

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
June 21, 2023 Session

FILED

10/03/2023

Clerk of the
Appellate Courts

ANTHONY TREMAYNE CARTWRIGHT v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Davidson County
No. 2016-D-2156 Steve R. Dozier, Judge**

No. M2022-00754-CCA-R3-PC

The Petitioner, Anthony Tremayne Cartwright, appeals from the denial of his petition seeking post-conviction relief from his convictions of aggravated assault and domestic assault, for which he received consecutive sentences of fourteen years and eleven months, twenty-nine days, respectively. He alleges that trial counsel's failure to investigate and present witnesses deprived him of his right to the effective 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, P.J., delivered the opinion of the court, in which KYLE A. HIXSON and MATTHEW J. WILSON, JJ., joined.

William H. Stover, Nashville, Tennessee, for the Appellant, Anthony Tremayne Cartwright.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General; and J. Wesley King, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

The facts giving rise to the Petitioner's convictions stem from two separate altercations between the Petitioner and the victim, Nakita Owens. The sole issue in this appeal is whether trial counsel was ineffective by failing to investigate and present witnesses to the altercation underlying the Petitioner's aggravated assault conviction. During this altercation on June 19, 2016, the Petitioner hit Owens after she tried to break his car window with a brick. Owens fell to the ground and her ear was partially ripped off.

See State v. Cartwright, No. M2019-00519-CCA-R3-CD, 2020 WL 2850975, at *1-4 (Tenn. Crim. App. June 2, 2020) (fully detailing facts as offered at trial).

At trial, the only witnesses that were present during the altercation were the Petitioner and Owens. Owens testified that she had planned to “kick [the Petitioner’s] ass” that night because he had been “messing around” with another woman. Id. at *1. She stated that she and the Petitioner were arguing, and she approached the Petitioner with a brick and tried to break his car window. Id. She then saw a “flash of white light” and “woke up on the ground.” Id. She refused to say whether the Petitioner was the person who hit her. Id. She admitted she was “tripping” during the altercation because she had consumed alcohol and Xanax. Id. She stated she had anger issues and, though she was not afraid of the Petitioner, he was “probably afraid of [her].” Id. at *2. The Petitioner testified that Owens was trying to hit him with the brick and he pushed her in self-defense. Id. at *4. The jury rejected the Petitioner’s self-defense claim and convicted him of aggravated assault for this altercation and domestic assault for the other altercation. After this court affirmed the Petitioner’s convictions, the Petitioner filed a petition for post-conviction relief.

The post-conviction court held an evidentiary hearing on April 14, 2022. At the hearing, four witnesses testified—the two witnesses that trial counsel allegedly failed to investigate or present at the Petitioner’s trial, the Petitioner, and trial counsel. The testimony relevant to the issue raised in this appeal is outlined below.

Shy Henderson testified that he was a “family friend” of the Petitioner and knew Owens from hanging out at the Petitioner’s grandmother’s house. At the time of the instant offenses, the Petitioner and Owens “talked,” but they were not having a sexual relationship. He had seen them in an altercation or argument “numerous times,” usually when Owens was drunk. He did not witness the altercation on June 19, 2016, but he arrived “after [] the commotion.” He later clarified on cross-examination that it was getting dark when he arrived, and he agreed that it would have been around 7:00 or 8:00 p.m. There were many people there, including Ontorio Pratt. When he later spoke with Pratt, it was his understanding that Pratt witnessed the altercation, along with “a lot more people.”

Henderson stated that after the Petitioner’s arrest, the Petitioner’s trial counsel called him. He gave trial counsel names and phone numbers of potential witnesses, including Ontorio Pratt. He later stated on cross-examination that he also gave trial counsel the names and numbers of “Tricia, Quantez Fite, [and] Granny B,” but they were now deceased. He also gave trial counsel his address. Trial counsel “had [him] get everybody that was over there” together. Henderson did, but trial counsel never called back to tell him the court date. He and the others assumed that they missed it. He never met trial

counsel in person. He was willing and available to testify on behalf of the Petitioner at trial but was not subpoenaed.

On redirect examination, Henderson stated that he did not remember the exact date of the altercation, but he remembered the altercation because others told him that Owens “came over there . . . drunk with all of the crazy stuff” and “got her face busted.” Though he did not see the altercation, he stated that “[s]he had been doing stuff like that. That [was] nothing new.” When he spoke with trial counsel before the Petitioner’s trial, he told him about Owens’ history of getting “drunk, talking crazy[,] [and] trying to fight all of the time.”

Ontorio Pratt testified that he witnessed the altercation between the Petitioner and Owens. Though he did not remember the exact date, it was during the summer of 2016. The day of the altercation, he was hanging out with the Petitioner on 17th Avenue North near the Petitioner’s grandparents’ house. He had never met Owens before she arrived that night. She was yelling and “going off.” Pratt stated that “[s]he had a brick in her hand” and was “trying to go at [the Petitioner] and hit him with the brick.” He did not remember anything specific she said, but she was “cussing [the Petitioner] up.” The Petitioner “just pushed her and she fell and [the] brick fell in her face.” Because it was dark, Pratt could not tell if Owens swung the brick at the Petitioner. He was across the street when he observed the altercation.

Pratt stated Owens was “most definitely” the initial aggressor. She got out of her car snapping and yelling. She picked up the brick while walking towards the Petitioner. The Petitioner was “[j]ust trying to get her to calm down.” When the brick hit Owens’ head, it was in her hand. Though Henderson contacted him, trial counsel never did. He never spoke to trial counsel about what he witnessed, though he was willing and available to testify at trial.

On cross-examination, Pratt repeated much of his earlier testimony about the altercation. He described Owens’ car speeding down the street and stopping out of nowhere. Owens got out arguing and yelling at the Petitioner. When asked who else was there, he replied “a lot of people” and provided the nicknames of two people that were now deceased, “Tooley and Monte Cane.” After the brick hit Owens, the Petitioner tried to help her up, but she did not want him to touch her. The Petitioner “just backed up” and Pratt “didn’t see him after that.” Owens got in the car and left. Pratt denied seeing any police. He also did not see any blood or notice that Owens’ “ear [was] kind of half hanging off.”

The Petitioner testified that the only times he met with trial counsel were in court and via video conferencing in the jail. Trial counsel was “just trying to get [the Petitioner] to plea” and never heard the Petitioner’s account. The Petitioner gave trial counsel the

name of several potential witnesses, including Henderson and Pratt. He did not have Henderson's phone number at the time, but trial counsel did contact Henderson. Trial counsel told the Petitioner that he had spoken with the witnesses but could not use them. At trial, the Petitioner's uncle and mother were present, but trial counsel said that he did not need them.

The Petitioner told trial counsel that Owens "was just somebody [he] was having sex with[.]" He stated that she had previously "beat [him] up" and had called the police on him numerous times. When he "[did not] want to mess with her [anymore]," she would "try to get [him] locked up[,]" just like this time." The Petitioner stated that he and trial counsel did not really talk about the altercation that occurred on June 19, 2016. They never discussed what the Petitioner was going to testify to at trial.

The Petitioner's summary of the altercation mirrored most of his trial testimony. He and Owens were supposed to go to a hotel room, so he went to her house to pick her up. He found her in her room "sweating real bad" and was unsure if she was alive. He told her to come outside and get some air. "[T]hen out of nowhere, she just start[ed] hitting[.]" He ran and got in the back seat of a car and locked the door. Owens opened the front passenger door and started hitting the Petitioner. The driver pulled away. The Petitioner asked the driver to stop on a nearby side street, and he ran to 17th Avenue, where his cousin's grandparents lived. He was standing there with a bunch of people when Owens came there "cussing, threatening, [and] swinging." She poured something on the back of his car. She grabbed a block and tried to break the car window, and the Petitioner grabbed the block and threw it. She then tried to break the windshield wiper. She swung at the Petitioner with a brick in her hand, so he pushed her in fear. She fell and just laid there. He insisted he did not hit her with the brick, and he "wouldn't have ran from [her house] if [he] wanted to fight her and beat her up." He told two "junkies" to look after Owens and to call an ambulance. He then left because he had been shot by a police officer before.

The Petitioner believed that Pratt's testimony would have helped his defense "tremendously" because Pratt would have had a better memory of the events at the trial. He thought the outcome would have been different because Pratt was an eyewitness that could have corroborated the Petitioner's account.

On cross-examination, the Petitioner testified that Henderson was there during the altercation but "probably didn't see it." The State then questioned the Petitioner about inconsistencies between his testimony and Pratt's. The Petitioner acknowledged that Pratt testified that Owens quickly got out of her car and picked up a brick on her way to the Petitioner, and that Owens drove away after. The Petitioner thought Pratt did not remember clearly because it was six years ago and suggested he may have "mixed up somebody [else's] situation with this one."

Trial counsel testified that he and the Petitioner “definitely had discussed everything” including both incidents charged, potential punishments, and plea offers. He thought the jury would not find Owens to be credible because she admitted to being intoxicated and acknowledged “that her story had changed . . . from the preliminary hearing.” Though the Petitioner told trial counsel that he was not going to take the stand, he declined the waiver “minutes before he ended up taking the stand.” They had been over the events repeatedly, so trial counsel told him “to just take the jury through what [] occurred that day.”

Trial counsel testified that he “certainly [makes] it [his] practice to always reach out to all witnesses.” He did not remember speaking with Henderson but stated that it was possible. He stated, “[I]f I did speak with him and [he] didn’t actually observe anything, he would have been taken off any potential witness list[.]” He did not recall getting a phone number for Pratt or speaking with him. He agreed that if he had other witness information, he would have tried to reach out to those witnesses. He visited the Petitioner in jail “plenty of times[.]” and there were “many court hearings where [he] would speak with [the Petitioner][,] sometimes an hour or so.”

On cross-examination, the Petitioner’s post-conviction counsel questioned trial counsel about the potential trial witnesses. Trial counsel could not recall if the Petitioner gave him names of individuals that were present during the altercation. He could not recall whether Henderson told him about other potential witnesses. However, he stated that he “certainly would have followed up and called anyone and everybody.” Potential witnesses, however, often do not answer the phone or return his calls. He also rules out some witnesses for various reasons. Trial counsel was unsure whether Pratt’s testimony would have been helpful if offered at trial. He stated that “it very well could have backfired to introduce somebody who has a different version of events from [the Petitioner],” but Pratt’s testimony may have prevented the Petitioner from having to testify, which “would have been most beneficial.”

The post-conviction court entered an order on May 18, 2022, denying relief. The post-conviction court noted that of the witnesses that trial counsel was allegedly ineffective in not investigating and presenting, “one was not present for the incident” and the other “gave a significantly different [account] than [the] Petitioner” and “would have testified in opposition to [the] Petitioner’s account.” The post-conviction court specifically accredited trial counsel’s testimony. Trial counsel testified that “he would have followed up on information provided for potential witnesses,” but “would not have used an individual who was not an eyewitness.” The post-conviction court found that trial counsel “did attempt to contact witnesses, [and rejected] witnesses who were unhelpful to the case.” It also highlighted that the “Petitioner’s own testimony [was] that trial counsel contacted

witnesses and made the decision to not use their testimony.” Because the Petitioner “failed to establish by clear and convincing evidence that trial counsel’s failure to call certain witnesses was deficient or caused [the] Petitioner prejudice,” the post-conviction court denied relief. The Petitioner filed a timely notice of appeal.

ANALYSIS

The Petitioner argues that he was denied the effective assistance of counsel when trial counsel failed to “investigate, locate, and subpoena witnesses” that were material to the Petitioner’s defense. He contends that trial counsel knew of two potential witnesses—Pratt and Henderson—that could have corroborated his self-defense claim, but trial counsel did not present them at trial. The State responds that the Petitioner cannot establish that trial counsel’s performance was deficient because trial counsel investigated potential witnesses and excluded those that could not provide helpful testimony. Additionally, the State contends that the Petitioner cannot establish prejudice because the testimony of Pratt and Henderson would not have helped the defense. We agree with the State.

A claim for post-conviction relief based on alleged ineffective assistance of counsel presents mixed questions of law and fact. Mobley v. State, 397 S.W.3d 70, 80 (Tenn. 2013) (citing Calvert v. State, 342 S.W.3d 477, 485 (Tenn. 2011)). We review the post-conviction court’s conclusions of law de novo, with no presumption of correctness. Id. The post-conviction court’s findings of fact, however, are conclusive on appeal unless the evidence preponderates against them. Calvert, 342 S.W.3d at 485 (first citing Grindstaff v. State, 297 S.W.3d 208, 216 (Tenn. 2009); and then citing State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999)). “Accordingly, appellate courts are not free to re-weigh or re-evaluate the evidence, nor are they free to substitute their own inferences for those drawn by the post-conviction court.” Whitehead v. State, 402 S.W.3d 615, 621 (Tenn. 2013) (citing State v. Honeycutt, 54 S.W.3d 762, 766 (Tenn. 2001)).

To obtain post-conviction relief, a petitioner must show that his or her conviction is void or voidable because of an abridgment of a constitutional right. Tenn. Code Ann. § 40-30-103. In this case, the Petitioner alleges that his constitutional right to the effective assistance of counsel was abridged. See U.S. Const. amend. VI; Tenn. Const. art. I, § 9. A petitioner alleging that they received the ineffective assistance of counsel must establish that: (1) counsel’s performance was deficient; and (2) the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996).

Counsel’s performance was deficient if “counsel’s representation fell below an objective standard of reasonableness.” Strickland, 466 U.S. at 687-88. In evaluating an attorney’s performance, “appellate courts must not use ‘20-20 hindsight.’” Nesbit v. State,

452 S.W.3d 779, 787 (Tenn. 2014) (quoting Mobley, 397 S.W.3d at 80). A fair assessment requires making every effort “to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” Strickland, 466 U.S. at 689. The court must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Id.

Counsel’s deficient performance prejudiced the defense if there is 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.” Id. at 694. If a petitioner fails to prove either prong of the Strickland test, the petitioner is not entitled to post-conviction relief. Goad, 938 S.W.2d at 370.

When a petitioner alleges that trial counsel failed to discover, interview, or present a witness at trial, the witness must be presented at the post-conviction hearing. Pylant v. State, 263 S.W.3d 854, 869 (Tenn. 2008) (citing Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990)). The post-conviction court must determine whether the witness’s testimony “would have been (1) admissible at trial and (2) material to the defense.” Id. If both prongs are satisfied, the post-conviction court must also determine whether the witness is credible. Id. at 869-70. If the post-conviction court determines that the testimony would have been inadmissible or “would not have materially aided the petitioner’s defense at trial,” the failure to present the witness was not deficient. Id. at 869.

Though the post-conviction court in this case failed to explicitly determine whether the testimony was admissible and material, its implicit finding was sufficient. See Garner v. State, No. W2011-01861-CCA-R3-PC, 2012 WL 2384058, at *10 (Tenn. Crim. App. June 25, 2012) (citing Seiber v. State, No. E2010-00285-CCA-R3-PC, 2011 WL 1484173, at *5 (Tenn. Crim. App. Apr. 19, 2011)) (“[A] written finding on this issue is not necessary to comply with the mandate of [Pylant]”). In finding that Henderson “was not present for the incident” and Pratt “gave a significantly different [account] than [the] Petitioner,” the post-conviction court implicitly found that the testimony would not have materially aided the Petitioner’s defense. Though the post-conviction court did not address the admissibility of the testimony, lack of materiality alone is sufficient to deny relief. See Pylant, 263 S.W.3d at 869.

The post-conviction court’s factual findings are supported by the record and demonstrate that trial counsel’s performance was not deficient. Though trial counsel did not remember the specifics of his investigation in this case, the post-conviction court accredited his general testimony about his investigation practices. The post-conviction court made no explicit finding about Henderson’s credibility or Pratt’s credibility, but

expressed concern about the inconsistencies between Pratt's account and the Petitioner's account.

The record suggests trial counsel investigated Henderson and decided not to present his testimony. Henderson testified that he did not witness the altercation between the Petitioner and Owens. Trial counsel testified that he "would not have used an individual who was not an eyewitness." Therefore, trial counsel's failure to present Henderson was a reasonable strategic decision. Henderson also testified that he gave trial counsel Pratt's name and phone number. Pratt testified that trial counsel never contacted him. Trial counsel testified, however, that he "would have followed up on information provided for potential witnesses" and witnesses often do not answer or return his phone calls. Either trial counsel's investigation did not uncover Pratt, or counsel attempted to but was unable to reach Pratt, the failure to investigate and present Pratt was not deficient. In either case, trial counsel's performance was not deficient.

Even if trial counsel's performance was deficient, it did not prejudice the Petitioner's defense. There is no proof that presenting Henderson and Pratt at trial would have created a reasonable probability of a different result. First, Henderson did not witness the altercation between the Petitioner and Owens. His testimony focused on the general nature of the Petitioner's relationship with Owens and her history of getting drunk and fighting the Petitioner. Second, the material aspects of Pratt's testimony were cumulative of Owens' testimony. Pratt testified that Owens was "most definitely" the initial aggressor. He described Owens "trying to go at [the Petitioner] and hit him with the brick," but he did not see whether she swung the brick at the Petitioner.

The jury heard similar testimony from Owens herself. Though Owens did not explicitly describe herself as the initial aggressor at trial, she acknowledged that during the argument, she approached the Petitioner with a brick and tried to break his car window. Cartwright, 2020 WL 2850975 at *1. She testified that she had planned to "kick [the Petitioner's] ass" that night because he had been "messing around" with another woman. Id. She admitted that she was "tripping" during the altercation because she had consumed alcohol and Xanax. Id. She also stated that she had anger issues and, though she was not afraid of the Petitioner, he was "probably afraid of [her]." Id. at *2. After hearing this testimony, the jury still rejected the Petitioner's claim of self-defense. Id. at *4. Since Pratt did not see Owens swing the brick at the Petitioner, the material aspects of his account are substantially similar to Owens' account. The testimony of both Pratt and Owens confirmed that Owens initiated the altercation, but could not corroborate the Petitioner's claim that Owens swung the brick at the Petitioner. Therefore, there is no reasonable probability that the testimony would have created a different result at trial, and the Petitioner is not entitled to relief.

CONCLUSION

Because the Petitioner has failed to establish that he received the ineffective assistance of counsel, the judgment of the post-conviction court is affirmed.

CAMILLE R. MCMULLEN, PRESIDING JUDGE