IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 22, 2008

LARRY GLENN CAULEY v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Robertson County
No. 7214 John A. Gasaway, III, Judge

No. M2007-02084-CCA-R3-PC - Filed June 30, 2008

The Petitioner, Larry Glenn Cauley, appeals from the post-conviction court's order denying his petition for post-conviction relief. On appeal, he asserts that the dismissal was error because he did not receive the effective assistance of counsel at trial, and because the credibility of one of the State's witnesses was called into doubt after his trial. Following our review, we conclude that the Petitioner has not shown that he is entitled to relief. We affirm the judgment of the post-conviction court.

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

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

James Kevin Cartwright, Clarksville, Tennessee, for the appellant, Larry Glenn Cauley.

Robert E. Cooper, Jr., Attorney General and Reporter; Lacy Wilber, Assistant Attorney General; John W. Carney, District Attorney General; and Dent Morrisss, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

The Petitioner was convicted of two counts of felony murder,[1] and he was sentenced to two consecutive life terms. See State v. Larry Glenn Cauley, Jr., No.01C01-9111CC00340, 1992 WL 217771, at *1 (Tenn. Crim. App., Nashville, Sept. 11, 1992), perm. to appeal denied (Tenn. Nov. 30, 1992). This Court affirmed the judgments of the trial court on direct appeal, and our supreme court denied his application to appeal. Id.

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[1] There were two mistrials before these convictions were secured in a third trial; the first trial resulted in a hung jury, and there were issues during the selection of the jury in the second trial that necessitated a mistrial.

In the opinion on direct appeal, this Court set out the facts underlying the Petitioner's crimes. See id. at *1–2. On June 28, 1988, the Petitioner and his brother shot and killed Wayne Tinnon, a cattleman, and an undercover detective, David Mandrell. See id.; see also State v. James Kelly Cauley, No. 01-C-019004CC00100, 1992 WL 75847 (Tenn. Crim. App., Nashville, Apr. 16, 1992), perm. to appeal denied (Tenn. Jan. 4, 1993) (adjudicating the brother's direct appeal). Approximately six weeks before the murders, the Petitioner sold stolen cattle to Tinnon, who carried large sums of cash for purchasing cattle. Larry Glenn Cauley, 1992 WL 217771, at *1. Detective Mandrell investigated the cattle theft, and he had Tinnon arrange another buy from the Petitioner. Id. The detective accompanied Tinnon to the second buy, and both men were robbed and killed; there were no cattle in the vicinity. Id. Their bodies were discovered on a remote farm in Robertson County. Id.

A firearms identification expert tested shell casings recovered from the scene of the killings and testified that a pistol and a rifle discovered in the Petitioner's parents' house, inside his brother's bedroom, were the weapons used to kill the victims. Id. After he was apprehended, the Petitioner gave conflicting statements: first he said he was not involved and did not know Tinnon, but later he admitted taking the victims to the farm where they were killed, asserting that he left before the murders. Id. The Petitioner's girlfriend testified that when the Petitioner and his brother left their apartment on the morning of the murders, his brother had been carrying a gun case. Id. at *2.

An inmate who had been jailed with the Petitioner, John Kevin Ellis, testified that the Petitioner told him he killed Tinnon with the pistol and his brother killed Detective Mandrell with the rifle. Id. The Petitioner confided in Ellis that the victims were killed because they "knew enough on him to put him away for a lot of time and that he would kill them again if necessary." Id. Another inmate jailed with the Petitioner testified that the Petitioner "admitted shooting the victims and assured him he would do it again." Id.

Following his conviction and the denial of his direct appeal, the Petitioner filed a petition for post-conviction relief. The post-conviction court dismissed the Petitioner's first petition for post-conviction relief for being untimely filed. However, this Court vacated the order of dismissal, ruling that the petition was timely. The original petition presented a number of grounds for relief. Specifically, the Petitioner averred that his conviction was based on evidence gained through an unconstitutional search and seizure; that his conviction was based on an unlawful arrest; that his privilege against self-incrimination was violated; and that he was denied the effective assistance of counsel.

In an amended petition filed after counsel was appointed to represent the Petitioner in his post-conviction action, the Petitioner asserted that newly discovered evidence warranted post-conviction relief. The newly discovered evidence to which the amended petition referred was a letter from John Kevin Ellis to the Assistant District Attorney General (Dent Morriss) who prosecuted the Petitioner. Subsequent to the Petitioner's trial, Ellis had been convicted of first degree murder and sentenced to life without parole, and General Morriss prosecuted his case as well. In the letter, Ellis claimed that his testimony at the Petitioner's trial was untrue and a product of prosecutorial coercion.

A hearing was held in the post-conviction court. At the hearing, Ellis testified that "everything" he wrote in the letter to General Morriss regarding his testimony at the Petitioner's trial was false. Ellis informed the court that he wrote "a lot" of letters in prison while under the influence of psychotropic medication. Ellis made the accusations in the letter in an effort to "do something to get a break off of [his] murder case that [he] got life without parole for."

Ellis remembered testifying at the Petitioner's trial, but he did not recall "exactly what was said." However, he asserted that he accurately related what the Petitioner told him in jail about the murders and that no one coached or prepared him before he testified at the Petitioner's trial. He also stated that he did not make any deal with the prosecutor before he testified at the Petitioner's trial.

On cross-examination, Ellis confirmed that he had written a second letter to General Morriss retracting the accusations made in the first letter. In the second letter, Ellis stated that he fabricated the allegations in the first letter and that he told the truth while testifying at the Petitioner's trial:

> Sir, I am writing you to apologize for the [first letter] I wrote you about the [Petitioner's] trial. I told the truth in that trial. I told the jury exactly what [the Petitioner] told me. And [General Morriss] had nothing to do with my testimony. I told the truth. And me making them allegations against you are totally a Lie. I don't know why I made that shit up but I'm totally sorry for saying them things.

(Emphasis in original.)

Lieutenant Jerrell[2] Jones testified that he was the administrator of the Robertson County Detention Facility in 1988 at the time the Petitioner was first detained and charged with murder. At that time, an inmate approached Lieutenant Jones and told him that he had overheard a conversation between Ellis and the Petitioner wherein the Petitioner admitted killing the victims. After being so informed, Lieutenant Jones sent a memorandum to General Morriss telling him about the information he had received from the inmate. The memorandum was dated October 19, 1989, and entered as an exhibit at the hearing.

General Morriss testified at the hearing that he prosecuted the Petitioner. He also testified that the dismissal of a contemporaneous burglary charge against Ellis was unrelated to the Petitioner's case. General Morriss testified that he did not make any agreement with Ellis before Ellis testified at the Petitioner's trial. He denied that he coerced or manipulated Ellis's testimony in any way. In fact, at the time Ellis testified, he had no pending charges.

The attorney who represented the Petitioner at trial (trial counsel) testified that he was hired by the Petitioner's family to represent him at the first two trials, which ended in mistrials, and that he was appointed to represent the Petitioner at the third and final trial. Because the State was

[2] The transcript of the proceedings incorrectly identifies Lieutenant Jones as "Gerald" Jones.

seeking the death penalty, a second attorney was also appointed to defend the Petitioner. Before trial, trial counsel made a number of discovery requests with which the State complied. Trial counsel testified that prior to the first trial, he met with the District Attorney General, who "basically, showed me the entire file in the case[.]" Accordingly, he was aware that Ellis and another "jailhouse witness" might testify against Petitioner.

Asked whether he interviewed the jailhouse witnesses before trial, trial counsel stated that he could not recall because approximately fourteen years had passed between the trial and the post-conviction hearing. However, he explained that he was aware of the substance of their testimony. As a result, he focused on preparing their cross-examinations and on impeaching their credibility with their criminal histories.

Trial counsel confirmed that he did not hire any expert witnesses in defending the Petitioner. He was aware that the State would call an expert to testify regarding gunpowder residue tests at trial because such an expert had been called at the previous trials. However, no defense expert witness was required to rebut that testimony because it was apparent before trial that the testimony regarding gunpowder residue would either be a "non-factor" or helpful to the defense. In addition, trial counsel testified that he was not surprised by the State's expert witness on firearms identification because he had also become familiar with his testimony at the first trial.

Trial counsel confirmed that he did not make any pretrial motions to limit the scope of the medical examiner's testimony, despite knowing that the doctor had a propensity for "going beyond the scope of what was asked." Trial counsel explained that, prior to trial, he made no such motions because he hoped the doctor would make the same mistakes he made in the first trial and discredit himself.

On cross-examination, trial counsel stated that he thought the best chance the Petitioner had at securing an acquittal was in the first trial. In the subsequent trials, "it was difficult for the defense to make the adjustments that the State was able to make." He agreed that the circumstantial evidence against the Petitioner was very strong. Trial counsel pointed out that the Petitioner's brother was tried "on virtually the same evidence," without the testimony of any jailhouse witness, and he was also convicted. The main defense put forth at trial was that another man with a violent criminal history, who was in close proximity to the scene on the day of the murders, had actually committed the offenses. However, trial counsel said that this defense was better established in the first trial than the final trial.

At the close of the proof, the post-conviction court allowed the parties to submits briefs in place of argument and reserved ruling on the petition. Approximately two months later, the court made an oral ruling denying post-conviction relief and stated that it would issue an order "setting out the basis for that ruling." However, almost two years passed before the post-conviction court made an in-depth and thorough ruling from the bench setting out the basis of its denial of the Petitioner's petition.

The Petitioner filed a timely notice of appeal.

ANALYSIS

On appeal, the Petitioner argues that trial counsel was constitutionally ineffective. Specifically, he avers that trial counsel's performance was deficient because he did not hire an expert witness to consult with the defense and refute the evidence offered by the State's firearms identification expert. Further, the Defendant contends that trial counsel was ineffective because he did not interview the "jailhouse witnesses" prior to trial. The Petitioner asserts that had trial counsel taken these actions, he would have been able to better discredit their testimony, especially that of Ellis.

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer's assistance to his or her client is ineffective if the lawyer's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant's lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant's failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer's performance, the reviewing court uses an objective standard of "reasonableness." Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel's choices "and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance

of the evidence is otherwise. Id. "However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions." Id. (emphasis in original).

In this case, the Petitioner's arguments that he is entitled to relief because he received the ineffective assistance of counsel are not persuasive. Putting the question of deficient performance aside,[3] it is evident that the Petitioner has not met his burden of showing how he was prejudiced by trial counsel's alleged shortcomings.

First, his assertion that trial counsel was constitutionally ineffective for failing to call a firearms identification (or ballistics) expert to refute the testimony of the State's firearms identification expert is unsupportable because the Petitioner did not call any such expert to testify at the hearing. See Black v. State, 794 S.W.2d 752, 757–58 (Tenn. Crim. App. 1990). This Court has previously explained that a claim of ineffective assistance for failure to call a witness must fail unless the witness at issue is called to testify at the post-conviction hearing:

> When a [post-conviction] petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing. As a general rule, this is the only way the petitioner can establish that (a) a material witness existed and the witness could have been discovered but for counsel's neglect in his investigation of the case, (b) a known witness was not interviewed, (c) the failure to discover or interview a witness inured to his prejudice, or (d) the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner. It is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of whether further investigation would have revealed a material witness or what a witness's testimony might have been if introduced by defense counsel. The same is true regarding the failure to call a known witness. In short, if a petitioner is able to establish that defense counsel was deficient in the investigation of the facts or calling a known witness, the petitioner is not entitled to relief from his conviction on this ground unless he can produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called.

Id. (citing Strickland 466 U.S. 668); see also Ricky G. Aaron v. State, No. M2006-01983-CCA-R3-PC, 2008 WL 203394, at *10 (Tenn. Crim. App., Nashville, Jan. 22, 2008) (stating that this Court's holding in Black "is unequivocal: the allegedly favorable witness must be called and must offer favorable testimony at the [post-conviction] evidentiary hearing in order for [a] petitioner to demonstrate prejudice"). By not calling a ballistics expert to testify at the post-conviction hearing,

[3] We do not conclude that trial counsel's performance in this case was deficient in any manner.

the Petitioner has failed to show that he was prejudiced because trial counsel did not call one at trial. In fact, the Petitioner admits in his brief that because the shell casings are no longer available for testing, "[t]here is not objective proof to give an expert now to demonstrate on appeal that a substantial defense was missed."

The Petitioner has also failed to show any kind of prejudice flowing from trial counsel's decision not to interview John Kevin Ellis before trial. He argues that had such an interview or a more thorough background investigation been conducted, trial counsel could have possibly uncovered that Ellis was "on drugs (or possibly off his medications . . .)." The Petitioner's speculative and conclusory averments regarding what a pretrial interview with Ellis might have revealed fall short of the clear and convincing evidence this Court requires to find that a lawyer was constitutionally ineffective. See Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. Moreover, even if the Petitioner were able to show that Ellis could have been thoroughly and convincingly discredited through information gleaned from a pretrial interview, the Petitioner would still be unable to demonstrate that he was actually prejudiced because a second inmate also testified at trial that the Petitioner admitted killing the victims. In addition to the second inmate's testimony relating the substance of the Petitioner's jailhouse admissions, the State also presented convincing circumstantial evidence of his guilt. Further, we agree with the post-conviction court that trial counsel's performance was not deficient in this regard because, as he explained, the substance of Ellis's testimony had been revealed to him at the first trial.

The Petitioner also contends that post-conviction relief is warranted because the State "committed misconduct by having not disclosed in a timely fashion the circumstances surrounding the events of having discovered the chief witness to a confession." More specifically, he contends that the State did not did not provide the defense with the memorandum written by Lieutenant Jones to General Morriss during discovery and, had that information been available to the defense, trial counsel might have been better able to refute Ellis's testimony. This argument is highly speculative. Moreover, the Petitioner has waived any claim of prosecutorial misconduct because the issue was not raised on direct appeal. See Robby Lynn Davidson v. State, No. M2005-02270-CCA-R3-PC, 2006 WL 3497997, at *8 (Tenn. Crim. App., Nashville, Dec. 4, 2006), perm. to appeal denied (Tenn. Apr. 23, 2007) (citing Tenn. Code Ann. § 40-30-106(g); John C. Johnson v. State, No. M2004-02675-CC-R3-CO, 2006 WL 721300, at *19 (Tenn. Crim. App., Nashville, Mar. 22, 2006)).

Lastly, the Petitioner argues that the first letter from Ellis to General Morriss qualifies as newly discovered evidence establishing that Ellis's trial testimony was "almost completely unbelievable to the point where its role in any prior determination of sufficiency of the trial evidence should be overturned and a new trial ordered." We do not agree; rather, the evidence does not preponderate against the post-conviction court's finding that the Petitioner failed to discredit Ellis's trial testimony. Although Ellis did write a letter claiming he lied at the Petitioner's trial, he also wrote a second letter swearing that the first letter was untrue. He also testified at the hearing that he told the truth at the Petitioner's trial. Accordingly, the Petitioner has failed to prove these factual allegations with clear and convincing evidence. See Momon v. State, 18 S.W.3d 152, 156 (Tenn.

1999) ("to sustain his post-conviction petition, the appellant must prove his allegations by clear and convincing evidence."); see also Tenn. Code Ann. § 40-30-110(f).

Conclusion

Based on the foregoing authorities and reasoning, the judgment of the post-conviction court denying the Petitioner's petition for post-conviction relief is affirmed.

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DAVID H. WELLES, JUDGE