

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs May 2, 2017

VERNON LIVINGSTON v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Madison County
No. C-16-17 Kyle Atkins, Judge**

No. W2016-02188-CCA-R3-PC

The petitioner, Vernon Livingston, appeals the denial of his post-conviction petition. The petitioner argues he received ineffective assistance of counsel at trial which forced him to enter a guilty plea prior to the conclusion of the trial. Following our review, we affirm the denial of the petition.

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

J. ROSS DYER, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT L. HOLLOWAY, JR., JJ., joined.

Joseph T. Howell, Jackson, Tennessee, for the appellant, Vernon Livingston.

Herbert H. Slatery III, Attorney General and Reporter; Breanne N. Hataway, Assistant Attorney General; Jerry Woodall, District Attorney General; and James W. Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

I. Trial

On June 7, 2012, the petitioner served as a “lookout” for the burglary and attempted burglary of two businesses in Jackson, Tennessee: Tyler Locksmith and Cash in a Flash. Two years and four court-appointed attorneys later, he arrived at trial with his fifth and sixth court-appointed attorneys. The petitioner faced eight charges, including: the Class D felony of burglary; the Class E felonies of theft of property over five hundred dollars, vandalism of property over five hundred dollars, and attempted burglary; and the

Class A misdemeanors of vandalism of property under five hundred dollars, possession of burglary tools, evading arrest, and possession of cocaine. After the State presented a significant portion of its proof, the petitioner asked to represent himself for the remainder of the trial. The trial court cautioned the petitioner from proceeding in this manner, and he ultimately agreed to continue with representation.

On the second day of trial, the State presented its final witnesses and closed its proof. After hearing all of the evidence against him, the petitioner sought to plead guilty rather than move forward with his defense. The trial then transitioned into a guilty plea hearing.

II. Guilty Plea Hearing

As the plea colloquy began, the petitioner stated he was not under the influence of any medications, drugs, or alcohol and did not suffer from any mental disabilities. However, the petitioner's behavior at various moments of the plea hearing made the trial court question his understanding and sincerity regarding the nature of the plea. For that reason, the trial court addressed several aspects of the plea at length. For example, the trial court discussed each conviction with the petitioner, the penalties the convictions carried, and the rights the petitioner was giving up by entering a guilty plea. The trial court noticed the petitioner was "smiling and laughing" during these discussions. As a result, the trial court repeated its questioning of the petitioner regarding his understanding of the plea until the trial court was satisfied the petitioner understood. Additionally, when the trial court asked the petitioner if his plea was being freely and voluntarily entered, the petitioner stated it was, but made "a gesture like it's not." The trial court then made it clear to the petitioner that he could either plead guilty or continue with trial. The petitioner chose to continue with the guilty plea, and he asserted his plea was being freely and voluntarily entered. Finally, when asked if he was satisfied with his attorneys, the petitioner initially stated he was not. Upon further inquiry, and a reminder that the trial court would not accept the plea absent an affirmative response to the question, the petitioner stated, "Yeah, I'm satisfied with my lawyers."

The State then read the facts of the indictment for each of the eight convictions into the record. Under the theory of criminal responsibility, the State asserted that on June 7, 2012, the petitioner committed crimes against Tyler Locksmith including: burglary (Count One), theft of property over five hundred dollars (Count Two), and vandalism of property over five hundred dollars (Count Three). Again under a theory of criminal responsibility, the State asserted that on June 7, 2012, the petitioner also committed attempted burglary (Count Four) and vandalism of property under five hundred dollars (Count Five) against Cash in a Flash. Finally, in relation to his other

crimes, the State asserted the petitioner was guilty of possession of burglary tools (Count Six), evading arrest (Count Seven), and possession of cocaine (Count Eight).¹

The petitioner affirmed the facts of each crime were substantially correct, and the State made the following recommendation to the trial court:

Your Honor, please, the State is recommending the following sentences: In Count One, four years as a Range II offender and no fine; Count Two, two years at a Range II, thirty-five percent, no fine; Count Three, two years at thirty-five percent and no fine; and Count Four, two years at thirty-five percent and no fine. The first four counts are felonies and the State is recommending that Count Four run consecutively to Count Three; Count Three consecutively to Count Two; and Two consecutively to Count One. That adds up to ten years effective sentence in Case 12-733. The misdemeanor counts, Five, Six, Seven, and Eight, the State is recommending a sentence of eleven months and twenty-nine days at seventy-five percent on each and every one of these counts. The State is recommending no fine on Counts Five, Six, and Seven, but as stated, the minimum statutory fine on Count Eight we're recommending at seven hundred and fifty dollars. The State is also recommending that this effective sentence in 12-733 of ten years run consecutively to cases on which the [petitioner] was on parole at the time of this offense.

The trial court ordered the petitioner to pay restitution to his victims and to pay his court costs, including the costs incurred for the jury for two days of trial prior to the plea.² After reviewing the details of the plea, the trial court held:

I'm going to find that his plea of guilty has been freely, voluntarily, and intelligently made, there's a factual basis for the plea, that the [petitioner's] had the advice of attorneys with whom he is satisfied, and the [c]ourt will accept his plea and make it -- the plea bargain agreement the order of the [c]ourt. You're hereby sentenced.

¹Without attempting to minimize the effect of the crimes on the victims, we choose not to discuss the individual facts and circumstance of each offense because the circumstances of the offenses are not necessarily relevant to the issues on appeal. We note that the petitioner agreed to the factual basis for the plea agreement at the hearing wherein the State relied on the eight-count indictment to form the basis for the guilty pleas.

²Because the judgment forms were not made a part of the record on appeal, we are relying on the transcript of the guilty plea hearing for the details of the petitioner's sentence.

As a result, the petitioner pled guilty to the offenses as charged in the indictment, and the trial court sentenced him, as a Range II offender, to an effective ten-year sentence.

III. Post-Conviction Evidentiary Hearing

The petitioner subsequently filed a petition for post-conviction relief. As summarized by the post-conviction court, the petitioner alleged:

1. Ineffective assistance of counsel for not raising the issue of the tampered crime scene during trial.
2. Ineffective assistance of counsel for not entering the recording from the officer's dashcam during trial.
3. Ineffective assistance of counsel for not entering [the] [p]etitioner's seized cell phone as evidence during trial to show that [the] [p]etitioner had recently left a friend's house prior to arriving at the crime scene.
4. Ineffective assistance of counsel for not presenting [the] [p]etitioner's alibi defense during trial.
5. Ineffective assistance of counsel for not challenging the admission of [the] [p]etitioner's statement to police during trial.
6. Trial counsel's ineffective assistance of counsel made [the] [p]etitioner's guilty plea unknowing and involuntary.

The post-conviction court held an evidentiary hearing during which the petitioner and one of his trial counsel testified. The post-conviction court summarized its factual findings from the evidentiary hearing, as follows:

[The] [p]etitioner testified that his trial counsel failed to investigate the crime scene to corroborate [the] [p]etitioner's claim that the crime scene had been tampered with by officers. [The] [p]etitioner also testified that he asked trial counsel to review the recording from the officer's dashcam, which would have shown that the officers colluded to fabricate evidence. [The] [p]etitioner testified that trial counsel should have objected to the admission of his statement to police during his trial because the statement was fabricated by the police. [The] [p]etitioner testified that trial counsel did not pursue [the] [p]etitioner's alibi defense during trial. [The] [p]etitioner testified that trial counsel's deficiencies forced him into pleading guilty against his will and therefore, his plea is a manifest injustice. Additionally, the trial [j]udge coerced him into pleading guilty.

Under cross-examination, [the] [p]etitioner testified that the trial [c]ourt appointed him four different attorneys based on his complaints

against each of them separately, before he was appointed the trial counsel involved in this petition. He confirmed that he was found by officers at the crime scene of two business burglaries, with burglary tools in his possession. He confirmed that cocaine was found on his person. He confirmed that the trial [c]ourt held a hearing on a [m]otion to [s]uppress his statement to police, wherein he confessed to participating in the burglaries, and the [c]ourt denied his motion. [The] [p]etitioner confirmed that on the second day of his trial, after the conclusion of the State's proof, he asked the Court to accept his guilty plea and not proceed with his defense at trial. He confirmed that he was provided a transcript of his guilty plea prior to the post-conviction hearing. He confirmed that during his plea, he told the [c]ourt that he understood his rights, that his plea was voluntary, that it was the best course of action for him to take, that he was satisfied with his trial counsel, that his trial counsel answered all of his questions about the case, that he admitted the facts of the offenses to which he was pleading, and that he had no questions for the [c]ourt at the conclusion of his plea. He confirmed that he had prior felony convictions on his record and had pled guilty to criminal offenses prior to the plea in this case.

. . .

Trial counsel . . . testified that he met with [the] [p]etitioner multiple times while he was incarcerated pretrial. He went over the proof the State would present against the [p]etitioner at trial, including [the] [p]etitioner's own statement to police. He testified that he knew the trial [c]ourt had denied the [m]otion to [s]uppress [the] [p]etitioner's confession; therefore, there was no basis to further challenge its admission at trial. He testified that [the] [p]etitioner never provided him information about an alibi defense and only brought up tangential information during the trial that might be corroborated on [the] [p]etitioner's cell phone seized by police. That information was that [the] [p]etitioner had left a friend's house immediately prior to arriving at the crime scene. Therefore, trial counsel requested a jury-out review of the contents of the cell phone. The trial [c]ourt allowed trial counsel to review the cell phone and had court security search for a phone charger to revive the battery charge. However, [the] [p]etitioner changed his mind about proceeding with his defense at trial and requested to plead guilty. In regards to the dashcam recording, the State opposed playing the entire audio recording to the jury, due to cursing language that an officer used that might be offensive to the jurors, but the [c]ourt was inclined to allow the entire audio to be played if relevant. Trial counsel

testified that this issue never came to a resolution because the [p]etitioner decided to plead guilty.

The post-conviction court found the petitioner failed to prove his claims by clear and convincing evidence, and denied the petition.³ This timely appeal followed.

ANALYSIS

On appeal, the petitioner argues the post-conviction court erred in denying his petition, alleging the ineffective assistance of counsel he received at trial forced him to plead guilty prior to its conclusion. In support of his claim, the petitioner contends trial counsel failed to investigate whether the police tampered with the crime scene, failed to pursue an alibi defense at trial, and failed to present exculpatory evidence from the dashcam recordings of the petitioner's arrest. Similarly, the petitioner asserts his guilty plea "was not knowingly and voluntarily entered" as a result of trial counsel's deficiencies. The petitioner also alleges the trial court coerced him into pleading guilty. In contrast, the State contends the petitioner failed to present evidence of trial counsel's deficiencies or how their alleged deficiencies prejudiced his guilty plea. Upon our review, we agree with the State.

The petitioner bears the burden of proving his post-conviction allegations by clear and convincing evidence. *See* Tenn. Code Ann. § 40-30-110(f). The findings of fact established at a post-conviction evidentiary hearing are conclusive on appeal unless the evidence preponderates against them. *See Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996). This Court will not reweigh or reevaluate evidence of purely factual issues. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997). However, appellate review of a trial court's application of the law to the facts is *de novo*, with no presumption of correctness. *See Ruff v. State*, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel presents mixed questions of fact and law. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Thus, this Court reviews the petitioner's post-conviction allegations *de novo*, affording a presumption of correctness only to the post-conviction court's findings of fact. *See id.*; *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceedings. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that

³According to the petitioner's post-conviction evidentiary hearing testimony, he filed a motion to withdraw his guilty plea which was denied. However, no evidence exists in the record of the alleged motion to withdraw or its denial.

the standard for determining ineffective assistance of counsel applied in federal cases is also applied in Tennessee). The *Strickland* standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. In order for a post-conviction petitioner to succeed, both prongs of the *Strickland* test must be satisfied. *Id.* Thus, courts are not required to even "address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.*; see also *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (stating that "a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

A petitioner proves a deficiency by showing "counsel's acts or omissions were so serious as to fall 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 v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the *Strickland* test is satisfied when the petitioner shows there is a reasonable probability, or "a probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. However, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

A guilty plea must be knowingly, voluntarily, and intelligently entered in order to be valid. *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010). The court must determine whether the guilty plea evidences a voluntary and informed decision to pursue a guilty plea in light of the alternative options available to the defendant. *Id.* In the context of a post-conviction challenge to a guilty plea, both prongs of the *Strickland* test must be met. *Garcia v. State*, 425 S.W.3d 248, 256 (Tenn. 2013). Thus, to successfully challenge his guilty plea, the petitioner must show counsel's performance was deficient, and he "must establish a reasonable probability that, but for the errors of his counsel, he would not

have entered the plea.” *Adkins v. State*, 911 S.W.2d 334, 349 (Tenn. Crim. App. 1994) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)); *Garcia*, 425 at 257 (Tenn. 2013).

The petitioner claims counsels’ ineffective representation at trial left him with no choice but to plead guilty at the close of the State’s proof. Specifically, the petitioner asserts trial counsel failed to pursue his alibi defense, failed to physically investigate the crime scene to illustrate police tampering with the same, and failed to elicit exculpatory evidence from the dashcam recordings of his arrest. However, as explained by the post-conviction court, the alleged ineffectiveness highlighted by the petitioner is not supported by any evidence. The court explained:

[The] [p]etitioner did not present any proof to substantiate his allegation that the crime scene had been tampered with by officers or that any evidence had been fabricated. He did not present any proof that the officer’s dashcam recording would have been exculpatory or beneficial to his case. [The] [p]etitioner did not present any proof to support his contention of an alibi defense. [The] [p]etitioner did not present any proof that [the] [p]etitioner’s statement to police was fabricated.

...

Other than [the] [p]etitioner’s own conclusory statements, [the] [p]etitioner failed to present any proof how trial counsel’s investigation of the location where [the] [p]etitioner was arrested would have been beneficial to his defense. Trial counsel in this matter was appointed almost two years after the arrest date, due to the number of attorneys appointed and removed at [the] [p]etitioner’s request. Additionally, [the] [p]etitioner failed to present any proof that officers tampered with or fabricated evidence at the crime scene. [The] [p]etitioner failed to present any proof that the admission of the dashcam recording would have been beneficial or exculpatory to his case. Additionally, [the] [p]etitioner was never denied the admission of the dashcam audio during trial. [The] [p]etitioner chose to plead guilty before the start of his defense. [The] [p]etitioner also failed to establish how the admission of his cell phone would have been beneficial to his case. Had it corroborated that he visited a friend’s home immediately prior to arriving at the crime scene, as was his contention, this would not have substantiated an alibi defense. [The petitioner] does not deny being present at the crime scene when the business alarm caused the police to respond. Therefore, the [c]ourt finds that [the] [p]etitioner has not met his burden of proof as to these issues.

More specifically, regarding the alleged alibi defense and the supposed exculpatory dashcam recordings, the record indicates trial counsel effectively pursued these defense avenues to their limits. Trial counsel testified that the petitioner did not inform him of the alibi witness until trial. Upon learning of the alleged alibi witness, trial counsel attempted to substantiate the petitioner's claims by searching the petitioner's cell phone for evidence in support of the same.⁴ Trial counsel went to great lengths to charge the cell phone, but ultimately found no evidence in support of the alleged alibi witness and/or defense. Despite his lack of evidence of ineffectiveness, the petitioner still is not entitled to relief because he failed to present the alleged alibi witness at the post-conviction hearing. *See Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008) (In order "[t]o succeed on a claim of ineffective assistance of counsel for failure to call a witness at trial, a post-conviction petitioner should present that witness at the post-conviction hearing."). As to the purported exculpatory dashcam video, trial counsel testified that the video, in fact, provided no exculpatory evidence on behalf of the petitioner. The post-conviction court accredited trial counsel's testimony, and nothing in the record preponderates against its factual findings. *See Tidwell*, 922 S.W.2d at 500. Accordingly, the petitioner has not proven trial counsel was ineffective as to these evidentiary issues, and the petitioner cannot show how the unsubstantiated deficiencies of counsel caused him to plead guilty.

Turning to the guilty plea itself, nothing in the record indicates the plea was coerced or entered into involuntarily. The evidence produced during the hearing supports the finding that the petitioner was fully aware of the nature of the guilty plea. The post-conviction court succinctly described the guilty plea hearing, as follows:

This [c]ourt has reviewed the transcript of the guilty plea admitted as an exhibit to the post-conviction hearing. During the plea, the trial [c]ourt clearly explained to the [p]etitioner the nature of the charges, the ranges of punishment, and the rights that [the] [p]etitioner gave up due to his plea. [The] [p]etitioner confirmed to the [c]ourt that he discussed the plea with his attorney and that he understood his plea agreement. [The] [p]etitioner confirmed that he was entering his plea freely and voluntarily, and that the facts in the indictments were substantially correct. Finally, [the] [p]etitioner confirmed he wanted the [c]ourt to accept the plea and did not have any questions at the conclusion of the plea.

...

⁴According to the petitioner, his cell phone would have provided evidence of the alibi witness who could have explained why the petitioner was in the area of the crimes on the night in question.

With regard to the voluntariness of [the] [p]etitioner's plea, the [c]ourt finds that the [p]etitioner was fully advised of his rights and the ramifications of entering his plea. [The] [p]etitioner failed to present any proof that he was coerced or forced into entering his plea. [The] [p]etitioner admitted to being familiar with the criminal justice system through his prior convictions. The [c]ourt further finds trial counsel's testimony credible, as to his case preparation, consultations with [the] [p]etitioner, and trial strategy.

Our review of the transcript of the guilty plea hearing echoes the finding of the post-conviction court. The record shows the trial court properly and thoroughly explained the nature and consequences of the petitioner's guilty plea, including the charges against the petitioner, the penalties he faced as a result of the plea, and the consequences that such a plea could have on the petitioner in future criminal proceedings. Throughout the hearing, the petitioner repeatedly affirmed that he understood his rights and wished to proceed with the guilty plea. The petitioner has failed to offer any evidence that preponderates against the post-conviction court's characterization of the knowing and voluntary nature of the petitioner's guilty plea. *See Tidwell*, 922 S.W.2d at 500. As such, the record makes clear that the submission of the guilty plea was absent coercion and was performed thoroughly and properly by the trial court.

As explained above, the post-conviction court found that the petitioner knowingly, intelligently, and voluntarily entered his guilty plea. Once a guilty plea is knowingly, voluntarily, and intelligently entered it is not void simply because the petitioner is no longer happy with his decision. *Robert L. Freeman v. State*, No. M2000-00904-CCA-R3-PC, 2002 WL 970439, at *2 (Tenn. Crim. App. May 10, 2002). After reviewing the record and the determinations by the post-conviction court as to the credibility of the petitioner and trial counsel, the petitioner has failed to show that he received ineffective assistance of counsel or that his guilty plea was not knowingly, voluntarily, and intelligently entered. No evidence exists in the record to support his attack on trial counsels' performance or how the alleged deficient performance affected the outcome of his guilty plea. *See Strickland*, 466 U.S. at 687. Accordingly, the petitioner is not entitled to post-conviction relief.

CONCLUSION

Based upon the foregoing authorities and reasoning, the judgment of the post-conviction court is affirmed.

J. ROSS DYER, JUDGE