

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs October 3, 2023

FILED

10/10/2023

Clerk of the
Appellate Courts

WILLIAM HEATH v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Shelby County
No. 13-02933 Chris Craft, Judge**

No. W2022-01459-CCA-R3-PC

The Petitioner, William Heath, appeals from the Shelby County Criminal Court’s denial of his petition for post-conviction relief from his convictions for especially aggravated robbery, aggravated assault,¹ and reckless endangerment, for which he is serving an effective forty-year sentence. On appeal, he contends that the post-conviction court erred in “failing to view the cumulative effect of [his] claims as a constructive denial of the right to counsel.” We affirm the post-conviction court’s judgment.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., and J. ROSS DYER, J., joined.

Gerald S. Green (on appeal); and Constance Alexander (at hearing), Memphis, Tennessee, for the appellant, William Heath.

Jonathan Skrmetti, Attorney General and Reporter; Katharine R. Decker, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; Sam Winnig, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Defendant’s convictions relate to the Defendant’s invasion into the victim’s home under false pretenses of having to use the bathroom, during which he robbed and stabbed the elderly victim, a family friend. The Defendant was convicted by a Shelby County Criminal Court Jury, and his convictions were affirmed on appeal. *See State v. William Heath*, No W2015-01837-CCA-R3-CD, 2016 WL 6135519, at *1 (Tenn. Crim.

¹ This offense was merged with the especially aggravated robbery conviction.

App. Oct. 21, 2016), *perm. app. denied* (Tenn. Jan. 20, 2017). Thereafter, he filed a pro se petition for post-conviction relief, in which he alleged that he received the ineffective assistance of trial counsel and that he did not receive a fair trial due to the State's alleged discovery violations. Relative to his ineffective assistance of counsel claim, the Petitioner alleged that he received the ineffective assistance of counsel because his trial attorney (1) failed to file a motion for a bill of particulars, (2) failed to investigate various matters adequately in order to prepare a defense, and (3) failed to subject the State's case to the adversarial process, from which prejudice must be presumed pursuant to *United States v. Cronin*, 466 U.S. 648 (1984). Post-conviction counsel was appointed, and the matter proceeded to a hearing.

The Petitioner and trial counsel testified at the post-conviction hearing. In his testimony, the Petitioner detailed the ways in which he thought trial counsel's performance was ineffective, focusing on alleged failures to investigate and to pursue forensic testing of a stain on the Petitioner's jacket and the knife found at the victim's home after the attack. The Petitioner acknowledged that he and the victim had known each other for about twenty years, that he did odd jobs for the victim in exchange for "cigarettes and stuff like that," and that he was at her house almost daily. He agreed that counsel showed him the discovery materials. He said he declined a twenty-year plea offer. He acknowledged that the victim had given a statement to the police and that she had identified him as her attacker at the trial. He agreed that the victim identified the knife as hers. He said that counsel never talked to his mother but acknowledged that the information she could have provided would not have made a difference in the outcome of the case.

Trial counsel testified that he reviewed the discovery and discussed the case with the Petitioner. Counsel said his file had been destroyed in a flood of his office, and he acknowledged that, due to the unavailability of the Petitioner's case file, his testimony was based upon his recollection. He said that the trial court had approved funds for a private investigator, who was deceased by the time of the post-conviction hearing. Counsel recalled that the investigator was assigned to interview the Petitioner's mother, but counsel did not recall the specifics. Counsel acknowledged that he did not request forensic testing of the knife and the Petitioner's clothing. Counsel agreed that the jacket the Petitioner wore when he was located shortly after the offenses had a stain which appeared to be blood. Counsel said that the victim's testimony that the knife was hers had been a surprise and that he thought it was helpful to the defense because it cast doubt on the State's theory that the knife had been the one used in the attack. Counsel said that the victim's testimony contained inconsistencies but that they had not been enough to overcome the strength of the evidence provided by her identification of the Petitioner as her attacker. He said that the victim had been a sympathetic witness for the State.

The post-conviction court denied relief in a written order. The court outlined the trial and the post-conviction hearing proof and addressed the Petitioner's allegations of

ineffective assistance of counsel related to trial counsel's failure to file a motion for a bill of particulars and the failure to investigate the case. With regard to the failure to investigate, the court addressed the specific alleged deficiencies of investigation. The court made detailed findings of fact and conclusions of law in denying relief on each of the Petitioner's claims related to the bill of particulars and the investigation. The court did not directly address the Petitioner's remaining allegation that relief was required pursuant to *Cronic* because counsel had failed to subject the State's case to the adversarial process.

On appeal, the Petitioner contends that the post-conviction court erred in "failing to view the cumulative effect of Petitioner's claims as a constructive denial of the right to counsel and, consequently, a structural constitutional error requiring the granting of the relief prayed for in the Petition for Post-Conviction Relief." The State responds that the court properly denied relief on the individual claims and that the Petitioner was not entitled to relief based upon the cumulative effect of counsel's alleged deficiencies in performance.

Post-conviction relief is available "when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103 (2018). A petitioner has the burden of proving his factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f) (2018). A post-conviction court's findings of fact are binding on appeal, and this court must defer to them "unless the evidence in the record preponderates against those findings." *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); see *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's application of law to its factual findings is subject to a de novo standard of review without a presumption of correctness. *Fields*, 40 S.W.3d at 457-58.

To establish a post-conviction claim of the ineffective assistance of counsel in violation of the Sixth Amendment, a petitioner has the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see *Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). The Tennessee Supreme Court has applied the *Strickland* standard to an accused's right to counsel under article I, section 9 of the Tennessee Constitution. See *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner must satisfy both prongs of the *Strickland* test in order to prevail in an ineffective assistance of counsel claim. *Henley*, 960 S.W.2d at 580. "[F]ailure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). To establish the performance prong, a petitioner must show that "the advice given, or the services rendered . . . are [not] within the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); see *Strickland*, 466 U.S. at 690. The post-conviction court must determine if these acts or omissions, viewed in light of all of

the circumstances, fell “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. 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.” *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); *see Pylant v. State*, 263 S.W.3d 854, 874 (Tenn. 2008). This deference, however, 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). To establish the prejudice prong, a petitioner must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

The Petitioner’s argument touches on two related, but distinct, avenues for relief premised upon the ineffective assistance of counsel: (1) performance which was so lacking that it amounted to abandonment of a defendant at a critical stage of the proceedings, from which prejudice must be presumed pursuant to *Cronic*, and (2) prejudice which resulted from the cumulative effect of counsel’s various deficiencies of performance. The Petitioner’s argument conflates the two as a single basis for relief. We will address whether the Petitioner is entitled to relief under either theory.

A. Failure to Subject the State’s Case to Meaningful Adversarial Testing

As we have summarized above, a post-conviction petitioner alleging ineffective assistance of counsel must ordinarily establish both deficient performance of counsel and prejudice from the deficient performance. *See Strickland*, 466 U.S. at 687. In *United States v. Cronic*, the Supreme Court recognized a narrow category of cases which were exempt from the *Strickland* requirement that prejudice be shown. Those cases included ones in which: (1) a “complete denial of counsel” occurred, (2) “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing,” and (3) the trial circumstances are such that “the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Cronic*, 466 U.S. at 658-60; *see Howard v. State*, 604 S.W.3d 53, 58 (Tenn. 2020). In such cases, prejudice is presumed “without inquiry into the actual conduct of the trial.” *Cronic*, 466 U.S. at 661.

The Petitioner’s argument implicates the second *Cronic* category. In such cases “the attorney’s failure must be complete” and not merely “at specific points” in the proceedings.” *Bell v. Cone*, 535 U.S. 685, 697 (2002). As we have stated, the post-conviction court’s order denying relief did not explicitly address the Petitioner’s *Cronic* claim. However, the order contains the following findings, which are relevant to counsel’s efforts to test the State’s case at the trial:

[Trial counsel] did the best he could with the facts of this case, involving a very sympathetic victim who was very well acquainted with the petitioner, who was seriously injured by being stabbed in the neck and robbed of her disability check money and was left to die after her cell phone was removed out of her reach so that she would not be able to summon help. She was certain that the petitioner did this to her, and he was found shortly after the stabbing at her neighbor's house. She made a very credible witness at trial. The petitioner has suggested no alternative defense. His attorney pointed out various inconsistencies and tried to suggest insufficiency of proof in his closing argument, succeeding in having the Criminal Attempt: Murder First Degree reduced to misdemeanor reckless endangerment, but the jury believed the victim nevertheless regarding the especially aggravated robbery. The petitioner received a fair trial with a very experienced criminal trial attorney, and the State during this process did nothing wrong in violation of any of the petitioner's legal rights.

The post-conviction court's findings of fact and conclusions of law demonstrate that trial counsel did not completely fail to subject the State's case to meaningful adversarial testing. *See Cone*, 535 U.S. at 697. Indeed, the court found that trial counsel "did the best he could with the facts of this case" and that the Petitioner received a fair trial. Despite the post-conviction court's failure to address this issue specifically, the record supports a conclusion that the court determined the Petitioner was not entitled to relief on this basis.

B. Cumulative Effect of Alleged Deficiencies of Performance

In his brief, the Petitioner argues that relief is appropriate under the "cumulative error doctrine" and asks this court to reverse the post-conviction court's judgment or to remand the case "with instructions to analyze the cumulative effect of the Petitioner's claims."

In the context of a trial, the cumulative error doctrine requires relief when "multiple errors [are] committed in the trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76-77 (Tenn. 2010) (internal citations omitted); *see State v. Jordan*, 325 S.W.3d 1, 79 (Tenn. 2010) ("[T]he combination of multiple errors may necessitate . . . reversal . . . even if individual errors do not require relief.") (quoting *State v. Cribbs*, 967 S.W.2d 773, 789 (Tenn. 1998)).

In contrast, in the context of post-conviction review, "when an attorney has made a series of errors [at the trial] that prevents the proper presentation of a defense, it is appropriate to consider the cumulative impact of the errors in assessing prejudice" of an

ineffective assistance of counsel allegation. *Timothy Terell McKinney v. State*, No. W2006-02132-CCA-R3-PD, 2010 WL 796939, at *37 (Tenn. Crim. App. Mar. 9, 2010), *perm. app. denied* (Tenn. Aug. 25, 2010); *see State v. Taylor*, 968 S.W.2d 900 (Tenn. Crim. App. 1997). More than one instance of deficient performance, when considered collectively, can result in a sufficient showing of prejudice pursuant to *Strickland*. *Timothy Terell McKinney*, 2010 WL 796939, at *37; *see Taylor*, 968 S.W.2d at 909. The question is whether counsel’s deficiencies “cumulatively prejudiced . . . the right to a fair proceeding and undermined confidence in the outcome of the trial.” *Timothy Terell McKinney*, 2010 WL 796939, at *37. Counsel’s failure to conduct adequate pretrial preparation and investigation may establish prejudice pursuant to *Strickland*. *Id.*

In the present case, the Petitioner did not allege in his post-conviction petition or argue at the hearing that he was prejudiced due to the cumulative effect of multiple deficiencies in trial counsel’s performance. To the extent that the Petitioner’s argument raises this theory for the first time on appeal, our consideration of it is waived. *See T.R.A.P. 36(a)*; *see also State v. Johnson*, 970 S.W.2d 500 (Tenn. Crim. App. 1996) (“Issues raised for the first time on appeal are considered waived.”).

In consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

ROBERT H. MONTGOMERY, JR., JUDGE