

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs December 13, 2022

FILED

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Clerk of the
Appellate Courts

NEMON WINTON v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Coffee County
Nos. 41944, 47294 Vanessa Jackson, Judge**

No. M2021-01148-CCA-R3-PC

Petitioner, Nemon Winton, appeals the denial of his petition for post-conviction relief, in which he alleged several claims of ineffective assistance of counsel. On appeal, he argues that trial counsel was ineffective for failing to request specific jury instructions and for utilizing an improper trial strategy. After thoroughly reviewing the record, we affirm the judgment of the post-conviction court.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and JILL BARTEE AYERS, JJ., joined.

Manuel B. Russ, Nashville, Tennessee, for the appellant, Nemon Winton.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Craig Northcott, District Attorney General; and Joshua C. Powell, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and procedural background

On March 8, 2015, between 5:00 and 6:00 a.m., Stephanie Trussell, Heather Hill, and Tabitha Tomlin arrived for work at a Burger King restaurant. *State v. Nemon Omar Winton*, No. M2018-01447-CCA-R3-CD, 2020 WL 1950777, at *1-2 (Tenn. Crim. App. Apr. 23, 2020), *perm. app. denied* (Aug. 7, 2020). Around 6:00 a.m., Petitioner knocked on the back door of the restaurant and Ms. Hill opened it. *Id.* at *1. He entered the building and pointed what Ms. Hill believed to be a real gun at her and told her to lay on

the ground. *Id.* Petitioner walked to the front of the restaurant and pointed the gun at Ms. Trussell and Ms. Tomlin. *Id.* He ordered them onto the ground, and the women complied. *Id.* Petitioner asked Ms. Tomlin, the restaurant manager, where she kept the money, and ordered her to take him to it. *Id.* Ms. Tomlin opened the safe, and Petitioner took bank deposit bags containing \$7,965.71. *Id.* at *2. He ordered Ms. Tomlin to lay down on the ground again. *Id.* Petitioner fled out the rear of the restaurant and told Ms. Hill, who was still lying on the floor in the back, not to move or he would kill her. *Id.* at *1.

Petitioner was apprehended later that morning. *Id.* While in custody, he told an officer that he used a fake gun and threw it in the grass prior to his arrest. *Id.* An officer located the weapon and determined it was an Airsoft pistol.¹ *Id.* at *2. Manchester Police Department Officer Daniel Ray testified at trial that Airsoft pistols “ha[ve] the correct feel of a pistol” and “look[] just like a pistol and feel[] like a real pistol.” *Id.*

At the conclusion of the trial, the jury convicted Petitioner of two counts of especially aggravated kidnapping, one count of aggravated kidnapping, and one count of aggravated robbery. Petitioner received a total effective sentence of 45 years in incarceration. *Id.* at *9.

On direct appeal, Petitioner challenged the sufficiency of the evidence, the trial court’s denial of a special jury instruction, and the length and manner of his sentence. *Id.* at *1. A panel of this Court reversed Petitioner’s aggravated kidnapping conviction as to Ms. Trussell and otherwise affirmed the judgments. *Id.*

Post-conviction Hearing

Petitioner filed a timely petition for post-conviction relief through appointed counsel, raising several claims of ineffective assistance of counsel. The post-conviction court conducted an evidentiary hearing on August 11, 2021.

Petitioner testified that prior to trial counsel’s representation, the Public Defender’s Office represented him. Petitioner said that the Public Defender’s Office secured a plea agreement of 22 years at 85 percent for Petitioner, but suggested rejecting the plea. Petitioner said that trial counsel also advised Petitioner to reject the plea. When asked whether trial counsel reviewed the State’s discovery, he replied, “I guess so.” Petitioner replied “I think so” in response to whether trial counsel reviewed the discovery

¹ There appears to be a discrepancy in whether the pistol was an Airsoft gun, or a “BB gun.” Regardless, the pistol was not a real gun.

with him. Petitioner recalled that trial counsel told him the State had a strong argument for robbery, but that “[trial counsel] didn’t see where there was any kidnapping.”

Petitioner said that he studied case law prior to trial. When he mentioned it to trial counsel, trial counsel said “he could represent [him] effectively on [the kidnapping charges].” Petitioner said he spoke with trial counsel four or five times, but they did not talk about anything “specific.” Petitioner agreed that he was generally aware of the trial process because he had “seen it on TV.” Petitioner said that trial counsel did not have a “plan of what action, of what was going to be said about the kidnappings when [they] went to court.” Petitioner testified that he did not understand trial counsel’s defense to the kidnapping charges “other than that [trial counsel said Petitioner] had a BB gun.” Petitioner said that trial counsel did not argue anything similar to what Petitioner studied prior to trial. Petitioner believed trial counsel should have argued that he did not detain the victims long enough to constitute kidnapping. He agreed it surprised him that trial counsel argued that Petitioner did not use a real weapon. In hindsight, Petitioner would have taken the plea agreement.

On cross-examination, Petitioner admitted that it was his choice to reject the plea agreement. On redirect examination, Petitioner agreed that he relied on the advice of his attorneys in making the decision to go to trial.

Trial counsel testified that Petitioner was “very well-informed. He was, he did a lot of reading and lot of research on his own.” Trial counsel said he was “fairly certain” he reviewed discovery with Petitioner. Trial counsel and Petitioner met four or five times prior to trial. Regarding the plea deal, trial counsel said, “I believe that both the Public Defender[’]s [Office] and myself wanted him to take the deal.” Trial counsel recalled telling Petitioner the State had a “very solid case” and talking to him about each element of kidnapping.

Trial counsel believed it would be difficult for the State to prove the kidnapping charges. However, after the State elicited testimony that Petitioner forced one of the victims to lay down on the ground and stay there, he told Petitioner “we’re sunk on that.” Trial counsel said that he was surprised the jury convicted Petitioner of kidnapping the other victims. Trial counsel said he believed Petitioner “was informed about the nature of a trial, how it was done.” Regarding whether to call defense witnesses, trial counsel said Petitioner made it “absolutely” clear he did not want to call his wife. Trial counsel reached out to the victims, but they would not speak with him. Trial counsel said that he met with a detective and examined the “BB gun” Petitioner used. He determined that it looked like a “BB gun,” and did not have the “action of an actual gun.” Trial counsel did

not recall whether the State asked the court to limit the *White* jury instructions to Ms. Tomlin or whether he requested the jury instructions to apply to all of the victims.²

On cross-examination, trial counsel affirmed that he researched relevant case law, reviewed the Public Defender's Office's notes, and visited the crime scene in preparation for trial. Trial counsel agreed his strategy was to argue that the victims could not "have reasonably believed [the BB gun] to be a [real] gun." He admitted that, in retrospect, he may have changed his trial strategy. However, at the time he "thought that was a sound tactic[.]"

The post-conviction court entered a written order denying post-conviction relief on September 13, 2021. The court found trial counsel's testimony "more credible" than Petitioner's testimony. The post-conviction court noted that post-conviction counsel acknowledged the jury received a *White* jury instruction for the charge of especially aggravated kidnapping of Ms. Tomlin. The court concluded that trial counsel was not ineffective for failing to request a *White* jury instruction as to Ms. Hill because she was not a robbery victim. The court found that the *White* jury instruction issue was moot as to Ms. Trussell because Petitioner's conviction for aggravated kidnapping of Ms. Trussell was reversed.

Regarding trial counsel's strategy to show that the victims could not have believed that Petitioner's BB gun was a real gun, the post-conviction court stated that the strategy was "based on [trial counsel's] own personal examination of the gun, and the [c]ourt should defer to his decision." Petitioner appealed.

Analysis

Petitioner argues that trial counsel was ineffective for failing to request the *White* jury instruction be applicable to all of the victims. He also contends that trial counsel was ineffective for pursuing a theory of defense that the victims could not have believed Petitioner's gun was real. The State responds that trial counsel provided effective assistance. We agree with the State.

² In *State v. White*, our supreme court addressed the due process concerns stemming from kidnapping convictions and accompanying felonies such as robbery, rape, or assault. *See generally* 362 S.W.3d 559 (Tenn. 2012). The court set forth a specific jury instruction, later included in the Tennessee Pattern jury instructions. *Id.* at 580-81; 8 Tenn. Prac. Pattern Jury Instr. T.P.I.—Crim. 8.03(a). The absence of a *White* instruction, when warranted, results in constitutional error unless the error was harmless beyond a reasonable doubt. *State v. Cecil*, 409 S.W.3d 599, 610 (Tenn. 2013).

Post-conviction relief is available for any conviction or sentence that is “void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” T.C.A. § 40-30-103. In order to prevail in a claim for post-conviction relief, a petitioner must prove his factual allegations by clear and convincing evidence. T.C.A. § 40-30-110(f); *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999). “Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998). On appeal, a post-conviction court’s findings of fact are conclusive unless the evidence preponderates otherwise. *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006). Accordingly, questions concerning witness credibility, the weight and value to be given to testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction court, and an appellate court may not substitute its inferences for those drawn by the post-conviction court. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001). However, the post-conviction court’s conclusions of law and application of the law to the facts are reviewed under a purely de novo standard, with no presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Both the Sixth Amendment to the Constitution of the United States and article I, section 9 of the Tennessee Constitution guarantee the right of an accused to the effective assistance of counsel. *See Davidson v. State*, 453 S.W.3d 386, 392-93 (Tenn. 2014). In order to sustain a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel’s representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Under the two-prong test established by *Strickland v. Washington*, 466 U.S. 668, 687 (1984), a petitioner must prove that counsel’s performance was deficient and that the deficiency prejudiced the defense. *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). Because a petitioner must establish both elements in order to prevail on a claim of ineffective assistance of counsel, “failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim.” *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). “Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.” *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 697).

The test for deficient performance is whether counsel’s acts or omissions fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688; *Henley*, 960 S.W.2d at 579. This Court must evaluate the questionable conduct from the attorney’s perspective at the time, *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982), and “should indulge a strong presumption that counsel’s

conduct falls within the wide range of reasonable professional assistance,” *State v. Burns*, 6 S.W.3d 453, 462 (Tenn. 1999).

Even if a petitioner shows that counsel’s representation was deficient, the petitioner must also satisfy the prejudice prong of the *Strickland* test in order to obtain relief. The question is “whether counsel’s deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.” *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). A petitioner must show that there is a reasonable probability “sufficient to undermine confidence in the outcome” that, “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Burns*, 6 S.W.3d at 463 (quoting *Strickland*, 466 U.S. at 694).

White Jury Instruction

Petitioner argues trial counsel was ineffective for failing to request the *White* jury instruction apply to all of the victims. We disagree.

A few years after *State v. White*, the supreme court addressed the issue of whether a *White* jury instruction must be given when a defendant is charged with the kidnapping and robbery of separate victims. See *State v. Teats*, 468 S.W.3d 495 (Tenn. 2015); *State v. Williams*, 468 S.W.3d 510 (Tenn. 2015). In *Teats*, the supreme court determined that:

[a] *White* jury instruction is not required when a defendant is charged with the kidnapping and robbery of different victims. The jury instruction we articulated in *White* was intended to address the due process concerns that arise when a defendant is charged with kidnapping a victim and other crimes, such as robbery, rape, or assault, that involve some inherent confinement of that victim. . . . Where a defendant is charged with kidnapping and an accompanying offense involving some confinement of the same victim, there are appropriate due process concerns that the defendant could be convicted of two crimes—e.g. robbery and kidnapping—when he has only committed one crime—robbery. But where, as in this case, the State charged the [d]efendant with robbing the restaurant manager and kidnapping four other employees, the [d]efendant does not stand the risk of being convicted of kidnapping a victim he confined only long enough to rob.

Teats, 468 S.W.3d at 503. “Simply put, where a defendant kidnaps one victim while robbing another, the due process concerns articulated in *White* are not present, as the kidnapping of one or more victims can never be ‘essentially incidental’ to an offense

perpetrated against a different victim or victims.” Williams, 468 S.W.3d at 516 (citing White, 362 S.W.3d at 580) (emphasis added).

Petitioner cannot establish deficient performance. As noted by the post-conviction court, the trial court provided a *White* jury instruction for the charge of especially aggravated kidnapping of Ms. Tomlin. Petitioner was not entitled to a *White* jury instruction as to Ms. Hill because she was only a victim of kidnapping. The issue as related to Ms. Trussell is moot because this Court reversed Petitioner’s aggravated kidnapping conviction. Trial counsel was not ineffective for failing to request *White* jury instructions apply to all of the victims. Petitioner is not entitled to relief.

Trial Strategy

Petitioner contends that trial counsel was ineffective for pursuing a theory of defense challenging the authenticity of the firearm rather than contesting the elements of kidnapping. Again, we disagree.

This Court will not use hindsight to second-guess a reasonable trial strategy, even if a different procedure or strategy might have produced a different result. *See Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). However, this deference to the tactical decisions of trial counsel is dependent upon a showing that the decisions were made after adequate preparation. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

The post-conviction court credited trial counsel’s testimony over Petitioner’s testimony. Trial counsel testified that he met with the detective who had possession of the BB gun. Based on his examination of the BB gun, he developed a trial strategy under the theory that the victims could not have believed the gun was real. While the defense was unsuccessful, we will not, in hindsight, second-guess trial counsel’s strategy. *Adkins*, 911 S.W.2d at 347. The evidence does not preponderate against the findings of the post-conviction court and Petitioner is not entitled to relief.

Conclusion

Based on the foregoing, the judgment of the post-conviction court is affirmed.

TIMOTHY L. EASTER, JUDGE