

FILED

04/24/2020

Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs October 2, 2019

RODRIQUEZ MCNARY v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 14-02782 J. Robert Carter, Jr., Judge

No. W2019-00048-CCA-R3-PC

Petitioner, Rodriquez McNary, appeals the denial of his petition for post-conviction relief. Following a jury trial, Petitioner and his two co-defendants were convicted of two counts of attempted first-degree murder, one count of aggravated assault, and one count of reckless endangerment. Defendant and one of his co-defendants were also convicted of one count of employing a firearm during the commission of a dangerous felony. The third co-defendant was convicted of employing a firearm during the commission of a dangerous felony after having been previously convicted of a felony and of possessing a firearm after having been convicted of a felony involving the use or attempted use of violence. Petitioner was sentenced to an effective forty-one-year sentence. On appeal, this court held that the evidence was insufficient to support Petitioner's conviction for employing a firearm during a dangerous felony and reversed and remanded the case for a new trial on the lesser-included offense of possession of a firearm during the commission of a dangerous felony. Petitioner's remaining convictions were affirmed. *State v. Dantario Burgess, et al.*, No. W2015-00588-CCA-R3-CD, 2017 WL 417231, at *1-10 (Tenn. Crim. App. Jan. 31, 2017). Petitioner contends on appeal that the post-conviction court erred in denying the petition for post-conviction relief because the post-conviction court erred in failing to find prosecutorial vindictiveness, and he was denied effective assistance of counsel. Following a review of the briefs and the record, we affirm the judgment of the post-conviction court.

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

THOMAS T. WOODALL, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Robert Golder, Memphis, Tennessee, for the appellant, Rodriquez McNary.

Herbert H. Slatery III, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Background

Trial

The complete facts underlying Petitioner's convictions were set forth by a panel of this court on direct appeal. *State v. Dantario Burgess, et al.*, No. W2015-00588-CCA-R3-CD, 2017 WL 417231, at *1-10 (Tenn. Crim. App. Jan. 31, 2017). A brief synopsis of the facts is also set out in this court's decision:

The evidence presented at trial established that on March 10, 2013, the Defendants and co-defendant Benjamin Bohannon shot at a group of people at an apartment complex and then fled in Mr. Jones-Cage's vehicle. The group included Mr. Demarcus Thomas, Ms. Shanna Niter, Ms. Niter's two year-old son J.N., Ms. Brittany Hervery, and Ms. Hervery's two-month-old daughter J.H. Mr. Thomas sustained multiple gunshot wounds to the face and head. He survived the shooting but requires twenty-four-hour care as a result of the injuries. Ms. Niter sustained a graze gunshot wound to her right side.

Id. at *1.

Post-Conviction Hearing

At the post-conviction hearing, Petitioner testified that trial counsel represented him at trial and on appeal. He was represented by someone else at the preliminary hearing. He said that trial counsel did not explain criminal responsibility to him.

Petitioner testified that he did not want to go to trial. He said: "Because I feel like I couldn't win because I had witnesses saying this and another witness saying I did and two of the witnesses saying I didn't. And I feel like I was in a lose/lose situation because it was my word against theirs." Petitioner testified that the original indictment against him was for "criminal attempt second degree murder, aggravated assault, reckless endangerment." A superseding indictment charged him with "[t]wo counts of criminal attempt first degree murder, one count of employment of a firearm, one count of aggravated assault, and one count of reckless endangerment." Petitioner testified that the plea offer on the first indictment was for ten years at thirty percent. He said: "I was told I

couldn't sign for it because my charge partners wouldn't sign for their time." He also said that trial counsel never discussed an open plea with him.

Petitioner testified that there was a plea offer on the superseding indictment for twenty years at thirty percent, and a couple of months later he was offered fifteen years at thirty percent. He said: "When I tried to sign for it, I was told the same thing. I couldn't sign because my two charge partners wouldn't cop for that." Petitioner testified that he would have accepted the fifteen-year offer. He said that approximately one month before trial, the State made a plea offer of ten years at thirty-percent in exchange for his testimony. Petitioner testified that on the day of trial, the State offered him thirteen and a half years in exchange for his testimony. He said that he could not testify because "[e]verything dealing with the case was gang related" and that testifying would have put his "life in jeopardy." Petitioner asserted that trial counsel did not do anything at trial but make an opening and closing statement. He said that trial counsel did not cross-examine any witnesses.

Petitioner testified that trial counsel told him that he was to be sentenced as a Range II offender even though Petitioner had no other convictions. He said that trial counsel did not do anything during the sentencing hearing. Petitioner testified that trial counsel filed a motion for new trial, but they did not discuss what to include in the motion. Petitioner received a copy of the motion after it was filed.

On cross-examination, Petitioner agreed that defense counsel for his co-defendants cross-examined witnesses. In addition to those questions, Petitioner wanted his trial counsel to ask: "The ones revolving around me and what I supposed [sic] to had did or done. Anything based around me to get them, like, say I did anything, you know what I'm saying, to prove the point that I didn't do nothing."

Trial counsel testified that he had practiced law for twenty-one years, and one-hundred percent of his practice is criminal law. He began representing Petitioner some time after the preliminary hearing and represented him throughout the appellate process. Trial counsel testified that he and Petitioner discussed the theory of criminal responsibility and that Petitioner was probably the least culpable of all co-defendants in the case. It was his opinion that it was not in Petitioner's best interest to go to trial because the State would not sever the cases. Trial counsel testified that any guilty plea offers "were really contingent upon everyone pleading, therefore, we never got to that point." Trial counsel continued to negotiate for a plea offer "up until the last minute." Trial counsel testified:

I personally felt like I had a good relationship with [Petitioner], and I felt like he wanted to accept a plea of some sort up until the last minute.

However, the State was never willing to sever. And then at the last minute in addition to that he decided he wanted to go to trial also.

Trial counsel testified that there were several plea offers in Petitioner's case. However, there was never a firm offer from the State in exchange for Petitioner's testimony. He explained to Petitioner that he thought the range in exchange for Petitioner's testimony would "probably be from 13 and a half to 20 years if he took the stand and gave truthful testimony." Trial counsel did not recall a plea offer of ten years in Petitioner's case.

Trial counsel testified that he and Petitioner had "very limited" conversations about the issues to be raised in the motion for new trial. He did not recall exactly what was said. Trial counsel testified that the trial strategy was that Petitioner was the least culpable of the co-defendants. He said:

And although that's a tough theory, the State has the advantage of the theory of criminal responsibility of the conduct of another, I think sometimes the jurors can differentiate and give each defendant a level of culpability or a level of what they're responsible for. So that would have been our hope is that they would have, you know, since he didn't - - no one identified him as firing a weapon, he was just there wrong place, wrong time possibly, that they would find him guilty of lesser included charges.

Trial counsel testified that there was extensive cross-examination of witnesses by co-defendants' counsel. He did not want to unnecessarily question those witnesses who did not implicate Petitioner in order to give them an opportunity to change their testimony. Trial counsel testified that he did not consider filing any sort of motion or action concerning the State's unwillingness to sever the co-defendants. He said that he did not like it when the State filed last-minute superseding indictments. However, he did not see anything that he thought would provide Petitioner relief on that. He did not feel that it would be fruitful to raise the issue at trial or in the motion for new trial.

On cross-examination, trial counsel testified that Petitioner received multiple plea offers from the State, but he did not recall a ten-year offer. Trial counsel testified that he and the State had numerous conversations prior to the superseding indictment. Concerning the superseding indictment, trial counsel said: "I'm sure I conveyed the fact that I don't appreciate it. I don't. I don't appreciate it when prosecutors do a superseding indictment, especially at the last minute. I don't like it. I don't think any of us at the bar like it." Trial counsel did not know why the State sought a superseding indictment. When asked if the indictment occurred because Petitioner rejected the plea offers, trial counsel testified:

Well not that I know for sure. I always personally as a defense lawyer feel like that plays a role. I would be naïve not to think that in my heart, you know. But I hope it doesn't. But as I said, I don't like superseding indictments. But she didn't tell me, hey I'm going to punish you for not -- my client [Petitioner] was always receptive to whatever I had to say as far as up until the very end, as far as what I suggested he should do, the path that we should take. But back to the point about the superseding indictment, [the prosecutor] never communicated with me that she was doing it for any purpose that I can remember.

On re-direct examination, trial counsel acknowledged that there was a new prosecutor assigned to Petitioner's case who reviewed the case and sought the superseding indictment. He further asserted: "And, you know, the thing is like I said there are other players in the picture. There's other co-defendants. And I believe if there was any ill will it was towards those, you know. The other co[-]defendants were the cogs in the wheel."

Analysis

Petitioner appeals the judgment of the post-conviction court denying him relief for his claims of prosecutorial vindictiveness and ineffective assistance of counsel. Petitioner argues that the post-conviction court erred by failing to find that the State's decision to seek a superseding indictment against him for two counts of attempted first degree murder, aggravated assault, reckless endangerment, and employing a firearm during the commission of a felony gives rise to prosecutorial vindictiveness. He further argues that his trial counsel's representation fell outside the range of acceptable professional performance for failing to move for a dismissal of the superseding indictment based on prosecutorial vindictiveness.

A post-conviction petitioner bears the burden of proving his or her allegations of fact by clear and convincing evidence. T.C.A § 40-30-110(f); *Dellinger v. State*, 279 S.W.3d 282, 293-94 (Tenn. 2009). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009) (quoting *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998)). In an appeal of a court's decision resolving a petition for post-conviction relief, the court's findings of fact "will not be disturbed unless the evidence contained in the record preponderates against them." *Frazier*, 303 S.W.3d at 679.

A petitioner has a right to "reasonably effective" assistance of counsel under both the Sixth Amendment to the United States Constitution and article I, section 9 of the

Tennessee Constitution. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). The right to effective assistance of counsel is inherent in these provisions. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *Dellinger*, 279 S.W.3d at 293. When a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. at 687; see *Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). Failure to satisfy either prong results in the denial of relief. *Id.* at 697.

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, 370 (Tenn. 1966) (*citing Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). Furthermore, the reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, *see Strickland*, 466 U.S. at 690, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. *See Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). The prejudice prong of the test is satisfied by showing a reasonable probability, *i.e.*, 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.

First, as to Petitioner's claim that the post-conviction court failed to find prosecutorial vindictiveness, Petitioner alleges that he "faced a new accusation carrying an enhanced punishment as collateral damage from the state's retaliation against his alleged co-conspirators. The prosecutor acted vindictively against at least one of the co-defendants for attempting to exercise his constitutional right to force the state, and the extension of this action against Petitioner was unreasonable." In essence, Petitioner argues that because he was originally indicted for two counts of attempted second-degree murder, aggravated assault, and reckless endangerment, and the State sought the superseding indictment with enhanced charges and the additional firearms charge after Petitioner and his co-defendants failed to accept the initial plea offer, the State's action amounted to prosecutorial vindictiveness.

However, this issue is waived. Petitioner failed to raise this issue on direct appeal. Tennessee Code Annotated section 40-30-106 provides that a "ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented" unless two exceptions apply, neither of which are applicable to Petitioner.

Next, Petitioner claims that trial counsel rendered ineffective assistance of counsel by failing to challenge the superseding indictment on the ground of prosecutorial

vindictiveness. However, it does not appear that Petitioner raised this issue in his post-conviction petition. Petitioner's original post-conviction petition was not included in the record on appeal. Appellant bears the responsibility of preparing a record that sufficiently "convey[s] a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal." Tenn. R. App. P. 24. The amended post-conviction petition that is in the record reflects that Petitioner raised the issue of prosecutorial vindictiveness as a stand-alone due process claim, not as one of ineffective assistance of counsel. Likewise, there was no mention of this claim as ineffective assistance of counsel at the post-conviction hearing, and the post-conviction court made no mention of this issue in its order denying post-conviction relief. Therefore, this issue is waived. "Issues not included in a post-conviction petition may not be raised for the first time on appeal and are waived." *Bobby J. Croom v. State*, No W2015-01000-CCA-R3-PC, 2016 WL 690689, at *8 (Tenn. Crim. App., Feb. 19, 2016)(citing *Walsh v. State*, 166 SW.3d 641, 645 (Tenn. 2005); *Cauthern v. State*, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004); See also *Anthony Bayman v. State*, No. W2018-01655-CCA-R3-PC, 2019 WL 3070376, at *10 (Tenn. Crim. App. July 12, 2019)). The petitioner's allegation was that the amendment to the indictment "was framed in the context of whether Petitioner's due process rights were violated by the trial court." The petitioner did not allege that trial counsel provided ineffective assistance regarding the amendment. Therefore, appellate review of the issue is waived because the Petitioner raised it for the first time on appeal). Furthermore, no evidence was presented at the evidentiary hearing pertaining to a claim of ineffective assistance of counsel by failure to challenge the superseding indictment on the basis of prosecutorial vindictiveness. Petitioner is not entitled to relief on this ground.

Conclusion

For the foregoing reasons, we affirm the judgment of the post-conviction court.

THOMAS T. WOODALL, JUDGE