

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs July 8, 2020

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MORIARCO LEE v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Madison County
No. C-18-76 Kyle C. Atkins, Judge**

No. W2019-01592-CCA-R3-PC

The Petitioner, Moriarco Lee, was found guilty by a jury of attempted first degree murder and aggravated assault, and he received a twenty-two-year sentence in confinement. The Petitioner's convictions were affirmed on direct appeal to this court. The Petitioner filed a petition for post-conviction relief contending, among other claims not raised on appeal, that he received ineffective assistance of counsel when trial counsel failed to subpoena alibi witnesses to testify at trial, failed to present video evidence at trial, and failed to challenge a biased juror. Following a hearing, the post-conviction court denied the petition, and the Petitioner appeals. After a review of the record, we affirm the judgment of the post-conviction court.

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

JOHN EVERETT WILLIAMS, P.J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. ROSS DYER, JJ., joined.

Joshua Dougan (at hearing) and Alexander D. Camp (on appeal), Jackson, Tennessee, for the appellant, Moriarco Lee.

Herbert H. Slatery III, Attorney General and Reporter; Sophia S. Lee, Senior Assistant Attorney General; Jerry Woodall, District Attorney General; and Benjamin C. Mayo, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL AND PROCEDURAL HISTORY

Trial

The Petitioner was convicted by a Madison County jury of attempted first degree murder and aggravated assault committed on the victim, Mr. Marketus Hendrix. *State v.*

Moriarco Montrell Lee, No. W2016-01391-CCA-R3-CD, 2017 WL 1380016, at *1 (Tenn. Crim. App. Apr. 13, 2017). The evidence presented at trial showed that two people the victim knew as “Yogi” and “D-Rich” shot him fourteen times outside of a barbershop in Jackson, Tennessee, on December 10, 2013. *Id.* Prior to the shooting, the person known as “Yogi” said “B****, you’re about to die.” *Id.*

Jackson Police Department (“JPD”) Officer James Jay Carter responded to a “shots fired” call in which dispatch informed him that subjects left in a white-colored vehicle headed eastbound on Lane Avenue. *Id.* When Officer Carter arrived on scene, he found the victim lying on the ground beside a vehicle and suffering from multiple gunshot wounds. *Id.* At that point, the victim could not speak, but he responded to Officer Carter’s questions by nodding. *Id.* After questioning the victim, Officer Carter discovered that the victim knew the suspects and that they left in a white four-door Honda. *Id.* JPD Investigator Marvin Jerome Rodish processed the crime scene, where he collected ten shell casings and two bullets. *Id.* at *2.

The victim was transported to the hospital. *Id.* at *1. On December 17, 2013, JPD Investigator Alberto Colon met with the victim while he was in the Intensive Care Unit. *Id.* at *2. At that time, the victim could speak a little bit, and he informed Investigator Colon that he knew the shooters as “Yogi” and “D-Rich.” *Id.* at *1. Investigator Colon used those street names to build two separate photographic lineups. *Id.* at *2. After showing the victim the lineups, the victim identified the Petitioner as “Yogi” and Mr. Dequevion Lee, the Petitioner’s brother, as “D-Rich.” *Id.* On cross-examination, Investigator Colon acknowledged that the victim also identified the Petitioner as “Little Yogi” and “Morico.” *Id.* The victim saw a white car at the scene, but he did not see the Petitioner inside of it. *Id.* at *1. The victim could not remember at trial a written statement he made during Investigator Colon’s interview. *Id.* In the statement, the victim stated that a person known as “Baldy” was driving the white car, that he knew “Baldy,” and that he had a sexual relationship with “Baldy’s” girlfriend while “Baldy” was in jail. *Id.* The victim testified at trial that he had seen “Baldy” at the barber shop earlier on the day of the shooting. *Id.* Investigator Colon later identified and interviewed “Baldy.” *Id.* at *2.

Investigator Colon interviewed the victim again prior to the preliminary hearing to find out where the second shooter had been standing. *Id.* at *2. With this information, Investigator Colon went back to the scene and found four additional shell casings where the victim told him the second shooter had stood. Another bullet was removed from the victim’s body at the hospital and collected as evidence. *Id.*

Special Agent Kasia Michaud with the Tennessee Bureau of Investigation’s Firearms Identification Unit examined ten .40 caliber shell casings, three bullets, and four 9 millimeter shell casings. *Id.* She determined that the .40 caliber shell casings were all fired from one gun and that the 9 millimeter shell casings were all fired from another gun.

Id. She could not determine whether any of the bullets came from those shell casings.
Id.

The jury convicted the Petitioner of attempted first degree murder and aggravated assault. *Id.* The trial court merged the aggravated assault conviction into the attempted first degree murder conviction and imposed a twenty-two-year sentence. *Id.* On appeal, this court affirmed the Petitioner's convictions but remanded for the trial court to complete a required uniform judgment form to reflect a merger of the aggravated assault conviction into the attempted first degree murder conviction. *Id.* at *5.

Post-Conviction Proceedings

The Petitioner filed a petition for post-conviction relief, contending that he received ineffective assistance of counsel. He claimed in his petition, among other claims not raised on appeal, that trial counsel was ineffective because she failed to subpoena alibi witnesses to testify at trial, failed to present video evidence at trial, and failed to challenge a biased juror. The post-conviction court held a hearing where the Petitioner and Mr. John Hamilton, an assistant public defender who brought the Petitioner's case file in absence of the Petitioner's trial counsel, testified. The Petitioner's trial counsel did not testify at the hearing.

The Petitioner testified that he "picked up" attempted first degree murder and aggravated assault charges on December 10, 2013. He was appointed pretrial counsel as his case progressed through city court. Pretrial counsel represented the Petitioner at a preliminary hearing, and, upon finding probable cause, the city court bound his case over to the grand jury. Following the grand jury's indictment, a different attorney, trial counsel, was appointed to represent the Petitioner.

The Petitioner stated that trial counsel discussed a plea offer for fifteen years at eighty-five percent, but he did not take the offer because he was a Range I offender and faced a sentence of fifteen to twenty-five years. The Petitioner recalled trial counsel telling him that there was a plea offer of "12 at 30" on the table that he could have accepted at any point during the trial if he did not feel comfortable. He stated he believed her because he had not previously been charged with a crime. He maintained that when he told trial counsel that he did not feel comfortable at trial, trial counsel ignored him.

The Petitioner testified that trial counsel spoke with him one time at the correctional facility where he was held prior to trial. He testified that he discussed a trial strategy with trial counsel, but she did not pursue that strategy at trial. The Petitioner explained that trial counsel did not do what he asked her to do in his case. In particular, the Petitioner explained that there were witnesses and an existing videotape of the scene that would have shown he was not at the scene of the crime when it occurred. He explained that trial counsel did not adequately investigate his lack of motive for the

crimes charged or the reason he was accused of them. Additionally, he testified that trial counsel could have contracted a private investigator to look into his case.

According to the Petitioner, trial counsel did not subpoena witnesses whom he asked her to subpoena prior to trial, including Ms. Bernice Messenger, Ms. Doris, and his sister, Ms. April Lee. The Petitioner stated that those witnesses would have testified that he was not at the scene of the crime. Trial counsel told the Petitioner that she had subpoenaed some of the witnesses “the day of court.” He stated that trial counsel failed to call witnesses to testify that were “summoned for [the] State on the front of the motion.” He explained that he did not understand the implications of trial counsel’s actions because he had never been in circuit court before nor had he been arrested prior to the present case. He informed the trial judge during the trial that none of his witnesses were able to testify. The Petitioner believed that the trial would have gone differently had witnesses testified on his behalf. He wanted to proceed at trial on the theory that he was not involved in the crime, but he felt that trial counsel did not put up a “fair fight.”

According to the Petitioner, trial counsel also did not obtain video evidence that would have helped his defense. Trial counsel did not obtain the full video footage from the store where the crime took place. He explained that certain parts of that existing video showed he was not at the scene. Trial counsel reviewed the video independently and informed the Petitioner that she never saw him in the video. He asked trial counsel to obtain the full video and use it at trial, but she did not do so.

The Petitioner testified that he felt one of the jurors was prejudiced against him because he believed one of his relatives “shot her sister’s arm off.” The juror’s family grew up with his mother, and they had known the Petitioner since he was a child. He did not immediately recognize the juror as someone he knew when she was selected, but he recognized her at some point during the trial. When he informed trial counsel about the juror, trial counsel ignored him. The Petitioner testified that he thought the juror’s presence on the jury affected the outcome of the trial because the juror could have gotten revenge on him for the harm done to her sister by his relative.

On cross-examination, the Petitioner recalled the juror being asked questions about whether she knew him and that she stated she could be fair and impartial. The Petitioner agreed that the juror testified that she did not know anything about the case, but he stated he could not say she answered the voir dire questions truthfully.

The Petitioner confirmed that the victim was the only person to identify him as the shooter. Trial counsel cross-examined the victim on that point and about a statement he made in the hospital in which he identified someone else as the shooter. Pretrial counsel also cross-examined the victim on that point at the preliminary hearing, and trial counsel had access to that record since she worked in the same office as pretrial counsel. The

Petitioner confirmed that trial counsel argued those points to the jury, but he explained that trial counsel did not do so “to the full extent.”

The Petitioner stated that he initially wanted to proceed to trial, but when he learned he did not have any witnesses present to testify, he wanted to instead accept a plea offer. He explained he wanted to accept an offer for twelve years at thirty percent that trial counsel told him was available. He also stated that, because he had an offer of fifteen years at eight-five percent on the table, he thought he could not receive a higher sentence than fifteen years after a trial.

Mr. John Hamilton testified that he presently worked as an assistant public defender in Jackson, Tennessee. He took the position left by trial counsel at the public defender’s office, but he did not represent the Petitioner. Mr. Hamilton was instead subpoenaed to provide records from the public defender’s office at the hearing in trial counsel’s absence.

Mr. Hamilton explained that the public defender’s office has its own investigator with formal law enforcement training. There was an investigation in the Petitioner’s case, and the case records indicated that trial counsel and the investigator met with the Petitioner at the jail to discuss witnesses. Mr. Hamilton gathered from the notes in the case file that trial counsel asked the Petitioner if he wanted to request a continuance to subpoena witnesses, but the Petitioner wanted to proceed to trial knowing they would not be there. Mr. Hamilton explained that there were “several different contacts” between trial counsel and the Petitioner. He later clarified in response to the post-conviction court’s questioning that he could identify five or six dates when trial counsel met with the Petitioner, but he explained he could not be certain of how many meetings occurred without consulting trial counsel.

Trial counsel obtained discovery from the State pursuant to its open file policy, and the Petitioner’s case file contained a copy of the transcript of the preliminary hearing. Mr. Hamilton explained that pretrial counsel, who represented the Petitioner at the preliminary hearing, was no longer employed with the public defender’s office. The case file reflected that trial counsel was pursuing an identity defense at trial. Trial counsel had access to four disks containing videos and photographs provided by the State. Mr. Hamilton believed the media files on the disks would be used to prove the Petitioner was not the person who committed the offense, but he did not have any personal knowledge of the contents of the media files.

Mr. Hamilton testified on cross-examination that he was neither the Petitioner’s trial counsel nor his appellate counsel. He was not employed with the public defender’s office when the Petitioner’s case went to trial. He had no knowledge of the conversations between trial counsel and the Petitioner, no knowledge of any instructions the Petitioner gave to trial counsel, and no knowledge of interviews she or the investigator had with

potential witnesses. In response to questioning by the court, Mr. Hamilton recalled from his knowledge of the case file a memorandum detailing the Petitioner's instructions for trial counsel to go to trial rather than continue the case to subpoena witnesses.

The post-conviction court recalled the facts of the underlying case and that it was "basically an identification case." The post-conviction court found that trial counsel cross-examined the victim on his contradictory statements as to the identification of the shooter. The court noted that the Petitioner did not establish what his witnesses' testimony would have been at trial, did not explain how trial counsel's cross-examination was inadequate, and did not present the video evidence that he claimed would have proven his innocence. The post-conviction court found that trial counsel met with the Petitioner five or six times and that the investigator met with him once. The post-conviction court found that the allegedly prejudiced juror did not testify at the hearing and that there was no objection made at trial. It found that there was not clear and convincing evidence presented that indicated trial counsel knew about the juror's potential bias to make an objection.

The post-conviction court found that the Petitioner decided to not seek a continuance in order to present witnesses and that the Petitioner did not present evidence as to what additional investigation would have shown. The post-conviction court denied his petition, concluding that the Petitioner failed to establish either deficiency or prejudice.

ANALYSIS

The Petitioner contends that the post-conviction court erred in denying his petition and that he received ineffective assistance of counsel. The Petitioner argues that trial counsel was ineffective because she: (1) failed to subpoena alibi witnesses to testify at trial, (2) failed to present video evidence at trial, and (3) failed to challenge a biased juror. The Petitioner claims these errors establish trial counsel's deficiency and that the errors prejudiced the defense at trial. The State contends that the Petitioner's appeal is not properly before this court because the post-conviction court granted the Petitioner's motion to file a delayed notice of appeal without authority to do so. The State argues that the interests of justice do not weigh in favor of granting the Petitioner request for review on the merits. The State also contends that the Petitioner is not entitled to relief on the merits of his claim.

We first note that the Petitioner's notice of appeal was not timely filed. The post-conviction court's order denying the petition was filed on February 15, 2019. The Petitioner filed his notice of appeal on September 5, 2019. Tennessee Rule of Appellate Procedure 4(a) requires that a notice of appeal be filed "within 30 days after entry of the judgment appealed from." However, this court may waive the requirement of a timely notice of appeal in the interest of justice. *Id.* On July 2, 2019, the Petitioner filed in the

post-conviction court an “Emergency Motion Requesting to File a Delayed Appeal and Memorandum of Law,” explaining that he discovered in the previous month that his post-conviction counsel had not filed an appeal and that post-conviction counsel had left private practice. The Petitioner alleged that he requested post-conviction counsel to appeal the denial of his petition. The post-conviction court granted the Petitioner’s motion despite not having the authority to do so. *See Raymond Ross v. State*, No. W2010-00875-CCA-R3-PC, 2010 WL 3792865, at *2 (Tenn. Crim. App. Sept. 29, 2010) (“[T]he post-conviction court does not possess the authority to enlarge the time for filing a timely notice of appeal in this court.”). Nevertheless, based on the circumstances underlying the Petitioner’s failure to comply with Rule 4(a), we conclude that the timely filing of the notice of appeal should be waived in the interest of justice.

A petitioner may request post-conviction relief by asserting grounds alleging that his “conviction or sentence is void or voidable because” it abridged his constitutional rights provided by the Tennessee or the United States constitutions. T.C.A. § 40-30-103. To obtain post-conviction relief, a petitioner must prove the allegations of fact made in the petition by clear and convincing evidence. *Id.* § 40-30-110(f).

On appeal, the post-conviction court’s findings of fact are conclusive unless the evidence preponderates against them. *Ward v. State*, 315 S.W.3d 461, 465 (Tenn. 2010). “[Q]uestions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the trial judge.” *Fields v. State*, 40 S.W.3d 450, 456 (Tenn. 2001) (citing *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997)). Additionally, appellate courts may not “substitute their own inferences for those drawn by the trial court.” *Id.* (citing *Henley*, 960 S.W.2d at 579). This court reviews “a post-conviction court’s conclusions of law, decisions involving mixed questions of law and fact, and its application of law to its factual findings de novo without a presumption of correctness.” *Whitehead v. State*, 402 S.W.3d 615, 621 (Tenn. 2013) (citations omitted).

A criminal defendant has a right to the assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). The right to assistance of counsel inherently guarantees that counsel’s assistance is “effective.” *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *Dellinger v. State*, 279 S.W.3d 282, 293-94 (Tenn. 2009). To prove that counsel was ineffective, a petitioner must show that (1) his counsel performed deficiently and (2) such deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687-88.

To establish deficient performance, a petitioner must show that “counsel’s representation fell below an objective standard of reasonableness.” *Id.* at 688. This standard requires a petitioner to demonstrate that the “services rendered or the advice given” were “below the range of competence demanded of attorneys in criminal cases.”

Grindstaff v. State, 297 S.W.3d 208, 216 (Tenn. 2009) (quoting *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). Counsel must have made errors so serious that counsel was not functioning as the “counsel” guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Measuring counsel’s performance requires giving deference to counsel’s decisions, and courts must apply a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 669. Accordingly, this court has held that a “petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings.” *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). The reviewing court “must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s conduct, and to evaluate the conduct from the perspective of counsel at that time.” *Howell v. State*, 185 S.W.3d 319, 326 (Tenn. 2006) (citing *Strickland* 466 U.S. at 689). The “deference to tactical choices only applies if the choices are informed ones based upon adequate preparation.” *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Adequate preparation includes counsel’s “duty to make reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary.” *Burns*, 6 S.W.3d at 462 (quoting *Strickland*, 466 U.S. at 691). Counsel’s decision to not investigate must be assessed by courts “for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Id.*

To demonstrate that a counsel’s deficient performance prejudiced the defense, a petitioner must prove “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Dellinger*, 279 S.W.3d at 294 (quoting *Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. Because a petitioner must establish both deficiency and prejudice to prove ineffective assistance of counsel, a court need not address both prongs where the petitioner has failed to establish one of them. *See Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 697).

Turning to the merits of the Petitioner’s claims, we find no error in the post-conviction court’s order denying the petition. The Petitioner first claims that trial counsel failed to subpoena alibi witnesses who would have testified favorable for his defense at trial. However, the Petitioner did not call those witnesses to testify at the post-conviction relief hearing. “When 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 (1990). Absent the witnesses’ testimony at the hearing, the potential prejudice resulting from the lack of those witnesses’ testimony at trial cannot be ascertained under the

evidence presented by the Petitioner in this case. Thus, the Petitioner has failed to establish prejudice with respect to this claim.

The Petitioner next claims that trial counsel was ineffective because she did not present a video at trial showing the Petitioner was not at the scene of the crime. Mr. Hamilton confirmed that video evidence existed in the Petitioner's file, but he had no knowledge of its substance. The Petitioner did not present the video at the post-conviction relief hearing. Without evidence of the contents of the video, we decline to speculate as to whether trial counsel's failure to present it at trial prejudiced the Petitioner's defense. Although the Petitioner argues that his testimony at the post-conviction hearing was unrebutted with respect to this claim, the post-conviction court was not required to accept the Petitioner's testimony as credible. *See Fields*, 40 S.W.3d at 456. The post-conviction court's findings impliedly gave little weight to the Petitioner's testimony. As a result, the Petitioner has not shown prejudice with respect to this claim.

The Petitioner's final claim is that trial counsel failed to challenge a biased juror, but he has failed to demonstrate prejudice. The Petitioner testified at the hearing that he recognized the juror during the trial as someone whom one of his relatives had "shot her sister's arm off." The Petitioner believed that juror could have gotten revenge on him through the jury's guilty verdict. However, the Petitioner did not present any proof at the hearing that the juror recognized him or that the incident would have prevented the juror from being fair and impartial. Without the juror's testimony at the hearing, we cannot conclude under these circumstances that she acted contrary to her sworn testimony at trial that she would be fair and impartial. *See Adrian S. Lenox v. State*, No. M2003-00482-CCA-R3-PC, 2004 WL 1144042, at *4 (Tenn. Crim. App. May 20, 2004) (holding that the petitioner failed to establish prejudice with respect to a claim that trial counsel failed to challenge two jurors, in part, because their testimony at trial that they would be fair and impartial were taken "at face value" absent their testimony at the post-conviction relief hearing). Therefore, we conclude that the Petitioner has failed to establish prejudice with respect to this claim.

The Petitioner argues that his testimony at the post-conviction hearing entitles him to relief because it was unrebutted due to trial counsel not testifying. Typically, the State should call trial counsel as a witness to the post-conviction relief hearing "to show what occurred" during the representation. *State v. Craven*, 656 S.W.2d 872, 873 (Tenn. Crim. App. 1982); *see State v. Hopson*, 589 S.W.2d 952, 954 (Tenn. Crim. App. 1979). However, the absence of trial counsel's testimony at the hearing does not remove the Petitioner's burden to prove the factual and legal contentions in his petition. *See, e.g., Jamarius Gant v. State*, No. W2019-00147-CCA-R3-PC, 2020 WL 918603, at *5 (Tenn. Crim. App. Feb 25, 2020), *no perm. app. filed* (holding that, "even without trial counsel's testimony, the petitioner failed to establish deficient performance or prejudice"). As discussed above, the Petitioner did not present evidence necessary to establish prejudice

with respect to any of his claims. Because we conclude that the Petitioner has not established prejudice, we decline to reach the issue of whether trial counsel deficiently performed. *See Goad*, 938 S.W.2d at 370 (citing *Strickland*, 466 U.S. at 697).

CONCLUSION

Based upon the foregoing reasons, we affirm the judgment of the post-conviction court.

JOHN EVERETT WILLIAMS, PRESIDING JUDGE