

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs October 30, 2018

FILED

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Clerk of the
Appellate Courts

CARMEL BORUM v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 13-03285 W. Mark Ward, Judge

No. W2018-00161-CCA-R3-PC

The Petitioner, Carmel Borum,¹ appeals from the denial of post-conviction relief, alleging he received ineffective assistance of counsel. He specifically argues trial counsel was ineffective in failing to challenge ownership of the stolen automobile and in failing to require the State to prove the value of the automobile. Upon our review, 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 NORMA MCGEE OGLE and TIMOTHY L. EASTER, JJ., joined.

Melody M. Dougherty, Memphis, Tennessee, for the Petitioner, Carmel Borum.

Herbert H. Slatery III, Attorney General and Reporter; Sophia S. Lee, Senior Counsel; Amy P. Weirich, District Attorney General; and Holly Palmer, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Petitioner's convictions stem from the theft of a white 1996 Buick Century automobile from the victim's carport. State v. Carmel Borum aka Carnel Borum, No. W2014-00179-CCA-R3-CD, 2015 WL 279866 (Tenn. Crim. App. Jan. 22, 2015), perm. app. denied (Tenn. June 16, 2015). The Petitioner appealed his convictions, which were affirmed by this court, and the Petitioner was later denied permission to appeal by the Tennessee Supreme Court. Id. Because the issues raised in this appeal are similar to the issues raised in the Petitioner's direct appeal, a factual recitation from this court's opinion from the direct appeal is necessary.

¹ The Petitioner's name is spelled as variations of "Carmel," "Carnel," and "Carnell" throughout the record on appeal.

The [Petitioner], Carmel Borum, also known as Carnel Borum, appeals his Shelby County Criminal Court jury convictions of two felonies—theft and evading arrest. He received an effective sentence of 18 years as a persistent offender. On appeal, he claims that the trial court erroneously admitted testimony about the value of the property in question and that the evidence was insufficient to support the convictions. Based upon our review of the record, the briefs, and the applicable law, we affirm the judgments of the trial court.

At trial, Michael Creswell testified that, on September 6, 2012, he was living at 2946 Mountain Terrace in Memphis. On that date at approximately 10:30 p.m., he discovered that someone had stolen his white 1996 Buick Century automobile from his open carport. Mr. Creswell testified that the car bore a Lafayette County, Mississippi license plate, and, at trial, he identified a picture of the car.

When asked by the prosecutor, “What was the value of that car to you?” Mr. Creswell responded, “I would price it around two thousand dollars.” Responding to the follow-up question, “[I]f you were to list that car to sell back around the time period it was stolen, what would you sell it for?” Mr. Creswell said, “I would want at least two thousand for it.”

Mr. Creswell testified that, when he discovered the car missing, he called 9–1–1 and relayed to the 9–1–1 operator the make, model, and color of the car and the license number. Approximately three hours after Mr. Creswell discovered the theft, a police officer telephoned him and told him the car had been recovered. Mr. Creswell testified that the steering column had been broken and that “whoever it was who stole the car had drove [sic] it on a flat . . . for so long it flattened the rim out and the rim started cutting into the strut tower.”

On cross-examination, Mr. Creswell testified that, two weeks prior to the theft, he had spent \$1,500 having his car’s transmission rebuilt. Mr. Creswell opined that, had he taken the car to a dealer to sell it, he would expect to get \$1,500 to \$2,000 for it.

Robert L. Strickland, an officer with the Memphis Police Department (“MPD”), testified that while he was on patrol in the early morning hours of September 7, 2012, he received a police alert that a white Buick Century had been stolen. Officer Strickland testified that he saw a white Buick Century and that he followed the Buick while he conferred

with the dispatcher. The officer was informed that the stolen car bore a Mississippi license plate. Officer Strickland waited for a second police car to join him, and then he activated his blue lights and siren to stop the Buick. The Buick, however, did not stop, and Officer Strickland pursued it for "several miles," recalling that the Buick ran "several stop lights." After the police supervisors told Officer Strickland and the other pursuing officers that the Buick had "blown a tire," the officers turned off their emergency equipment and observed the Buick which, at this time, was traveling at about 30 to 35 miles per hour. Despite the loss of a tire, the Buick traveled another three miles, followed by "eight to ten" police cars.

During the pursuit, Officer Strickland noticed that the Buick was being driven by a "male black" individual. After the Buick stopped, Officer Strickland used his cruiser to prevent the driver from exiting the driver's side of the Buick; however, as the officer was getting out of his cruiser, he saw the Buick's driver running away. The officer gave chase on foot while radio-broadcasting the man's description to his fellow officers who had joined in the search for the fleeing man. Officer Strickland suspended his pursuit when an 80-to-90-pound pit bulldog came toward him. Nevertheless, the officer saw the same man about five minutes later after the man had been captured by officers on the perimeter of the search location. Officer Strickland testified that the man in custody, the [Petitioner], was sweating and limping and was the same person who ran from the Buick and whom he had been chasing.

Officer Strickland reviewed the photograph that Mr. Creswell had earlier identified as being a picture of his Buick, and the officer testified that the car in the picture was the car he pursued on September 7, 2012.

Officer Strickland testified that he saw the profile of the driver's face during the chase and again when the man ran behind the police car after the vehicles had stopped. The officer iterated that the [Petitioner] was the same man who had driven the Buick.

MPD Officer Clarence Farwell testified that he participated in the events that led to the [Petitioner's] arrest on the night of September 6-7, 2012. He identified the [Petitioner] as the person who was apprehended following the pursuit of a white Buick Century. Officer Farwell said that the pursuing police cars were employing their blue lights and sirens in an effort to stop the Buick. During the pursuit, the left front tire of the Buick "blew out." The Buick traveled on, and although the officers discontinued

their active pursuit, they followed and monitored the Buick as it drove on the rim of the left front wheel. Officer Farwell testified that he maintained the Buick in his sight until it stopped. When it stopped, Officer Strickland blocked exit from the driver's side door with his police car, and Officer Farwell positioned his car on the passenger side of the Buick to prevent the door on that side from being opened. Officer Farwell testified that the [Petitioner] crawled out the passenger side window and across the hood of Officer Farwell's car and ran away. The officer testified that, when the [Petitioner] ran from the parked cars, he ran in front of the cars and not around the rear.

....

The jury convicted the [Petitioner] of theft of property valued at \$1,000 or more but less than \$10,000, a Class D felony, and of evading arrest, a Class E felony. The trial court sentenced the [Petitioner] respectively to consecutive Department of Correction terms of 12 years and six years, yielding an effective sentence of 18 years. The [Petitioner] filed a timely but unsuccessful motion for a new trial and then a timely notice of appeal.

The [Petitioner] complains about Mr. Creswell's testimony concerning the value of the stolen Buick, and he couches the issue in terms of the trial court's erroneously admitting Mr. Creswell's testimony as to value. The State does not address this issue as an evidentiary issue; rather, it treats the issue of value as a component of the [Petitioner's] sufficiency-of-the-evidence claim. Nevertheless, casting the issue as evidentiary error avails the defendant nothing. Because he did not present the issue as evidentiary error in his motion for new trial, he has waived the issue as cast in this form. *See* Tenn. R. App. P. 3 (providing that "in all cases tried by jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence . . . or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for new trial; otherwise, such issues will be treated as waived"). That said, we will address the issue of value further in our treatment of the claim of insufficient evidence.

....

Mr. Creswell testified that, at the time of the theft, his vehicle was worth from \$1,500 to \$2,000. This assessment places the value well within

the range of theft described in Code section 39-14-105(a)(3). Thus, the evidence was sufficient to establish theft as a Class D felony.

Carnell Borum, 2015 WL 279866, at *1-3.

The Petitioner filed a pro se petition for post-conviction relief on May 26, 2015, and an amended petition through appointed counsel on August 28, 2015, incorporating his previous pro se petition and further alleging that he was denied effective assistance of counsel.

Post-Conviction Hearing. At the January 5, 2018 post-conviction hearing, trial counsel testified that he met with the Petitioner at least five times before trial and reviewed discovery materials with him. Trial counsel confirmed that they reviewed the Petitioner's criminal history, potential sentence, and lack of mitigating factors. He said the State offered the Petitioner a plea deal to serve two and one-half years, but the Petitioner declined the offer. Trial counsel said he wanted to pursue an alibi defense at trial, but the Petitioner never provided contact information for anyone who could corroborate his whereabouts. As a result, trial counsel pursued a misidentification defense at trial. Trial counsel explained that the Petitioner's booking photo, specifically his hair, "was entirely different" from the suspect described by the police. Even though the booking photo was entered into evidence at trial, trial counsel said "it still didn't sway the jury." He said he chose not to use an expert for identity, fingerprints, or valuation because he did not believe it would be fruitful and no fingerprints were found. Trial counsel explained that he chose not to investigate the registered owner of the stolen car because the discovery listed the victim as the owner in possession. On cross-examination, trial counsel testified that he chose not to investigate or challenge the car's value because the victim testified that he spent \$1,500 to repair the car, that it had sentimental value to him, and that he would sell it for approximately \$2,000.

Trial counsel testified that the State's discovery contained an N.C.I.C. Stolen Vehicle Form that listed the victim as the owner of the stolen car. Trial counsel confirmed that the N.C.I.C. report could not be entered into evidence without the police verifying the ownership of the car. Trial counsel explained that this verified report led him to believe that there was no question as to ownership of the car. Trial counsel explained that the discovery also contained a NADA Guide or Kelley Blue Book valuation of the car at \$2,045. He explained that this valuation was the basis for his decision not to independently investigate or have an expert testify to the value of the car. Trial counsel said the Petitioner made threatening comments to him after the State rested at trial and was placed into a stun belt. Trial counsel confirmed that the Petitioner said, "You better get that booking photo in, or I am going to catch a mother-f[---]ing charge[.]" Trial counsel said he "bolted from the [c]ourt[room]" and was "rattled" by the

Petitioner's threat. He then called the Tennessee Board of Professional Responsibility to report the incident and was instructed to continue to represent the Petitioner so as not to prejudice him. On cross-examination, trial counsel confirmed that the N.C.I.C. report stated that "registration does not match the report" and that the car's last registration listed Tiffany Blaylock, not the victim, as the owner. Trial counsel clarified that the N.C.I.C. Stolen Vehicle Form was likely filled out by the Memphis Police Department and listed the victim as the owner; however, the actual N.C.I.C. report listed Tiffany Blaylock and Enterprise Rental Car, not the victim, as owners or registrants.

The Petitioner testified that he met with trial counsel four or five times to discuss strategies before trial. The Petitioner did not recall discussing his criminal history, potential sentence, or mitigating factors with trial counsel. The Petitioner recalled being offered deals from the State for three years and for two and one-half years and confirmed that he knew he faced up to twelve years if he went to trial. He testified that he received a transcript of the preliminary hearing but no other discovery from trial counsel. He said he told trial counsel that he "was selling drugs" the night he was arrested and "[t]hat was the whole purpose of [him] running" away from the police. He said he was with other people who could corroborate his alibi, including an individual named Dante Take but admitted that he never provided Take's phone number to trial counsel. He said he asked trial counsel to perform fingerprint testing inside the stolen car "to show that [he] was not in this vehicle, at all." He also asked trial counsel to challenge the ownership and value of the stolen car. The Petitioner said he and trial counsel had a "conflict" on the day of trial and that a stun belt was placed on his ankle as a result. He said he did not speak with trial counsel again for fear of being stunned. On cross-examination, the Petitioner recalled getting upset with trial counsel before being placed in the stun belt but denied saying anything threatening to trial counsel. He specifically denied telling trial counsel "You better get that booking photo in, or I am going to catch a mother-f[---]ing charge[.]" The Petitioner confirmed that the stun belt was under his clothing and was never used on him.

After the hearing, the post-conviction court took the case under advisement and subsequently issued a written order denying post-conviction relief. The post-conviction court found that the Petitioner failed to prove he was prejudiced by trial counsel's decisions regarding the ownership or value of the automobile. Referencing the victim's testimony at trial, the post-conviction court further found that the Petitioner failed to provide proof at the post-conviction hearing establishing the true owner of the automobile or that its value was less than \$1,000. Moreover, the post-conviction court noted that, pursuant to Tennessee Code Annotated section 39-11-106(26), "a theft can be committed against a person who may not be the lawful owner of the property." It is from this order that the Petitioner now appeals.

ANALYSIS

The Petitioner argues that he received ineffective assistance of counsel based on trial counsel's failure to investigate and challenge the ownership and value of the stolen car. He specifically argues that the victim was not the true owner and could not have testified to the car's value. The Petitioner asserts that he was prejudiced by being convicted of a felony (theft of property over \$1,000) instead of a misdemeanor (theft of property \$1,000 or less). The State responds that the Petitioner failed to call the "true owner" of the stolen car as a witness at the post-conviction hearing and failed to show how he was prejudiced by trial counsel's alleged "deficient investigation." Upon our review, we agree with the State.

Post-conviction relief is only warranted when a petitioner establishes that his or her conviction or sentence is void or voidable because of an abridgment of a constitutional right. T.C.A. § 40-30-103. The Tennessee 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 citations and quotation marks omitted); see Felts v. State, 354 S.W.3d 266, 276 (Tenn. 2011); Frazier v. State, 303 S.W.3d 674, 679 (Tenn. 2010). A post-conviction petitioner has the burden of proving the factual allegations by clear and convincing evidence. T.C.A. § 40-30-110(f); Tenn. Sup. Ct. R. 28, § 8(D)(1); Dellinger v. State, 279 S.W.3d 282, 293-94 (Tenn. 2009). Evidence is considered clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from it. Lane v. State, 316 S.W.3d 555, 562 (Tenn. 2010); Grindstaff v. State, 297 S.W.3d 208, 216 (Tenn. 2009); Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

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. Vaughn, 202 S.W.3d at 116 (citing Strickland v. Washington, 466 U.S. 668, 687 (1984); 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. 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).

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. at 369 (citing Strickland, 466 U.S. at 688; Baxter, 523 S.W.2d at 936). Prejudice arising therefrom is demonstrated once the petitioner establishes “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 370 (quoting Strickland, 466 U.S. at 694). Finally, as relevant to the issues herein, the Tennessee Supreme Court has held that “[f]ailure to conduct a reasonable investigation constitutes deficient performance.” State v. Burns, 6 S.W.3d 453, 462 (Tenn. 1999).

Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. The Supreme Court has noted that the adversary system requires that “all available defenses are raised” so that the government is put to its proof. . . . And, of course, the duty to investigate also requires adequate legal research.

Baxter, 523 S.W.2d at 932-33 (quoting United States v. DeCoster, 487 F.2d 1197, 1203-04 (D.C. Cir. 1973)). In any ineffective assistance of counsel case, however, “a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” Burns, 6 S.W.3d at 462 (quoting Strickland, 466 U.S. at 691).

Here, the Petitioner argues that he received ineffective assistance of counsel based on trial counsel’s failure to investigate and challenge the ownership or value of the stolen car. Trial counsel explained that he relied on the information provided in the discovery and decided not to call expert witnesses or challenge the ownership or value of the car. Trial counsel’s defense theory was misidentification or to establish that the Petitioner was not the individual who stole the car. Trial counsel further relied on testimony by the victim, whose credibility was assessed by the jury at trial, that he paid \$1,500 to repair the car, that it was given to him by his mother, that it had sentimental value to him, and that he would request \$2,000 if he were to sell it. More to the point, although the Petitioner argued that the victim was not the owner of the car and that the car’s value was less than \$1,000, the Petitioner did not present any witnesses or proof at the post-conviction hearing in support of this claim.

Tennessee law is clear 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). The presentation of the witness at the post-conviction hearing is typically the only way for the petitioner to establish:

(a) a material witness existed and the witness could have been discovered but for counsel’s neglect in his investigation of the case, (b) a known witness was not interviewed, (c) the failure to discover or interview a witness inured to his prejudice, or (d) the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner.

Id. Neither the post-conviction court nor this court may speculate on “what a witness’s testimony might have been if introduced by defense counsel.” Id. Here, the Petitioner provided no information or argument as to what testimony or information these witnesses would have provided or why they were not available. In its order denying relief, the post-conviction court found that the Petitioner failed to prove deficient performance or prejudice by not producing the witnesses or testimony regarding whether they could have been reasonably located. Moreover, the Petitioner essentially makes the same argument presented to and rejected by this court in his direct appeal challenging the sufficiency of the evidence supporting the element of value for the offense of theft. Accordingly, the Petitioner has failed to carry his burden of establishing deficient performance or prejudice as result thereof. He is not entitled to relief.

CONCLUSION

Based upon the foregoing reasoning and analysis, we affirm the judgment of the post-conviction court.

CAMILLE R. McMULLEN, JUDGE