

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
January 5, 2023 Session

FILED 02/08/2023 Clerk of the Appellate Courts
--

KEITH TRAMMELL v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 13-03215, 13-03989 Chris Craft, Judge

No. W2022-00042-CCA-R3-PC

The petitioner, Keith Trammell, appeals the denial of his post-conviction petition, arguing he received the ineffective assistance of counsel on direct appeal. Following our review, we affirm the post-conviction court’s denial of the petition.

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

J. ROSS DYER, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and JOHN W. CAMPBELL, SR., JJ., joined.

Ben Israel, Memphis, Tennessee, for the appellant, Keith Trammell.

Jonathan Skrmetti, Attorney General and Reporter; Andrew C. Coulam, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

The petitioner was convicted of theft of property valued over \$1,000, vandalism, and two counts of coercion of a witness, for which he received an effective term of twenty-four years’ incarceration. *State v. Keith Trammell*, No. W2014-02433-CCA-R3-CD, 2016 WL 690537, at *1 (Tenn. Crim. App. Feb. 19, 2016), *perm. app. denied* (Tenn. June 24, 2016). This Court affirmed the petitioner’s convictions on direct appeal, and the Tennessee Supreme Court denied his application for permission to appeal. *Id.* The underlying convictions stem from the petitioner’s attempting to steal an air conditioning condenser

unit from a home and subsequently sending threatening letters to the homeowner from the county jail. *Id.* at *1-*2.

The record shows that prior to trial the petitioner wrote numerous letters to the trial court complaining about trial counsel and requesting to have new counsel appointed. In a hearing held on May 14, 2014, the trial court noted its knowledge of the petitioner's complaints with counsel and provided the petitioner an opportunity to address the court. The petitioner told the court that he wanted to represent himself with the assistance of elbow counsel. After reviewing a number of questions with the petitioner and admonishing him that it was "a bad idea," the trial court agreed to the petitioner's request to represent himself and appointed another attorney, with whom the petitioner was not yet aggrieved, to serve as elbow counsel. The court then set the matter for trial.

On the trial date, which was approximately three months later, the trial court again cautioned the petitioner that the court did not think it was a good idea for him to represent himself and reiterated that the petitioner would be held to the same requirements as a lawyer. The petitioner maintained he still wanted to proceed pro se.

The petitioner was ultimately convicted, and the attorney who had served as elbow counsel represented the petitioner on direct appeal. On direct appeal, the petitioner, via appellate counsel, claimed the trial court erred in sentencing him as a career offender and in allowing evidence of uncharged crimes. *Id.* at *1.

The petitioner subsequently filed a pro se petition for post-conviction relief, signifying as grounds for relief on the pre-printed form that his conviction was based on the use of a coerced confession, his conviction was based on the failure of the prosecution to disclose favorable evidence, and the denial of effective assistance of counsel. In the memorandum attached to his petition, the petitioner specifically argued: (1) the trial court failed to establish a record that he had adequately and knowingly waived his right to counsel at trial and then denied the petitioner the right to testify in his own defense, and (2) he was denied the effective assistance of counsel at sentencing because his attorney failed to adequately investigate and pursue the State's plea offer or object to the petitioner's being sentenced as a career offender. (I: 11) Counsel was appointed to represent the petitioner and filed an amended petition alleging that the petitioner "was denied [the] effective assistance of counsel at trial in that he was not allowed to properly utilize elbow counsel; and . . . denied effective assistance at his sentencing hearing in that counsel . . . did not subpoena witnesses for the hearing."

The petitioner moved to have post-conviction counsel relieved and new counsel appointed, complaining that he had not met with or been in contact with post-conviction counsel and that the amended petition filed by post-conviction counsel "is merely

conclusory[] and fails to add any support to the original pleadings.” It appears that the petitioner’s motion for new counsel was denied or not addressed before the evidentiary hearing because post-conviction counsel represented the petitioner at the hearing. At the onset of the hearing, post-conviction counsel was allowed, without an objection by the State, to orally amend the amended petition to include an allegation that the petitioner “was never really properly advised what a limited role that the elbow counsel would play in the trial and actually what standard he would be held to.”

The petitioner was the only witness to testify at the evidentiary hearing. The petitioner said he made the decision to represent himself at trial “after a year and a half of [original trial counsel] not showing up and [the trial judge] getting mad.” The petitioner recalled that “it got pretty nasty” between original trial counsel and the petitioner. Because he was not happy with his original trial counsel and the trial court would not appoint a new attorney, the petitioner told the court he wanted to represent himself. The trial court appointed another attorney to serve as elbow counsel, but the petitioner “had to do everything [him]self.”

The petitioner testified that he did not actually understand that representing himself meant he would have to do everything and that he wanted elbow counsel to do certain things that elbow counsel was not allowed to do. He claimed the trial court never told him that he would be held to the same standard as a lawyer or explained what it meant for him to represent himself. According to the petitioner, all the court told him was “I would have to do all of my legal work. I couldn’t ask [elbow counsel] to do nothing for me.” However, via a series of questions by the State, the petitioner acknowledged the court told him that he would be responsible for representing himself, putting on witnesses to testify, and if he wanted to testify, he had to do so in question/answer format. He acknowledged the court also told him that elbow counsel was only available to help with process and procedure, like subpoenaing a witness or physically filing a motion the petitioner drafted, and could not make objections. The court also told the petitioner that he would be treated like the other lawyers and that elbow counsel could handle the trial for him if he changed his mind about representing himself.

After the petitioner concluded his testimony, the post-conviction court inquired into the petitioner’s earlier assertion that he wanted to have post-conviction counsel removed as his attorney. The petitioner explained that he and post-conviction counsel did not communicate and he “need[ed] a lawyer that [he] can communicate with.” However, the petitioner did not want a new hearing with a new attorney and wanted to have the hearing that was just conducted count as his post-conviction hearing. The petitioner said he was satisfied with the hearing and that there was no reason to have a new attorney appointed. In response to questioning by the court, the petitioner affirmed that post-conviction counsel did the job he was supposed to do and there was nothing else the petitioner wanted brought

out at the hearing that had not been addressed. The petitioner agreed for the court to show that the petitioner's motion for a new attorney "is moot because you had your hearing and you're fine with your hearing."

On December 10, 2021, the post-conviction court entered a written order denying the petition. The post-conviction court outlined the petitioner's primary claims as: the trial court (1) failed to establish a record that the petitioner had adequately and knowingly waived his right to counsel at trial and (2) never properly advised the petitioner what a limited role elbow counsel would play in the trial and the standard to which the petitioner would be held. The court determined both claims were "simply not supported by the record." In making this finding, the post-conviction court recounted the voir dire of the petitioner by the trial court on May 14, 2012, in which the petitioner was "extensively questioned" about his request for self-representation, including specific questions suggested by our legal precedent. The post-conviction court observed that the trial court again tried to discourage the petitioner from proceeding pro se on the day of trial and recounted that colloquy. The post-conviction court determined that "the petitioner was adequately advised and warned by the trial judge of the perils of self-representation and the different limitations on the roles of *pro se* counsel and advisory counsel." The post-conviction court also found that the petitioner offered no proof "concerning anything that occurred that denied the petitioner the utilization of elbow counsel."

Analysis

On appeal, the petitioner challenges the post-conviction court's finding that he received the effective assistance of counsel. The petitioner asserts appellate counsel rendered ineffective assistance by failing to argue that the petitioner's waiver of counsel at trial was unknowing and involuntary. The petitioner additionally asserts he is entitled to a new post-conviction hearing because post-conviction counsel did not represent him effectively or raise the aforementioned specific allegation. The State contends that the petitioner waived consideration of his ineffective assistance of appellate counsel claim by failing to raise it in the post-conviction court and that the petitioner is not entitled to a second evidentiary hearing due to his dissatisfaction with post-conviction counsel. Upon our review of the record and the applicable law, we agree with the State.

The petitioner bears the burden of proving his post-conviction factual allegations by clear and convincing evidence. 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. *Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996). This Court will not reweigh or reevaluate evidence of purely factual issues. *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. *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. *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); *State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting 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)).

The test used to determine whether appellate counsel was constitutionally effective is the same test applied to claims of ineffective assistance of counsel at the trial level. *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004). To establish a claim of ineffective assistance of counsel, the petitioner must show that: 1) counsel's performance was deficient; and 2) counsel's deficient performance prejudiced the outcome of the proceedings. *Strickland*, 466 U.S. at 687; *see Carpenter*, 126 S.W.3d at 886.

"Appellate counsel is not constitutionally required to raise every conceivable issue on appeal." *Carpenter*, 126 S.W.3d at 887 (citing *King v. State*, 989 S.W.2d 319, 334 (Tenn. 1999)). Generally, appellate counsel has the discretion to determine which issues to raise on appeal and which issues to leave out. *Id.* Thus, courts should give considerable deference to appellate counsel's professional judgment with regard to which issues will best serve the petitioner on appeal. *Id.* Appellate counsel is only afforded this deference, however, "if such choices are within the range of competence required of attorneys in criminal cases." *Id.*

When a claim of ineffective assistance of counsel is based on the failure of appellate counsel to raise a specific issue on appeal, the reviewing court must determine the merits of the issue. *Id.* "If an issue has no merit or is weak, then appellate counsel's performance will not be deficient if counsel fails to raise it." *Id.* Similarly, if the omitted issue has no merit then the petitioner suffers no prejudice from counsel's decision not to raise it. *Id.* If the issue omitted is without merit, the petitioner cannot succeed in his ineffective assistance claim. *Id.*

As asserted by the State, the petitioner, either pro se or through counsel, never alleged appellate counsel was ineffective for failing to challenge the adequacy of his waiver of counsel at trial. Instead, the petitioner challenged the adequacy of the waiver as a stand-alone issue and raised an ineffective assistance of counsel claim regarding the utilization of elbow counsel. Even post-conviction counsel's oral amendment at the evidentiary hearing was a freestanding challenge to the adequacy of the trial court's admonishments regarding the utilization of elbow counsel and standard to which the petitioner would be held at trial. The petitioner essentially attacked elements of his self-representation from various other angles but never from the angle alleged in this appeal. "[I]ssues not addressed in the post-conviction court will generally not be addressed on appeal." *Holland v. State*, 610 S.W.3d 450, 458 (Tenn. 2020) (quoting *Lane v. State*, 316 S.W.3d 555, 561-62 (Tenn. 2010)). Accordingly, we agree with the State that this issue is, therefore, not properly before this court and has been waived for consideration on appeal.

In addition, the petitioner's second issue regarding his entitlement to a new post-conviction hearing due to his dissatisfaction with post-conviction counsel is without merit. The record suggests that the petitioner is an individual who is chronically dissatisfied with

his attorneys. It is apparent that it was for this reason the post-conviction court had the petitioner clarify on the record that he was satisfied with the hearing that was conducted, he did not want to have the hearing all over again with a new attorney, and he wanted to have the hearing that was just conducted “count” as his post-conviction hearing. Further, the petitioner affirmed that post-conviction counsel did the job he was supposed to do and there was nothing else the petitioner wanted addressed that had not already been discussed at the hearing. Finally, the petitioner agreed for the post-conviction court to show the petitioner’s motion for a new attorney as “moot because you had your hearing and you’re fine with your hearing.” The petitioner cannot now claim he was not satisfied with post-conviction counsel and the hearing.

Moreover, “there is no constitutional entitlement to the effective assistance of counsel in a post-conviction proceeding.” *Frazier v. State*, 303 S.W.3d 674, 680 (Tenn. 2010). Tennessee Supreme Court Rule 28 section 6(C) provides that:

(2) Appointed or retained counsel shall be required to review the pro se petition, file an amended petition asserting other claims which the petitioner arguably has or a written notice that no amended petition will be filed, interview relevant witnesses, including petitioner and prior counsel, and diligently investigate and present all reasonable claims.

(3) Appointed or retained counsel shall file the certificate of counsel set forth in the appendix within thirty (30) days of either being retained or appointed to represent petitioner, except for good cause shown.

These rules “set forth a minimum standard of service to which post-conviction counsel is held,” and “do not provide any basis for relief from a conviction or sentence.” *Frazier*, 303 S.W.3d at 681. “All that due process requires in the post-conviction setting is that the defendant have ‘the opportunity to be heard at a meaningful time and in a meaningful manner.’” *Stokes v. State*, 146 S.W.3d 56, 61 (Tenn. 2004) (quoting *House v. State*, 911 S.W.2d 705, 711 (Tenn. 1995)). Specifically, a full and fair hearing only requires “the opportunity to present proof and argument on the petition for post-conviction relief.” *Id.* at 714. This Court has repeatedly held that a Rule 28 violation by post-conviction counsel, potentially aside from an egregious violation, does not entitle a petitioner to a second post-conviction hearing. *See, e.g., Joe L. Ford v. State*, No. W2022-00247-CCA-R3-PC, 2022 WL 6920402, at *6 (Tenn. Crim. App. Oct. 12, 2022); *Kenneth Brown v. State*, No. W2017-01755-CCA-R3-PC, 2017 WL 931735, at *12-*13 (Tenn. Crim. App. Feb. 22, 2019); *David E. Breeze v. State*, No. W2015-02251-CCA-R3-PC, 2017 WL 1907738, at *7 (Tenn. Crim. App. May 9, 2017), *perm. app. denied* (Tenn. Sept. 22, 2017). The petitioner received a full and fair hearing on his post-conviction petition and has failed to

show that post-conviction counsel was so extremely deficient as to mandate a second hearing.

Conclusion

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

J. ROSS DYER, JUDGE