

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

Assigned on Briefs July 8, 2014

**JONATHAN EVERETT v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Shelby County**  
**No. 06-06767 Lee V. Coffee, Judge**

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**No. W2013-02033-CCA-R3-PC - Filed July 28, 2014**

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A Shelby County jury convicted Petitioner, Jonathan Everett, of one count of second degree murder, one count of attempted voluntary manslaughter, and one count of reckless endangerment. He received an effective sentence of twenty-nine years, eleven months, and twenty-nine days for those offenses. This court affirmed the verdict and sentence on direct appeal. *See State v. Jonathan Everett*, W2008-01578-CCA-R3-CD, 2011 WL 1304893 (Tenn. Crim. App. at Jackson, Apr. 4, 2011). Petitioner subsequently filed a petition for post-conviction relief, alleging ineffective assistance of counsel at trial and on direct appeal. The Post-Conviction Court denied his petition. We affirm the decision of the Post-Conviction Court.

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

JERRY L. SMITH, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and CAMILLE R. MCMULLEN, JJ., joined.

Lance R. Chism, Memphis, Tennessee, for appellant, Jonathan Everett.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Gregory Gilbert, Assistant District Attorney General, for the respondent, State of Tennessee.

**OPINION**

### *Factual Background*

This case arose from a shooting that occurred on March 10, 2006, near Trezevant High School in Memphis, resulting in the death of one victim and a gunshot injury to another. Petitioner was a juvenile, seventeen years old, at the time of the offense. During an interview with the police on March 11, 2006, he confessed that he was the shooter, but insisted that one of his victims had threatened him over “some gang related stuff.” Petitioner’s mother was present during the interview. After a hearing, Petitioner was bound over to the Criminal Court to stand trial as an adult.

The Shelby County Grand Jury indicted Petitioner for one count of first degree murder and two counts of attempted first degree murder. The focus of the lengthy jury trial was the question of whether Petitioner might have acted out of self defense or was motivated by some sort of prior provocation. Petitioner testified at trial, as did his mother and a family friend. Several young men connected with the incident, including one of the victims, testified for the prosecution. At the conclusion of the proof, the jury found Petitioner guilty of lesser included charges -- one count of second degree murder, one count of attempted voluntary manslaughter, and one count of reckless endangerment.

The trial court held a separate sentencing hearing after which Petitioner was sentenced to twenty-five years for the second degree murder, four years for the attempted voluntary manslaughter, and eleven months and twenty-nine days for reckless endangerment. The trial court determined that consecutive sentences were warranted based upon Petitioner’s classification as a dangerous offender. As a result, Petitioner’s effective sentence for the convictions was twenty-nine years, eleven months, and twenty-nine days.

Petitioner filed a motion for new trial, presenting at least sixteen grounds for relief. The trial court denied the motion, and Petitioner filed a timely appeal of his conviction to the Court of Criminal Appeals. After hearing a number of arguments challenging both his conviction and his sentences, this court affirmed the trial court. *See Everett*, 2011 WL 1304893. Petitioner filed an application to the Supreme Court for permission to appeal, which was denied on August 25, 2011.

### *Post-Conviction Proceedings*

Petitioner filed a timely *pro se* petition for post-conviction relief on June 6, 2012. The post-conviction court found that the petition contained colorable claims and appointed private counsel to represent Petitioner at the post-conviction proceedings. Counsel filed an amended petition on July 20, 2012, which addressed the proper standard of proof in post-conviction proceedings, alleged that Petitioner had received ineffective assistance of counsel at trial which prejudiced his defense, and identified four areas where trial counsel’s performance was allegedly deficient. Post-conviction counsel also certified that he had

investigated the possible constitutional violations alleged in the *pro se* petition, discussed other possible claims with Petitioner, and filed the required certification that he “raised all non-frivolous constitutional claims warranted by existing law or a good faith argument for the extension, modification or reversal of existing law which Petitioner has.” See Tennessee Supreme Court Rule 28, § (6)(C)(3).

The post-conviction evidentiary hearing was conducted on July 26, 2013. Petitioner’s attorney announced at the outset that he was withdrawing two of the allegations that he had raised in the amended petition, and would attempt to prove the remaining two: (1) “[t]hat Petitioner’s counsel was ineffective in failing to discover and call witnesses who had evidence that was relevant to Petitioner’s defense,” and (2) “[t]hat Petitioner’s conviction was based on failure of the prosecution to disclose evidence to the defense that was favorable to the defendant.”

Petitioner testified at the post-conviction hearing, as did David Bell, the attorney who represented him at trial, and Ray Lepone, the prosecuting attorney. Trial counsel was questioned closely about the frequency of his contact with Petitioner prior to trial and his efforts to interview the 30 or 40 potential witnesses whose names Petitioner and his mother had given him. He testified that he met with Petitioner many times in jail and in court, sometimes seeing him in the evening or on weekends to fill him in on what he had heard from potential witnesses or on whatever new statements, pictures or other evidence he had discovered. Trial counsel also testified that he met with Petitioner’s mother numerous times, and that he frequently talked with her on the phone, sometimes as often as two or three times a week. He stated that he, his associate counsel and an investigator assigned to the case tried to contact every potential witness, but that many of them claimed to have no knowledge of the shootings and/or that they responded to his requests in a hostile or profane manner. While trial counsel did call some witnesses to the stand whose names Petitioner or his mother had given him, he testified that he chose not to call some others because their testimony would have opened the door to questions about gang activities in which Petitioner was involved.

Petitioner acknowledged that trial counsel had met with him in jail “at least five times,” but he stated that he was unsatisfied with trial counsel’s representation because the attorney failed to present some evidence that might have supported his claim of self-defense. Petitioner said that he did not believe that trial counsel talked to all of the potential witnesses whose names he had been given and that trial counsel’s interviews of some potential witnesses only consisted of a question or two. He also insisted that two of the witnesses who had testified against him at trial had since told him that they were lying and would like to set the record straight, but he acknowledged that they refused to testify at his post-conviction hearing because they were afraid.

Petitioner also claimed that the prosecution withheld photographs of the locations of spent shell casings which might have helped his case. Under questioning, he admitted that he didn't know if any such photographs existed, but insisted that they "should exist." Petitioner also complained about testimony at trial about the results of gunpowder residue tests on the hands of one of his victims. The examiner who performed the tests testified that they were inconclusive. Petitioner insisted that trial counsel should have hired an independent examiner to make sure a more conclusive result could be presented to the jury.

When the prosecutor took the stand, he testified at length that he follows an "open file" discovery policy which allows the defense to inspect and copy all the evidence in his files. He also testified that he always conducts his own investigation to make sure that all the evidence collected by the police is turned over to him, because if it is not, then that failure is imputed to him. The prosecutor testified that in the present case he received a number of photos from the police and that he showed them all to trial counsel, but that there were no photos showing the locations of shell casings.

At the conclusion of testimony and of argument by Petitioner's post-conviction counsel, the court ruled from the bench. The court's decision was memorialized in a detailed final order filed on August 9, 2013. The court declared that it found trial counsel's testimony to be credible, and that the attorney was conscientious and zealous in his representation of Petitioner, including in his pursuit of potential witnesses to support Petitioner's theory of self-defense. Conversely, the court found that Petitioner's testimony was not credible.

The court also found that the prosecutor did not withhold any evidence from the defense, and that he offered all the evidence in his possession to the defense in a spirit of full cooperation. As for Petitioner's testimony that if certain witnesses had been called or certain evidence had been produced, the outcome of the trial would have been different, the court characterized that testimony as pure conjecture that was not backed up by any testimony from those witnesses. The court found that as a result of trial counsel's efforts, Petitioner was convicted of lesser charges than were included in the indictment, and that he received a more lenient sentence than the life sentence that would have resulted from conviction of the more serious charges. The court accordingly denied the petition for post-conviction relief.

Petitioner filed a notice of appeal. This court subsequently learned that post-conviction counsel's law license had been transferred to disability inactive status, and we appointed Lance Chism in his place to represent Petitioner on appeal.

#### *Analysis*

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, the petitioner bears the burden of showing two things: (1) the services rendered

by trial counsel were deficient and (2) that the deficient performance was prejudicial. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984); *Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below “the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). A defendant is not entitled to perfect representation, but only to constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996).

To demonstrate prejudice, the petitioner must show that there is a reasonable probability that, if not for counsel’s deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. at 694. “Because a petitioner must establish both prongs of the test 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).

Petitioner acknowledges that while there is a constitutional right to counsel at trial as well as on direct appeal of a conviction, there is no constitutional right to counsel at post-conviction proceedings, and thus no constitutional right to effective counsel at such proceedings. See *Pennsylvania v. Finley*, 481 U.S. 551, 554-555 (1987); *Frazier v. State*, 303 S.W.3d 674, 680 (Tenn. 2010); *House v. State*, 911 S.W.2d 705, 712 (Tenn. 1995). There is, nonetheless, a statutory right to counsel in post-conviction proceedings under Tennessee law. See T.C.A. § 40-30-207(b)(1).

“This statutory right, does not, however, serve as a basis for relief on a claim of ineffective assistance of counsel in a post-conviction proceeding and does not include ‘the full panoply of procedural protection that the Constitution requires be given to defendants who are in a fundamentally different position -- at trial and on first appeal as of right.’” *Frazier*, 303 S.W.3d at 680 (citing *House*, 911 S.W.2d at 712). The requirements of procedural due process are satisfied in post-conviction proceedings if the petitioner was afforded “the opportunity to be heard at a meaningful time and in a meaningful manner.” *James Patterson v. State*, W2009-01874-CCA-R3-PC, 2011 WL 579122 at \*5 (Tenn. Crim. App. at Jackson, Feb. 17, 2011)(perm. app. denied July 14, 2011).

The obligations and responsibilities of appointed and retained attorneys in post-conviction proceedings are set out in Tennessee Supreme Court Rule 28. Attorneys must “review the pro se petition, file an amended petition asserting other claims which petitioner arguably has or a written notice that no amended petition will be filed, interview relevant witnesses, including petitioner and prior counsel and diligently investigate and present all reasonable claims.” Tenn. Sup. Ct. R. 28 § 6(C)(2). Attorneys must also file the certification required by Tennessee Supreme Court Rule 28, § (6)(C)(3) to prove that they have fulfilled

duties under Rule 28.

Post-conviction counsel filed an amended petition that listed four issues related to the performance of Petitioner's trial counsel. At the beginning of the evidentiary hearing, he announced that he was waiving two of those issues and would attempt to prove the remaining two: (1) that trial counsel failed to discover and call witnesses whose testimony would have helped his defense, and (2) that the prosecuting attorney had failed to disclose evidence that was favorable to Petitioner. It is well-established that counsel "retains the right to make strategic and tactical decisions—including the determination of which issues are reasonable and should be raised and pursued—based on counsel's professional judgment." *Leslie v. State*, 36 S.W.3d 34, 38 (Tenn. 2000).<sup>1</sup> Thus, post-conviction counsel cannot be faulted for choosing to pursue only those issues that he considered most likely to succeed.

When Petitioner took the stand, he testified that, in his opinion, trial counsel failed to vigorously track down and interview all the witnesses whose names he and his mother submitted, and he insisted that the prosecution had withheld important evidence from the defense. But Petitioner's testimony was controverted by that of his trial counsel and the prosecutor.

Trial counsel testified that he and his associates attempted to contact all the suggested witnesses, but that they were thwarted in many cases by the unwillingness of those witnesses to testify or their declarations that they didn't know anything about the case or the people involved. The prosecuting attorney testified that he shared all the evidence he had with the defense and he explained why it would not have been to his advantage to withhold evidence. He also stated that he informed the defense that some of the witnesses the defense considered presenting had gang affiliations, and that he would question them about those affiliations if they took the stand. Both the trial attorney and the prosecutor were cross-examined by Petitioner's attorney, and Petitioner's attorney presented closing arguments at the conclusion of testimony. Clearly, Petitioner exercised his right "to be heard at a meaningful time and in a meaningful manner."

The post-conviction court found, however, that Petitioner's testimony was not credible, while the testimony of his trial counsel and the prosecuting attorney was credible.

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<sup>1</sup>The two claims that Petitioner's post-conviction counsel declined to pursue were: (3) "[t]hat Petitioner's conviction was based on the action of a grand or petit jury that was unconstitutionally selected or empaneled," and (4) "[t]hat Petitioner's counsel was ineffective in failing to object to jury instruction containing an erroneous statement of Tennessee law concerning self-defense; failing to argue against errors in sentencing; failing to argue against enhancement of Petitioner's sentence; and committing cumulative errors that, taken together, denied Petitioner due process of law."

*See State v. Young*, 196 S.W.3d 85, 107 (Tenn. 2006) (stating that the credibility of the witnesses is to be resolved by the trier of fact); *State v. Dych*, 227 S.W.3d 21, 40 (Tenn. Crim. App. 2006) (stating that “[a]ll questions involving the credibility of witnesses, the weight and value to be given the evidence, and all factual issues are resolved by the trier of fact, not the appellate courts”).

The Petitioner bears the burden of proving the allegations of fact in his post-conviction petition by clear and convincing evidence. T.C.A. § 40-30-110(f); *Dellinger v. State*, 279 S.W.3d 282, 293 (Tenn. 2009). Findings of fact made by the trial court will not be disturbed on appeal, unless the evidence contained in the record preponderates against them. *Frazier*, 303 S.W.3d at 679 (citing *Brooks v. State*, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988); *Clenny v. State*, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978)). The evidence does not preponderate against the post-conviction court’s findings as to the arguments that were presented to it, and we must therefore affirm those findings.

Petitioner asks this Court to remand this case to the post-conviction court for the purpose of addressing a number of additional claims that were not presented at trial or on the direct appeal of his conviction. He contends that post-conviction counsel was derelict in his duties for failing to present those claims.

The basis of Petitioner’s argument is an assertion that his counsel failed to perform the last of Rule 28 6(C)(2)’s listed duties, to “diligently investigate and present all reasonable claims.” He argues that diligent investigation of the trial record would have revealed a number of claims that were not raised in the post-conviction hearing. He cites trial counsel’s failure to object to alleged errors in the jury instructions about self defense, counsel’s failure to object to testimony about the autopsy of the victim that was presented by a coroner who did not himself perform the autopsy, and counsel’s failure to argue that the absence of photographs showing the location of shell casings entitled Petitioner to a presumption that such photos, if produced, would have been exculpatory. *See State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999). Petitioner also contends that his trial counsel’s cross-examination of the State’s witnesses was inadequate, that counsel should have retained an independent gunshot residue expert, and that the case should be remanded to the post-conviction court for a hearing on those issues and “any other issues that were not adequately alleged and developed at the post-conviction hearing.”

Rule 28 does not expressly provide a remedy if post-conviction counsel fails to comply with all the requirements of the rule. Although Petitioner asks us to grant him a second post-conviction hearing so it can consider issues that were not presented at the initial post-conviction hearing, he acknowledges that this court has never held that the failure of counsel to fully comply with Rule 28 justifies a new hearing. *See Patterson*, 2011 WL

579122 at \*6 (stating that Rule 28 “does not afford the remedial right of a second or amended post-conviction hearing.”); *see also Hollis G. Williams v. State*, W2006-00779-CCA-MR3-PC, 2007 WL 1711717 at \* 6 (Tenn. Crim. App. at Jackson, June 13, 2007) (perm. app. denied Nov. 19, 2007); *Richard L. Elliott v. State*, No. M2004-00853-CCA-R3-PC, 2005 WL 1315753 at \*2 (Tenn. Crim. App. at Nashville, June 3, 2005) (perm. app. denied Dec. 5, 2005).

Petitioner insists, however, that we have never definitively ruled out that option. In support of that theory, he cites the following language from our decision in *Ronald Donnell Moore v. State*: “In this case we need not determine whether the failure of counsel to comply with all the requirements of Rule 28 itself justifies the granting of a new hearing.” W1999-02125-CCA-R3-PC, 2001 WL 792612 at \*5 (Tenn. Crim. App. at Jackson, July 13, 2001).

The petitioner in *Moore* was charged with first degree murder. He asserted to his trial counsel that the victim’s death was the result of intervening actions by two individuals. His trial counsel did not interview those potential witnesses or present that claim to the jury. The petitioner was convicted of first degree murder and sentenced to life imprisonment. The petitioner informed his post-conviction counsel of the same claim. The post-conviction counsel likewise failed to interview the two witnesses, or to otherwise investigate the claim. He also did not file the certification required by Tenn. Sup. Ct. R. 28, § 6(C)(3).

The petitioner stated at the post-conviction hearing, that he wished to call the two witnesses. The post-conviction court continued the hearing so the two witnesses could be called. But the post-conviction counsel failed to put on any proof at the continued hearing, and “[t]he tenor of the remarks of the trial court indicate it had forgotten that additional witnesses might be presented.” 2001 WL 792612 at \*2. The Petitioner was apparently not present at the continued hearing, and after a long discussion with post-conviction counsel about the counsel’s motion to withdraw, the trial court dismissed the petition. This court reversed the post-conviction court and remanded the case for a new post-conviction hearing, because among other things, “Petitioner did not have the opportunity to be heard prior to the dismissal as to whether [the failure of the witnesses to appear] was his fault.” 2001 WL 792612 at \*5.

The claims in the instant case, that a remand is necessary to address the additional allegations raised in this appeal, do not rise to near the level of dereliction of post-conviction counsel in *Moore*. In *Moore*, post-conviction counsel’s failures led to the dismissal of the petition without any opportunity for his claims to be presented at all. *Id.* In this case, the question of ineffectiveness of counsel was vigorously presented. Whatever the precedential value of *Moore*, it should not be read as a backdoor way of securing a second post-conviction



hearing where an adequate opportunity to be heard has already been afforded. Moreover, post-conviction counsel adequately performed the duties set out in Supreme Court Rule 28, and nothing before us justifies a remand for a second post-conviction hearing.

In sum, there is nothing in the record to indicate that trial counsel's representation fell below the "the range of competence demanded of attorneys in criminal cases." Nor can Petitioner demonstrate a reasonable probability that, if not for counsel's failure to raise at trial or on appeal the issues he cites in this appeal, the result of the proceeding would have been any different. We must, therefore, affirm the decision of the post-conviction court.

***Conclusion***

The judgment of the post-conviction court is affirmed.

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JERRY SMITH, JUDGE