IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs April 10, 2002

RICKY GARRETT v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Davidson County
No. 98-A-448 Steve R. Dozier, Judge

No. M2001-00312-CCA-R3-PC - Filed June 3, 2002

The petitioner appeals the denial of his petition for post-conviction relief from a burglary conviction, arguing that the post-conviction court erred in finding that he received the effective assistance of trial counsel. He contends that trial counsel failed to provide information that was essential for him to make informed decisions in his case and failed to present an adequate defense at trial, and that the cumulative effect of the alleged deficiencies in counsel's performance was to prejudice the outcome of his case. We affirm the denial of the petition for post-conviction relief.

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 JOE G. RILEY and NORMA MCGEE OGLE, JJ., joined.

Cynthia F. Burnes, Nashville, Tennessee, for the appellant, Ricky Garrett.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Renee R. Erb, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The petitioner, Ricky Garrett, was convicted by a Davidson County jury of the burglary of a storage warehouse and was sentenced by the trial court as a career offender to a mandatory term of twelve years imprisonment, to be served at 60%. His conviction was affirmed on direct appeal to this court. See State v. Ricky L. Garrett, No. M1999-00175-CCA-R3-CD, 1999 Tenn. Crim. App. LEXIS 1266 (Tenn. Crim. App. Dec. 17, 1999). The direct appeal opinion provides the following synopsis of the evidence at the petitioner's trial:

> Defendant tripped a silent alarm at Drake Hardware in Nashville. Several Metro police officers responded to the alarm, including the owner's son-in-law, Officer Devin Moses. Moses and another officer, Michael Gann, heard loud noises coming from inside the storage warehouse. After officers surrounded the store, Officer Gann saw defendant pull the corrugated tin siding away from an upper corner of the warehouse, peek outside, and then drop out of the opening into the weeds. When Canine Officer Danny Hale warned defendant to surrender or the dog would be released, defendant wisely stood up and Officer Gann arrested him without further incident. Gann admitted that he found no stolen property on defendant's person, and that defendant appeared "high."
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> Officer Moses worked for his father-in-law at the store almost daily and was familiar with the layout and contents of the warehouse. Moses found that the locks on the warehouse's rear sliding doors were broken, the glass in the doors between the warehouse and the main store was broken, and an air conditioning unit and circular saw were out of place. The air conditioning unit had been moved to the walkway near the point of illegal entry. The saw had been moved near the point of defendant's exit.

Id. at *1-*3.

On April 11, 2000, the petitioner filed a *pro se* petition for post-conviction relief. On November 8, 2000, following the appointment of post-conviction counsel, an amended petition was filed in which the petitioner alleged, *inter alia*, that he was denied the effective assistance of trial counsel. Although he asserted a number of claims of ineffective assistance in his *pro se* and amended petitions, the petitioner limits himself on appeal to the following issues, which he presents in his brief as follows:

> I. Whether counsel was deficient in failing to advise the defendant of the likelihood of conviction and of the potential sentence;
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> II. Whether counsel failed to properly present defendant's case by advising him not to testify;
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> III. Whether defendant made a knowing waiver of his right to request that [the trial judge] recuse himself from presiding over defendant's trial;
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> IV. Whether trial counsel erred by failing to present inconsistent statements of the arresting officers to the jury; and

V. Whether the alleged deficiencies amount to ineffective assistance of counsel, and whether the defendant was prejudiced by these deficiencies.

At the November 20, 2000, evidentiary hearing, the petitioner complained that his trial counsel failed to provide essential information he needed to make informed decisions in his case. He testified that on the day of trial his counsel presented him with papers to sign, telling him that the original judge in his case had started another trial and his case was being transferred to the courtroom of another judge. The petitioner said that trial counsel advised him it would be in his best interest to agree to the transfer, and that it would prevent a continuance of his trial. However, trial counsel never told him that the new judge had been an assistant district attorney, and he signed the back of the waiver form without noticing that information. Had he known that fact, he "probably would have considered" not signing the waiver and delaying his trial. He admitted on cross-examination that the trial judge had been fair.

The petitioner testified that trial counsel also failed to inform him of the consequences of refusing the plea bargain offered by the State. Although she urged him to accept the four-year sentence offered, and told him that he would receive a twelve-year sentence if convicted at trial, she did not explain that he would have to serve the sentence at 60%. The petitioner said that he wanted to go to trial because trial counsel told him he had a good case, and he did not think he would be convicted.

The petitioner additionally complained of trial counsel's failure to present an adequate defense. He said that trial counsel did not investigate the inconsistent statements made by his arresting officers, and failed to introduce them at trial. According to his testimony, one of the officers said he was apprehended with no resistance, another said he was running from behind the building, and the third said he was hiding in some bushes. The petitioner suggested that the jurors would have realized that the police were "fabricating information" if trial counsel had introduced the officers' inconsistent reports into evidence. He said he wanted to tell the jury that the officers were "fabricating a case against [him]," but his trial counsel advised him not to testify, telling him that the State would use his prior convictions against him. Had he taken the stand, he would have explained that the storage building was full of worthless junk, that he was intoxicated, and that he had no intention of stealing anything. The building was old and run-down and "might as well [have] be[en] open to the public"; he did not break any locks to enter. He acknowledged that he told trial counsel he did not want to testify.

Trial counsel testified that she graduated from Vanderbilt Law School in 1996, and had been an assistant public defender with the Metropolitan Public Defender's Office for approximately four years. She had a record of approximately nineteen contacts with the petitioner, not counting court appearances. Most of these contacts consisted of in-person meetings to discuss his case; one or two might have been letters that she wrote to him. She repeatedly explained to the petitioner that because he had seven prior felony convictions and was listed as a career offender, the only sentence he could

receive if he were convicted at trial was twelve years at 60%. She wanted the petitioner to accept the plea bargain offered by the State, which was four years at 30%, and spent "a considerable amount of time explaining to him" that the judge would not have "any discretion as to how much time he got" if he were convicted at trial. However, the petitioner insisted on going to trial. Trial counsel agreed that the petitioner appeared to have "had it in his mind that he had a good case." Although she was not exactly sure of his reasons for refusing the State's offer, she believed that he felt he was not guilty of burglary and would not be convicted. She had not agreed, and had told him that he would probably be convicted if he went to trial.

Trial counsel said that she fully explained the petitioner's right to testify at trial, and that he was the only one who could waive that right. She had, however, advised him not to testify, explaining that the State would be able to introduce his prior record, and telling him that a jury probably "would not look favorably upon his criminal convictions." Also, in trial counsel's opinion, the petitioner, "really didn't have a whole lot to add to the facts as we saw them, he was going to admit that he was inside the building[.]" The petitioner had agreed, and the decision not to testify had been his. As for the officers' statements, trial counsel's recollection was that each officer had a specific duty with regard to the investigation of the burglary, and their statements were not inconsistent.

Trial counsel testified that the petitioner's case was originally assigned to a different courtroom. The judge in that courtroom had called another case, which resulted in the petitioner's case being reassigned to the courtroom of the judge who ultimately presided over his trial. Because the petitioner's trial judge had been an assistant district attorney at the time the petitioner was indicted, there was "an issue as to whether or not [the petitioner] would waive into [his] Court[.]" Trial counsel and a colleague at the public defender's office together explained the situation to the petitioner, and went over the waiver form with him before he signed it. He appeared to understand the wavier and did not appear, at the time, to have any problems with having his case heard by the judge who presided at his trial.

On January 17, 2001, the post-conviction court entered a six-page order denying the petitioner relief. The court found, *inter alia,* that the petitioner failed to meet his burden of proving his allegations of ineffective assistance of counsel by clear and convincing evidence. Thereafter, the petitioner filed a timely appeal to this court.

ANALYSIS

Ineffective Assistance of Counsel

The petitioner contends that the post-conviction court erred in finding that he received the effective assistance of trial counsel. He alleges that trial counsel was deficient for failing to inform him of the consequences of refusing the plea bargain offered by the State, and for failing to give him sufficient information to make a knowing waiver of his right to request that the trial judge recuse himself from the case. He further alleges that trial counsel presented an inadequate defense by

failing to introduce the allegedly inconsistent statements made by his arresting officers, which would have cast doubt upon their credibility, and by advising him not to testify, which deprived him of his only opportunity to make the jury aware that he lacked the requisite mental intent for burglary. The petitioner contends that the cumulative effect of the deficiencies in counsel's performance was to prejudice the outcome of his trial, and deprive him of the effective assistance of counsel. The State contends that the petitioner failed to prove his allegations by clear and convincing evidence, and that the post-conviction court therefore properly denied the petition for post-conviction relief.

I. Standard of Review for Post-Conviction Proceeding

The petitioner has the burden of proving his allegations in the post-conviction proceeding by clear and convincing evidence. Tenn. Code Ann. § 40-30-210(f) (1997). The post-conviction court's findings of fact following an evidentiary hearing are conclusive on appeal unless the record preponderates against those findings. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). The post-conviction court's conclusions of law, however, are reviewed purely *de novo*, without any presumption of correctness. Id. Since the issue of ineffective assistance of counsel presents mixed questions of law and fact, we review this issue *de novo*, with a presumption of correctness given only to the post-conviction court's findings of fact. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001); Burns, 6 S.W.3d at 461.

II. Claim of Ineffective Assistance of Counsel

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 deficient performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997), perm. to appeal denied (Tenn. 1998) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). 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, 104 S. Ct. at 2064.

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, 104 S. Ct. at 2065, and Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). When analyzing a petitioner's allegations of ineffective assistance of counsel, this court must indulge in a strong presumption that the conduct of counsel fell within the range of reasonable professional assistance, see Strickland, 466 U.S. at 690, 104 S. Ct. at 2066, and may not second-guess the tactical and strategic choices made by trial counsel unless they 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, 104 S. Ct. at 2068.

Because both prongs of the test must be satisfied, a failure to show either deficient performance or resulting prejudice results in a failure to establish the claim. See Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997), cert. denied, 525 U.S. 830, 119 S. Ct. 82, 142 L. Ed. 2d 64 (1998). For this reason, 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." Strickland, 466 U.S. at 697, 104 S. Ct. at 2069; 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").

A. Alleged Failure to Explain Consequences of Rejecting Plea Bargain

The petitioner first contends that trial counsel failed to "sufficiently explain . . . the risks and advantages of accepting the plea bargain offer made by the State." Trial counsel testified, however, that she repeatedly explained both the length of the sentence the petitioner would receive if convicted at trial, and the percentage of the sentence he would be required to serve. She also testified that she told the petitioner she thought he would be convicted if he went to trial and, for that reason, urged him to accept the plea bargain offered by the State. When asked if she were confident she had informed the petitioner of the full ramifications of a conviction at trial, trial counsel replied:

> Absolutely. It became more important when an offer of four years at thirty percent was made, which was so much less than he would have gotten at trial. But each and every time I spoke with him about that offer, I also spoke with him about how he would be getting twelve at sixty at trial if he were convicted, because of his prior convictions.

Based on trial counsel's testimony, the post-conviction court found that the petitioner was "well informed of the consequences of proceeding forward with trial." The record supports this finding. The petitioner has not shown that trial counsel was deficient by failing to provide information about his plea bargain, or the sentence he risked by proceeding to trial.

B. Advice Not to Testify

As his second issue, the petitioner contends that trial counsel failed to properly present his case by advising him not to testify. Suggesting that trial counsel was unfamiliar with Hall v. State, 490 S.W.2d 495 (Tenn. 1973), allowing a jury to infer intent to commit a theft from a defendant's breaking and entering into a building containing valuable property, the petitioner argues that his theory of defense, which was that he lacked the requisite mental intent for burglary, combined with the fact that he was discovered in the building, made it necessary for him to testify in order to explain to the jury that he was intoxicated and entered the building without any intent to commit a felony, theft, or assault.[1] The petitioner asserts that had he testified, it would have been possible for the jury to weigh his credibility and find him guilty of misdemeanor criminal trespass, rather than felony burglary. He argues, therefore, that trial counsel made an "egregious error" in advising him not to take the stand.

We respectfully disagree. Counsel's advice regarding whether a defendant should testify in his own behalf is a strategic decision, which this court will not second-guess. See Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Butler v. State, 789 S.W.2d 898, 900 (Tenn. 1990). Trial counsel's testimony that she advised the petitioner not to testify because of his prior convictions was corroborated by the petitioner, who acknowledged that he told trial counsel he did not want to testify because he understood that the State would attempt to impeach his testimony with his record, which included convictions for voluntary manslaughter, shoplifting, reckless endangerment, receiving stolen property, attempt to commit burglary, and two counts of theft over $500. Any competent criminal attorney would have been concerned about the effect the knowledge of these prior convictions would have on a jury.

In addition to her concern that the jury would look unfavorably on the petitioner's prior convictions, trial counsel was also of the opinion that the petitioner's testimony would add little to his defense. Once again, this was a judgment call on her part, which we will not second-guess. We note, however, that the direct appeal opinion in this case belies the petitioner's assertion that it was "necessary for [him] to take the stand in order to convey any theory of [his] defense to the jury." According to the petitioner, his theory of defense was that he was intoxicated and lacked the requisite mental intent for burglary. The recitation of facts in the direct appeal opinion reveals that although the petitioner did not testify, this theory of defense was conveyed, albeit indirectly, through the testimony of his arresting officer, who admitted that no stolen property was found on the petitioner's person, and that the petitioner appeared "high" when he was apprehended and arrested. See Garrett, 1999 Tenn. Crim. App. LEXIS 1266, at *2. Trial counsel testified that she had several discussions with the petitioner about his lack of intent to commit a burglary, revealing that she was well aware of his theory of defense. We presume, moreover, that trial counsel argued the petitioner's theory of defense to the jury in closing.

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[1] Burglary is defined as when a person, "without the effective consent of the property owner[,] [e]nters a building other than a habitation . . . not open to the public, with intent to commit a felony, theft or assault[.]" Tenn. Code Ann. § 39-14-402(a)(1) (1997).

C. Petitioner's Waiver of Right to Request Recusal of Trial Judge

The petitioner next contends that trial counsel was deficient for failing to provide him with sufficient information to make a knowing waiver of his right to request that the trial judge recuse himself from the case. He asserts that he would not have agreed to the waiver had he "really known" of the trial judge's former employment, and argues that, although he suffered no prejudice as a result of signing the waiver, the cumulative effect of the alleged deficiencies in counsel's performance was to deny him the effective assistance of counsel.

In denying relief on this claim, the post-conviction court found that the petitioner "ha[d] not carried the burden" of demonstrating deficient performance of counsel. The record supports this finding. At the evidentiary hearing, the petitioner conceded that he signed the waiver agreeing to have his case heard by the trial court. He claimed, however, that trial counsel presented the waiver without explaining that the trial judge had been employed with the prosecutor's office, and that he signed the back of the form without noticing that information. However, the petitioner's signature appears not on the back, but instead at the bottom of the single-page, four-paragraph "Waiver by the Defendant to the Disqualification of the Court." By signing the form, the petitioner acknowledged that he had been informed that the trial judge was serving as an assistant district attorney at the time formal proceedings began in his case, that the district attorney's office was prosecuting his case, and that the judge had to disqualify himself unless all parties involved, including the petitioner, consented to allow the judge to hear the case. Even if we assume the petitioner signed the form without reading its contents, trial counsel's testimony was that she explained the form to him and he appeared to understand what he was signing. She remembered the petitioner's initially being "upset a little bit about the way that his case had moved," but also specifically remembered that after her explanation, he "agreed and wanted to go forward with his trial on that day." Furthermore, the petitioner was unable to show any prejudice as a result of the alleged deficiency in counsel's performance, having admitted during cross-examination that the trial judge conducted a fair trial and was not responsible for the fact that he was convicted.

D. Failure to Introduce Allegedly Inconsistent Statements of Arresting Officers

Lastly, the petitioner contends that trial counsel was ineffective for failing to introduce allegedly inconsistent statements made by two of the arresting officers in his case, which would have cast doubt upon their credibility at trial. Specifically, he argues that Officer Gann's arrest report, stating that the petitioner was "apprehended comming [sic] out of the building," is inconsistent with that given by Canine Officer Hale, which states that the petitioner was discovered hiding in some weeds and that he surrendered after Hale threatened to release the police dog on him. He further argues that Officer Gann's trial testimony was inconsistent with his written report.

The arrest reports were not introduced at the evidentiary hearing, but were admitted as a supplemental record on appeal. The arrest report prepared by Officer Gann contains the following brief narrative of the petitioner's arrest: "On this date, in response to the alarm at Drake Hardware,

1223 Dickerson Rd., Ricky Garrett was apprehended comming [sic] out of the building." Officer Hale's report contains more detail:

> At approx 0140 hrs. Off. D. Moses (663) advised me that the alarm at Drake Hardware 1223 Dickerson Pk. I responded to the scene along with 663 & 651. I pulled up in the rear. Off. M. Gann advised me that he saw the male black suspect come out and hide in some weeds. I went up with K-9 Vader and advised him to give up or the dog would be released to find him. He then spoke up and advised me he was giving up. There was no contact between the suspect and my K-9. Off. Mike Gann took the suspect into custody.

During his trial testimony, Officer Gann apparently provided the detail he omitted from his police report, testifying that the petitioner dropped out of the building into some weeds but came out of hiding when threatened with the police dog. See Garrett, 1999 Tenn. Crim. App. LEXIS 1266, at *2.

The petitioner contends that trial counsel was ineffective for failing to introduce the allegedly inconsistent arrest reports, and for failing to raise the "critical" inconsistency between the accounts Officer Gann provided in his written report and at trial.[2] However, trial counsel did not find the arrest reports to be inconsistent. The post-conviction court accredited her testimony in this regard, and our review of the supplemental record on appeal leads us to conclude that she was not unreasonable in her evaluation of this evidence. Although Officer Gann's statement that the petitioner was "apprehended comming [sic] out of the building" may not have been literally accurate, it did not contradict the account in Officer Hale's report, or Officer Gann's testimony at trial. Therefore, trial counsel was not deficient for failing to introduce the arrest reports into evidence, or for failing to cross-examine Officer Gann regarding the difference between his concise arrest report and the more detailed account he provided at trial.

Applying the Strickland holding that we must "evaluate [counsel's] conduct from counsel's perspective at the time" the decisions had to be made, that we must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," 466 U.S. at 689, 104 S. Ct. at 2065, and that in challenging counsel's conduct a petitioner must show that "no competent counsel would have taken the action," Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir. 2000), cert. denied, 531 U.S. 1204, 121 S. Ct. 1217, 149 L. Ed. 2d 129 (2001), we conclude that the petitioner has failed to show that his trial counsel did not perform within the range of competence required of attorneys in criminal cases.

[2] The petitioner argues that the statement that he was apprehended coming out of the building "support[s] the theory of the defense that [he] was merely an inebriated trespasser," whereas the statement that he hid in weeds after coming out of the building allowed the jury to "possibly draw a negative inference regarding" his mens rea.

CONCLUSION

Based upon the foregoing authorities and reasoning, we conclude that the petitioner received the effective assistance of trial counsel. Accordingly, we affirm the denial of his petition for post-conviction relief.

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ALAN E. GLENN, JUDGE