

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
February 13, 2007 Session

**ANTHONY M. CLARK v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Sumner County  
No. 998-2004 Jane W. Wheatcraft, Judge**

**No. M2006-01176-CCA-R3-PC -Filed August 6, 2007**

The Appellant, Anthony M. Clark, appeals the Sumner County Criminal Court's denial of his petition for post-conviction relief. Clark, pursuant to a plea agreement, pled guilty to aggravated sexual battery, a Class B felony, and unlawful photographing in violation of privacy, a Class A misdemeanor and received concurrent sentences of twelve years at 100% and eleven months, twenty-nine days, respectively. On appeal, Clark contends that his guilty plea to aggravated sexual battery was not knowingly and voluntarily entered due to the ineffective assistance of counsel in failing to adequately investigate the case. Following review, we affirm the judgment of the post-conviction court.

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

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH and J.C. MCLIN, JJ., joined.

Patrick T. McNally, Nashville, Tennessee, for the Appellant, Anthony M. Clark

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; and Sallie Wade Brown, Assistant District Attorney General, for the Appellee, State of Tennessee.

**OPINION**

**Factual Background**

The Appellant was charged with two counts of unlawful photographing in violation of privacy, which were alleged to have occurred in November and December 2002, and three counts of rape of a child, which were alleged to have occurred on January 11, 2003. At the

preliminary hearing, the State presented the testimony of the victim<sup>1</sup> and Detective Tim Bailey of the Sumner County Sheriff's Department.

The victim testified that she was twelve years old and that, during the time period these crimes occurred, her family was temporarily staying with the Appellant and his family. On the evening of January 11, 2003, after the Appellant's wife had gone upstairs to bed, the Appellant came downstairs and tried to pull up the victim's shirt and said "Let me see your breasts." The victim said "no," and the Appellant went back upstairs. The victim then went to sleep on the couch.

The victim testified that she later awoke to find that the Appellant had pulled down her pajama bottoms and underwear and "[h]e started to finger me. . . . He stuck his finger in my vagina and my butt." Subsequently, the Appellant went to another room and obtained a camera. When he returned, he "tried to pull up [her] shirt and take a picture." The victim knocked the camera out of the Appellant's hand, and he again returned upstairs.

The victim related that after the incident she went back to sleep, but the Appellant returned a third time and again pulled down her pajama bottoms. According to the victim, the Appellant was wearing his robe, and he kneeled beside the couch and "put[] his hand in [her] underwear. . . . He fingered [her] in [her] vagina."

Detective Bailey, who questioned the Appellant about the alleged rapes, testified that the Appellant confirmed that he had gone upstairs and came downstairs three times; that he was wearing a robe; and that he had a camera and attempted to photograph the victim. Bailey also testified that he executed a search warrant of the Appellant's residence and found two videotapes. One segment on the videotape was date-stamped November 30 and depicted the victim, as filmed through a keyhole in the downstairs bathroom, and showed her breasts. Bailey stated that the next segment on the videotape was date-stamped December 3 and showed the victim using the bathroom and undressing before stepping into the shower. Detective Bailey testified that the Appellant admitted to videotaping the victim through a keyhole in the bathroom door. He further testified that the Appellant stated that he removed the bathroom door while taping the second segment so he could get a clearer picture of the victim. According to Bailey, the Appellant also admitted that he had hidden the camera in a gym bag or laundry basket and that he wanted to film the victim in the nude because he was a voyeur.

On April 3, 2003, the Appellant was indicted by a Sumner County grand jury for three counts of rape of a child and two counts of unlawful photographing. On November 10, 2003, the Appellant, pursuant to the terms of a plea agreement, pled guilty to one count of aggravated sexual battery and one count of unlawful photographing, with the remaining charges being dismissed. Pursuant to the terms of the negotiated plea agreement, the Appellant received concurrent sentences of twelve years for aggravated sexual battery and eleven months, twenty-nine days for unlawful photographing, resulting in an effective sentence of twelve years in confinement.

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<sup>1</sup> In order to protect the identity of minor victims of sexual abuse, it is the policy of this court not to refer to them by name. *State v. Schimpf*, 782 S.W.2d 186, 188 n.1 (Tenn. Crim. App. 1989).

On November 8, 2004, the Appellant filed a petition for post-conviction relief alleging that his guilty pleas were not knowingly or voluntarily entered due to ineffective assistance of counsel arising from trial counsel's failure to adequately investigate possible defense strategies. On May 1, 2006, the post-conviction court held a hearing at which numerous witnesses testified.

Brian and Carrie Faulkner testified that they were good friends with both the Appellant's and the victim's families. Mr. Faulkner testified that he was the first to find out about the victim's allegations against the Appellant and, at that time, Mrs. Stout, the victim's mother, said that the victim reported that the Appellant had touched her inappropriately. At another time, Mrs. Stout said that the victim reported the Appellant was "getting her anally, then, you know, vaginally and everything else like that until it blew up to where the night that they arrested him." Mrs. Faulkner, who babysat the victim the night the Appellant was arrested, talked to the victim that night, as well as on other occasions, and said the victim gave different versions of the events.<sup>2</sup> "One minute it was that he had vaginally penetrated her. The next it was anally, and then she said that all he did was try to lift [her] shirt and take pictures."

The Appellant's wife testified that she believed the Appellant was innocent and that she had hired trial counsel to defend him. She further related that, two weeks prior to the victim's report of the crimes in this case, the victim had also reported similar sexual crimes against another person, Kaleb Waller. Mrs. Clark acknowledged that Waller had pled guilty after confessing to digitally penetrating the victim and fondling her breasts.

The thirty-six-year-old Appellant testified that he had been employed by the Franklin Police Department for two years and had previously served as a police officer in the military for seventeen years. With regard to trial counsel's performance, the Appellant testified that he had met with trial counsel only twice, shortly after he made bond in late February, 2003. He further added, however, that:

We talked mostly by telephone. He gave me pretty much an open line and said, you know, if you can remember anything, call me. So I used to write things down and call him often . . . .

The Appellant specifically testified that he called trial counsel "[a]t the very least, at least once a week if not sometimes more." He stated that he was able to reach trial counsel "most times" or "[trial counsel] would always call me back." The Appellant also related that he provided trial counsel with the names of several witnesses, including the Faulknors and Mrs. Clark. He said he also gave trial counsel a computer diskette which contained information about the case and about the victim and her mother.

During their meetings, the Appellant testified that trial counsel never discussed possible defenses or trial strategy with him, such as emphasizing the fact that there was no medical evidence of digital penetration. The Appellant also testified that trial counsel failed to follow the

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<sup>2</sup> It is altogether unclear from the transcript regarding the testimony of either Brian or Carrie Faulkner which, or, if any, of the "different versions of the events," was actually related by the victim or whether reported by others in the community.

Appellant's suggestions to hire a private investigator or a defense expert. However, the Appellant admitted that trial counsel had contacted the detective in Davidson County who investigated the Waller case. He further acknowledged that trial counsel had advised him that he probably would not be able to impeach the victim with her inconsistent statements from that case.

The Appellant concluded that trial counsel believed the videotapes were so damaging that he would be convicted of all charges. He felt that trial counsel "gave up on [him,]" and, "[a]gainst [the] advice of [his] wife and family and [his] own advice[,]" the Appellant notified counsel that he would accept the plea agreement. He explained that "[he] felt as though [his] attorneys weren't going to be there for me, that [he] didn't have a shot in hell, basically." According to the Appellant, he felt as if "[he] had no choice" and "felt almost forced, like [he] was under duress to take the thing . . . ."

During his testimony at the post-conviction hearing, the Appellant admitted that he had videotaped the victim on two occasions but stated that he did so because he thought she had stolen some money from his office and was attempting to catch her in the act. He further stated that he suspected that the victim had stolen a lockbox, so he removed the bathroom door to prevent her from concealing any other items which she might steal.

Trial counsel testified that he met with the Appellant on several occasions and spoke with him by phone numerous times. Trial counsel acknowledged that the Appellant had given him a diskette and a printout of information about defense witnesses and that counsel had reviewed the information with the Appellant. Trial counsel testified that he investigated all possible leads which might yield evidence for the Appellant's defense and conducted a lengthy interview with Detective Bailey. Trial counsel stated that he and an associate also contacted the detective working on the Waller case and learned that Waller had admitted to the allegations and pled guilty to one count of rape of a child, one count of attempted rape of a child, two counts of aggravated sexual battery, and two counts of attempted aggravated sexual battery. Trial counsel further testified that he reviewed the report of the victim's medical examination, performed in the Waller case at Our Kids Center, which indicated that there was "no conclusive evidence" of digital penetration. However, he did not believe that the report would have exonerated or created a reasonable doubt as to whether the Appellant did in fact digitally penetrate the victim. Trial counsel stated that he also expressed concern to the Appellant that the jury could infer that the Appellant desired to have sexual contact with the victim in light of the fact that he had secretly videotaped her breast and her nude body. Thus, trial counsel filed a motion to sever the child rape charges from the unlawful photographing charges. Additionally, trial counsel testified that he filed a Motion for Discovery and Inspection in the case and reviewed the State's response with the Appellant. Trial counsel stated that:

I know that I have gone over the discovery with [the Appellant] on several occasions. I know that we talked about these videotapes. We talked about [the victim's] statement. We talked about the concerns and challenges that could be made to her credibility. . . . We talked about just about each and every piece of discovery that was there.

Trial counsel testified that on November 7, 2003, the State revised its plea offer, and counsel met with the Appellant to review the offer. The terms of the agreement were that the Appellant would plead guilty to aggravated sexual battery and unlawful photographing, with the remaining charges being dismissed. The agreement further provided that the Appellant would receive a sentence of twelve years, to be served at 100%, for the aggravated sexual battery and a sentence of eleven months, twenty-nine days, to be served concurrently, for the unlawful photographing. Trial counsel stated that the Appellant wanted some time to think about the offer and advised trial counsel that he would let him know the next day. In the interim, trial counsel continued his preparations for trial. The Appellant later advised trial counsel that he would accept the State's plea offer.

On May 12, 2006, the post-conviction court filed a lengthy and detailed Memorandum Opinion and Order denying the Appellant's petition for post-conviction relief. On May 22, 2006, the Appellant filed a timely notice of appeal.

### **Analysis**

On appeal, the Appellant asserts that trial counsel's failure to adequately investigate the facts of the case coerced the Appellant to enter an involuntary guilty plea. He asserts that "trial counsel did not conduct any independent investigation whatsoever during the eight months [he] represented [the Appellant.]" Specifically, he asserts that trial counsel: (1) failed to contact possible defense witnesses, specifically Mr. and Mrs. Faulkner, who could have impeached the victim's credibility based upon her constantly evolving descriptions of the offenses; (2) failed to investigate Waller's case and utilize the information which could have been gained to impeach the victim and support the Appellant's defense; and (3) failed to retain professional services, namely to "consult with a pediatrician to review the Our Kids [Center] examination" and "to consult with [the Appellant] so that they could put forward their own expert witnesses to support [the Appellant's] position that he was not guilty."

In evaluating the knowing and voluntary nature of a guilty plea, the United States Supreme Court has held that, "[t]he standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970). In making this determination, the reviewing court must look to the totality of the circumstances. *State v. Turner*, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995); *see also Chamberlain v. State*, 815 S.W.2d 534, 542 (Tenn. Crim. App. 1990). Indeed, a

court charged with determining whether . . . pleas were 'voluntary' and 'intelligent' must look to various circumstantial factors, such as the relative intelligence of the defendant; the degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

*Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993).

Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate that guilty pleas be voluntarily and intelligently made. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985) (citing *Alford*, 400 U.S. at 31, 91 S. Ct. at 164).

To succeed in a challenge for ineffective assistance of counsel, the Appellant must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), the Appellant must establish (1) deficient representation and (2) prejudice resulting from the deficiency. In the context of a guilty plea, to satisfy the second prong of *Strickland*, the Appellant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Lockhart*, 474 U.S. at 59, 106 S. Ct. at 370; *see also Walton v. State*, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997). The Appellant is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceeding. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). This deference to the tactical decisions of trial counsel, however, is dependant upon a showing that the decisions were made after adequate preparation. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

The issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). "A trial court's *findings of fact* underlying a claim of ineffective assistance of counsel are reviewed on appeal under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise." *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001) (citing Tenn. R. App. P. 13(d)). However, *conclusions of law* are reviewed under a purely *de novo* standard, with no presumption of correctness. *Id.* at 458.

## **I. Standard of Review**

Preliminarily, the Appellant presents an issue for review which is germane to our review of all findings of fact made by the post-conviction court in this case. In sum, the Appellant asserts that in *Fields* the Tennessee Supreme Court established an incorrect standard for the review of factual findings in a post-conviction proceeding. Accordingly, he argues that adherence to *Fields* by this court will likewise result in error.

In *Fields*, our supreme court held:

Consistent with our statement in *Burns*, Rule of Appellate Procedure 13(d) requires a *de novo* review of a trial court's factual findings.<sup>3</sup> In conducting this

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<sup>3</sup> The Tennessee Supreme Court concluded that Tenn. R. App. P. 13(d), which governs the standard of review of factual findings in civil cases, "seems to be the most appropriate provision within the Rules of Appellate Procedure for reviewing the trial court's factual findings in the post-conviction context." *Fields*, 40 S.W.3d at 457 n.4.

*de novo* review, however, appellate courts are to accord those factual findings a presumption of correctness, which is overcome only when the preponderance of the evidence is contrary to the trial court's findings of fact. This standard is identical to that previously recognized in *Henley* and in other cases, which required deference to the trial court's findings of fact "unless the evidence in the record preponderates against those findings."

*Fields*, 40 S.W.3d at 456-57 (footnote added) (citation & footnote omitted).

In support of his argument on appeal, the Appellant contends that:

The problem that the Court created in *Fields* is that the standard set out in T.R.A.P. 13(d) is not the standard stated in *Henley*. The Court in *Henley* described the standard to be applied as, "[t]he findings of fact of the trial judge on a petition for post conviction relief are afforded the weight of a jury verdict and are conclusive on appeal." *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997). This, of course, is more closely akin to the standard of review of a jury verdict in either a civil or criminal trial. *See* T.R.A.P. 13(d) . . . and (e)

. . . .

[T]he *Henley*, "weight of a jury verdict" standard, either in a criminal case . . . or in a civil case, wherein it can only be overturned if "no material evidence" supports the verdict, simply cannot be reconciled with the Rule 13(d) standard, "*de novo* upon the record of the post-conviction court, accompanied by a presumption of correctness."

The Appellant further notes that the appellate courts of this state continue to specifically cite to *Henley* "as controlling the standard that was set out in *Fields*." *See, e.g., Wiley v. State*, 183 S.W.3d 317, 325 (Tenn. 2006); *Serrano v. State*, 133 S.W.3d 599, 603 (Tenn. 2004); *Jaco v. State*, 120 S.W.3d 828, 830-31 (Tenn. 2003); *Crawford v. State*; 151 S.W.3d 179, 181 (Tenn. Crim. App. 2004).



*Randolph v. Randolph*, 937 S.W.3d 815, 810 (Tenn. 1996), the Appellant argues that, when the credibility of a witness is not at issue or where no credibility findings are made by the post-conviction court within the exercise of its fact finding function, “the review is strictly *de novo*.” The Appellant contends that no such findings were made in this case, and he urges this court to conduct a *de novo* review of the record and to evaluate each witnesses’ credibility without a presumption of correctness.

The record before us, however, reflects that the post-conviction court made findings regarding the credibility of witnesses, including a finding that certain portions of the Appellant’s testimony were simply “not believable.” For this reason, we apply the standard that the post-conviction court’s findings regarding credibility are entitled to substantial deference unless the evidence preponderates against those findings. *Fields*, 40 S.W.3d at 456. “Because the trial judge is in a better position to weigh and evaluate the credibility of the witnesses who testify orally, we give great weight to the trial judge’s findings on issues involving credibility of witnesses.” *Gillock v. Board of Professional Responsibility*, 656 S.W.2d 365, 367 (Tenn. 1983). With regard to all other findings of fact, we apply the rule that “review of findings of fact by the trial [or post-conviction] court in civil actions [or post-conviction proceedings] shall be *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.” Tenn. R. App. P. 13(d); *see also Fields*, 40 S.W.3d at 456. This court is bound by the decisions of our supreme court, and, as such, we decline any invitation to resolve the inconsistencies, as alleged, between *Fields* and *Henley*.

## **II. Ineffective Assistance of Counsel**

On appeal, the Appellant asserts that trial counsel’s performance was deficient in multiple areas. Specifically, he contends that trial counsel failed to adequately investigate the case and that, as a result, the Appellant’s plea was not knowingly and voluntarily entered.

### **a. Failure to Interview Possible Defense Witnesses**

As his first factual basis for ineffective assistance of counsel, the Appellant argues that trial counsel failed to interview Brian and Carrie Faulkner, possible defense witnesses who could have impeached the victim’s credibility. According to the Appellant, trial counsel was aware that the Faulkners could testify to the victim’s varying accounts of her encounters with the Appellant. The Appellant asserts that the victim’s conflicting statements effectively amounted to a recantation of her rape allegations because, in one version, she stated only that the Appellant tried to lift her shirt and take a picture.

Trial counsel acknowledged that he did not interview the Faulkners. However, he testified that the Appellant gave him a diskette and a printout of information about possible defense witnesses, including the Faulkners, and that he had reviewed the information with the Appellant. Trial counsel further stated that, when he reviewed the discovery with the Appellant, they specifically discussed the victim’s statements and “challenges that could be made to her credibility.”

In denying relief, the post-conviction court found that the Faulkners' testimony would not have impeached the victim's testimony, concluding that the victim's various statements



the three separate occasions he came downstairs. The post-conviction court specifically concluded that “[t]his is a child victim who never deviated from stating that she had been violated.”

While we agree that the failure to interview witnesses may constitute deficient performance in some cases, in this case we conclude that trial counsel could reasonably rely on his client’s summary of the Faulkners’ potential testimony in deciding whether to conduct further investigation and interview them personally. Thus, after *de novo* review, accompanied by a presumption of correctness, we conclude that the evidence does not preponderate against the court’s findings on this issue.

#### **b. Failure to Investigate and Utilize Medical Report from Waller Case**

Next, the Appellant asserts that trial counsel was ineffective because he failed to investigate a separate case in which the victim alleged that Kaleb Waller had sexually assaulted her only a few weeks prior to the Appellant’s assault of the victim. The Appellant contends that trial counsel failed to examine and obtain information from the court file, namely the State’s discovery response, and that trial counsel’s decision not to use the information contained in the file as impeachment evidence resulted in his performance being below the standard of competence demanded of attorneys in criminal cases. The Appellant further asserts that trial counsel never consulted with him in regard to the sexual examination performed on the victim in the Waller case. According to the Appellant, he was unaware that the results of the examination indicated that the examiner found no conclusive evidence of trauma from digital penetration until after his plea was entered. He asserts, based upon the information contained in the report, that there is a reasonable probability that a jury would have concluded that he did not digitally penetrate the victim since there was no physical evidence of penetration.

In contrast, trial counsel testified that he did contact the Davidson County detective in charge of the Waller case. Counsel learned that, based on the victim’s allegations against him, Waller was charged and pled guilty to rape of a child, aggravated sexual battery, and other sex offenses, after he confessed to digitally penetrating the victim and fondling her breasts. Trial counsel further testified that he had reviewed the report from Our Kids Center but did not think it was persuasive in refuting the victim’s allegations.

The post-conviction court found that trial counsel appropriately investigated the Waller case and concluded that the “Appellant’s attorneys obtained the court file, ascertained that the Defendant in the case confessed to the molestation and the case was disposed [of.]” After *de novo* review, we conclude that the record supports the post-conviction court’s findings on this issue.

#### **c. Failure to Retain Professional Services**

The Appellant further asserts that trial counsel was deficient based upon his failure to employ expert services in investigating the case. In fact, the Appellant testified that trial counsel discouraged him from employing a private investigator because trial counsel did not think one was necessary. Nonetheless, the Appellant testified that he had “hired several private

investigators” in preparation for the post-conviction hearing. However, their testimony was not presented at the hearing. Thus, the Appellant has failed to demonstrate that, if he had hired a private investigator in preparation for his trial, the Appellant would have discovered information that the Appellant and trial counsel did not already know. *See Black v. State*, 794 S.W.2d 75, 757 (Tenn. Crim. App. 1990).

With regard to this issue, the post-conviction court found that trial “[c]ounsel did not think that [hiring a private investigator] would be helpful to the defense of the case. These rape events occurred in the course of one evening and the only people present were the [Appellant] and victim. The Court does not see how a private investigator would have been helpful.” The sparse proof in the record with regard to this factual claim does not preponderate against this finding.

The Appellant also asserts that trial counsel did not consult with him about hiring a pediatrician as a defense witness “to support [the Appellant’s] position that he was not guilty.” The Appellant asserts that he “was ready to put a defense team together and his trial counsel failed to assist[, thus,] denying [the Appellant] effective assistance of counsel.” The Appellant’s allegation implies that he would have retained an expert witness if trial counsel had discussed the possibility with him. However, if a petitioner seeks to establish deficient performance based upon trial counsel’s failure to employ an expert witness, then it is incumbent upon the petitioner to call a witness at the post-conviction hearing to establish that the witness’s testimony would have benefitted the petitioner and that prejudice has resulted. *Id.* at 757. The Appellant did not do so, thus, he has failed to demonstrate that he could have found a pediatrician who would have testified that the medical evidence indicated he did not digitally penetrate the victim. No relief is warranted.

#### **d. Trial Counsel’s Statement in the Bill of Particulars**

Finally, the Appellant asserts that trial counsel effectively conceded that he was not prepared for trial based upon a statement contained in a Motion for Bill of Particulars filed ten days before trial. The motion stated that “[the Appellant] cannot adequately prepare or conduct the defense without this information and he will thereby be deprived of his right . . . [of] effective assistance of counsel under the Sixth Amendment . . . .” At the post-conviction hearing, trial counsel testified that, at the time he filed this motion, he was preparing for trial as the Appellant had not accepted the State’s plea offer. At the time the motion was filed, trial counsel had already obtained the specifics of the offenses through the preliminary hearing. One day after the motion was filed, the Appellant stated that he would accept the State’s plea offer. Nonetheless, trial counsel continued to prepare for hearings on the motions. Two days later, the Appellant pled guilty.

In denying relief, the post-conviction stated it did “not find that the filing of the Motion for Bill of Particulars on November 7, 2003 to indicate that defense counsel was unprepared to go to trial.” We conclude the record does not preponderate against this finding.

### **III. Involuntary Plea**

The Appellant asserts that “[i]f trial counsel had done the investigation to ascertain the defense proof and consulted with [his] client on trial strategy, [the Appellant] would not have plead[ed] guilty to charges he did not commit and would have proceeded, as he always intended, to trial by jury.” The Appellant stated that “he lost all hope in his trial lawyers because they had not conducted any investigation and were unprepared to try the case” and that he was “almost forced, like [he] was under duress to take the [plea bargain] . . . .”

In denying relief, the post-conviction court made the following findings:

In this case, the State had a credible young victim. There was corroboration of her testimony by physical evidence and the Appellant’s own statements.

The Court finds that [the Appellant] met with his attorneys on many occasions, that he was shown the discovery material, that there was discussion of the motions which were being filed, that he knew . . . his counsel was prepared and ready to go to trial if [the Appellant] had not decided to accept the State’s offer. The [Appellant’s] exposure had he been convicted on all counts was seventy-five (75) years on the A felonies . . . . In light of the apparent strength of the State’s case, his twelve (12) year at 100% sentence seems eminently fair and one for which he should be grateful.

The Court finds that [Appellant’s] counsel was effective, prepared, had investigated the facts of the case, had filed appropriate motions and zealously represented [his] client.

Trial counsel testified that he investigated the leads the Appellant gave him and that he discussed the victim’s prior misstatements and possible impeachment evidence with the Appellant. Trial counsel further testified that he advised the Appellant that the State had a compelling case. The evidence established that Appellant had secretly videotaped the twelve-year-old victim so he could view the private areas of her body. Further, the Appellant admitted to Detective Bailey that he had videotaped the victim because he was a voyeur. Clearly, this conduct would have been damaging to the Appellant’s defense. Moreover, the victim’s account of the sexual assault was corroborated by the Appellant’s admission that he came downstairs three times during the night and that he had a camera and wanted to take a picture of the victim.

We have conducted a *de novo* review of the post-conviction court’s findings, accompanied by a presumption of correctness, and conclude that the evidence does not preponderate against the court’s findings. The Supreme Court has recognized that the expectation or hope of a lesser sentence, or recognition of the convincing nature of the evidence against the accused, are considerations that might suggest the advisability of a guilty plea. *Brady v. United States*, 397 U.S. 742, 751, 90 S. Ct. 1463, 1470 (1970). The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. *Id.* at U.S. 757, 90 S. Ct. at 1473. Otherwise, the finality of a guilty plea would be meaningless. Our review of the entire record affirmatively demonstrates that the Appellant’s pleas “represent[ed] a

voluntary and intelligent choice among the alternative courses of action open to the [Appellant].”  
*See Alford*, 400 U.S. at 31, 91 S. Ct. at 164.

**CONCLUSION**

Based upon the foregoing, the denial of the Appellant’s petition for post-conviction relief by the Sumner County Criminal Court is affirmed.

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DAVID G. HAYES, JUDGE