IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 1, 2020

TOMMIE PHILLIPS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 09-05231 Mark Ward, Judge

No. W2019-01927-CCA-R3-PC

The petitioner, Tommie Phillips, appeals the denial of his petition for post-conviction relief, which petition challenged his 2011 Shelby County Criminal Court jury convictions of felony murder, reckless homicide, attempted first degree murder, aggravated rape, aggravated sexual battery, especially aggravated kidnapping, and aggravated burglary. He argues that he was deprived of the effective assistance of counsel. Discerning no error, we affirm.

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

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

Josie S. Holland and Roberto Garcia Jr., Memphis, Tennessee, for the appellant, Tommie Phillips.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

A Shelby County Criminal Court Jury convicted the petitioner of four counts of felony murder, one count of reckless homicide, two counts of attempted first degree murder, one count of aggravated rape, one count of aggravated sexual battery, six counts of especially aggravated kidnapping, and two counts of especially aggravated burglary based upon his committing several offenses against several members of the same family on December 9, 2008. *See State v. Tommie Phillips*, No. W2012-01126-CCA-R3-CD, slip op. at 1-2 (Tenn. Crim. App., Jackson, Dec. 13, 2013). On that date, the petitioner entered

the home M.L.[1] shared with her 85-year-old mother, F.G., and demanded money and jewelry from the women at gunpoint. *See id.*, slip op. at 2-3. He forced M.L. to take F.G. to F.G's bedroom and to bind F.G.'s hands and feet with shoelaces and then demanded that M.L. remove her bathrobe and get into her bathtub before he bound her hands and feet. The petitioner told M.L. that friends of her son, C.L., had robbed a friend of the petitioner's "and that her son was 'going [to] be the pawn for it.'" *Id.*, slip op. at 3. The petitioner penetrated M.L. vaginally with his fingers, sliced at her throat, and stabbed her in the chest. "The [petitioner] stepped out of the bathtub, smiled at her, and went back into her bedroom." *Id.*, slip op. at 4. He returned with her bathrobe "and said, 'Pack it down, you'll live.' He told her that if her son arrived in fifteen minutes, he could call the paramedics to save her. He said, 'I do this all the time,' then smiled and left the bathroom." *Id.* M.L. "heard her mother scream, '[P]lease, don't kill me.' M.L. called out to her mother, and the [petitioner] told her, '[S]hut up or I'll kill her.'" *Id.*, slip op. at 5 (first and third alterations in original). When she called for her mother again, she got no response.

Approximately 10 minutes later, C.L. arrived and struggled with the petitioner at the door. *See id.* As the men struggled, M.L. managed to loosen her bindings and make her way into the kitchen, where she discovered that the petitioner had disconnected the telephone line. She made her way back into the bathroom and heard the petitioner's commanding C.L. to bind himself. When the petitioner realized that M.L. had tried to call for help, he attempted to shoot her three times, but the gun did not fire. At that point, the petitioner pointed his knife at her "and said, '[Y]ou just killed your son' and went into the kitchen." *Id.*, slip op. at 5 (alteration in original). M.L. heard C.L. "screaming and begging for his life" and then walked down the hallway, where she saw C.L. "lying on her mother's bed, bound and bleeding, and the [petitioner] stabbing him." *Id.* M.L. saw F.G. lying unresponsive on the bathroom floor "with her head between the commode and the wall." *Id.* M.L. obtained a hammer from her dresser and went back into F.G.'s room, where the petitioner continued to stab C.L., and walked toward the petitioner with the hammer.

At that point, M.L.'s daughter, M.J.L., looked into the room and screamed. *See id.* C.L. called out for M.J.L. to run, and the petitioner gave chase. M.L. then heard a fall and the petitioner's ordering M.J.L. not to move. C.L., who had been able to free himself, then ran into the living room. C.L. and M.J.L. "attacked the [petitioner] from both sides, and M.L. advanced and tried to hit him with the hammer." *Id.*, slip op. at 6. "[T]he struggle spilled out onto the porch," where "C.L. collapsed." *Id.* The petitioner jumped from the porch, smiled, and "said, '[H]ey, man, I'm gone' and ran down the street." *Id.*

[1] To protect the anonymity of the victim of sexual offenses, we are referring to all of the victims by their initials.

C.L. suffered more than a dozen stab wounds to his back, chest, arm, and leg, "including a life-threatening stab wound to his upper chest that penetrated through the chest wall into the space for the heart and lungs." *See id.*, slip op. at 7-8. F.G. died in the bathroom with "a blue bandana wrapped tightly around her neck, apparently strangling her." *Id.*, slip op. at 8.

While the petitioner and his mother were being transported to the police station for the petitioner to be interviewed, the transporting officer overheard the petitioner's telling his mother "his side of the story." He said "that F.G. was having a heart attack and he put a pillow under her head." *Id.*, slip op. at 8-9. He "also told his mother that he and C.L. got into a fistfight over a debt" and "that C.L. pulled a shotgun on him and pulled the trigger, but the gun did not go off. The two then fought each other with knives." *Id.*, slip op. at 9. Later, the petitioner "admitted being in the house and stabbing C.L. and M.L. but claimed that he did so in self-defense." *Id.* He claimed that F.G. complained "about her heart, so he got a pillow and put it under her head and she lay down on the bathroom floor." *Id.*

> Following the conclusion of the proof, the jury convicted the [petitioner] of four counts of first degree felony murder, one count of reckless homicide as a lesser-included offense of first degree premeditated murder, two counts of attempted first degree murder, one count of aggravated rape, one count of aggravated sexual battery as a lesser-included offense of aggravated rape, six counts of especially aggravated kidnapping, and two counts of especially aggravated burglary. The jury acquitted the [petitioner] on one count of especially aggravated burglary. The trial court merged the following convictions: the four felony murder and the reckless homicide convictions into one felony murder conviction; the aggravated sexual battery conviction with the aggravated rape conviction; the six especially aggravated kidnapping convictions into three convictions, one per victim; and the two especially aggravated burglary convictions into one conviction.

Id., slip op. at 11.

On direct appeal, this court modified the petitioner's conviction of especially aggravated burglary to a conviction of aggravated burglary and affirmed the judgments in all other respects. *See id.*, slip op. at 1, 31-32. The supreme court denied the petitioner's application for permission to appeal in March 2014, and the petitioner filed a timely petition for post-conviction relief in December 2014. He claimed entitlement to post-

conviction relief on the basis that he was deprived of the effective assistance of counsel, arguing that counsel performed deficiently by failing to adequately investigate, failing to challenge prosecutorial misconduct and vindictiveness, failing to challenge the admissibility of his pretrial statement to the police, and failing to challenge alleged flaws in the indictment.

Following the appointment of counsel, the petitioner filed an amended petition for post-conviction relief in May 2016, again alleging ineffective assistance of counsel. He argued that trial counsel failed to adequately prepare for the case, failed to challenge the admissibility of his statement on Fourth Amendment grounds as well as Fifth Amendment grounds, and failed to present "pertinent issues of law" on appeal. In his second amended petition for post-conviction relief, the petitioner further distilled his claims of ineffective assistance of counsel. In his third amended petition, the petitioner further refined his earlier claims and added claims that trial counsel performed deficiently by failing to adequately investigate the role of two men in the State's investigation, failing to adequately cross-examine C.L., and failing to object to the admission of certain video recordings.

At the May 11, 2018 evidentiary hearing,[2] Attorney G., an assistant district public defender who was at the time of the petitioner's trial "part of the capital defense team," and Attorney S. represented the petitioner at trial. Additionally, the capital defense team included a full-time investigator. He recalled that the petitioner's "was a life without parole case" that "ultimately" resulted in "a straight life verdict." He said that Attorney S. was lead counsel. Attorney G. recalled having moved to suppress the petitioner's statement, but he could not recall the specifics of the motion. He testified that they received discovery materials from the State that they then discussed with the petitioner.

Attorney G. testified that the facts in the case "were problematic." He also reported that, during his investigation, he went to view the shotgun that the petitioner had allegedly used during the offenses. At that time, he observed that a 20-gauge round was jammed in the barrel of the 12-gauge weapon, which aligned with the testimony of the State's witnesses that the petitioner "had a shotgun and that he pointed at someone and pulled the trigger and it didn't work." He said that they alerted the police, and a police officer was able to remove the round.

Prior to the sentencing hearing, the defense team "did a full social history" on the petitioner. He recalled that they presented a number of mitigating factors and were

[2] The evidentiary hearing was conducted in four parts on May 11 and August 20, 2018, and May 14 and September 20, 2019.

successful in getting a life sentence as opposed to a sentence of life without the possibility of parole.

During cross-examination, Attorney G. testified that, by the time of the petitioner's trial, he had been practicing law for some 15 years and had been part of the capital defense team for five or six years. He had tried at least one other capital case to verdict. Counsel said that the State did not seek the death penalty in the petitioner's case, explaining, "I think that there might have been some issues with intellectual disability that prevented death notice." The State did seek a sentence of life without the possibility of parole. He agreed that identity was not an issue in the case and that the petitioner had made a statement implicating himself.

At the August 20, 2018 evidentiary hearing, Attorney N., another member of the capital defense team, testified that he was appointed to represent the petitioner shortly after the petitioner's arrest. He said that the team's handling of the petitioner's case "was fairly intensive" and that it began with Attorney N.'s handling the preliminary hearing. Attorney N. said that he remained on the petitioner's case until he retired from the public defender's office.

Attorney N. said that he was familiar with the Memphis Police Department's 48-hour hold policy and that he had challenged the constitutionality of the procedure in another case. He agreed that a magistrate agreed to a 48-hour hold in the petitioner's case. When he retired, other members of the capital defense team took over the petitioner's case. Attorney S. was not hired until after Attorney N. left the public defender's office, but Attorney N. recalled that Attorney G. was second chair throughout the case.

During cross-examination, Attorney N. testified that he had handled 12 or 13 homicide cases prior to being assigned to the petitioner's case. He agreed that the hearing on the motion to suppress the petitioner's statement was held in two parts separated by a few months and that that procedure was not uncommon due to scheduling issues.

Upon questioning by the court, Attorney N. said that although the team had considered the issue, they did not move to suppress the petitioner's statement on any ground related to the 48-hour hold in this case.

At the May 14, 2019 evidentiary hearing, Lieutenant Colonel Caroline Mason of the Memphis Police Department ("MPD") testified that she assisted in the investigation in the petitioner's case. As part of her duties, she interrogated the petitioner. She recalled that on December 10, 2008, the petitioner "turned himself in to the police and said that he wanted to go to the Homicide Office and clear his name." She said that the petitioner agreed to provide a DNA sample and was eventually provided with *Miranda*

warnings at 1:52 p.m. Lieutenant Colonel Mason testified that she had "made the scene" of the offenses on the previous day and that she was aware that the petitioner had been identified as the perpetrator by "one of the surviving victims." At some point during the interrogation, the petitioner "just asked for an attorney. He said he was done talking. He wanted an attorney." After the petitioner asked for an attorney, she and other officers "got everything prepared to take him down to put a hold on him. Lieutenant Colonel Mason explained the 48-hour hold procedure that was in place at the MPD at the time of the offenses:

> 48-hour hold gives us the opportunity if we do have the possible suspect or the person of interest in . . . our interview room. We're talking to them, getting information from them. We follow all the steps with the Miranda Warning. They waive that right and agree to speak with us. We'll gather information from them, and if we don't have enough at that time to charge but that person of interest has provided some information, we want to go back and verify that information before we . . . formally charge them to it.
>
> Sometimes it exonerates them. If they're not guilty, then we release the hold. But we usually use that as an opportunity to verify some more information or get some more witnesses in if we get the person of interest in before.

She said that the MPD stopped utilizing the procedure.

Lieutenant Colonel Mason said that the petitioner admitted having stabbed some people but made some claims related to self-defense before asking for a lawyer. After that, she "wrote this arrest ticket" that was "put with the 48-hour hold." Lieutenant Colonel Mason testified that the petitioner was interviewed again on December 11, 2008. He was then charged on December 12, 2008.

During cross-examination, Lieutenant Colonel Mason agreed that the petitioner came to the police station at approximately 12:40 p.m. on December 10, 2008, to turn himself in. He then gave a statement wherein he admitted being at the location of the offenses and stabbing the victims. She said that, at the time the petitioner provided the first statement, at least one of the victims had identified the petitioner by first and last name as the perpetrator. She agreed that, by the time the petitioner asked for an attorney, police officers had probable cause to charge him with something but were in the process of determining what the appropriate charges would be. For that reason, they placed a 48-hour hold on the petitioner at 7:13 p.m. During that hold, another officer who had not been

present during the first interview scheduled an interview with the petitioner for the following morning. That officer canceled the interview after learning that the petitioner had invoked his right to counsel. Nevertheless, at some point, the petitioner asked to speak to the detectives in the case. The petitioner was then interviewed a second time. Based upon the two statements as well as the statements of the witnesses, the defendant was placed under arrest and charged at 4:51 p.m. on December 12, 2008.

Attorney S. testified that, at the time of the petitioner's trial, he had been licensed to practice law for 20 years, was working in the Shelby County Public Defender's Office, and had tried nearly 100 jury trials, "over 80 percent" of which were murder trials. He said that, after he took over as the lead attorney for the capital defense team, the team "tried to catch" every murder case "on the front end like an arraignment date down in General Sessions" and get appointed to represent indigent homicide defendants. They then followed those cases through the trial and appeal process. The team had two dedicated investigators. Attorney S. said that he thought the team had done "everything we could do and put on the best defense we knew how to put on" but that he was not satisfied with the outcome of the case because he did not "like losing." He said, however, that the petitioner's "was a hard case."

The petitioner testified that he was not pleased with the outcome of his trial "[b]ecause I felt I had been taken advantage of as far as what my Constitutional Rights states that I'm entitled to be governed with." The petitioner said that he "was initially picked up off Felix Street. I had got contacted that the polices [sic] were looking for me." He said that he surrendered to the police because his mother was in the police car. The petitioner asserted that certain witnesses testified untruthfully at the suppression hearing, as demonstrated by discovery materials that he received after the hearing, and said that he thought his attorneys should have resubmitted the suppression motion in light of the new information. He could not, however, produce any document that clearly showed that any witness testified untruthfully and claimed instead, that "the timing" of various things tended to show that the witness's testimony was untruthful.

The petitioner testified that, as far as he knew, none of his attorneys had developed a trial strategy. He recalled that he underwent a psychological evaluation, the results of which established that he "was borderline mental retarded," which caused the prosecutor to "withdraw the death penalty . . . because they couldn't kill the mental retarded." He also claimed that he "felt my attorney was ineffective, because they didn't give me my motion to discovery."

The court reconvened on September 20, 2019, for the purpose of hearing closing arguments from the parties. The petitioner argued that his primary issue was with his counsels' handling of the motion to suppress, asserting that the attorneys should have

challenged his statement on Fourth Amendment grounds instead of or in addition to Fifth Amendment grounds. Specifically, he claimed that "the unreasonable and undue delay that occurred in [the petitioner's] case before he was properly charged" resulted in a Fourth Amendment violation that required suppression of the statement he provided to the police. The petitioner also challenged the "factual determination" that the petitioner had turned himself in to the authorities. The petitioner also argued that his attorneys performed deficiently by "allowing the motion to suppress [to] occur over several months, that the evidence was taken out of order, that that was ineffective, that it should have all taken place in one day." The post-conviction judge, who also presided over the petitioner's trial, noted that it was his practice to allow such proceedings to be bifurcated and pointed specifically to the evidentiary hearing in the petitioner's post-conviction proceeding as an example. Nevertheless, the petitioner claimed that the bifurcation of the hearing on the motion to suppress allowed the State to "explain away certain issues" that it might not have been able to do in a single hearing.

The petitioner also claimed that he was deprived of the effective assistance of counsel because his counsel failed "to properly prepare . . . a strategy for the trial" and because they actually pursued "opposing strategies." When probed by the court about what would have been an effective strategy given that witnesses unequivocally identified the petitioner and that he admitted his own involvement, post-conviction counsel stated that the petitioner "would have preferred for his counsel to strictly pursue a strategy of contesting his guilt" but could not specify exactly what that strategy would have been.

The State argued that although counsel did their best to challenge the State's proof, the evidence of the petitioner's guilt was overwhelming. The State noted that counsel moved to suppress the petitioner's statement on Fifth Amendment grounds and that the issue was thoroughly litigated in the trial court and on appeal. The State noted that, by the time the petitioner gave his initial statement, he had been identified by at least one of the victims and had already incriminated himself. The State also observed that the trial court had found the petitioner's testimony at the suppression hearing to be lacking credibility.

At the conclusion of the evidentiary hearing, the post-conviction court took the case under advisement. In the written order denying post-conviction relief, the court concluded that the petitioner failed to establish by clear and convincing evidence facts that established that he was deprived of the effective assistance of counsel. The post-conviction court found that the petitioner failed to present any proof to support his allegations that any of his attorneys failed to adequately prepare for or investigate the case. The court concluded that, contrary to the petitioner's general assertion that trial counsel failed to adequately communicate with him prior to trial, the petitioner testified that he met with his attorneys regularly. The post-conviction court found that the petitioner failed to present

any evidence to support his claim that any witness lied during the suppression hearing and that, as a result, he failed to establish that counsel performed deficiently by failing to relitigate the motion to suppress on this basis. The court concluded that any challenge to the petitioner's statement based upon the Fourth Amendment would not have been successful given that a probable cause determination was made on the same day that the petitioner turned himself in to the police.

In this timely appeal, the petitioner reasserts his claim of ineffective assistance of counsel, arguing that his counsel performed deficiently by failing to challenge the admission of his statement on Fourth Amendment grounds because "there was an unreasonable delay in obtaining a probable cause hearing." The State contends that the post-conviction court did not err by denying relief.

We view the petitioner's claim with a few well-settled principles in mind. Post-conviction relief is available only "when the conviction or sentence 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. A post-conviction petitioner bears the burden of proving his or her factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f). On appeal, the appellate court accords to the post-conviction court's findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). By contrast, the post-conviction court's conclusions of law receive no deference or presumption of correctness on appeal. *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).

Before a petitioner will be granted post-conviction relief based upon a claim of ineffective assistance of counsel, the record must affirmatively establish, via facts clearly and convincingly established by the petitioner, that "the advice given, or the services rendered by the attorney, are [not] within the range of competence demanded of attorneys in criminal cases," *see Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975), and that counsel's deficient performance "actually had an adverse effect on the defense," *Strickland v. Washington*, 466 U.S. 668, 693 (1984). In other words, 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.* at 694. Should the petitioner fail to establish either deficient performance or prejudice, he is not entitled to relief. *Id.* at 697; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Indeed, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697.

When considering a claim of ineffective assistance of counsel, a reviewing court "begins with the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all significant decisions," *Kendrick v. State*, 454 S.W.3d 450, 458 (Tenn. 2015) (citing *Strickland*, 466 U.S. at 689), and "[t]he petitioner bears the burden of overcoming this presumption," *id.* (citations omitted). We will not grant the petitioner the benefit of hindsight, second-guess a reasonably based trial strategy, or provide relief on the basis of a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

A claim of ineffective assistance of counsel is a mixed question of law and fact. *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010); *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). When reviewing the application of law to the post-conviction court's factual findings, our review is de novo, and the post-conviction court's conclusions of law are given no presumption of correctness. *Fields*, 40 S.W.3d at 457-58; *see also State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000).

In order to prevail on a claim that his counsel was ineffective for failing to challenge his statement on Fourth Amendment grounds, the petitioner "must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). Stated differently, whether counsel rendered deficient services that prejudiced the petitioner on this matter depends entirely on the merit of the underlying motion.

In our view, the record supports the denial of post-conviction relief. The petitioner failed to present any evidence at the evidentiary hearing that suggests that a Fourth Amendment challenge to his statement would have been sustained by the trial court. The petitioner challenged his statement on Fifth Amendment grounds, and, as part of its ruling denying the motion to suppress, the trial court specifically found that the petitioner lacked credibility. *See Tommie Phillips*, slip op. at 23. Moreover, on appeal, this court specifically concluded that "even if the court erred in not suppressing the [petitioner's] statement, such error was harmless beyond a reasonable doubt. The jury heard testimony from three witnesses, all of whom identified the [petitioner] as the perpetrator and one of whom had known the [petitioner] socially for several years." *Id.*, slip op. at 23-24. Consequently, even if the petitioner had presented facts to support a conclusion that a Fourth Amendment challenge would have been successful, he still cannot show that the result of his trial would have been different given the overwhelming proof of his guilt.

Accordingly, the judgment of the post-conviction court is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE