

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 17, 2000

SHELLY BREEDEN v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Cocke County
No. 25, 502-ii Richard R. Vance, Judge

No. E1999-02220-CCA-R3-PC
January 2, 2001

The petitioner pled guilty to one count of second degree murder, a Class A felony, and one count of conspiracy to commit second degree murder, a Class B felony. Tenn. Code Ann. §§ 39-12-107(a); 39-13-210. The petitioner was sentenced to concurrent sentences of twenty-five (25) years and twelve years (12), respectively. The petitioner subsequently filed a petition for post-conviction relief. After a hearing, however, the petition was dismissed. The petitioner now appeals the post-conviction court's dismissal of her petition. In this appeal the petitioner alleges ineffective assistance of counsel, because trial counsel allowed her to plead guilty without the use or benefit of a court ordered psychological evaluation. After a careful review of the record, we affirm the trial court's dismissal of the petitioner's petition for post-conviction relief.

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

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which DAVID H. WELLES, J., and WILLIAM B. ACREE, JR., SP. J., joined.

James D. Hutchins, Dandridge, Tennessee, for the appellant, Shelly Breeden.

Paul G. Summers, Attorney General and Reporter; R. Stephen Jobe, Assistant Attorney General; Al C. Schmutzer, Jr., District Attorney General; and James Bruce Dunn, Assistant District Attorney, for the appellee, State of Tennessee.

OPINION

The petitioner, Shelly Breeden, was indicted on one count of first degree murder and one count of conspiracy to commit first degree murder. Before trial, however, the petitioner decided to accept a guilty plea offer made by the District Attorney's office. On May 12, 1998, the petitioner plead guilty to one count of second degree murder, a class A felony, and one count of conspiracy to commit second degree murder, a Class B felony, for which she received concurrent sentences of

twenty-five (25) years and twelve (12) years, respectively. Tenn. Code Ann. §§ 39-12-107(a); 39-13-210. Further, as part of the guilty plea agreement, the petitioner was required to serve eighty five (85) percent of her sentence before she is eligible for release.

On January 1, 1998, the petitioner filed a petition for post-conviction relief. The petition was dismissed after a hearing. The petitioner subsequently appealed the post-conviction court's dismissal of her petition alleging ineffective assistance of counsel. The case is now properly before this court.

FACTS

During the spring of 1997, the petitioner shared a home with her boyfriend, B.J. Kessler, and their three-year-old son. During late spring of 1997, the victim, Amy King, and the victim's boyfriend, George Pate, moved into the home shared by the petitioner, the petitioner's boyfriend, and their son. Sometime during the summer of 1997, the petitioner and George Pate became involved in a romantic relationship while the petitioner's boyfriend was working out of town.

Prior to August 1, 1997, the petitioner and her two co-defendants, George Pate and Joe Maine, formulated a plan to kill the victim. On or around August 1, 1997, Joe Maine's girlfriend, Rebecca Peters, went to the petitioner's home to babysit for the petitioner. In exchange for her services Mrs. Peters was promised a motorcycle, a mobile home, and some money. Joe Maine accompanied his girlfriend to the petitioner's home that evening.

While at the petitioner's home, the two co-defendant's lured the victim outside after telling her that they wanted to show her something. The two co-defendant's later went back inside the home without the victim. Co-defendant Maine had blood on his pants when he returned. The victim was never talked about or seen again after she left with the petitioner's co-defendants..

Nearly three weeks after the victim disappeared, Mr. Kessler noticed a foul odor somewhere on the property, which prompted him to call the police. When the police conducted an investigation, they found the victim's body in a cistern on the property. It was also discovered that lime had been poured on the victim's body in an effort to hide the stench. An autopsy later revealed that the victim had been hit in the head with a blunt object and stabbed multiple times.

Co-defendant Pate and the petitioner claimed that the death of the victim was an accident. Co-defendant Pate, however, later changed his story and admitted killing the victim. Co-defendant Maine also admitted his part in the murder. Both co-defendant's implicated the petitioner in the crime. The petitioner was subsequently charged with first degree murder and conspiracy to commit first degree murder.

After being arrested, the petitioner's trial attorney entered a motion for a court ordered psychological evaluation of the petitioner. After a hearing on the petition, the trial court ordered a psychological evaluation to be conducted. The psychological evaluation, however, was never

conducted because the petitioner accepted a guilty plea offer made by the District Attorney's office. The petitioner pled guilty to second degree murder and conspiracy to commit second degree murder.

The petitioner's trial counsel later explained that he recommended that the petitioner accept the guilty plea offer. The petitioner's trial counsel further explained that especially incriminating evidence was mounting against the petitioner, and that he believed the District Attorney's offer was a good offer. Further, he explained that he believed the defense that the petitioner had been pursuing was destroyed by incriminating evidence that had surfaced.

At the guilty plea hearing, the petitioner told the trial court on two separate occasions that she believed that it was in her best interest to accept the guilty plea offer made by the District Attorney's office. Further, during the guilty plea hearing the trial court asked the petitioner about the "mental evaluations and psychological testimony [that] was discussed" at an earlier hearing. Again, the petitioner indicated that she believed that it was in her best interest to accept the guilty plea offer made by the District Attorney's office. The petitioner's guilty plea was accepted by the trial court, and she was sentenced to concurrent sentences of twenty-five (25) years and twelve (12) years. Further, as part of the guilty plea agreement, the petitioner was required to serve eighty-five (85) percent of her sentence before she is eligible for release.

On January 1, 1998, the petitioner filed for post conviction relief. The petitioner's petition was dismissed after a post-conviction hearing. The petitioner subsequently filed this appeal.

ANALYSIS

Ineffective Assistance of Counsel

The petitioner contends that her trial counsel was ineffective because he allowed her to plead guilty to the District Attorney's guilty plea offer without the use or benefit of a court ordered psychological evaluation. We disagree.

Standard of Review

This Court reviews a claim of ineffective assistance of counsel under the standards of Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975), and Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The petitioner has the burden to prove that (1) the attorney's performance was deficient, and (2) the deficient performance resulted in prejudice to the defendant so as to deprive him of a fair trial. Strickland, 466 U.S. at 687, 104 S.Ct. at 2064; Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Overton v. State, 874 S.W.2d 6, 11 (Tenn. 1994); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990).

The test in Tennessee to determine whether counsel provided effective assistance is whether his performance was within the range of competence demanded of attorneys in criminal cases. Baxter, 523 S.W.2d at 936. The petitioner must overcome the presumption that counsel's conduct

falls within the wide range of acceptable professional assistance. Strickland, 466 U.S. at 689, 104 S.Ct. at 2065; State v. Burns, 6 S.W.3d 453, 462 (Tenn. 1999). Therefore, in order to prove a deficiency, a petitioner must show “that counsel’s acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms.” Goard, 938 S.W.2d at 369 (citing Strickland, 466 U.S. at 688, 104 S.Ct. at 2065).

In reviewing counsel's conduct, a "fair assessment . . . 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, 104 S.Ct. at 2065. The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997); Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982).

Analysis: Ineffective Assistance of Counsel

The petitioner’s trial counsel testified at the petitioner’s post-conviction hearing. In testimony given by the petitioner’s trial counsel, he explained that the petitioner’s original defense was that the petitioner was pressured into aiding in the murder of the victim as a result of being dominated by co-defendant Pate. Trial counsel testified that he sought the psychological evaluation to prove the petitioner’s defense, and to aid in avoiding a life sentence without the possibility of parole.

Trial counsel further testified that he later recommended that the petitioner accept the District Attorney’s guilty plea offer because of mounting evidence against the petitioner. Specifically, trial counsel explained that both of the petitioner’s co-defendants had agreed to testify about the petitioner’s involvement in the murder. Further, trial counsel testified about a letter that was found that was written by the petitioner. The contents of the letter contained absolute and undying declarations of the petitioner’s love for co-defendant Pate, suggesting that there was no history of domination by co-defendant Pate. Continuing, the petitioner’s letter also contained material that appeared to link her to the crime. First, the letter showed what appear to be the petitioner’s dislike for the victim. Second, the letter stated that something that had been planned had “better be untraceable” because of a fear the petitioner had about going to prison and losing her children. Trial counsel testified that he believed that the testimony of the petitioner’s co-defendants and the letter effectively destroyed the petitioner’s defense.

At the post-conviction hearing the petitioner’s trial counsel also testified that he had handled between eighteen (18) and twenty (20) homicide cases in the past. Trial counsel testified that he was familiar with mental defenses and recognized that the evidence that was mounting against the petitioner was very damaging to her defense. Given trial counsel’s prior experience in cases similar to the petitioner’s and the evidence against the petitioner, he believed that the District Attorney’s guilty plea offer was a good offer and that it was in the best interest of the petitioner to accept it.

The post-conviction court obviously did not believe that the petitioner overcame the burden of proving that her trial counsel's conduct fell below the range of acceptable professional assistance. Specifically, the post-conviction court held that "considering all of the facts, all of the circumstances, [trial counsel] made an informed and calculated strategic decision to abandon the defense that [the petitioner] was dominated by Mr. Pate and subject to mental stresses." We agree.

The petitioner also sets forth in her argument that trial counsel was ineffective because he did not notify the trial court of the summary of the petitioner's intake form at Cherokee Health Systems. The record clearly shows, however, that the trial court was aware of a mental examination that was to be conducted, and had notice from a prior hearing of possible mental deficiencies that may have plagued the defendant. Further, the post-conviction court also reviewed the intake form, but obviously concluded that the notes contained therein did not show a mental defect sufficient to render the petitioner incompetent to enter a guilty plea.

It is well established that this court may not reweigh or reevaluate the evidence, nor substitute its inferences for those drawn by the trial judge. Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997); Massey v. State, 929 S.W.2d 399, 403 (Tenn. Crim. App. 1996). Absent the finding of evidence that preponderates against the post-conviction court's findings, we may not disturb the post-conviction court's findings. Henley, 960 S.W.2d at 578. We do not find that the evidence in the record preponderates against the findings of the post-conviction court. This collateral issue is without merit.

The petitioner also contends in her argument that she did not understand the guilty plea proceedings because she was under the influence of prescribed drugs at the time of the guilty plea hearing. The petitioner's trial counsel testified, however, that the petitioner appeared to be comprehensive when he saw her the day of the guilty plea hearing. Trial counsel also testified that he believed that the petitioner knew and understood what she was doing at the guilty plea hearing.

The transcript of the guilty plea hearing was introduced at the post-conviction hearing in an effort to show that the petitioner was alert and understood what was taking place. The transcript shows clear and concise answers given by the petitioner when questions were posed to her by the trial court. The guilty plea transcript fails to support the petitioner's contention that she was unaware of what was going on at the guilty plea hearing and that she was confused.

The medication log used by the department of corrections was also introduced into evidence at the post-conviction hearing in an attempt to disprove the petitioner's contention that she was on medication at the time of the guilty plea hearing. The pages from the medication log containing information for the day of the guilty plea hearing, however, were not found in the log that was introduced into evidence. Based upon the information that was present for the days set forth in the log, the post-conviction court found that it was not likely that the petitioner was on medication at the time of the guilty plea hearing. The post-conviction court also discounted the petitioner's contention that the medication that she was on caused her to be unable to understand the proceedings at the

guilty plea hearing, noting that there was no evidence presented at the hearing concerning the effects of the medication that the petitioner claimed to be taking.

After a review of the record, we see no reason to disturb the findings of the post-conviction court. The petitioner has failed to establish that the evidence preponderates otherwise. See, e.g., Henley, 960 S.W.2d at 579; Black v. State, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990).

CONCLUSION

The post-conviction court's dismissal of the petitioner's petition for post-conviction relief is affirmed.

JOHN EVERETT WILLIAMS, JUDGE