

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 5, 2017

FILED

02/15/2018

Clerk of the
Appellate Courts

DARRELL M. ANDERSON v. STATE OF TENNESSEE

Appeal from the Circuit Court for Madison County
No. C-16-294 Roy B. Morgan, Jr., Judge

No. W2017-00922-CCA-R3-PC

The petitioner, Darrell M. Anderson, appeals the denial of his post-conviction petition, arguing the post-conviction court erred in finding he received effective assistance of counsel at trial. After our review of the record, briefs, and applicable law, we affirm the judgment of the post-conviction court.

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 JOHN EVERETT WILLIAMS and ALAN E. GLENN, JJ., joined.

Joseph T. Howell, Jackson, Tennessee, for the appellant, Darrell Anderson.

Herbert H. Slatery III, Attorney General and Reporter; Robert W. Wilson, Assistant Attorney General; Jody Pickens, District Attorney General; and Rolf Hazlehurst, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

A. Trial Proceedings and Direct Appeal

In 2013, a Madison County jury convicted the petitioner of attempted aggravated assault for which he received a sentence of twelve years, as a career offender. On appeal, this Court affirmed the petitioner's conviction. *State v. Darrell Anderson*, No. W2014-01626-CCA-R3-CD, 2014 WL 4608144, at *1 (Tenn. Crim. App. Aug. 3, 2015), *perm. app. denied* (Tenn. Dec. 10, 2015). The Court summarized the facts, as follows:

This case arose after the [petitioner] brandished a pistol and threatened the victim. On the afternoon of the incident, the victim noticed that another woman had parked her vehicle in the victim's parking space. The victim asked the woman why she was parked in that spot, and an altercation ensued. The victim and the other woman exchanged blows, and the victim was taken to the ground. She estimated that the fight lasted three to five minutes. The victim's fiancé exited their home and separated the two women. The victim's grandmother also interceded to break up the fight.

The victim returned to her home and went inside. About forty-five minutes later, the victim was walking back and forth between her front yard and her porch discussing the fight with her mother and several others. She noticed a green BMW driving down the street at a high rate of speed. She saw the [petitioner] exit the vehicle and display a pistol. The victim heard the [petitioner] say that he "would light this b***h up." The victim believed that the [petitioner] meant that he would fire the gun at her and her home. Once the victim saw the pistol, she "immediately" ran into her house. She explained that the pistol was not aimed directly at her but that it was pointed "[u]p at" the victim and the others on the porch. The victim testified that she felt "[s]cared for [her] life" and "threatened." She believed that the [petitioner] was "[a]bout ten feet" away from her when she saw the gun, and she estimated that she was able to see the [petitioner] for "[m]aybe 30 seconds to a minute."

Elisa Gray, the victim's mother, testified that she was in the victim's yard when she saw a green car "driving really fast" pull up beside the yard of the victim's next door neighbor. She saw the [petitioner] exit the vehicle with a gun, and she heard him cock the weapon. She also heard the [petitioner] say "something about lighting it up or something like that." She testified that she "was about six to eight feet away from" the [petitioner] at the time. She recalled that the victim ran into her house as soon as the [petitioner] got out of his vehicle with a gun. She was able to memorize the [petitioner]'s license plate number, and she later gave the number to police.

Laura Paar, a member of the Jackson Police Department, responded to a call at the victim's residence. She interviewed the victim, who was "very distraught" and "[f]rantic." She also interviewed other witnesses who were present and obtained a physical description of the [petitioner], along with his license plate number. She issued a "BOLO" containing the

[petitioner]’s physical description and license plate number. Based on Officer Paar’s report, Sergeant Chris Chestnut later compiled a photographic lineup that included a photograph of the [petitioner]. He showed the lineup to the victim, and she identified the [petitioner].

The [petitioner] did not present any proof. At the conclusion of the trial, the jury found the [petitioner] not guilty of the charge of aggravated assault but convicted him of the lesser included offense of attempted aggravated assault.

Id. at *1-2.

B. Post-Conviction Proceedings

The petitioner timely filed a *pro se* petition for post-conviction relief alleging numerous claims of ineffective assistance of counsel. After the appointment of counsel, the petitioner filed three amended post-conviction petitions raising a total of eleven claims relating to the effectiveness of trial counsel.

During the April 21, 2017 post-conviction hearing, the petitioner testified trial counsel was ineffective for failing to call Nora Jones and Renee Parker as witnesses during his trial. Ms. Jones was dating the petitioner at the time and Ms. Parker is Ms. Jones’ sister. According to the petitioner, Ms. Jones and Ms. Parker were eye-witnesses to the incident and would have testified that the victim was the first aggressor. The petitioner also claimed trial counsel should have objected to the victim’s inconsistent testimony, specifically the fact the victim claimed she saw the petitioner with a gun but also testified she was in the house during the incident.

Next, the petitioner testified he witnessed, and in turn informed trial counsel, that members of the jury “mixed and mingled” with the State’s witnesses during a recess. Despite being notified by the petitioner of what he had witnessed, trial counsel failed to object and/or inform the trial court.

The petitioner also testified trial counsel was ineffective for failing to hire an investigator to conduct background checks on the State’s witnesses. According to the petitioner, an investigation into the State’s witnesses would have revealed the victim and her family “had been problematic through the system throughout the years.” Without expounding, the petitioner claimed they were involved in “gang violence, a shooting, intimidating people.”

Next, the petitioner, while admitting that he would not have pled guilty, testified trial counsel was ineffective for failing to negotiate his case. The petitioner also testified trial counsel failed to communicate with him. The petitioner stated trial counsel never visited him in jail, and they would only talk right before a hearing. Had trial counsel met with the petitioner, they could have adequately attacked the issue of witnesses mixing with the jury.

The petitioner also claimed trial counsel was ineffective for failing to file a motion to suppress the photographic lineup. According to the petitioner, his due process rights were violated because he did not have an attorney present when the police presented the photo array to the victim. The petitioner also stated that counsel should have moved to suppress the petitioner's prior conviction because it was over 10 years old.

Finally, the petitioner testified that counsel failed to challenge a female juror who was the victim of an assault. The petitioner informed trial counsel that he wanted the juror removed but was told he did not have any challenges remaining.

The petitioner then called Brian Armstrong as a witness. Mr. Armstrong testified that he was a friend of the petitioner and that the two were Masons together. Mr. Armstrong also claimed that he witnessed one of the "jurors [speak] with a witness or the prosecutor" in the courtroom during a recess. Mr. Armstrong did admit, however, that he was "foggy" on the details now.

The final witness to testify during the post-conviction hearing was trial counsel. Trial counsel testified he was provided with open-file discovery from the State, copied the discovery, and provided a copy of the discovery to the petitioner. Trial counsel also testified that he met with the petitioner on numerous occasions. According to trial counsel, the petitioner was out on bond prior to and during trial, and the two of them met regularly at trial counsel's office. The petitioner's bond was not revoked until after the guilty verdict was returned by the jury.

Trial counsel also testified that he discussed the possibility of a plea agreement with the State and the petitioner. However, the petitioner "was adamant that he did not want to negotiate, did not want to accept a plea offer, and wanted to go to trial."

Concerning Ms. Jones and Ms. Parker, trial counsel testified that the petitioner's two friends had been involved in an altercation with the victim earlier that day. However, at the direction of the petitioner, Ms. Jones and Ms. Parker left the scene and, therefore, were not eyewitnesses to the events surrounding the petitioner's later interaction with the victim.

Finally, trial counsel testified that he was never informed about members of the jury mingling with the State's witnesses or the prosecution.

Analysis

On appeal, the petitioner asserts the post-conviction court erred in denying his petition for post-conviction relief, alleging trial counsel failed to inform him of the nature of the charges; failed to provide him with a copy of discovery; failed to file a motion to suppress the photographic lineup; only met with the petitioner on court dates; failed to strike a female juror who was the victim of an assault; failed to properly investigate his case; failed to call certain witnesses; failed to object to prosecutorial misconduct when members of the jury spoke with witnesses; and failed to object when a State's witness, Sergeant Chris Chestnut, perjured himself. The State asserts the petitioner failed to present clear and convincing evidence demonstrating trial counsel was deficient or how trial counsel's alleged deficiencies prejudiced his trial. Upon our review, we agree with the State.

To obtain relief in a post-conviction proceeding, a petitioner must demonstrate that his or her "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." Tenn. Code Ann. § 40-30-103. The post-conviction petitioner bears the burden of proving his allegations of fact by clear and convincing evidence. *See* Tenn. Code Ann. § 40-30-110(f). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010) (quoting *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009)).

Appellate courts do not reassess the trial court's determination of the credibility of witnesses. *Dellinger v. State*, 279 S.W.3d 282, 292 (Tenn. 2009) (citing *R.D.S. v. State*, 245 S.W.3d 356, 362 (Tenn. 2008)). Assessing the credibility of witnesses is a matter entrusted to the trial judge as the trier of fact. *R.D.S.*, 245 S.W.3d at 362 (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. *See Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case 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, which presents mixed questions of fact and law, is reviewed de novo, with a presumption of

correctness given only to the post-conviction court's findings of fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001); *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and article I, section 9 of the Tennessee Constitution both require that criminal defendants receive effective assistance of counsel. *Cauthern v. State*, 145 S.W.3d 571, 598 (Tenn. Crim. App. 2004) (citation omitted). When a petitioner claims he received ineffective assistance of counsel, he has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. *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 the same standard for determining ineffective assistance of counsel applied in federal cases also applies 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.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). With regard to the standard, our supreme court has held:

[T]he assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. . . . Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations.

Finch v. State, 226 S.W.3d 307, 315-16 (Tenn. 2007) (quoting *Baxter*, 523 S.W.2d at 934-35).

When reviewing trial counsel's performance, this Court "must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from the perspective of counsel at that time." *Howell v. State*, 185 S.W.3d 319, 326 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 689). The fact that a trial strategy or tactic failed or was detrimental to the defense does not, alone, support a claim for ineffective assistance of counsel. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). Deference is given to sound tactical decisions made after adequate preparation for the case. *Id.*

To satisfy the prejudice prong of the test, the petitioner "must establish a reasonable probability that but for counsel's errors the result of the proceeding would have been different." *Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 694). "A 'reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). In order to prevail, the deficient performance must have been of such magnitude that the petitioner was deprived of a fair trial and that the reliability of the outcome was called into question. *Finch*, 226 S.W.3d at 316.

Courts need not approach the *Strickland* test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697; *see also Goad*, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

Other than the "foggy" recollection of Mr. Armstrong concerning the petitioner's allegation that members of the jury "mixed and mingled" with the State's witnesses, the petitioner failed to offer any proof in support of most of his claims. More specifically, the petitioner failed to call Ms. Parker and Ms. Jones despite his claim counsel should have called them at trial; he failed to present any proof substantiating his claim that counsel was ineffective for failing to hire an investigator to do background checks on the State's witnesses; and he offered no proof showing Sergeant Chestnut perjured himself at trial. When a petitioner contends trial counsel failed to discover, interview, or present witnesses in support of his defense, the petitioner must call those witnesses to testify at an evidentiary hearing. *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). This is the only way the petitioner can establish that:

(a) a material witness existed and the witness could have been discovered but for counsel's neglect in his investigation of the case, (b) a known witness was not interviewed, (c) the failure to discover or interview a witness inured to his prejudice, or (d) the failure to have a known witness

present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of [p]etitioner.

Id. Even if a petitioner is able to show counsel was deficient in the investigation of the facts or the calling of a known witness, the petitioner is not entitled to post-conviction relief unless he produces a material witness at his post-conviction evidentiary hearing who “could have been found by a reasonable investigation” and “would have testified favorably in support of his defense if called.” *Id.* at 758. Without doing this, the petitioner cannot establish the prejudice requirement of the two-prong *Strickland* test. *Id.*

The petitioner also contends trial counsel was ineffective by failing to meet with him while he was in jail prior to trial, failing to provide him with discovery, and failing to explain the nature of the charges against him and, therefore, he could not properly prepare a defense for trial. However, both the post-conviction court and trial counsel noted that the petitioner was out on bond prior to and during trial and that the petitioner’s bond was not revoked until after the jury returned a guilty verdict. Additionally, trial counsel testified that he was provided with open file discovery from the State, made a copy of the discovery for the petitioner, and discussed the discovery with the petitioner, and the post-conviction court accredited the testimony of trial counsel over that of the petitioner. The petitioner also claims counsel was ineffective for failing to file a motion to suppress the photographic line-up because the petitioner and/or his attorney were not present when the police presented the line-up to the victim. However, “there is no Sixth Amendment right to have defense counsel present when the State provides a pretrial photographic display to a witness.” *State v. Blye*, 130 S.W.3d 776, 781 (Tenn. 2004) (citing *United States v. Ash*, 413 U.S. 300, 321 (1973); *Houston v. State*, 567 S.W.2d 485, 488 (Tenn. Crim. App. 1978)). As found by the post-conviction court, the petitioner has failed to carry his burden of proof establishing deficiency on the part of trial counsel. Therefore, the petitioner is not entitled to relief on these claims as well.

The petitioner’s final claims relate to the jury at his trial. First, the petitioner contends trial counsel was ineffective for failing to strike a female juror who was allegedly the victim of an assault. Initially, we note that the petitioner put on no proof concerning this juror, the facts surrounding her assault, or how, if at all, the juror’s prior experience may have influenced the verdict. Furthermore, as noted by the post-conviction court in denying relief on this claim, the record reveals that the petitioner exhausted all of his preemptory challenges at trial. Therefore, the only way trial counsel could have challenged the juror is for cause. Yet, as noted above, the petitioner failed to present any proof concerning the juror’s assault case and/or how that experience may have influenced the juror’s verdict. Accordingly, even if counsel were deficient in failing

to make a challenge for cause, the petitioner has failed to establish prejudice and, therefore, is not entitled to relief.

Finally, the petitioner argues counsel was ineffective for failing to object when members of the jury were allegedly seen talking with some of the State's witnesses during the trial. Trial counsel testified that he never witnessed any mingling between the State's witnesses and the juror and was never informed of such by the petitioner. In denying relief on this claim, the post-conviction court noted the petitioner offered "no actual proof" of what occurred other than his testimony and Mr. Armstrong's "foggy" recollection of the events. The petitioner did not call a member of the jury or the State's witnesses he claimed were talking to the jury members. Additionally, the trial court concluded,

[t]here's been not one iota of proof there was any misconduct in this case between any juror and anyone else, and again, the Court emphasizes the admonitions were given to the jury. I even find some discrepancies in what [the petitioner] claims and what his own witness, Mr. Armstrong, testified to today. I know they're Masonic brothers, but the point is, Mr. Armstrong wasn't even sure whether it was – at one point in his testimony, a witness or a prosecutor talking to a juror, and he couldn't hear anything. . . . There's just nothing offered today for this Court to consider for the record based on the testimony of [the petitioner] and Mr. Armstrong to say there's any weight to be given as far as proof in this case for justification of post-conviction.

Based on the proof presented, we agree with the post-conviction court's determination that the petitioner has failed to establish by clear and convincing evidence his factual allegation that members of the jury spoke and mingled with the State's witnesses during the petitioner's trial. Accordingly, the petitioner has failed to meet his burden of proof and is not entitled to relief.

CONCLUSION

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

J. ROSS DYER, JUDGE