

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs March 3, 2020

FILED

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Clerk of the
Appellate Courts

ANGELA SMITH v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Gibson County
No. H-9317 Clayburn Peeples, Judge**

No. W2019-00994-CCA-R3-PC

The petitioner, Angela Smith, appeals the denial of her post-conviction petition, arguing the post-conviction court erred in finding she received the effective assistance of counsel at trial. Following our review, we affirm the denial of the petition.

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 JAMES CURWOOD WITT, JR. and TIMOTHY L. EASTER, JJ., joined.

Patrick Dollar, Assistant Public Defender, Trenton, Tennessee, for the appellant, Angela Smith.

Herbert H. Slatery III, Attorney General and Reporter; Samantha L. Simpson, Assistant Attorney General; Garry Brown, District Attorney General; and Jason Scott, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Trial

The petitioner was convicted of aggravated arson for which she received a sentence of thirty-five years' incarcerated. *State v. Angela L. Smith*, No. W2017-01036-CCA-R3-CD, 2018 WL 1056982, at *1 (Tenn. Crim. App. Feb. 23, 2018), *no perm. app. filed*. This Court affirmed her convictions and sentence on appeal and summarized the facts presented at trial, as follows:

[D]uring the early morning hours of April 23, 2012, while four people who lived in an adjoining apartment were sleeping, the [petitioner] set fires on the front and back porches of a duplex in Humboldt, Tennessee, where she had been living. Mr. Anthony Burke lived behind the duplex with his backyard abutting the backyard of the duplex. During that time period, Mr. Burke worked until midnight and slept during the day. At approximately 4:20 a.m., Mr. Burke went outside to retrieve his cellular phone, which he had left in his car. He testified that he saw a light flicker and then saw the back porch of the duplex on fire. He also saw the [petitioner] “dousing” the fire with what appeared to be lighter fluid.

Mr. Burke testified that he told the [petitioner] to come to him. The [petitioner] did not come directly to Mr. Burke but was standing ten to twelve feet away from him and underneath a street light. Mr. Burke asked the [petitioner] what she was doing, and she replied, “[d]on't worry about it.” Mr. Burke stated that the [petitioner] attempted to conceal what appeared to be lighter fluid under her hoodie. When Mr. Burke approached her, she fled. Mr. Burke chased the [petitioner] toward the end of the street and then ran back to his home where he instructed his then girlfriend to call the police.

Mr. Burke ran to the back porch of the duplex and saw that the [petitioner] had used a foosball table and pieces of scrap wood positioned against the duplex to start the fire. Mr. Burke beat on the door to wake anyone who might be inside the duplex, and two or more people exited the duplex. Mr. Burke returned to the back porch where he removed items and attempted to extinguish the fire. Once he saw the firefighters and police officers arriving, he ran to the street to flag them down.

Later the same day, Mr. Burke provided the police officers with a written statement, and he identified the [petitioner] from a photographic line-up on the following day. He said he did not know the [petitioner] when he identified her in the line-up. He denied having a prior confrontation with the [petitioner] during which he called her children “N words” or previously following the [petitioner] around while in a supermarket.

Ms. Sarah Woods testified that at the time of the fire, she was living in an apartment in the duplex with Mr. Freddie Parris, Ms. Samantha Callison, and Ms. Callison’s young son. Ms. Woods stated that while the [petitioner] moved her belongings into the other apartment in the duplex,

Ms. Woods did not know whether the [petitioner] ever spent the night there. Ms. Woods had seen the [petitioner] at the duplex on only three occasions within the month, including April 22, 2012, the day prior to the fires.

Ms. Woods testified that on the afternoon of April 22nd, the [petitioner] was moving her belongings out of the apartment when the landlord arrived. The [petitioner] and the landlord began arguing because the landlord wanted money from the [petitioner] before she moved. The [petitioner] said she did not have the money. Ms. Woods said that before the [petitioner] left, the [petitioner] said, “[t]his blank¹ is going down tonight.” Ms. Woods stated that she, Mr. Parris, and Ms. Callison heard the [petitioner] make the statement. Ms. Woods did not believe that the landlord was present when the [petitioner] made the statement.

During the early morning hours of April 23rd, Ms. Woods awoke to a man banging on the door and yelling, “[g]et out, get out, your house is on fire, your house is on fire.” Once Ms. Woods and the others got out of the apartment, the man informed them that he was getting ready for work when he looked out of his window and saw a person setting fire to the duplex.

On cross-examination, Ms. Woods acknowledged that she did not see who set the fire. She said that when the [petitioner] first moved into the apartment, the landlord introduced the [petitioner] to her. Ms. Woods did not know that the [petitioner] had two small children and never saw the children playing in the yard.

Humboldt Police Officer Matthew Nierenberger responded to the scene. When he arrived, he saw three people attempting to extinguish a small fire on the front porch. Upon speaking to someone at the scene, Officer Nierenberger realized that there was also a fire on the back porch. He stated that a game table had been set on fire and was leaning against the back door areas of the duplex. He believed that the fire department had to use equipment to extinguish the fire on the back porch.

Investigator Randy Smith, the assistant fire chief and lead fire investigator for the City of Humboldt, was called to investigate the fires, which had been extinguished before his arrival. He noted evidence of burning on the front porch of the duplex and damage to the rear porch

¹ Ms. Woods expressed reluctance to curse during her testimony. She clarified that the curse word with which she substituted “blank” was another word for a “female dog.”

leading into the back door of one of the apartments. He did not test for accelerants. He took a written statement from Mr. Burke, who denied knowing the [petitioner], and was present when Mr. Burke identified the [petitioner] in a photographic line-up as the perpetrator.

On cross-examination, Investigator Smith testified that the [petitioner] was developed as a suspect due to statements she had made prior to the fire. He noted that other witnesses who provided statements to law enforcement about the [petitioner] included Mr. Parris, who was deceased, and Ms. Callison, whom Investigator Smith was unable to locate by the time of the trial.

Mr. Rayburn Anthony, who owned the duplex, testified that he told the [petitioner] that he wanted her to move out of the apartment because she was three months behind on the rent. The [petitioner] responded that while she did not have anywhere to go, she would find another place to live. Mr. Anthony did not recall an argument between them. He also could not remember whether the [petitioner] had moved out when the fire occurred.

Mr. Anthony was contacted about the fire by both the fire department and Mr. Burke. He arrived at the scene around daylight and observed that the fire had melted some of the plastic around the back door. He clarified that the damage was to the apartment that had been rented by the [petitioner]. He recalled that others were renting the second apartment but he could not recall who they were. He stated that the [petitioner] did not have permission to burn the duplex and that he never instructed her to do so.

On cross-examination, Mr. Anthony testified that he did not know who started the fire. He did not report the fire to his insurance company but paid for the repairs himself to avoid having a claim against his insurance policy. He stated that the damage totaled more than the \$500 deductible.

The [petitioner], testifying in her own defense, acknowledged that she had three prior convictions for aggravated burglary, three prior theft convictions, and one prior conviction for attempted burglary, all of which occurred in November 2002. She maintained that during a prior incident, she and Mr. Burke exchanged “a few words” when one of her daughters and a friend were playing in his backyard. She stated that after Mr. Burke “said what he said,” she told the children to return to her house.

The [petitioner] testified that she moved into the apartment in January 2012 and moved out in March 2012. She said that in April 2012, her belongings were still inside the apartment but that she was living with her aunt. She denied that she owed Mr. Anthony rent or that she attempted to negotiate with him to remain in the apartment. She said she only owed Mr. Anthony the deposit of \$200. She denied threatening to damage the duplex and maintained that she did not start the fire. She asserted that she was at her aunt's home when the fire occurred.

On cross-examination, the [petitioner] maintained that she told Mr. Anthony that she was moving and that he did not ask her to move. She said Mr. Anthony never introduced her to her neighbors in the duplex. She denied saying, "[T]his b[****] is going down tonight." She stated that in addition to the confrontation with Mr. Burke in the backyard, Mr. Burke followed her around the grocery store.

The jury convicted the [petitioner] of aggravated arson. Following a sentencing hearing, the trial court sentenced the [petitioner] to thirty-five years to be served at 100% as a Range II, multiple offender.

Angela L. Smith, 2018 WL 1056982, at *1-3.

II. Post-Conviction Hearing

After this Court affirmed the judgments of the trial court, the petitioner filed a timely pro se petition for post-conviction relief. Upon the appointment of counsel, the petitioner filed an amended petition, arguing, in part: trial counsel failed to effectively communicate with the petitioner prior to trial and failed to file a motion to suppress the petitioner's criminal record.

At the subsequent evidentiary hearing, trial counsel and the petitioner both testified. The petitioner testified trial counsel met with her three times prior to trial, with each meeting lasting between ten and fifteen minutes. According to the petitioner, trial counsel never showed her any of the State's discovery or discussed the strengths and weaknesses of the State's case against her. The petitioner stated trial counsel informed her that if a jury convicted her, she could receive a life sentence, a sentence of twenty-five years, or a sentence of twenty years. The petitioner asked trial counsel to present an offer of ten years at thirty percent release eligibility to the State, but trial counsel failed to do so.

The petitioner admitted she had seven prior. She stated her prior convictions were “about ten years old” at the time of trial, but she did not offer any testimony concerning the length of her incarceration or enter any evidence other than her own testimony concerning her prior convictions. The petitioner claimed trial counsel never informed her of the sentence range for aggravated arson or that the trial court could enhance her sentence based on her prior convictions. She also claimed trial counsel never discussed with her the possibility of excluding her prior convictions at trial.

On cross-examination, the petitioner acknowledged both the trial court and the State informed her that she could receive a maximum sentence of forty years with one-hundred percent release eligibility if convicted of aggravated arson. On re-direct, the petitioner stated that sometime prior to trial, she wrote a letter to the trial court requesting a new attorney due to lack of communication with trial counsel. The letter was introduced into evidence at the post-conviction hearing.

Trial counsel testified he used the petitioner’s father as an intermediary to communicate with the petitioner. He spoke with the petitioner’s father on seven or eight occasions and met with the petitioner approximately four times. While admitting that one of his meetings with the petitioner was short, trial counsel testified that the other three meetings were extensive. Trial counsel stated that he was aware of all the evidence the State had against the petitioner and that he informed the petitioner regarding the strength of the State’s case.

Trial counsel’s defense strategy was to focus on the conflicting eyewitness testimony. For example, trial counsel focused on the fact that Mr. Burke told law enforcement the petitioner was carrying “lighter fluid” while another witness claimed the petitioner was carrying “charcoal lighter.” Trial counsel told the petitioner the conflicting statements could potentially help her defense, but trial counsel admitted he was uncertain if the differences would have an impact on the jury since both “charcoal lighter” and “lighter fluid” are accelerants.

Trial counsel also testified that the trial court, the petitioner’s father, and trial counsel all warned the petitioner that if she went to trial and the jury convicted her, the trial court could enhance her sentence. Trial counsel testified he shared the State’s plea offer with the petitioner, and the petitioner rejected the offer. Trial counsel could not remember the terms of the offer, but he recalled telling the petitioner that the State would not present a better offer. On cross-examination, trial counsel acknowledged he never presented the petitioner’s suggested plea offer to the State. He also acknowledged he did not file a motion to suppress the petitioner’s prior convictions.

After its review of the evidence presented, the post-conviction court denied relief, and this timely appeal followed.

Analysis

On appeal, the petitioner argues trial counsel was ineffective for failing to adequately communicate with the petitioner and failing to file a motion to suppress the petitioner's criminal record. The State contends the post-conviction court correctly denied the petition as the petitioner failed to meet her burden. Following our review of the record and submissions of the parties, we affirm the judgment of the post-conviction court.

Post-conviction relief is available when a “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.” Tenn. Code Ann. § 40-30-103. Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. *Dellinger v. State*, 279 S.W.3d 282, 293 (Tenn. 2009) (citing U.S. Const. amend. VI; *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)). When a claim of ineffective assistance of counsel is made under the Sixth Amendment to the United States Constitution, 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. 668, 687 (1984); see *Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993).

Deficient performance requires a showing that “counsel's representation fell below an objective standard of reasonableness,” despite the fact that reviewing courts “must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 688-89. Prejudice requires proof of “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. “Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.” *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). The *Strickland* standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

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.*

The burden in a post-conviction proceeding is on the petitioner to prove her allegations of fact supporting her grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); *see Dellinger*, 279 S.W.3d at 293-94. On appeal, we are bound by the trial court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Fields v. State*, 40 S.W.3d 450, 456 (Tenn. 2001). Additionally, "questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved" by the post-conviction court. *Id.* Because they relate to mixed questions of law and fact, we review the trial court's conclusions as to whether counsel's performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. *Id.* at 457.

A. Adequate Communication

The petitioner argues trial counsel was deficient by failing to adequately communicate with her. Specifically, the petitioner asserts trial counsel only met with her on four² occasions and spent most of his time communicating with the petitioner's father, did not advise the petitioner of the evidence the State intended to use against her, and did not advise the petitioner that her criminal record could be used to enhance her sentence. The State contends that the petitioner has failed to show deficient performance or prejudice related to trial counsel's communication with the petitioner.

The post-conviction court found that trial counsel maintained sufficient contact with the petitioner. The post-conviction court noted it is common practice for attorneys to communicate with clients through an intermediary. The post-conviction court concluded it was reasonable for trial counsel to use "a person who logically would have more interest in the [petitioner]'s well being than anybody else, [the petitioner's] father, as a person to convey information back and forth." The post-conviction court also concluded that trial counsel "met with the petitioner a sufficient amount of time" for the petitioner to be able to understand the seriousness of the charges, that trial counsel "kept [the petitioner] advised as to the strength of the State's case," and that trial counsel discussed with the petitioner whether there were any advantages to emphasizing the discrepancy between the "lighter fluid" and "charcoal lighter."

² At the post-conviction hearing, the petitioner claimed trial counsel only met with her on three occasions; however, in her brief, she states trial counsel met with her on four occasions.

Upon our review of the record, we agree with the post-conviction court. The record does not support the petitioner's assertion that trial counsel failed to adequately communicate with her. Trial counsel testified he met with the petitioner on four occasions and used the petitioner's father as an intermediary, meeting with him on seven or eight occasions. Trial counsel stated that he informed the petitioner of the State's evidence against her and that she could receive an enhanced sentence if convicted. Additionally, by the petitioner's own admission, trial counsel informed her of the State's plea offer, which she rejected. The post-conviction court accredited trial counsel's testimony, and we will not disturb this on appeal. *See Fields*, 40 S.W.3d at 456. Accordingly, the petitioner has failed to show trial counsel's performance was deficient. The petitioner is not entitled to relief.

B. Motion to Suppress

The petitioner also argues trial counsel was ineffective for failing to file a motion to suppress the petitioner's criminal record. When cross-examined at trial, the petitioner acknowledged she had seven prior felony convictions, including three convictions for aggravated burglary, three theft convictions, and one conviction for attempted burglary, which all occurred in November 2002. *Angela L. Smith*, 2018 WL 1056982, at *2. The petitioner argues trial counsel should have filed a motion to suppress her convictions because they were inadmissible under Tennessee Rule of Evidence 609. The State contends that the petitioner has failed to establish trial counsel's performance was deficient.

Rule 609(a) states that evidence of a witness's prior conviction may be admitted if (1) the witness is asked about the conviction on cross-examination, (2) the crime is a felony or involves "dishonesty or false statement," (3) when the impeached witness is the accused in a criminal prosecution, the State gave the accused "reasonable written notice" of the impeaching conviction prior to trial, and the trial court upon request "determine[d] that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues." *Id.*

To prove prejudice on a claim that trial counsel was ineffective for failing to file a motion to suppress, a petitioner must show "by clear and convincing evidence that (1) a motion to suppress would have been granted and (2) there was a reasonable probability that the proceedings would have concluded differently if counsel had performed as suggested." *Terrance Cecil v. State*, No. M2009-00671-CCA-R3-PC, 2011 WL 4012436 at *8 (Tenn. Crim. App. Sept. 12, 2011), *no perm. app. filed* (citing *Vaughn v. State*, 202 S.W.3d 103, 120 (Tenn. 2006)). "In essence, the petitioner should incorporate a motion to suppress within the proof presented at the post-conviction hearing." *Id.*

Here, the petitioner contends that trial counsel was ineffective by not filing a motion to suppress the petitioner's prior convictions, which the State used to attack her credibility at trial.³ However, rather than explaining how she would have been successful if a motion to suppress had been filed, the petitioner merely states that "[i]t was [t]rial [c]ounsel's failure to raise the issue of the prior convictions prior to trial and the absence of any probative/prejudicial determination by the [t]rial [c]ourt as to these convictions that warrants relief." Without introducing any proof to demonstrate that a motion to suppress would have been successful, the petitioner has failed to establish that he was prejudiced by trial counsel's failure to file a motion to suppress. *Terrance Cecil*, 2011 WL 4012436 at *8.

Similarly, the petitioner appears to suggest, without explicitly stating, that her prior convictions were inadmissible because they were more than ten years old at the time of her trial. Tennessee Rule of Evidence 609(b) states that evidence of a prior conviction is not admissible if "a period of more than ten years has elapsed between the date of release from confinement and commencement of the action or prosecution; . . ." *Id.* At the post-conviction hearing, the petitioner testified she was confined as a result of her convictions. She testified her convictions were "about ten years old" at the time of her trial; however, she did not state her date of release from confinement, nor did she introduce evidence, such as judgment sheets, to demonstrate that more than ten years had elapsed between the date of her release from confinement and the date of her trial. *See* Tenn. R. Evid. 609(b). Accordingly, the petitioner has failed to demonstrate that a motion to suppress would have been successful under Rule 609(b) if filed, and therefore, failed to prove trial counsel was deficient. *Terrance Cecil*, 2011 WL 4012436 at *8. The petitioner is not entitled to relief.

C. Cumulative Error

Finally, the petitioner raises an additional issue in her brief, stating, "[w]hether the deficiencies, standing alone or cumulatively, deprived [the petitioner] of a fair trial and/or her constitutionally protected rights." However, she failed to address this issue in the argument section of her brief, and therefore, it is waived. Tenn. Ct. Crim. App. R. 10 ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."). The petitioner is not entitled to relief.

Conclusion

³ The post-conviction court did not specifically address this issue in its ruling on the post-conviction petition.

Based upon the foregoing authorities and reasoning, we affirm the post-conviction court's judgment denying the petitioner post-conviction relief.

J. ROSS DYER, JUDGE