

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs November 1, 2016

MAHLON JOHNSON v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Shelby County
No. 09-06118 James C. Beasley, Jr., Judge**

No. W2016-00665-CCA-R3-PC – Filed January 31, 2017

The Petitioner, Mahlon Johnson, appeals the denial of post-conviction relief for his convictions for sexual battery and aggravated assault. On appeal, he argues that he received ineffective assistance of counsel. After 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 JOHN EVERETT WILLIAMS and J. ROSS DYER, JJ., joined.

Constance Wooden Alexander, Memphis, Tennessee, for the Petitioner, Mahlon Johnson.

Herbert H. Slatery III, Attorney General and Reporter; Brent C. Cherry, Senior Counsel; Amy P. Weirich, District Attorney General; and Ann Schiller, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The Petitioner was indicted by the Shelby County Grand Jury for two counts of aggravated rape, one count of aggravated assault, and one count of aggravated burglary. State v. Mahlon Johnson, No. W2011-01786-CCA-R3-CD, 2013 WL 501779, at *1 (Tenn. Crim. App. Feb. 7, 2013). The charges stemmed from an altercation that occurred on October 31, 2008, between the Petitioner and his wife, the victim. Id. at *1. This court summarized the facts underlying the Petitioner’s charges in its opinion on direct appeal. Id. at *1-8. In short, the Petitioner and the victim had been separated at the time of the altercation, and the victim was at home asleep when she was awakened during the night by the Petitioner, who did not live in the home. Id. at *1. The victim testified that the Petitioner accused the victim of cheating on him and then became aggressive,

eventually raping the victim both vaginally and anally, as well as brutally assaulting her. *Id.* at *2.

The State pursued two aggravated rape charges, and the jury returned guilty verdicts of the lesser included offense of sexual battery on both counts. The jury acquitted the Petitioner of aggravated burglary but found him guilty of aggravated assault. The trial court sentenced the Petitioner to an effective sentence of twenty-seven years in the Tennessee Department of Correction. The Petitioner appealed, claiming insufficiency of the evidence, failure to merge his convictions, double jeopardy violations, and improper sentencing. On direct appeal, this court affirmed the Petitioner's convictions and sentence.

The Petitioner filed a pro se petition for post-conviction relief on November 13, 2013, alleging that his two trial attorneys provided ineffective assistance of counsel on numerous grounds. The post-conviction court determined that the Petitioner had a colorable claim and appointed counsel on November 14, 2013. Petitioner's post-conviction counsel did not file an amended petition, and an evidentiary hearing was held on February 26, 2016.¹

Post-Conviction Hearing. At the post-conviction hearing, the Petitioner testified that he met with one of his trial attorneys twice before trial and that he did not meet his other trial attorney until the day of trial. The Petitioner said that one of his issues with trial counsel was that the Petitioner was "indicted up on the wrong indictment" for his sexual battery conviction and that "it was invalid due to [the] statutory spouse exclusion." The Petitioner testified that he believed spousal rape was valid under Tennessee law. The Petitioner also testified that counsel failed to include certain issues in his motion for new trial and failed "to merge the sexual battery and the aggravated assault conviction together, because it all happened in one continuous act."

The Petitioner acknowledged that he was charged with two counts of aggravated rape and that, considering the notice of impeachment and notice of enhancement factors filed against him, he could have received up to sixty years for each count of rape as a career offender. The Petitioner testified that he also believed he should not have received consecutive sentences and that his aggravated assault charge should have been an assault charge because he never used a weapon. The Petitioner confirmed that trial counsel was ineffective for failing to include these issues in his motion for new trial. However, when asked if he was pleased with the way trial counsel tried his case, the Petitioner responded that "the case, basically actually, you know, it came out good." On cross-examination,

¹ There is no explanation in the record for the lengthy delay between the filing of the petition and the evidentiary hearing.

the Petitioner acknowledged that he made multiple pre-trial appearances in court from October 2009 to November 2010.

The Petitioner was represented by two attorneys at trial, who we will refer to as first and second counsel. First counsel testified that he was assisting second counsel on the Petitioner's trial. First counsel spoke with the Petitioner before trial, reviewed discovery, and was "familiar with the allegations" and "[f]amiliar with [the Petitioner's] stance on the matter." First counsel clarified that he only assisted with the trial and that second counsel handled all pre-trial matters. First counsel testified that, at trial, the Petitioner admitted to committing the aggravated assault. First counsel said that he was "pretty happy with the verdict" and that, if Petitioner had a lesser criminal history, he would have been sentenced to "less than ten years, I'm sure." First counsel also testified that the two rape charges were "two separate acts, not one ongoing act" and that "this wasn't a situation where I felt in the motion for new trial that the two separate alleged acts should have been merged."

On cross-examination, first counsel clarified that he "just didn't think merger was appropriate" and so he "focused more on what [counsel] thought the basis for the insufficiency of the evidence was." First counsel had been practicing criminal law and handling criminal trials for fifteen years, including approximately eight death penalty cases, fifty first-degree murder cases, and "numerous trials." First counsel testified that, because of this experience, he was hired to assist second counsel with the Petitioner's trial. First counsel drafted the motion for new trial and second counsel filed the motion, however, neither attorney handled any part of the Petitioner's appeal. Second counsel was not called to testify at the hearing.

At the conclusion of the testimony, the post-conviction court denied the Petitioner's request for post-conviction relief and found that,

From all of the issues that [the Petitioner] has raised with regard to basically sentencing and the illegality of the sentencing and merger issues and double jeopardy issues, were all raised on appeal and were all litigated on appeal, were all thoroughly discussed on appeal, and the Court finds that trial counsel and appellate counsel did a good job on this.

.....

And so, I would have to find as a matter of law that [first and second counsel] did above and beyond what is required in the manner in which they hired this case. That . . . [the Petitioner] got very reputable

representation and that it was very effective, obviously by the verdict that was returned.

After the hearing, the post-conviction court entered a written order denying relief. In its order, the court determined that, based on the evidentiary hearing, “the only issue raised by the [P]etitioner was the ineffective assistance of trial counsel in the filing of the [m]otion for [n]ew [t]rial.” The court noted that the Petitioner “felt an issue should have been included in the [m]otion for [n]ew [t]rial that was not” but that “[t]rial counsel testified that he felt there was no legal basis for the particular issue so he did not include it.” The post-conviction court also noted that this court had addressed the particular issue on a plain error review and found the issue to be without merit. The Petitioner now timely appeals.

ANALYSIS

On appeal, the Petitioner appears to argue that he received ineffective assistance of counsel based on the following grounds: (1) trial counsel failed to adequately prepare the Petitioner for trial; (2) the Petitioner’s convictions were not merged; (3) the convicting evidence was insufficient; (4) the Petitioner was not given concurrent sentences; (5) the Petitioner was immune from sexual battery or rape “since he and the victim were married;” (6) trial counsel failed to include certain issues in the Petitioner’s motion for new trial; and (7) trial counsel failed to call the Petitioner’s sister as a witness at trial.² The Petitioner limits his ineffective assistance of counsel claims to trial counsel only, and makes no claims against his appellate counsel. The State responds to each allegation and argues that the post-conviction court properly denied relief. Upon review, we agree with the State and also note that the majority of the Petitioner’s claims are inappropriate for post-conviction relief and were previously determined by this court on direct appeal.

Initially, we note that post-conviction relief is only warranted when a petitioner establishes that his or her conviction is void or voidable because of an abridgement 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

² The Petitioner’s issues on appeal have been re-organized for clarity.

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); Frazier v. State, 303 S.W.3d 674, 679 (Tenn. 2010); see Felts v. State, 354 S.W.3d 266, 276 (Tenn. 2011). 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. Id. (citing Strickland v. Washington, 466 U.S. 668, 687 (1984) and 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 clear and convincing evidence proves that his attorney's conduct fell below “an objective standard of reasonableness under prevailing professional norms.” Goad, 938 S.W.2d 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.”” Goad, 938 S.W.2d at 370 (quoting Strickland, 466 U.S. at 694).

We note that “[i]n evaluating an attorney’s performance, a reviewing court must be highly deferential 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) (citing Strickland, 466 U.S. at 689). Moreover, “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” Strickland, 466 U.S. at 688-89. However, we note that this ““deference to matters of strategy and tactical choices applies only if the

choices are informed ones based upon adequate preparation.”” House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (quoting Goad, 938 S.W.2d at 369).

As an initial matter, we can quickly dispose of issues two through five, as listed above. The Petitioner first claims, as he did in his direct appeal, that the trial court made several errors related to merger, sufficiency of the evidence, and sentencing. To the extent that the Petitioner is attempting to re-litigate issues raised and rejected by this court on direct appeal, the post-conviction court correctly denied relief. See T.C.A. § 40-30-106(f). This court previously determined on direct appeal that the Petitioner’s sexual battery convictions could not be merged together because they constituted two separate acts and that the Petitioner’s sexual battery and aggravated assault convictions also could not be merged because “the statutory elements of these offenses, as charged in this case, do not constitute the same offense and one is not a lesser included offense of the other.” Mahlon Johnson, 2013 WL 501779, at *13-17. Moreover, the Petitioner’s claim that he was incorrectly given consecutive sentences is waived because he failed to raise this argument on direct appeal and, waiver notwithstanding, “the imposition of consecutive sentences rests in the discretion of the trial court and is not reviewable by post-conviction proceedings.” State v. Russell, No. 03C01-9301-CR-00019, 1993 WL 478022, at *4 (Tenn. Crim. App. Nov. 22, 1993) (citing Wooten v. State, 477 S.W.2d 767, 768 (Tenn. Crim. App. 1971)); see T.C.A. § 40-30-106(g). It is also well established that sufficiency of the evidence claims are not appropriate in a post-conviction context. See Workman v. State, 868 S.W.2d 705, 711 (Tenn. Crim. App. 1993) (“It has long been established in this jurisdiction that a petitioner may not litigate the sufficiency of the evidence in a post-conviction suit.”).

Finally, the Petitioner’s claim that he was subject to spousal immunity for his sexual battery convictions is also invalid, as sufficiency of an indictment cannot be reviewed or tested in a proceeding for post-conviction relief and, furthermore, spousal immunity for rape and sexual battery offenses was statutorily abolished in Tennessee in 2005 and does not exist as a source of relief for the Petitioner. See Brown v. State, 445 S.W.2d 669 (Tenn. 1969) (holding that the sufficiency of an indictment cannot be challenged in a post-conviction proceeding); see T.C.A. § 39-13-507, repealed by 2005 Tenn. Pub. Acts, ch. 456, § 2. Accordingly, we will limit our analysis to the Petitioner’s remaining issues which are properly raised on appeal.

I. Preparation for Trial. First, the Petitioner argues that trial counsel was ineffective because they “never prepared with [the Petitioner] for trial in this case.” It is unclear from the record exactly how many times the Petitioner met with trial counsel. The Petitioner acknowledged on cross-examination that he made approximately nine pre-trial appearances before the trial court, but he also claimed that he met second counsel only twice before trial and that he never met first counsel before trial. First counsel

testified at the post-conviction hearing that he did speak with the Petitioner before trial. The post-conviction court made no specific findings of fact regarding trial counsel's preparation with the Petitioner, however, the court did note that trial counsel "did above and beyond what is required" and that the Petitioner "got very reputable representation and that it was very effective, obviously by the verdict that was returned."

The Petitioner has not presented any argument as to how any additional preparation would have changed the outcome of his case. In fact, the Petitioner seemed pleased with the outcome of his case and testified at the post-conviction hearing that "the case, basically actually, you know, it came out good." Because the Petitioner has failed to establish deficient performance or prejudice resulting from trial counsels' preparation for trial, he is not entitled to relief.

II. Motion for New Trial. The Petitioner next claims that trial counsel "purposely failed to raise the merger and consecutive sentencing issues in his motion for new trial and on appeal." The record does not include a copy of the motion for new trial or a transcript from the hearing. However, at the post-conviction hearing, first counsel conceded that he did not include the merger and consecutive sentencing issues in the motion for new trial because "this wasn't a situation where [counsel] felt in the motion for new trial that the two separate alleged acts should have been merged." On cross-examination, first counsel reiterated that he "didn't think merger was appropriate" and that he "focused more on what [counsel] thought the basis for the insufficiency of the evidence was." The post-conviction court noted that, although certain merger issues were not raised in the motion for new trial, the specific issue was raised in the Petitioner's brief on appeal and this court reviewed it for plain error and "concluded that there were two completely separate incidents" and that, under the analysis, the issue "didn't have any merit."

Because we must give deference to the professional judgment and strategic decisions of counsel, we cannot conclude that trial counsel performed deficiently in failing to raise an issue that they deemed to be without merit. See Burns, 6 S.W.3d at 462 (citing Strickland, 466 U.S. at 689); see also Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993) ("[T]here is no constitutional requirement that an attorney argue every issue on appeal. . . . Generally, the determination of which issues to present on appeal is a matter which addresses itself to the professional judgment and sound discretion of appellate counsel."). In addition, this issue has been previously determined and therefore waived. Accordingly, the Petitioner is not entitled to relief.

III. Presentation of Witness. Finally, the Petitioner alleges that "he wanted his sister to testify on his behalf, and that [trial counsel] felt as his [sic] she was not needed." 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 did not present his sister as a witness at the post-conviction hearing, and the Petitioner provided no information or argument, at the evidentiary hearing or in his brief, as to what testimony or information his sister would have provided. The post-conviction court did not address this issue or make any findings of fact or conclusions of law. As stated above, this court will not speculate as to what testimony might have been introduced. The Petitioner has failed to carry his burden to prove the ineffective assistance of counsel. He is not entitled to relief.

CONCLUSION

Based on the foregoing authorities and analysis, we affirm the judgment of the post-conviction court.

CAMILLE R. McMULLEN, JUDGE