted that it was error to advise the petitioner of the wrong sentencing range. When they discovered the petitioner was a Range II offender, Toohey recalled the petitioner commenting, "I wish I'd known that before – you know, I wish I'd known that back when you were – when, you know, you're telling me this plea – this offer was 25 years." According to Toohey, even after realizing the error, the petitioner never indicated "[he] would have definitely taken [the offer]" or "[he] would have definitely refused [the offer.]" Toohey simply does not corroborate the petitioner's claim that but for the erroneous sentencing advice he would have accepted the State's offer rather than proceed to trial. In our view, the record established clearly and convincingly that the petitioner would have insisted upon going to trial, regardless of trial counsel's failure to accurately determine his range status. Accordingly, we conclude that the petitioner has not demonstrated that he was prejudiced by trial counsel's deficient performance regarding his range status.

II. Motion for permission to further Amend Post-Conviction Petition. The petitioner claims the Sullivan County Criminal Court erred by failing to allow him to amend his petition a fourth time "in light of the recent U.S. Supreme Court ruling in State v. Gomez." The record shows the post-conviction court gave the petitioner almost a year to review the transcript of the trial proceedings, determine any viable issues from the pro se petition, and file the necessary amendments to it. Certainly, a year provides more than a "reasonable opportunity" for the petitioner to amend his petition. Tenn. Sup. Ct. R. 28, § 6(B)(4)(b); see also T.C.A. § 40-30-106(d) (2006). In reality, the petitioner's motion for permission to amend was filed on June 28, 2007, four months after the U.S. Supreme Court vacated Gomez I, and well within the time established by the post-conviction court for all amendments to be filed. Even if properly filed, the fourth amendment to the petition intended to raise "several Blakely-related issues." The petitioner cannot prevail based on Blakely because his conviction became final on March 26, 2004, and this Court has repeatedly held that Blakely does not apply retroactively to cases on collateral appeal. See Donald Branch v. State, No. W2003-03042-CCA-R3-PC, 2004 WL 2996894, at *10 (Tenn. Crim. App., Jackson, Dec. 21, 2004), perm. to appeal denied, (Tenn. May 23, 2005); see also Barry K. Harris v. State, No. M2007-02845-CCA-R3-CD, 2008 WL 3451292, at *2 (Tenn. Crim. App., Nashville, Aug. 13, 2008). Accordingly, the post-conviction court did not err in denying the petitioner relief on this issue as a matter of law.

III. Motion to Recuse. Next, the petitioner challenges the impartiality of the post-conviction court, alleging that it was biased in ruling against him and in refusing to grant his motion

for recusal. To the contrary, the State argues the record establishes that the post-conviction court was very patient and respectful of the petitioner. We agree.

Our supreme court has stated, "Whether a judge should recuse herself or himself from a legal proceeding rests within the sound discretion of the judge." State v. Cannon, 254 S.W.3d 287, 307 (Tenn. 2008) (citations omitted). An objective test is applied to determine if recusal is proper because the appearance of bias is just as injurious to the integrity of the courts as actual bias. Id. Therefore, recusal is warranted (1) if a judge has any doubt concerning his or her ability to preside over a case impartially or neutrally, or (2) when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality. Id. This court will not interfere with the trial court's decision on appeal unless the record clearly shows an abuse of discretion. Id.

The petitioner complains that the post-conviction judge failed to recognize his own predisposition to rule against him. In the analysis and argument section of the petitioner's brief, he refers to one comment the post-conviction court made in its order denying relief in support of his bias claim. The court wrote that "[t]he pro-se petitioner eventually filed nine separate post-conviction cases attacking his conviction for the theft and rape and numerous pro-se [sic] letters, and pleadings. Nine separate P.C.P. numbers were assigned by the clerk (as written in brief)." Without any reference to the record, the petitioner further urges us to conclude the post-conviction court was biased because it described the petitioner as "difficult" and [the petitioner's] court file as "epic." He concludes, based on these comments, that the post-conviction judge should have recused himself "due to a conflict of interest or at least the appearance of impartiality."

As an initial matter, the above statement from the trial court's order shows the procedural posture of the case, not bias. As to the other alleged statements, the petitioner's claim is no more than a bald allegation of bias because he fails to properly refer to any other portions of the record. "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." See Tenn. Ct. Crim. App. R. 10(b). Failure to comply with this basic rule will ordinarily constitute a waiver of the issue. Id.; State v. Thompson, 36 S.W.3d 102, 108 (Tenn. Crim. App. 2000). Despite the petitioner's failure to reference the record, we have reviewed the entire record in this case and conclude the post-conviction court properly denied the petitioner's motion to recuse.

IV. Ineffective assistance of counsel based on "violations of the [petitioner's] rights under the Miranda decision." The petitioner now claims a "Miranda violation" whereas on direct appeal, he claimed the search warrant was improper. In both instances, the petitioner's principal complaint was the suppression of evidence, the DNA, as a result of his statement to law enforcement. In the petitioner's direct appeal a panel of this court specifically stated, "[o]nce the [new] information was obtained, a new attempt to obtain a search warrant was appropriate. . . . [T]hat is, we are not convinced that the Defendant was in any way prejudiced by the process followed by the State in seeking and obtaining the search warrant." Id. at 5. All aspects of the suppression issue were thoroughly litigated in the trial court, on direct appeal, and later by the supreme court. See State v. Blye, 130 S.W.3d 776, 779 (Tenn. 2002); State v. Allen Prentice Blye, No. E2001-01227-CCA-R3-CD, 2002 WL 31487524, at *2-6 (Tenn. Crim. App., Knoxville, Sept. 19, 2002). The suppression

issues addressed in the direct appeal have been resolved and the petitioner has presented nothing to show that his suppression claim otherwise has merit. Accordingly, the petitioner has failed to show ineffective assistance of counsel.

V. **Ineffective assistance of counsel based on a "fail[ure] to adequately protect the [petitioner's] interest at the sentencing phase of his original prosecution.**" Here, the petitioner's argument is twofold. First, he claims trial counsel was ineffective because he failed to obtain expert psychological services for the purpose of mitigating his sentence. The record shows trial counsel had a prior mental health report of the petitioner's which stated that the expert was "[n]ot aware of any diagnosis of any mental illness." Trial counsel reviewed the psychological reports which determined the petitioner was competent to stand trial and testified the reports did not include anything that would benefit the petitioner at sentencing. Despite the petitioner's testimony that he had been hit in the head with a rock as a child, trial counsel further testified the petitioner was "very intelligent" and without impairment from any prior injury. Further, on direct appeal, this court specifically addressed the trial court's denial of the petitioner's request for a continuance for the purpose of obtaining expert psychological reports and determined the petitioner did not demonstrate a particularized need for such services. State v. Allen Prentice Blye, No. E2001-01227-CCA-R3-CD, 2002 WL 31487524, at *9-10 (Tenn. Crim. App., Knoxville, Sept. 19, 2002). Accordingly, the petitioner has failed to demonstrate either deficient performance or prejudice required for this claim.

Secondly, the petitioner argues trial counsel was ineffective by allowing him to be sentenced in both sets of cases, the aggravated burglary and aggravated rape along with the theft cases, all on the same day. Our review of this issue shows the sentencing court held two separate sentencing hearings on the same day. Before doing so, trial counsel consulted with the petitioner to determine if he was opposed to proceeding in that manner. The only other proof in this record shows that the petitioner agreed to having both sentencing hearings on the same day. Thus, the petitioner has failed to show ineffective assistance of counsel.

Conclusion. Based on the foregoing, the judgment of the post-conviction court is affirmed.

CAMILLE R. McMULLEN, JUDGE