

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs June 5, 2019

FILED

08/30/2019

Clerk of the
Appellate Courts

DANTARIO BURGESS v. STATE OF TENNESSEE

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

No. W2018-01707-CCA-R3-PC

The Petitioner, Dantario Burgess, appeals the denial of his petition for post-conviction relief, arguing that the post-conviction court erred in finding that he received effective assistance of trial counsel. Following our review, we affirm the denial of the petition.

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

ALAN E. GLENN, J., delivered the opinion of the court, in which THOMAS T. WOODALL and TIMOTHY L. EASTER, JJ., joined.

Jason M. Matthews (on appeal), and Mark McDaniel, Jr., (at hearing), Memphis, Tennessee, for the appellant, Dantario Burgess.

Herbert H. Slatery III, Attorney General and Reporter; Renee W. Turner, 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

In 2015, the Petitioner and two co-defendants, Rodriguez McNary and Joseph Jones-Cage, were tried together before a Shelby County Criminal Court jury on charges that arose out of their participation with a fourth man, Benjamin Bohannon, in a drive-by shooting of a group of people outside a Memphis apartment complex. State v. Dantario Burgess, Rodriguez McNary and Joseph Jones-Cage, No. W2015-00588-CCA-R3-CD, 2017 WL 417231, at *1 (Tenn. Crim. App. Jan. 31, 2017), perm app. denied (Tenn. May 22, 2017). At the conclusion of their trial, the Petitioner was convicted of two counts of

attempted first degree murder, one count of aggravated assault, one count of reckless endangerment, one count of employing a firearm during the commission of a dangerous felony having been previously convicted of a felony, and one count of possession of a firearm after having been convicted of a felony involving the use or attempted use of violence. The trial court sentenced him to an effective term of fifty-five years in the Department of Correction. Id. This court affirmed the Petitioner's convictions and sentences, and our supreme court denied his application for permission to appeal. Id.

Our direct appeal opinion provides the following overview of the evidence at trial:

The evidence presented at trial established that on March 10, 2013,¹ 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. (footnote omitted).

The shooting was precipitated by co-defendant Jones-Cage's anger over Facebook posts about him that were made by Ms. Niter's cousin, Glen Hervery, Jr., who was known as "Little Glen." Id. at *2, *8. At approximately 10:30 to 11:00 a.m. on April 10, 2013, Mr. Jones-Cage and his three co-defendants appeared at the Hillview Apartments in a Ford Explorer that was registered to Mr. Jones-Cage's father. Id. at *1, *7. Mr. Jones-Cage was driving, the Petitioner was sitting in the backseat on the passenger side of the vehicle, co-defendant Rodriguez McNary was sitting in the backseat on the driver's side of the vehicle, and co-defendant Benjamin Bohannon was sitting in the front passenger seat. Mr. Jones-Cage called out to ask Ms. Niter where "Little Glen" was and to tell her to call him to the scene. Id. at *1-6. Mr. Thomas told the men to leave because there were children in the area, and Mr. Jones-Cage responded with an expletive directed at Mr. Thomas, the children, and the women. The men in the Ford Explorer then opened fire on the group before fleeing from the scene. Id.

¹ This date is a typographical error, which was presumably caused by the first witness's error in referring to the date of the incident as March 10. All other witnesses referred to the date of the shooting as April 10, 2013.

The evidence against the Petitioner at trial included: eyewitness testimony of Ms. Niter, who identified the Petitioner as the man who was sitting on the back passenger side of the vehicle and who fired his gun outside the half-lowered window at the group outside the apartment; co-defendant Jones-Cage's statement to police, redacted to eliminate the names of his co-defendants, in which he claimed that the three other men who accompanied him to the apartments to hunt for "Little Glen" shocked him by opening fire and that he had no knowledge of their plans and took no part in the shooting; evidence of a still-active arrest warrant for co-defendant Benjamin Bohannon based on his failure to appear at a court date in the case; and the Petitioner's October 11, 2014 recorded telephone call from the jail to "Benjamin" about his "no show." Id. at *1-8.

In his defense, the Petitioner's grandmother and mother each testified that the Petitioner was caring for the grandmother on the morning of April 10, 2013. Id. at *10. The defense also included testimony by co-defendant Jones-Cage, who recanted his statement to police and said that he drove alone to the apartment to address an issue with Mr. Hervery, that Mr. Thomas was involved in a dice game when he arrived, and that one of the dice game participants shot Mr. Thomas over a dispute in the dice game. Id. at *9. Mr. Jones-Cage explained that he had blamed the shooting on his co-defendants because he believed that they had stolen some music equipment from him. Id.

On December 4, 2017, the Petitioner filed a pro se petition for post-conviction relief in which he raised a number of claims, including ineffective assistance of counsel. Post-conviction counsel was appointed, and an evidentiary hearing was held on May 31, 2018. Although the Petitioner alleged a number of instances of ineffective assistance of counsel in his pro se petition, he confines himself on appeal to arguing that trial counsel was ineffective for failing to file a motion to sever his trial from his co-defendants' and for failing to get the preliminary hearing transcript authenticated to introduce at the hearing on his motion to suppress the eyewitness identification by Ms. Niter. The Petitioner additionally argues that the post-conviction court reached an illogical decision that was based on a "clearly erroneous assessment" of the evidentiary hearing evidence.

At the hearing, the Petitioner's appointed trial counsel, who represented him from his arraignment through the trial, testified that the State's key witness against the Petitioner was Ms. Niter, who identified the Petitioner as a participant in the crime. Trial counsel said she filed a motion to suppress Ms. Niter's eyewitness identification and cross-examined her extensively at both the suppression hearing and at trial regarding her identification. She stated that Ms. Niter had made several inconsistent statements to the police and was inconsistent in the accounts she provided at the suppression hearing and at trial. As she recalled, Ms. Niter expressed uncertainty at the suppression hearing about her identification of the Petitioner but more confidence in her identification at trial. Trial counsel further recalled that Ms. Niter admitted on cross-examination that she had been

initially unable to identify the Petitioner for the police but had later received “some information about his tattoo” that had refreshed her memory and enabled her to make a positive identification.

Trial counsel testified that she learned of Ms. Niter’s inconsistent statements to police only a few days prior to trial when she received some late discovery materials from the State. She said she attempted to introduce a transcript of the preliminary hearing as substantive evidence at the suppression hearing in order to impeach Ms. Niter’s credibility and to support her argument that the identification was suggestive. Although trial counsel was able to cross-examine Ms. Niter with respect to her prior testimony, the trial court prevented her from introducing the preliminary hearing transcript because it had not been authenticated. She agreed that the trial court granted her leave to bring in a witness to authenticate the transcript but said that she was unable to do so.

Trial counsel acknowledged that the Petitioner’s co-defendant, Mr. Jones-Cage, made a statement to police in which he identified the Petitioner as involved in the shooting. She said co-defendant Jones-Cage “decided on the last day of trial that he wanted to testify” and during his testimony recanted his statement. She explained that she did not file a pretrial motion to sever the Petitioner’s case from his co-defendants’ because her understanding from talking to their counsel was that none of the co-defendants intended to testify at trial. She said she did not make an oral motion to sever upon co-defendant Jones-Cage’s last minute decision to testify because co-defendant Jones-Cage “had an affidavit [in which] he stated that [the Petitioner] was not involved in the crime[,]” and she learned that he had told both the Petitioner and his own counsel that he intended to recant his statement. She discussed the issue “with [her] client and the other co-defendants,” and “there was some question as to whether or not [co-defendant Jones-Cage’s] testimony would actually be helpful to the defense.”

Trial counsel testified that she and the Petitioner communicated frequently and met together at least twice outside of court. In addition, there were numerous court settings, and she spoke with the Petitioner at each of those. She said the Petitioner was a highly intelligent man and “was very active and very knowledgeable about his defense throughout the entire process.” She stated that she eventually received open file discovery from the State after filing a motion to compel but that the discovery came in “piece-meal[,] and the majority of it came in[] very late.” She testified that she informed the Petitioner of the materials as she received them and reviewed most of them with him.

On cross-examination, trial counsel testified that at the time of the Petitioner’s trial, she had been practicing law for three or four years, primarily focusing on criminal defense, and had been involved in three or four felony trials. She agreed that there were

many corroborating witnesses to the crime, although only one eyewitness who identified the Petitioner as a gunman. She said she believed “one of the deciding factors at the trial” was the Petitioner’s recorded telephone call from the jail, which showed that he had a conversation with one of the co-defendants and which, in her opinion, “was deemed . . . an admission” on the Petitioner’s part of his involvement in the crime.

Trial counsel testified that her defense consisted primarily of trying to show that the Petitioner was not involved and had an alibi for the time of the shooting. She acknowledged that she was able to vigorously cross-examine the sole identification witness about her inconsistencies in her prior testimony and in her statements. She also agreed that she was able to elicit testimony from co-defendant Jones-Cage about his retaliatory reason for “maliciously” naming the Petitioner “in a crime he did not commit” and said that she did not see how that testimony was prejudicial to the Petitioner.

The Petitioner testified that he originally thought that trial counsel was “exceptionally good,” but when he began researching the law after being sent to prison, he realized that she had prejudiced his suppression hearing by failing to follow the proper procedures for having evidence admitted. He claimed trial counsel lied that her decision not to request a severance at trial was based on her knowledge of Mr. Jones-Cage’s affidavit because Mr. Jones-Cage “didn’t do that affidavit until February.” The Petitioner testified that he pointed out to trial counsel that the redaction of co-defendant Jones-Cage’s statement to replace the Petitioner’s and his co-defendants’ names with “the other guys” was just a “sneak way” for the State to point the finger at the Petitioner and his co-defendants. The Petitioner said that he wrote trial counsel a letter after trial pointing out the above, as well as other errors, and he implied that he also mentioned the error to trial counsel during the trial. The Petitioner also complained about trial counsel’s failure to bring charges of prosecutorial misconduct based on the State’s withholding of evidence by its delayed response to discovery requests.

On cross-examination, the Petitioner acknowledged that a pretrial hearing was held on the eyewitness’s alleged misidentification of him and that the issue was raised in his direct appeal. He further acknowledged that trial counsel was able to elicit evidence at trial about his co-defendant’s recantation of his statement to police and the co-defendant’s motivation for initially naming the Petitioner as a participant in the crime.

On August 21, 2018, the post-conviction court denied the petition in a written order containing detailed findings of fact and conclusions of law. With respect to the Petitioner’s claim that counsel provided ineffective assistance for failing to have the transcript of the preliminary hearing authenticated, the court found that the Petitioner failed to show how counsel’s alleged deficiency in this regard prejudiced the outcome of his case. As for the Petitioner’s allegation that counsel was ineffective for failing to

move for a severance of the Petitioner's case, the court noted that co-defendant Jones-Cage's statement was redacted to eliminate any reference to the Petitioner, that the co-defendant was subject to cross-examination, and that the co-defendant attempted in his testimony to exonerate the Petitioner and the other co-defendants. The court found that the Petitioner was "essentially restat[ing] his arguments from his direct appeal" and that the Petitioner failed to show any acts of deficient performance of counsel that resulted in prejudice to the Petitioner's case. Accordingly, the court concluded that the Petitioner failed to meet his burden of demonstrating that he was denied the effective assistance of counsel.

ANALYSIS

The Petitioner contends that the post-conviction court erred in finding that he failed to meet his burden of demonstrating ineffective assistance of counsel, arguing that his trial counsel was ineffective for failing to move for a severance and for failing to have the transcript of the preliminary hearing authenticated for admission as an exhibit at the suppression hearing. The Petitioner additionally contends that the post-conviction court "abused [its] discretion due to he [sic] reached an illogical conclusion, based his decision on a clearly erroneous assessment of the evidence and also employed reasoning that caused [the Petitioner] an injustice."²

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). 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 post-conviction 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).

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's

² Post-conviction counsel states in his brief that he included this issue "verbatim subject to the demands of [the Petitioner]."

deficient performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687 (1984). 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)). Moreover, 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.

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.").

The record fully supports the post-conviction court's findings and conclusions that the Petitioner failed to meet his burden of demonstrating that he received ineffective assistance of counsel. Trial counsel explained that she did not file a pretrial motion to sever the cases because none of the co-defendants originally intended to testify. She further explained that she did not make an oral motion to sever upon co-defendant Jones-Cage's last minute change of heart because she was aware that he intended to recant his statement and provide a motive for his having originally blamed the Petitioner and the co-defendants for the crime. She also indicated her belief that such testimony might actually help, rather than hurt, the Petitioner's case. Regardless of the actual timing of Mr. Jones-

Cage's affidavit, trial counsel made it clear during her testimony that she was aware at the time of trial of Mr. Jones-Cage's intention to recant his statement and to attempt to exonerate the Petitioner.

Trial counsel also made it clear that she vigorously cross-examined the eyewitness at both the suppression hearing and at trial with respect to inconsistencies in her prior statements and her identification of the Petitioner as a perpetrator of the crime. Even assuming, *arguendo*, that trial counsel was somehow deficient for not having the transcript of the preliminary hearing authenticated for admission as an exhibit at the suppression hearing, we agree with the post-conviction court that the Petitioner has not shown how his case was prejudiced as a result.

Finally, we agree with the State that the Petitioner has not shown how his case was prejudiced by any of the various allegations he makes in the final "shotgun approach" portion of his brief, in which he lodges complaints against trial counsel, the prosecutor, and the post-conviction court. Accordingly, we affirm the denial of the petition for post-conviction relief.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the judgment of the post-conviction court.

ALAN E. GLENN, JUDGE