

FILED

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Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs April 25, 2023, at Knoxville

ROGER REED v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
Nos. 14-05946, 16-02946 James M. Lammey, Jr., Judge

No. W2022-01369-CCA-R3-PC

The petitioner, Roger Reed, appeals the Shelby County Criminal Court’s denial of post-conviction relief from his 2016 convictions of premeditated first degree murder, felony murder, and aggravated robbery, arguing that he was deprived of the effective assistance of counsel at trial. We affirm the judgment of the post-conviction court.

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

JAMES CURWOOD WITT, JR., P.J., delivered the opinion of the court, in which TIMOTHY L. EASTER, and TOM GREENHOLTZ, JJ., joined.

Donald Hackett, Memphis, Tennessee, for the appellant, Roger Reed.

Jonathan Skrmetti, Attorney General and Reporter; Brooke A. Huppenthal, Assistant Attorney General; Steven J. Mulroy, District Attorney General; and Justin Prescott, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case arose from an incident in which the petitioner and co-defendant, Lashonda Williams, murdered the victim, Don Reed, stole the victim’s cash and watch, and disposed of the victim’s body in a field. *State v. Roger Reed*, No. W2017-00266-CCA-R3-CD, 2018 WL 3689496 (Tenn. Crim. App., Jackson, July 31, 2018).

Evidence at trial showed that, in 2014, the victim approached the petitioner and Ms. Williams in the victim’s car and proposed having sex with them. *Id.* at *2. The petitioner “negotiated the details of the transaction,” and the petitioner and Ms. Williams “got into the car” with the victim. *Id.* The petitioner then shot and killed the victim with Ms. Williams’ gun, “moved the victim’s body into the backseat[,] and told Ms. Williams to drive,” directing her “to a field.” *Id.* “When they stopped, they dragged the victim from

the backseat and into the field before going through the victim's pockets. The [petitioner] took \$40 and the victim's watch and then directed Ms. Williams to drive the victim's car back to [the petitioner's] father's house." *Id.* The petitioner and Ms. Williams drove the victim's vehicle to Greenville, Mississippi, where they were ultimately apprehended after a pursuit. *Id.* at *1-2. The petitioner's fingerprints were discovered in the victim's car, and officers found the victim's watch in the petitioner's grandmother's house. *Id.* The petitioner and Ms. Williams had taken photographs of themselves "smiling and laughing" in the victim's vehicle. *Id.* at *2. The petitioner was convicted of first degree premeditated murder, felony murder, and aggravated robbery, and the trial court sentenced him to an effective sentence of life plus 21 years in prison. *Id.* at *4. This court affirmed the petitioner's convictions on direct appeal. *Id.* at *1.

The petitioner filed a timely pro se petition for post-conviction relief, alleging sentencing errors, insufficient evidence to support his convictions, and the ineffective assistance of counsel. After the appointment of counsel, he filed two amended petitions, incorporating all claims in his pro se petition and further fleshing out his claim of ineffective assistance of counsel.

At the bifurcated evidentiary hearing, the petitioner testified that he had been in a relationship with the co-defendant for five months prior to the murder of the victim. He said that the co-defendant was receiving disability payments for being "a slow learner" and that she took medication for mood issues. He also said that she was "up and down," had violent or aggressive outbursts, and behaved in an unpredictable manner. The petitioner complained that counsel did not fully explore the co-defendant's mood swings or pretrial change in medication that was occasioned to better control her mood swings. He also said that counsel failed to explore the co-defendant's suggestibility.

The petitioner testified that when he was arrested, he told the police where to find the murder weapon but that trial counsel failed to elicit testimony from police officers about his cooperation in locating the handgun. The petitioner said that counsel failed to discuss a trial strategy with him. He said that he made suggestions for a defense strategy but that counsel was not receptive. He denied that counsel ever told him about a plea offer. He said that counsel met with him possibly four times while the case was pending and that counsel did not write to or call him. The petitioner said that he was unaware that the victim was a known figure in the community but that counsel told him a change of venue was not possible. The petitioner also said that counsel failed to give him all of the discovery materials. He acknowledged that he viewed videos from the Texaco station and Regency Bank but said that counsel did not offer these videos into evidence at trial. He claimed that the videos should have been introduced at trial because they showed that the petitioner did not get into the victim's car.

The petitioner said that trial counsel did not explain his right not to testify at trial and told him that he had to testify despite the petitioner's unwillingness to do so. He said that counsel failed to call as witnesses the petitioner's father, stepmother, and brothers.

During cross-examination, the petitioner acknowledged that the trial court told him that no one could either make him testify or prevent him from doing so. He agreed that it was his decision to testify and that he could have testified even if counsel thought it was a bad idea. The petitioner acknowledged that the defense strategy was to show that he was not present when the co-defendant committed the murder but that the jail letters attributed to him "blew a hole" in the strategy, although he denied ever seeing the letters or writing them.

On redirect examination, the petitioner said that counsel did not attempt to procure an expert to testify about the co-defendant's medications. He also said that he felt pressured to testify at trial because counsel told him that he could not win if he did not testify.

Trial counsel testified that he was appointed to represent the petitioner. He said that he received discovery materials after filing a motion for discovery and that he reviewed the materials with the petitioner. Trial counsel said that the State made a plea offer of 25 years but that the petitioner rejected the offer even though counsel advised him that his chances at trial were not good. Counsel recalled that he often spoke with the petitioner's father and grandmother but did not recall how many times he spoke with the petitioner.

Trial counsel said that he explained to the petitioner the pros and cons of testifying, noting, "I think I left it to [the petitioner's] discretion." Counsel said that the petitioner had testified in a previous case that resulted in an acquittal, and counsel believed that the previous acquittal emboldened the petitioner to go to trial and testify. Trial counsel said that the defense strategy was to present evidence that the co-defendant killed the victim, removed the body, and picked up the petitioner afterward. Counsel said that the petitioner came up with this defense.

Trial counsel acknowledged that because the victim was a local pastor, the New York Post had covered the case. He said that he would not have delved deeper into the co-defendant's mental disability because it could have made her "look more sympathetic" to the jury. He also opined that the co-defendant's disability was not relevant to the defense theory that the co-defendant alone murdered the victim. He said that the co-defendant testified to the medications she was taking but acknowledged that he did not consult with an expert about those medications. He acknowledged that it could have been important if any of the medications were "antipsychotic" but said that at the time, he did

not think the co-defendant's medications were relevant to the trial strategy. Trial counsel said, "I think in the end it's those photographs" of the petitioner and co-defendant "smiling in the victim's car, which may or may not have been blood stained," that "were just troubling." He agreed that because the petitioner and the co-defendant blamed each other for the murder, anything that made the co-defendant less credible would have been useful. He said that he saw "no benefit" to presenting evidence that the petitioner led police to the murder weapon.

On cross-examination, counsel said that the petitioner had previously been acquitted of attempted carjacking. Counsel believed the acquittal emboldened the petitioner and said that the petitioner told him that he would plead guilty only to being an accessory after the fact.

The post-conviction court issued a written order denying post-conviction relief and incorporated its oral findings and conclusions from the evidentiary hearing. The post-conviction court found no instances of deficient performance by trial counsel, opining that counsel's only mistake was being unable to convince the petitioner to accept the 25-year plea offer. The court stated that the petitioner was the "architect of his own demise" and that taking the photographs was the worst thing he could have done. The court found that not presenting evidence that the petitioner showed the police where to find the handgun was a reasonable trial strategy because it "would be a double-edged sword" in that "[i]t just shows [that the petitioner] had it and he knew where it went." The court also noted that the petitioner did not cooperate with the police when "he jumped out of the car" and "hid in the woods" following a high-speed chase. The post-conviction court did not make specific findings of fact as to counsel's failure to present additional evidence on the co-defendant's mental illness and medications or his failure to present video evidence, but in denying relief, the court implicitly accredited counsel's testimony.

In this timely appeal, the petitioner reasserts his argument that trial counsel performed deficiently by failing to present evidence of the co-defendant's mental illness and medications, failing to present evidence that the petitioner cooperated with the police by leading them to the murder weapon, and failing to present video evidence of the co-defendant entering the victim's vehicle alone, and that the cumulative effect of counsel's errors prejudiced him. The State contends that the post-conviction court properly denied relief.

We view the petitioner's claim with a few well-settled principles in mind. Post-conviction relief is available only "when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. A post-conviction petitioner bears the burden of proving his or her factual allegations by clear and convincing evidence. *Id.*

§ 40-30-110(f). On appeal, the appellate court accords to the post-conviction court's findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). By contrast, the post-conviction court's conclusions of law receive no deference or presumption of correctness on appeal. *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).

Before a petitioner will be granted post-conviction relief based upon a claim of ineffective assistance of counsel, the record must affirmatively establish, via facts clearly and convincingly established by the petitioner, that “the advice given, or the services rendered by the attorney, are [not] within the range of competence demanded of attorneys in criminal cases,” see *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975), and that counsel's deficient performance “actually had an adverse effect on the defense,” *Strickland v. Washington*, 466 U.S. 668, 693 (1984). In other words, the 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. Should the petitioner fail to establish either deficient performance or prejudice, he is not entitled to relief. *Id.* at 697; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Indeed, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” *Strickland*, 466 U.S. at 697.

When considering a claim of ineffective assistance of counsel, a reviewing court “begins with the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all significant decisions,” *Kendrick v. State*, 454 S.W.3d 450, 458 (Tenn. 2015) (citation omitted), and “[t]he petitioner bears the burden of overcoming this presumption,” *id.* (citations omitted). We will not grant the petitioner the benefit of hindsight, second-guess a reasonably based trial strategy, or provide relief on the basis of 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). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

We agree with the post-conviction court that trial counsel's decision to omit evidence of the petitioner's leading police to the murder weapon was a sound, strategic decision because the evidence could have further implicated the petitioner and may not have had a positive effect in light of his attempting to flee from police. The record indicates that trial counsel's decision not to present additional evidence of the co-defendant's mental illness or medications was also a strategic one. Trial counsel testified that presenting such evidence could have made the co-defendant appear more sympathetic to the jury and that

the evidence was irrelevant to the trial strategy. This is precisely the sort of strategic decision that is left to the sound discretion of trial counsel. *See Adkins*, 911 S.W.2d at 347. Furthermore, the petitioner failed to present the expert testimony at the evidentiary hearing that he says trial counsel should have presented at trial, and we will not speculate as to the effect of a mental illness or certain medications on the co-defendant's behavior. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) ("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."). Similarly, because the petitioner failed to present the videos at the evidentiary hearing that he asserts counsel should have offered at trial, we will not speculate on their content or the effect they may have had at trial. *See id.*

Accordingly, the judgment of the post-conviction court is affirmed.

JAMES CURWOOD WITT, JR., PRESIDING JUDGE