

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 22, 2009 Session

TIMOTHY FLOOD v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Knox County
No. 87567 Bob R. McGee, Judge**

No. E2009-00294-CCA-R3-PC - Filed March 24, 2010

The Petitioner, Timothy Flood, appeals as of right the Knox County Criminal Court's denial of his petition for post-conviction relief from his conviction for four counts of child rape. On appeal, the Petitioner argues that he did not waive his claims regarding speedy trial and sentencing because appellate counsel was ineffective in neglecting to raise these claims and that he received ineffective assistance of counsel at trial and on appeal. Following our review, we affirm the post-conviction court's judgment denying the petition for post-conviction relief.

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

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Tracy Jackson Smith, Knoxville, Tennessee, attorney for appellant, Timothy Flood.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Steven W. Sword, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

The Petitioner was convicted by a jury of four counts of child rape and sentenced by the trial court to an effective sentence of forty years in the Tennessee Department of Correction. On direct appeal, appellate counsel attacked the sufficiency of the evidence and the trial court's refusal to allow a proposed defense witness to testify. This court held that "the evidence was sufficient to support the convictions," but we reversed the Petitioner's

conviction concluding that “the defendant’s ‘constitutional right to present a defense was violated by exclusion of the proffered hearsay evidence.’” State v. Timothy Flood, No. E2005-00878-CCA-R3-CD, 2006 WL 249508, at *8 (Tenn. Crim. App. Feb. 2, 2006), rev’d (Tenn. Mar. 15, 2007). The supreme court reversed this court’s opinion and concluded that the Petitioner “was not deprived of his constitutional right to present a defense by the trial court’s exclusion of the victim’s statements to her father.” State v. Flood, 219 S.W.3d 307, 319 (Tenn. 2007).

This case stems from four separate instances of child rape of the victim, the Petitioner’s cousin. The victim testified regarding each of the instances in detail. See Flood, 2006 WL at *1. The Petitioner’s theory of the case was that the victim was molested by someone else. Trial counsel called several alibi witnesses to testify that he was not near the victim or alone with the victim when these alleged instances occurred. Trial counsel also sought to introduce testimony from the victim’s father that the victim told her father that the Petitioner touched her and made her touch his penis. This was inconsistent with her initial allegations, that he made her perform oral sex on him four different times. The victim also asked her father “if the Defendant would still have to go to jail if someone else w[ere] caught.” The Petitioner elicited this testimony as an offer of proof after the trial court ruled that this testimony was inadmissible.

On August 28, 2007, the Petitioner filed a pro se petition for post-conviction relief alleging several errors at the trial and appellate court levels. On June 23, 2008, after numerous requests for an extension of time, appointed counsel filed a supplemental memorandum in support of the Petitioner’s initial petition for post-conviction relief. The amended petition alleged that the Petitioner was denied his right to a speedy trial, that the trial court improperly sentenced the Petitioner, and that counsel was ineffective at trial and on appeal. Following a full evidentiary hearing, the post-conviction court denied relief on January 13, 2009. The Petitioner filed a notice of appeal on February 13, 2009.

The proof at the evidentiary hearing consisted solely of the testimony of trial counsel and the Petitioner. Trial counsel testified that he met with the Petitioner approximately ten to fifteen times throughout the course of handling the Defendant’s case. Trial counsel did not hire an investigator to help with the Petitioner’s case, but, according to trial counsel, he interviewed several people in regards to the Petitioner’s case and ultimately called more witnesses to testify than the State. He called the following seven witnesses in the Petitioner’s case-in-chief: Robbie Dewayne Flood, Deborah Flood, Tiffany Michelle Flood, Melvin W. Tate, Timothy Flood, Vickie McKinney, and John Anderson. He also proffered the testimony of Deoce Dingus, Sr., the victim’s father, after he was denied the opportunity to call this witness in the Petitioner’s case-in-chief.

Trial counsel stated that he talked with the Petitioner's brother regarding the first instance of child rape, but he could not remember if this discussion was prior to the day of trial. He stated that although he interviewed the Petitioner's girlfriend on the phone several times, he did not pursue calling her as a witness because her recollection in regards to the timing of the fourth instance of rape did not match the Petitioner's testimony. Moreover, she seemed reluctant to testify, and the subpoena was never served.

Trial counsel admitted that he did not question the victim's mother in regards to her statement that she believed the stepfather committed the rapes. He attributed this oversight to the fact that he did not know why she believed this, and he did not want to ask her questions when he did not know how she would respond at trial. He explained that he was reluctant to call several of the Petitioner's suggested witnesses because their testimony would be repetitious and, in some cases, conflicting.

On cross-examination, trial counsel testified that he has handled thousands of criminal cases throughout his thirty-three years of practice. A "substantial portion" of his practice is criminal defense, and he has tried twenty to thirty jury trials. He attributed the delay in the trial to the State, himself, and the trial court. He stated that the delay did not concern him because in his experience delays are "usually to a defendant's advantage," and his "basic theory of criminal defense law is that anytime my client is not in jail, we're doing a good job."

In contrast to trial counsel's testimony, the Petitioner contended that trial counsel did not prepare him for trial. According to the Petitioner, he only met with trial counsel five times before trial, and he was not even aware that he was charged with four separate instances of child rape until the day of trial. Trial counsel did not discuss the advantages and disadvantages of testifying or talk with the Petitioner about the possible sentences in his case.

The Petitioner also argued that trial counsel did not adequately investigate his case or follow up on the leads provided by the Petitioner. Trial counsel did not meet with several of the witnesses until the day before trial, and he met with some of the witnesses on the actual trial date. The Petitioner stated that he provided trial counsel with his girlfriend's address, but trial counsel never subpoenaed her for trial. Moreover, trial counsel never contacted the Petitioner's father, who was a potential eyewitness to the fourth alleged rape.

On cross-examination, the Petitioner admitted that trial counsel called several witness in his defense at trial. The Petitioner also admitted that trial counsel provided him with the plea agreement information in his case and that he signed a letter noting his rejection of the plea agreement. The letter sets forth all of the charges and the possible sentences for each

count. Even though trial counsel suggested that the Petitioner take the deal, the Petitioner declared that he did not read the letter because he “wasn’t taking no plea offer.”

Following the evidentiary hearing, the post-conviction court found that the speedy trial and sentencing allegations were waived for failure to raise them on direct appeal and that the trial court was bound by the supreme court’s decision that counsel’s failure to illicit testimony on cross-examination would not have changed the outcome of the trial.

On appeal, the Petitioner asserts that the speedy trial and sentencing errors were not waived and that the post-conviction court should have considered the merits of his claims because appellate counsel was ineffective for failing to appeal these issues. The Petitioner also asserts that trial counsel was ineffective at trial and sentencing and that the post-conviction court erred in concluding that the supreme court’s ruling was binding on the post-conviction court. The State responds that this court does not have jurisdiction because the Petitioner failed to file a timely notice of appeal. Additionally, the State argues that the post-conviction court properly denied the petition for post-conviction relief because the Petitioner waived his claims regarding the speedy trial and sentencing violations and failed to establish any deficiency in trial counsel’s representation. Following our review, we affirm the judgment of the post-conviction court.

ANALYSIS

As an initial issue, we must address the State’s argument that the Petitioner’s notice of appeal was untimely. The Petitioner’s counsel did not offer any explanations in her brief for the untimely notice of appeal. During oral arguments, counsel requested this court to waive the requirement in the interest of justice. Counsel did not file a motion to waive timely filing of the notice of appeal. Instead, counsel stated during oral arguments that she was unaware of her error until she read the State’s brief.

Pursuant to Tennessee Rules of Appellate Procedure 4(a), a notice of appeal “shall be filed with and received by the clerk of the trial court within 30 days after the date of entry of the judgment appealed from[.]” However, the untimely filing of a notice of appeal is not always fatal to an appeal. As stated in Rule 4(a), “in all criminal cases the ‘notice of appeal’ document is not jurisdictional and the filing of such document may be waived in the interest of justice.” Tenn. R. App. P. 4(a). “In determining whether waiver is appropriate, this court will consider the nature of the issues presented for review, the reasons for and the length of the delay in seeking relief, and any other relevant factors presented in the particular case.” State v. Markettus L. Broyle, No. M2005-00299-CCA-R3-CO, 2005 WL 3543415, at *1 (Tenn. Crim. App. Dec. 27, 2005); see also State v. Robert William Rockwell, No. E2006-01717-CCA-R3-CD, 2007 WL 2297817, at *2 (Tenn. Crim. App. Aug. 13, 2007), no perm.

app. filed. Waiver is not automatic and should only occur when “the interest of justice” mandates waiver. Rockwell, 2007 WL at *2 (internal citations omitted). “If this court were to summarily grant a waiver whenever confronted with untimely notices, the thirty-day requirement of Tennessee Rule of Appellate Procedure 4(a) would be rendered a legal fiction.” Id. (citing Michelle Pierre Hill v. State, No. 01C01-9506-CC-00175, 1996 WL 63950, at *1 (Tenn. Crim. App. Feb. 13, 1996)).

While we do not discount the time requirements of our judicial system, we cannot disregard the fact that the notice of appeal was filed a mere one day past the filing deadline. Accordingly, we will waive the timeliness requirement in the interest of justice and consider this appeal on its merits.

I. Waiver of Speedy Trial and Sentencing Errors

The Petitioner contends that the post-conviction court erred in ruling that the Petitioner waived any issues in regards to his speedy trial rights and sentencing errors. The Petitioner argues that the failure to raise these issues should be attributed to counsel’s incompetence. Additionally, if this court concludes that these issues are waived, his claim of ineffective assistance of counsel for failure to raise these issues is not subject to waiver. The State contends that these issues are waived, and if they are not waived, the Petitioner did not present any proof at the post-conviction hearing to support his claims.

The Petitioner did not raise these issues on direct appeal. “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.” Tenn. Code Ann. § 40-30-110(f). In determining whether an issue is waived in a post-conviction proceeding, the Tennessee Code states:

(g) A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

- (1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or

(2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

Tenn. Code Ann § 40-30-106(g) (emphasis added). Accordingly, we conclude that the special circumstances provided in Tenn. Code Ann. § 40-30-106(g)(1)-(2) do not apply in this case; therefore, the issues relating to speedy trial and sentencing are waived. However, our conclusion on this issue does not preclude us from considering the Petitioner's claim that counsel was ineffective for failing to raise these issues on direct appeal.

II. Ineffective Assistance of Trial and Appellate Counsel

The Petitioner contends that trial counsel was ineffective in investigating the case and presenting the case at trial and sentencing. The Petitioner argues that trial counsel and appellate counsel were ineffective because they failed to preserve the speedy trial and sentencing issues for appeal. The State responds that the Petitioner failed to show by clear and convincing evidence that counsel was ineffective at trial or on appeal.

The burden in a post-conviction proceeding is on the petitioner to prove his allegations of fact supporting his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the post-conviction court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-72 (1993). In other words, a showing that counsel's performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, "the result of the proceeding would have been different." Strickland, 466 U.S. at 694. The Strickland standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A. Failure to Raise Speedy Trial Issue

The Petitioner argues that trial counsel was deficient in delaying the Petitioner's trial for more than four years and that appellate counsel was deficient in failing to raise the speedy trial issue on appeal. The State responds that the Petitioner did not present any proof at the post-conviction hearing to support his claims. To prevail, the Petitioner must establish that his right to a speedy trial was violated and that counsel failed to pursue the issue on appeal.

Once the state initiates criminal proceedings, the right to a speedy trial is implicated pursuant to the Sixth Amendment to the United States Constitution and to article 1, section 9 of the Tennessee Constitution. See Tenn. Code Ann. § 40-14-101 (2006); Tenn. R. Crim. P. 48(b). The right is meant "to protect the accused against oppressive pre-trial incarceration, the anxiety and concern due to unresolved criminal charges, and the risk that evidence will be lost or memories diminished." State v. Utley, 956 S.W.2d 489, 492 (Tenn. 1997) (citations omitted). In Barker v. Wingo, 407 U.S. 514, 530 (1972), the Supreme Court devised a balancing test to determine speedy trial issues and identified the following factors for consideration:

- (a) The length of delay;
- (b) The reason for the delay;
- (c) The defendant's assertion of his right to a speedy trial; and
- (d) The prejudice to the defendant

See also State v. Bishop, 493 S.W.2d 81, 84-85 (Tenn. 1973) (implicitly adopting the Barker balancing test for our state's constitutional and statutory right to a speedy trial). The remedy for the denial of a speedy trial is dismissal of the charges. Strunk v. United States, 412 U.S. 434, 440 (1973).

The first Barker factor, length of delay, is a threshold factor, serving as the "triggering mechanism" that will necessitate consideration of the other three factors. Barker, 407 U.S. at 530. "Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." Id. "[T]he length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case." Id. at 531-32. "While such a delay must approach one year to trigger the Barker v. Wingo analysis the line of demarcation depends on the nature of the case." State v. Utley, 956 S.W.2d 489, 494 (Tenn. 1997) (citing Doggett v. United States, 505 U.S. 647, 652 (1992)).

Here, the Petitioner was tried over four years after he was indicted by the Knox County Criminal Court. Thus, considering the peculiarities of his case, this delay was

significant. In regards to the second factor, the reason for the delay, the record before us does not indicate any specific reason for the delays. While most of the delays were attributed to the Petitioner's attorney at trial, the State, the court, and the Petitioner all asked for delays at some point. In regards to the third factor, the assertion of the right to a speedy trial, the Petitioner never objected to the continued delays. Notably, the Petitioner was not in jail during these four years.

The fourth Barker factor, prejudice, has been described by the Tennessee Supreme Court as "the single most important factor in the balancing test." State v. Baker, 614 S.W.2d 352, 356 (Tenn. 1981). "Prejudice . . . should be assessed in the light of the interests of [the] defendants which the speedy trial right was designed to protect," which the Supreme Court identified as: "(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired." Barker, 407 U.S. at 532. The Court noted that "the most serious [of these interests] is the last, because the inability of a defendant [to] adequately . . . prepare his case skews the fairness of the entire system." Id.

In the Petitioner's brief, the Petitioner states that he was prejudiced by the delay. The Petitioner did not present any proof at the post-conviction hearing that he was prejudiced by the delays in his case. The Petitioner did not present any evidence of lost witnesses or impairment to his defense by the delay in trial. Moreover, trial counsel presented seven witnesses for the defense when the Petitioner's case went to trial.

The Petitioner's girlfriend was the one potential witness who was not present at trial. However, she was never successfully subpoenaed, and trial counsel testified that this witness was not actively pursued because her testimony about the timing of the fourth incident conflicted with the Petitioner's testimony. The Petitioner tried to insinuate that the "lapse of time eroded the memory" of this witness. While trial counsel did admit that the delay in the start of trial was substantial and that memories can fade over time, he stated that the Petitioner's girlfriend recalled different times, not that she forgot the times. Following our review, we conclude that the Petitioner failed to show by clear and convincing evidence that his right to a speedy trial was violated; therefore, appellate counsel was not ineffective for failing to preserve this issue for appeal.

B. Failure to Preserve Sentencing Issues

The Petitioner argues that the trial court's use of enhancement factors violated his right to trial by jury and that the trial court erred in imposing consecutive sentencing. The Petitioner contends that trial counsel was ineffective in failing to raise these issues in the motion for new trial and that appellate counsel was ineffective in failing to raise these issues

on appeal. The State responds that the Petitioner did not present any proof at the post-conviction hearing to support his claims. As with the speedy trial issue, to prevail, the Petitioner must establish that he was sentenced contrary to law and that counsel failed to pursue the issue on appeal.

After noting that the trial court had before it for consideration the presentence report, the victim-impact statement, the evidence at trial, and statements of counsel at the sentencing hearing, the trial court sentenced the Petitioner as a Range I standard offender to 20 years on each of the four counts. The trial court ordered the sentence in Count 2 to run consecutively with the sentence in Count 1, while the sentences in Counts 3 and 4 were to run concurrently with Count 2. In sentencing the Petitioner, the trial court noted one of the State's enhancement factors: The defendant abused a position of public or private trust or used a special skill in a manner that significantly facilitated the commission or the fulfillment of the offense. The trial court then sentenced the Petitioner to the presumptive sentence of twenty years for each Class A felony.

Enhancement Factor

The Petitioner was sentenced two weeks before the supreme court's decision in Blakely v. Washington, 542 U.S. 296 (2004). Although trial and appellate counsel could have presented the issue for review before Blakely was decided and put the Petitioner's case in the pipeline, subsequent cases have held that Blakely did not announce a new rule of law. David Earl Palmer v. State, No. W2005-01421-CCA-R3-PC, 2006 WL 3147053, at *8 (Tenn. Crim. App. Nov. 3, 2006), perm. app. denied (Tenn. Mar. 5, 2007). Thus, Blakely would not retroactively apply to the Petitioner's case. Muhammad v. State, No. E2007-00748-CCA-R3-PC, 2009 WL 400633, at *5 (Tenn. Crim. App. Feb. 18, 2009), perm. app. denied (Tenn. Aug. 17, 2009).

Appellate counsel could have argued that the Petitioner's sentence was illegal according to Apprendi v. New Jersey, 530 U.S. 466 (2000). This argument would have failed as well. While the trial court did note an enhancing factor, the Petitioner was sentenced in accordance with Apprendi. Id. at 490. The trial court sentenced the Petitioner to the presumptive minimum for the Class A felonies and did not use facts not found by the jury to sentence the Petitioner above the statutory maximum sentence allowed for the offenses. Tenn. Code Ann. § 40-35-210(c) (1999). Accordingly, we conclude that the Petitioner's sentence is lawful and that trial and appellate counsel were not ineffective in failing to preserve for appeal the Petitioner's sentencing issue.

Consecutive Sentencing

When sentencing the Petitioner, the trial judge noted the applicability of Tenn. Code Ann. 40-35-115, which allows the trial court to

[O]rder sentences to run consecutively if the court finds by a preponderance of the evidence that:

...

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims.

Tenn. Code Ann. § 40-35-115(b)(5). The Petitioner argues that “there is no evidence in the record regarding the [Petitioner's] relationship with the victim and the extent of the emotional and psychological damage suffered by the victim.” The Petitioner was convicted of four offenses of child rape against his cousin. The victim testified that these rapes occurred throughout the Summer of 1999. Moreover, the victim's mother filed a victim-impact statement on behalf of her daughter. While we do note that the trial court did not specifically state his reasons for applying consecutive sentencing immediately prior to sentencing the Petitioner, the trial court did state that he was convinced that consecutive sentencing applied in the Petitioner's case. Additionally, the trial court mentioned early on in the hearing that he had the benefit of the victim-impact statement filed on behalf of the minor. We conclude that the trial court's decision to impose consecutive sentencing is supported by the record. Accordingly, we conclude that trial and appellate counsel were not ineffective in failing to preserve the Petitioner's sentencing issue relating to the consecutive sentencing in his case and that the Petitioner was not prejudiced by their failure to raise this issue.

C. Failure to Prepare Case and Effectively Examine Witnesses

The Petitioner contends that trial counsel was ineffective in preparing his case for trial. The Petitioner argues that trial counsel failed to cross-examine the victim concerning statements she made to her father and that such failure precluded the Petitioner from introducing her prior inconsistent statements into evidence. The Petitioner also argues that

trial counsel failed to investigate State and defense witnesses; failed to follow leads provided by the Petitioner; failed to prepare defense witnesses for trial; failed to present an alibi witness; failed to cross-examine the victim's mother and a Department of Children Services investigator on a pivotal issue; and failed to call mitigation witnesses at the sentencing hearing. The State responds that the Petitioner failed to show by clear and convincing evidence that counsel was ineffective at trial.

First, we will address the allegation relating to the cross-examination of the victim because this issue has been discussed by this court and the supreme court. See Flood, 2006 WL at *8; see also Flood, 219 S.W.3d at 319. The Petitioner claims that the post-conviction court erred in concluding that the supreme court's ruling was binding on the post-conviction court. This issue relates to the victim's statements to her father regarding the incidents. In its ruling, the supreme court concluded that the testimony was not critical enough to the Petitioner's defense to deprive him of his constitutional right to due process, thereby overruling this court's opinion that the Petitioner should receive a new trial. The supreme court noted that

[Trial counsel] could have asked the victim about the statements. If the victim denied making the statements, [trial counsel] could have introduced the statements into evidence through the victim's father pursuant to Tennessee Rule of Evidence 613. [Trial counsel] had the opportunity to question the victim about the statements but did not do so. Generally, the right to present a defense is not denied when a defendant does not pursue a line of questioning during cross-examination.

However, the issue before the court was not whether counsel was ineffective for his failure to confront the victim with the statements. The supreme court's ruling focused on whether the Petitioner was denied his right to present a defense.

Consequently, the issue before this court, whether trial counsel was ineffective for failing to know and follow the Rules of Evidence, has not been previously determined. Here, the Petitioner contends that trial counsel failed to confront the victim in the Petitioner's case with a prior inconsistent statement, that the Petitioner made her touch his penis.¹ This, according to the Petitioner, was in contrast to the victim's earlier statements that the Petitioner made her perform oral sex on him. Trial counsel's error resulted in the exclusion

¹The supreme court previously determined that the victim's question to her father, "if someone else w[ere] caught, would [the Petitioner] still have to go to jail," was not a statement for purposes of the hearsay rule.

of statements she made to her father that were potentially helpful for the Petitioner's case. Tenn. R. Evid. 613(b). In this respect, counsel was deficient for failing to comply with the Tennessee Rules of Evidence. However, this does not end our inquiry. As noted by the supreme court, this testimony was not critical to the defense. While the two statements are inconsistent for purposes of the hearsay rule, both statements indicate that the victim was forced to touch the Petitioner's penis in some manner. Therefore, we do not believe that the jury would have viewed the statements as contradictory. Accordingly, we conclude that the Petitioner did not prove by clear and convincing evidence that absent trial counsel's error, the result of the proceedings would have been any different.

All of the Petitioner's other claims relate to trial counsel's alleged failure to discover, investigate, present, and properly cross-examine witnesses. The Petitioner and trial counsel were the only witnesses who testified at the post-conviction hearing. This court has long held that "[w]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). We cannot speculate as to what these witnesses may have said if presented or how other witnesses may have responded to a rigorous cross-examination. Id. Following our review, we conclude that the post-conviction court did not err in finding that the Petitioner failed to establish by clear and convincing evidence that counsel was ineffective at trial.

CONCLUSION

In consideration of the foregoing and the record as a whole, the judgment of the post-conviction court denying the petition for post-conviction relief is affirmed.

D. KELLY THOMAS, JR., JUDGE