

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs March 3, 2020

FILED

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Clerk of the
Appellate Courts

BRANDON BLOUNT v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 14-00998 Paula L. Skahan, Judge

No. W2019-00832-CCA-R3-PC

Brandon Blount, Petitioner, was convicted of one count of aggravated burglary acting in concert with two or more other persons and possession of a firearm during the commission of a dangerous felony after a jury trial. He was sentenced to an effective sentence of eleven years. Petitioner's convictions and sentences were affirmed on direct appeal. *See State v. Brandon Blount*, No. W2015-00747-CCA-R3-CD, 2016 WL 3131355 (Tenn. Crim. App. May 26, 2016), *perm. app. denied* (Tenn. Sept. 26, 2016). Petitioner subsequently sought post-conviction relief on the basis of ineffective assistance of counsel. After a hearing, the post-conviction court denied relief. Petitioner appeals, arguing that the post-conviction court improperly denied post-conviction relief. Because we determine that Petitioner has failed to establish that trial counsel was ineffective, we affirm the judgment of the criminal court.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J. ROSS DYER, JJ., joined.

Robert Golder, Memphis, Tennessee, for the appellant, Brandon Blount.

Herbert H. Slatery III, Attorney General and Reporter; Samantha Simpson, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Petitioner was convicted by a jury of one count of aggravated burglary acting in concert with two or more other persons and one count of possession of a firearm during the commission of a dangerous felony. *Id.* at *1. Petitioner and two other men were apprehended and arrested after Memphis Police officers responded to a call of a burglary in progress. Officers saw Petitioner exit a house through a back window while armed with a gun. Petitioner hid underneath the porch of a nearby house until he was discovered by officers. One co-defendant exited the same window while another co-defendant hid inside the house. Defendant later admitted to police that he was at the house to steal copper but declined to make a formal statement. *Id.* Both co-defendants accepted plea agreements, but Petitioner went to trial. Prior to trial, Petitioner filed a motion to suppress his statements to police. The trial court denied the motion.

At trial, one of the co-defendants testified that the men “went to the house for the purpose of finding something to steal and sell for money.” *Id.* at *4. The proof established that Petitioner was the first person to enter the residence and that he was armed with a gun. *Id.* At the close of the proof, lead trial counsel asked the trial court to instruct the jury that unlawful possession of a weapon in a public place and unlawful possession of a weapon were both lesser-included offenses of the firearm charge. The State argued that unlawful possession of a firearm was not a lesser-included offense of the offense charged based on the statutes in place at the time of the commission of the offenses. The trial court first opined that these offenses were not lesser-included offenses of the indicted offense but later agreed to instruct the jury that unlawful possession of a firearm was a lesser-included offense. The trial court commented that in its opinion Petitioner would actually benefit if the instruction was not given. After consideration of the issue, the trial court instructed the jury as follows:

In reaching your verdict, you shall first consider the offense charged in the indictment. If you find [Petitioner] guilty of that offense beyond a reasonable doubt, you shall return a verdict of guilty for that offense. If you unanimously find [Petitioner] not guilty of that offense you shall then proceed to consider whether or not [Petitioner] is guilty of the next lesser offense in order from greatest to least within this indictment. You shall not proceed to consider any lesser-included offense until you have first made a unanimous determination that [Petitioner] is not guilty of the immediately preceding greater offense or you unanimously have a reasonable doubt of the guilt of that offense. If you have a reasonable doubt of the guilt of [Petitioner] as to all offenses charged and included in this indictment, you shall return a verdict of not guilty.

The trial court instructed the jury that count two, charging Petitioner with possession of a firearm with intent to go armed during the commission of, or attempt to commit a

dangerous felony, aggravated burglary, acting in concert with two or more persons had the lesser-included offense of possession of a firearm with intent to go armed during the commission of, or attempt to commit a dangerous felony, aggravated burglary.

During closing argument at trial, counsel for the State asked the jury to utilize “common sense.” Specifically, counsel for the State urged the jury to “not [be] fooled by [Petitioner’s] fairytale” because Petitioner was “not Goldilocks” and “wasn’t going in that house looking for a place to rest his head and maybe a bowl of porridge.” Counsel for the State argued that Petitioner and his co-defendants entered the house to “steal something . . . so that [Petitioner] could get some money and he did it all while he was armed with this fully loaded, .357 handgun.”

The jury asked the following question during deliberation, “Can we do the lesser charge on criminal trespass & can we charge him guilty on the gun charge?” The trial court told the jury that if it found Petitioner guilty of any lesser-included offense except aggravated burglary in count one, then the jury could not find Petitioner guilty as charged or of the instructed lesser-included offenses in count two. The trial court specifically told the jury that they would “not reach count two if [the jury] d[id] not convict of count one, as charged, or the first lesser[-]included [offense].” The jury convicted Petitioner as charged in the indictment.

On direct appeal, this Court affirmed Petitioner’s convictions and determined Petitioner waived review of the jury instruction issue on appeal by failing to submit a request for the jury instruction in writing. *Brandon Blount*, 2016 WL 3131355, at *5-6. Similarly, this Court determined that Petitioner waived his argument with respect to prosecutorial misconduct on appeal for failure to object to the argument during trial. *Id.* at *7. The supreme court denied permission to appeal.

Petitioner subsequently filed a pro se petition for post-conviction relief. In the petition, he argued that trial counsel was ineffective for failing to file a written motion for lesser-included offenses and for failing to file a motion to determine what plea offers were given to the co-defendants. Counsel was appointed, and an amended petition was filed adding additional allegations of ineffective assistance of counsel based on counsel’s failure to object to prosecutorial misconduct and failure to object to the manner that the trial court answered the jury question during deliberation.

Post-conviction Hearing

At the post-conviction hearing, lead trial counsel testified that he represented Petitioner at trial along with co-counsel. This was the first case lead trial counsel and co-counsel tried together. Lead counsel was licensed to practice law in 2008. Lead trial

counsel recalled “a couple” of plea negotiations prior to trial but remembered that Petitioner declined the offers. Lead trial counsel explained Petitioner’s potential sentence exposure, and Petitioner “never said he didn’t understand anything during the course of representation.”

Lead trial counsel admitted that he did not file a written request for lesser-included offenses in Petitioner’s case but explained that he did not always file written requests “depend[ing] on whether the Judge is going to instruct it without that request.” Lead trial counsel explained that he “believe[d] he orally asked for [the trial court to charge] unlawful possession of a weapon” and recalled “discussion orally back and forth about whether or not it was a lesser[-included offense].”

Lead trial counsel admitted that he did not object during the State’s closing argument but explained that he “personally ha[d] not” ever objected during closing argument. He did not think that the State’s comments were “objectionable” but rather were the State’s “characterization of [Petitioner’s] testimony.” Additionally, lead trial counsel explained that he did not object to the way that the trial court answered the jury question because he did not feel that it was a misstatement of the law or confusing to the jury.

Petitioner testified that he met with lead trial counsel and co-counsel only twice prior to trial for “[a]pproximately ten minutes.” He explained he only had a “small understanding” of what he was charged with in the indictment. He thought “[g]oing in concert . . . was acting to commit a violent offense, like going in to hurt or kill or harm some person inside the building or place” but admitted that he had learned since trial that was not exactly what it meant. Petitioner recalled that counsel explained at least two plea offers, one for nine years day for day and another offer for “6 at 30, and a possibility that I could do some time in the - - at - - on the gun, but I think it was still at 3 at 100.” Petitioner was under the impression that there was “no way [he] could get probation.” Petitioner also recalled an eight-year offer.

Petitioner claimed that lead trial counsel “answered the questions” he had but “left [him] with questions when he answered questions.” Petitioner claimed he still had unanswered questions at the time of the post-conviction hearing.

The post-conviction court determined Petitioner failed to establish prejudice from trial counsels’ failure to request a jury instruction in writing. The post-conviction court found that “although the issue was waived on appeal, the record does not prove that failure to include the instruction for the lesser weapons offense had the probable effect of changing the trial’s outcome.” The post-conviction court noted that a “mere possibility” that the issue could have been overturned on appeal does not establish prejudice.

Moreover, the post-conviction court found that trial counsel's failure to object during closing arguments was not prejudicial because lead trial counsel testified that he made the strategic decision not to object based on his assessment that the comments made by the State were a "characterization" of Petitioner's testimony. Lastly, the post-conviction court found that lead trial counsel and co-counsel were not ineffective for failing to request a written response to the jury's question. The post-conviction court determined again that trial counsel strategically chose not to object to the trial court's method of orally answering the jury by repeating the jury instructions. Consequently, the post-conviction court denied relief. Petitioner filed a timely notice of appeal.

Analysis

On appeal, Petitioner argues that the post-conviction court improperly denied relief after determining lead trial counsel's actions were strategic and did not prejudice Petitioner. The State disagrees.

Post-conviction relief is available for any conviction or sentence that is "void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. In order to prevail in a claim for post-conviction relief, a petitioner must prove his factual allegations by clear and convincing evidence. T.C.A. § 40-30-110(f); *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998). On appeal, a post-conviction court's findings of fact are conclusive unless the evidence preponderates otherwise. *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006). Accordingly, questions concerning witness credibility, the weight and value to be given to testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction court, and an appellate court may not substitute its own inferences for those drawn by the post-conviction court. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001). However, the post-conviction court's conclusions of law and application of the law to the facts are reviewed under a purely de novo standard, with no presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Both the Sixth Amendment to the Constitution of the United States and article I, section 9 of the Tennessee Constitution guarantee the right of an accused to the effective assistance of counsel. *See Davidson v. State*, 453 S.W.3d 386, 392-93 (Tenn. 2014). In order to sustain a claim of ineffective assistance of counsel, a petitioner 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 the two prong test established by *Strickland v. Washington*, 466 U.S. 668, 687 (1984), a petitioner

must prove that counsel's performance was deficient and that the deficiency prejudiced the defense. *See State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel applied in federal cases also applies in Tennessee). Because a petitioner must establish both elements in order to prevail on a claim of ineffective assistance of counsel, "failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). "Indeed, 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) (citing *Strickland*, 466 U.S. at 697). The test for deficient performance is whether counsel's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688; *Henley*, 960 S.W.2d at 579. This Court must evaluate the questionable conduct from the attorney's perspective at the time, *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982), and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," *State v. Burns*, 6 S.W.3d 453, 462 (Tenn. 1999). This Court will not use hindsight to second-guess a reasonable trial strategy, even if a different procedure or strategy might have produced a different result. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). However, this deference to the tactical decisions of trial counsel is dependent upon a showing that the decisions were made after adequate preparation. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Even if a petitioner shows that counsel's representation was deficient, the petitioner must also satisfy the prejudice prong of the *Strickland* test in order to obtain relief. The question is "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). A petitioner must show that there is a reasonable probability "sufficient to undermine confidence in the outcome" that, "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Burns*, 6 S.W.3d at 463 (quoting *Strickland*, 466 U.S. at 694).

Petitioner first argues that lead trial counsel was ineffective for failing to request a written jury instruction. Certainly, a Defendant is entitled to a complete and correct charge of the law. *State v. Page*, 184 S.W.3d 223, 229 (Tenn. 2006) (citing *State v. Teel*, 793 S.W.2d 263, 249 (Tenn. 1990)). When a party requests an instruction in writing prior to the submission of the instructions to the jury, a trial court is required to instruct the jury "as to the law of each offense specifically identified in the request that is a lesser included offense of the offense charged in the indictment." T.C.A. § 40-18-110(a). If a jury charge is not requested in writing, the trial court can "charge the jury on any lesser included offenses or offenses, but no party shall be entitled to any lesser included offense

charge.” *Id.* -110(b). “Absent a written request, the failure of a trial judge to instruct the jury on a lesser-included offense may not be presented as a ground for relief either in a motion for new trial or on appeal. T.C.A. § 40-18-110(c). At trial, there was a rather lengthy discussion among lead trial counsel, the State, and the trial court about the lesser-included offenses to be charged to the jury on the firearms count. Trial counsel did not file a written request. At the post-conviction hearing, lead trial counsel explained that he verbally asked for an instruction and admitted that there was no case law that supported the lesser-included instruction at the time of Petitioner’s trial. The post-conviction court determined that Petitioner was not prejudiced by lead trial counsel’s failure to request the instruction. We agree. The jury convicted Petitioner of the charged offense in this count, thus the jury never even had the opportunity to consider any lesser-included offenses. Moreover, the jury is presumed to follow the instructions as given by the trial court. The post-conviction court properly denied relief.

Petitioner next argues that lead trial counsel was ineffective for failing to object to the trial court’s verbal supplemental instruction to the jury after the jury asked a question during deliberation. A trial judge has the authority to give supplemental instructions to the jury in response to a jury question. *State v. Forbes*, 918 S.W.2d 431, 451 (Tenn. Crim. App. 1995). Here, the jury asked, “Can we do the lesser charge on criminal trespass & can we charge him guilty on the gun charge?” The trial court told the jury that they would “not reach count two if [the jury] d[id] not convict of count one, as charged, or the first lesser[-] included.” Lead trial counsel did not object to the supplemental instruction because it was, in his opinion, “reasonably clear.” The post-conviction court determined that lead trial counsel refrained from objecting based on a reasonable trial strategy. We decline to second-guess this reasonable trial strategy. *See Adkins*, 911 S.W.2d at 347; *Williams*, 599 S.W.2d at 279-80. The post-conviction court properly denied relief.

Finally, Petitioner argues that lead trial counsel was deficient for failing to object to the State’s closing argument. Petitioner alleges that the failure to object was prejudicial because it prohibited plenary review. Lead trial counsel testified that he made the strategic decision not to object because counsel for the State was merely characterizing Petitioner’s behavior and comparing it to Goldilocks and did not find the language objectionable. The post-conviction court determined that lead trial counsel’s strategic decision did not change the outcome of the case, and therefore Petitioner could not establish prejudice. Again, we decline to second-guess this reasonable trial strategy. *See Adkins*, 911 S.W.2d at 347; *Williams*, 599 S.W.2d at 279-80. The post-conviction court properly denied relief.

Conclusion

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

TIMOTHY L. EASTER, JUDGE