IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs September 13, 2016

ANTWAN M. CARTWRIGHT v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2012-A-198 Mark J. Fishburn, Judge

No. M2015-02138-CCA-R3-PC – September 19, 2016

Antwan M. Cartwright ("the Petitioner") appeals from the post-conviction court's denial of his petition for post-conviction relief. The Petitioner contends that he was denied the effective assistance of counsel based upon trial counsel's failure to timely deliver discovery to the Petitioner and because the Petitioner only met with trial counsel four times during counsel's two-year representation. The Petitioner further argues that, but for trial counsel's inadequate performance, he would not have accepted the State's plea offer to serve a twenty-five year sentence at 100%. After a thorough review of the appellate record and applicable law, we affirm the judgment of the post-conviction court.

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

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

Jesse Pratt Lords, Nashville, Tennessee, for the appellant, Antwan M. Cartwright.

Herbert H. Slatery III, Attorney General and Reporter; Sophia S. Lee, Senior Counsel; Glenn Funk, District Attorney General; and Jan Norman, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual and Procedural Background

Guilty Plea Hearing

On January 31, 2012, the Petitioner was indicted on one count each of first degree murder, especially aggravated robbery, and attempted aggravated robbery, with co-

defendants Richard Hudson, Angelo Jetton, Sarah Kuzminski, and Quintez Miller. On April 3, 2014, the Petitioner accepted the State's plea offer and entered a guilty plea to second degree murder in count one; the remaining counts were dismissed. Pursuant to the plea agreement, the Petitioner was sentenced to twenty-five years at 100% in the Department of Correction.

At the guilty plea submission hearing, the Petitioner testified that he had completed the eleventh grade and could read and write. The Petitioner affirmed that he was not under the influence of any drugs or alcohol and that he was not suffering from any mental illness. The Petitioner testified that he had signed the guilty plea petition, which he had previously read, and he agreed with the trial court that he fully and completely understood the contents of the plea petition. The trial court informed the Petitioner of the charges against him and the possible sentencing ranges for those offenses. The Petitioner affirmed that he understood he was pleading guilty to one count of second degree murder as a Range I violent offender.

The Petitioner informed the court that his trial counsel had discussed the facts of the case with him and that trial counsel had explained the relevant law and evidence in his case, as well as any applicable defenses. The Petitioner testified that he was aware of his right to plead not guilty, to have a speedy and public jury trial at which the State would have the burden of proving guilt beyond a reasonable doubt, to confront the State's witnesses, to not testify, and to be represented by counsel.

The State offered the following factual basis for the plea:

> [O]n September 29th of 2011, at approximately 22:45 hours, []Derrick Chandler and Terrance Ross were victims of an armed robbery, at which point Terrance Ross was shot and killed. After being interviewed, [the] surviving victim Derrick Chandler told police that he and his friend Ross were returning [to a residence on] Thomas Avenue with James Primm and Keith Bass because it was Derrick's birthday. He stated that he had spoken earlier to co-defendant [Kuzminski] and she stated that she was [going to] come over for a booty call. He and his friend Terrance, who is the deceased victim, had gone to the liquor store and they returned back to the parking lot to find a dark-colored car parked near the duplex. Derrick approached the car looking for [co-defendant Kuzminski], but only saw her boyfriend, [co-defendant] Hudson, in the car. They had a brief conversation in which [co-defendant] Hudson could not give an explanation for why he was there. The victims got spooked, began . . . walking towards the house. At that point, a man that's described to have red [sic], and wearing a white T-shirt, pulled a gun out and told them to ["]set it out[."]

The witness, Mr. Chandler, recalled seeing a gun versus other witnesses [who] saw two other people outside of the car, at which point the statement was made to the victims, they ran to the house, and shots were fired and Derrick Chandler thought he was shot and ran to the Wendy's on Gallatin Road. The victim, Terrance Ross, dropped at the location and died on his way to the hospital. On that very same day at approximately 22:55 hours, which was [ten] minutes after the shooting call to 9-1-1 was made, [co-defendant] Hudson and [the Petitioner] were stopped by [an] officer in a dark blue Pontiac Bonneville, matching the description that Derrick Chandler gave to the police, that was being driven by [the Petitioner]. The car also did belong to [the Petitioner]. They consented to a search of the vehicle, and officers found a black and white style motorcycle mask that matched the description of one that the suspects had been wearing by Derrick Chandler in the car, but did not take that into custody or detain [co-defendant] Hudson or [the Petitioner] any further because the[y] didn't have any information at that time the mask was used for the robbery.

Later on the next day, [co-defendants] Hudson and [Kuzminski] were interviewed, at which point they originally told the police that [co-defendant Hudson] had just gone over to buy drugs, the deal was set up between [co-defendant Kuzminski] and Derrick Chandler, at which point when he got over to the location [on] Thomas [Avenue], three men jumped out of the bushes in an area that is not related to this car and tried to rob the victims, which [co-defendant] Hudson originally told the police that he wasn't involved, it just kind [of] happened.

Later after being interviewed a couple of more times, [co-defendant] Hudson eventually told the police that what had happened is that he and [the Petitioner] went to go to the location to rob Derrick Chandler. They picked up [co-defendants] Miller and [] Jetton on the way, at which point they went over to commit the robbery and it was determined that [co-defendants] Miller and [] Jetton and [the Petitioner] were to get out of the car and lay in wait for the victims. After that happened, apparently the victims started fighting and it was not part of the plan, and shots were fired and victims then shot. All three of the suspects got back in the car. And upon asking why they shot the victim, apparently [co-defendant] Hudson stated to police that [co-defendant] Jetton said because they ran.

During a consent search of [the Petitioner]'s father's house [on] Avondale, the police found the victim, Terrance Ross's cell phone located inside one of [the Petitioner]'s shoes. When interviewed, [the Petitioner]

> stated he had purchased the phone from a junkie at (unintelligible) Lischey on the Saturday after the murder; however, he had already told the police that he had not been back to the house on Avondale since the night of the murder, which would have placed – somehow he couldn't explain how the phone that belonged to the victim was in his shoe in a house where he was when he hadn't been back to that location since supposedly getting the phone.
>
> The phone records show that, cell phone records subpoenaed by police show that Terrance Ross's phone, [co-defendant Kuzminski]'s phone and [the Petitioner]'s phone were all using the same cell towers during the same timeframe immediately following the robbery and murder.

The Petitioner agreed with the trial court that he heard the facts read by the District Attorney General and that those facts were true and correct. The trial court found that there was a factual basis to support the plea and that the Petitioner entered the plea competently, knowingly, and voluntarily.

Post-Conviction Proceedings

On January 16, 2015, the Petitioner filed a timely pro se petition for post-conviction relief, arguing that trial counsel was ineffective. The post-conviction court appointed counsel to the Petitioner, who then filed an amended petition. At an evidentiary hearing, the Petitioner testified that he met with trial counsel four times between his arraignment and the guilty plea hearing. The Petitioner stated that trial counsel was "in a rush" and did not discuss his case with him in detail. The Petitioner's trial counsel mailed the discovery to him eleven months after his arraignment. The Petitioner also asserted that trial counsel told him that, under the State's plea offer, he would be pleading guilty in exchange for a sentence of twenty-five years with a 30% release eligibility, not 100%. The Petitioner stated he "zoned out" during the plea hearing and told the trial court that he was satisfied with trial counsel's representation because he "was trying to get it over with[]." The Petitioner testified that, if he had understood that he was pleading to a sentence of twenty-five years at 100% instead of 30% release eligibility, he would not have accepted the plea and would have proceeded to trial. The Petitioner testified that trial counsel did not discuss potential defenses, witnesses, or a trial strategy.

On cross-examination, the Petitioner stated that he had participated in the plea process before on other charges and was familiar with the trial court's plea process. The Petitioner also admitted that he received his discovery from his trial counsel nine months after his arraignment, instead of eleven. The Petitioner stated that he was familiar with

the potential sentence for first degree felony murder, which was originally charged in count one of the indictment. The Petitioner testified that he accepted the plea deal because his trial counsel told him to. He maintained that he did not rob or shoot anyone.

Next, trial counsel testified that he represented the Petitioner from February 2012 to April 2014. Trial counsel stated that he had been practicing criminal law for ten to eleven years and that approximately eighty percent of his practice was criminal defense work. Trial counsel testified that he did not remember the exact date that he sent discovery to the Petitioner, but "that's one of the things [he] is most conscientious about is copying discovery and getting it to [his clients]." Trial counsel contacted the secretary of the assistant warden of the facility where the Petitioner was located to "make arrangements" to send the discovery to the Petitioner because the Petitioner was "in a TDOC facility where there [are] certain rules," and the Petitioner's discovery was "rather large, kind of notebook size, double-sided." Trial counsel testified that he met with the Petitioner on his court dates "many times" and that he explained to Petitioner that "he was facing some pretty serious charges" and the potential sentences of those charges. Further, trial counsel noted that he discussed the evidence, such as Mr. Ross's phone, with the Petitioner.

Trial counsel stated that the Petitioner told him he obtained Mr. Ross's phone from an individual named "Dude" at a "BP gas station that was near the shooting," but later Petitioner stated co-defendant Hudson gave him the phone. Trial counsel noted that co-defendant Hudson later agreed to testify against the Petitioner and other co-defendants. Trial counsel stated that his communication with the Petitioner was limited while he prepared for trial. He had difficulty arranging for the Petitioner to be brought to court for all of his court dates because of "bad weather" and because the Department of Correction implemented a new policy for transferring inmates. Finally, trial counsel stated that he explained to Petitioner the concept of felony murder, his potential sentence for second degree murder as a Range II offender, the State's notice of enhanced punishment, and the State's plea offer of twenty-five years at 100% because the Petitioner was a Range II offender. Trial counsel testified that the Petitioner "specifically indicated he did not want to risk . . . [a] 60-year sentence basically."

On cross-examination, trial counsel testified that he investigated the gas station where the Petitioner allegedly purchased the victim's phone but was unsuccessful in locating an individual named "Dude" who sold a phone to the Petitioner. Trial counsel did not attempt to obtain video recordings from the gas station because the Petitioner "indicated that the gas station was closed and it was late at night" and the Petitioner later "changed his story when . . . [co-defendant] Hudson was going to testify." At that point, trial counsel stated that the Petitioner told him that co-defendant Hudson gave the phone to the Petitioner while they were in the Petitioner's car. Trial counsel also investigated

the neighborhood where the crime occurred but did not "walk around and knock on the doors" or look for other eyewitnesses. Trial counsel stated he did not investigate the possibility of other eyewitnesses because "this was a case that was driven by some physical evidence" and by the testimony of a co-defendant. Trial counsel testified that he did not photograph the crime scene when he visited the neighborhood where the crime occurred, did not interview the police officers who worked the crime scene, and did not examine the physical evidence. Trial counsel discussed with the Petitioner the possibility of the Petitioner's testifying for the State. Lastly, trial counsel testified that the Petitioner had never asked him to withdraw the plea agreement and that he "had no indication that [the Petitioner] was not happy with anything."

The post-conviction court subsequently denied the petition for post-conviction relief in a memorandum opinion. In its opinion, the post-conviction court found that "[trial counsel] mailed discovery to [the] Petitioner pursuant to prison rules because it was voluminous and supplemented discovery when necessary" and that "[the] Petitioner did not receive the discovery mailed to him until eleven months after arraignment." Additionally, the post-conviction court found that the Petitioner understood the terms of the plea agreement at the plea colloquy, specifically that he would be sentenced to a term of twenty-five years at 100%. The post-conviction court also found that trial counsel "discussed the pertinent evidence against [the] Petitioner," "used video conference to keep [the] Petitioner updated on his case as trial approached," and "went to the crime scene but did not look for eyewitnesses and did not take photos."

The post-conviction court held that the Petitioner's claim of ineffectiveness based on trial counsel's failure to discover defense witnesses was without merit because the Petitioner did not present any potential witnesses at the post-conviction hearing. Second, the post-conviction court held that the Petitioner was not entitled to post-conviction relief on the grounds that trial counsel failed to keep him informed about his case because the Petitioner admitted that he discussed the facts with trial counsel, that he received discovery several months before the trial, and that he met with trial counsel several times either in person or via video conference. Therefore, the court denied the petition for post-conviction relief. The Petitioner's timely appeal followed.

II. Analysis

Standard of Review

In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. Jaco v. State, 120 S.W.3d 828, 830 (Tenn. 2003). Post-conviction relief cases often present mixed questions of law and fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). Appellate courts are bound

by the post-conviction court's factual findings unless the evidence preponderates against such findings. Kendrick v. State, 454 S.W.3d 450, 457 (Tenn. 2015). When reviewing the post-conviction court's factual findings, this court does not reweigh the evidence or substitute its own inferences for those drawn by the post-conviction court. Id.; Fields, 40 S.W.3d at 456 (citing Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997)). 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]." Fields, 40 S.W.3d at 456 (citing Henley, 960 S.W.2d at 579); see also Kendrick, 454 S.W.3d at 457. The post-conviction court's conclusions of law and application of the law to factual findings are reviewed de novo with no presumption of correctness. Kendrick, 454 S.W.3d at 457.

Ineffective Assistance of Counsel

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven in order for the court to grant post-conviction relief. Strickland, 466 U.S. at 687; Henley, 960 S.W.2d at 580; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996). Accordingly, if we determine that either factor is not satisfied, there is no need to consider the other factor. Finch v. State, 226 S.W.3d 307, 316 (Tenn. 2007) (citing Carpenter v. State, 126 S.W.3d 879, 886 (Tenn. 2004)). Additionally, review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689; see also Henley, 960 S.W.2d at 579. We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. Granderson v. State, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006).

As to the first prong of the Strickland analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." Henley, 960 S.W.2d at 579 (citing Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)); see also Goad, 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate "that 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); see also Baxter, 523 S.W.2d at 936.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. Goad, 938 S.W.2d at 370. Therefore, under the second prong of the Strickland analysis, 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. (quoting Strickland, 466 U.S. at 694) (internal quotation marks omitted).

A substantially similar two-prong standard applies when the petitioner challenges counsel's performance in the context of a guilty plea. Hill v. Lockhart, 474 U.S.52, 58 (1985); Don Allen Rodgers v. State, No. W2011-00632-CCA-R3-PC, 2012 WL 1478764, at *4 (Tenn. Ct. Crim. App. April 26, 2012). First, the petitioner must show that his counsel's performance fell below the objective standards of reasonableness and professional norms. See Hill, 474 U.S. at 58. Second, "in order to satisfy the 'prejudice' requirement, the [petitioner] must show that there is a reasonable probability that, but for counsel's errors, he would have not have pleaded guilty and would have insisted on going to trial." Id. at 59.

On appeal, the Petitioner argues that trial counsel was ineffective because counsel met with him only four times throughout the representation, and the Petitioner did not receive his discovery until almost one year after arraignment. Because of trial counsel's deficient performance, the Petitioner contends that he was "unable to formulate strategy or assist counsel in understanding the case" and that he mistakenly believed the State's plea offer was for a twenty-five year sentence with 30% release eligibility. The Petitioner asserts that, but for trial counsel's ineffective representation, he would not have accepted the State's plea deal and would have instead gone to trial.

The Petitioner has not proven deficient performance based on trial counsel's providing of discovery, meeting with the Petitioner throughout counsel's representation, and explaining the Petitioner's plea agreement. First, the delay in the delivery of the discovery materials was not due to any deficiency on the part of trial counsel. Trial counsel testified that the discovery material obtained from the State was "rather large, kind of notebook sized, double-sided, so . . . that takes a little bit of time to copy that and send it out . . . ." Additionally, trial counsel testified that he contacted the secretary of the assistant warden of the facility where the Petitioner was located to "make arrangements" to send the discovery to the Petitioner because the Petitioner was "in a TDOC facility where there [are] certain rules . . . [and] they won't let you hand someone something in the back that size . . . ." Trial counsel also testified that he updated the Petitioner any time he received additional discovery and when the Petitioner was transferred to a different facility, trial counsel sent a new copy of the discovery to that location. The

post-conviction court accredited trial counsel's testimony regarding the availability of discovery, and the evidence does not preponderate against this finding.

Regarding the number of times trial counsel met with the Petitioner and the Petitioner's understanding of his plea agreement, trial counsel testified that he met with the Petitioner "many times" and that he spoke with the Petitioner at those meetings to ensure that the Petitioner understood the charges against him and potential sentences. Further, trial counsel testified that he discussed with the Petitioner what evidence the State might use against him, such as the victim's phone that was recovered from the Petitioner's shoe. Trial counsel noted that as the Petitioner's trial date in April 2014 approached, he had "more contact" with the Petitioner and that he explained the concept of felony murder to the Petitioner to ensure that the Petitioner understood that the State did not have to prove that he shot the victim to be convicted of the crime. Trial counsel testified that he explained the State's plea offer to the Petitioner, specifically that he would be sentenced to a term of twenty-five years at 100%.

Again, the post-conviction court found that trial counsel's performance was not deficient in the amount of communication between counsel and the Petitioner and that the Petitioner understood the release eligibility of his sentence under the plea agreement. The post-conviction court found:

> [The] Petitioner agreed in open court that he discussed the facts and circumstances of his case with [trial counsel], that [trial counsel] explained the law and evidence that the State had against [the] Petitioner as well as possible defense strategies. [The] Petitioner also acknowledged that he was pleading as a Range I violent offender and would have to serve one-hundred percent (100%) of his twenty-five (25) year sentence.

Because the evidence does not preponderate against the post-conviction court's findings, we hold that the Petitioner has failed to establish that trial counsel was deficient in any respect. Because the Petitioner has failed to prove the first prong of the Strickland test, we will not consider the second prong. Finch, 226 S.W.3d at 316 (citing Carpenter, 126 S.W.3d at 886). The Petitioner is not entitled to relief.

III. Conclusion

For the aforementioned reasons, the judgment of the post-conviction court is affirmed.

_____

ROBERT L. HOLLOWAY, JR., JUDGE