

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 6, 2022

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PAUL BUCHANAN v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 14-02411 Jennifer Johnson Mitchell, Judge

No. W2022-00126-CCA-R3-PC

The Petitioner, Paul Buchanan, appeals the denial of his petition for post-conviction relief, arguing that the post-conviction court erred in finding that he received effective assistance of counsel. Based on our review, we affirm the judgment of the post-conviction court.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and KYLE A. HIXSON, JJ., joined.

Shae Atkinson, Memphis, Tennessee (at hearing and on appeal), for the appellant, Paul Buchanan.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

In 2016, the Petitioner was convicted by a Shelby County Criminal Court jury of aggravated robbery, two counts of felon in possession of a firearm, and one count of convicted felon in possession of a handgun. After merging the weapons counts into a single conviction, the trial court sentenced the Petitioner to an effective term of forty years in the Department of Correction. This court affirmed the convictions on appeal, and our supreme court denied the Petitioner's application for permission to appeal. *State v. Paul Buchanan*,

No. W2017-00160-CCA-R3-CD, 2017 WL 4082486, at *1 (Tenn. Crim. App. Sept. 14, 2017), *perm. app. denied* (Tenn. Dec. 8, 2017).

The Petitioner's convictions arose from his actions on the night of April 13, 2013, when, armed with a handgun, he rushed his next-door neighbor, Antonio Blake, as the victim was unlocking the door to his duplex, brandished a pistol, demanded his money, and took \$100 from his pocket following a brief struggle inside the victim's home. *Id.* The victim identified the Petitioner as the armed perpetrator in a statement to a police detective ten days after the robbery, circling the Petitioner's photograph on a photographic spreadsheet. The victim also made a positive courtroom identification of the Petitioner at the preliminary hearing and at trial. The victim expressed certainty in his identification, testifying at trial that he was very familiar with the Petitioner, who lived in the other side of the duplex, and immediately recognized him by his distinctive voice. *Id.*

On cross-examination, the victim acknowledged having told the Memphis Police Department ("MPD") investigator that there was a second man with the Petitioner during the robbery. *Id.* at *2. He did not recall having told the 911 dispatcher and the police officer who responded to his home that two men had robbed him, one named Paul and the other named Michael, and that Michael had hit him in the head with a gun. *Id.* at *2. However, MPD Officer Catlin Kelly, who responded to the victim's home on the night of the robbery, acknowledged during cross-examination that the victim stated that he had been robbed by "Paul" and "Michael" and that Michael had the gun. *Id.*

On December 13, 2018, the Petitioner filed a pro se petition for post-conviction relief in which he raised a claim of ineffective assistance of counsel. Following the appointment of post-conviction counsel, he filed an amended petition in which he alleged that trial counsel was ineffective for, among other things, failing to develop a sound defense strategy and advising him not to testify in his own defense.

At the evidentiary hearing, trial counsel, who said he had been practicing criminal defense law for fifteen or sixteen years by the time of the hearing, testified that he had represented the Petitioner in a previous case and was appointed to represent him in the instant case. He stated that he and the Petitioner had a good relationship and no problems communicating. He said that the Petitioner's probation in the previous case was revoked due to the instant case, resulting in the Petitioner's incarceration in the Tennessee Department of Correction rather than the county jail. He did not have the Petitioner brought to Shelby County for every single court date, but he met with him in person several times, in meetings that lasted for up to an hour, and he kept in regular communication with him throughout his preparation of the case.

Trial counsel testified that his defense for the Petitioner, who had no alibi, consisted of attempting to show that the victim was mistaken in his identification. As part of his preparation, he reviewed and shared discovery with the Petitioner, hired an investigator who made several unsuccessful attempts to locate and interview the victim, and consulted with an expert in eyewitness identification. He ultimately decided not to use the eyewitness identification expert at trial after the expert informed him that the victim's familiarity with the Petitioner would undermine the expert's testimony about the unreliability of eyewitness identifications. Trial counsel testified that he was aware that there was a second, unidentified perpetrator. However, he never had any leads as to that person's identify and was never able to locate him. He could not recall when the State's photographs of the crime scene were made available to him, and he did not know whether the Petitioner saw the photographs before trial. Regardless, he did not think there was anything particularly noteworthy about the photographs, which appeared to show that a struggle had taken place inside the victim's home, consistent with the victim's account of the robbery. He said that he did not discuss lesser-included offenses because their defense was one of mistaken identity and he believed that the victim's testimony would result in an all or nothing conviction.

Trial counsel recalled that the Petitioner had an extensive criminal record and qualified as a career offender. He said that the State made a plea bargain offer that involved a thirty-year sentence and that he communicated the offer to the Petitioner. He was unable to recall if he and the Petitioner discussed the benefits versus disadvantages of that offer, but he did recall that the Petitioner was adamant from the beginning about his desire to take the case to trial.

Trial counsel testified that he discussed with the Petitioner the facts of the case, the elements of the offenses, and the State's proof against him, but he did not attempt to persuade him one way or the other with respect to his desire to take the case to trial. He stated that he attempted to point out the unreliability of the victim's identification of the Petitioner from a quick, nighttime encounter and to highlight inconsistencies in the victim's accounts of the crime. He recalled that the victim had been drinking on the night of the robbery, and that it came out at trial that the victim had an outstanding warrant and was taken into custody by the officers who responded to the robbery call. He said he advised the Petitioner not to testify at trial, telling him forthrightly that nothing would be accomplished by doing so and that he could be cross-examined on his extensive criminal record. He had no memory of the Petitioner's having originally announced in the *Momon* hearing that he wanted to testify but then changing his mind after a trial break. He said he would never try to discourage a client from testifying if that was his desire, but that he would not hesitate to tell a client if he thought the client's decision to testify was a foolish one.

On cross-examination, trial counsel agreed that the Petitioner's change of heart about testifying occurred after the trial court informed the Petitioner that it was admitting a number of the Petitioner's prior convictions for impeachment purposes. Trial counsel stated that the Petitioner had been charged with a number of commercial burglaries in the previous case in which he had represented him, ultimately pleading guilty in exchange for a lengthy community corrections sentence. He agreed that he vigorously cross-examined the victim about his statements and about his identification of the Petitioner.

In response to questions by the post-conviction court, trial counsel testified that he believed it was during the *Momon* hearing that the trial court informed the Petitioner of the convictions that would be admissible for impeachment purposes. He could not recall the specifics of his conversation with the Petitioner during the break, but agreed that it likely consisted of his telling the Petitioner that it would not be wise for him to testify.

The Petitioner testified that he received discovery, but that none of the crime scene photographs were included and that he was unaware of the existence of any photographs until the State introduced some of them at trial. He stated that when he asked trial counsel why he had not received the photographs, trial counsel told him that they were irrelevant. The Petitioner testified that the only discovery he received was a "thin" packet of materials that contained the victim's statement, the affidavit of complaint, and a transcript of the preliminary hearing, in which the victim testified that the Petitioner had hit him in the face. The Petitioner expressed his opinion that if someone his size hit the victim in the face, the victim would have gone to the hospital or had "some type of medical record."

The Petitioner acknowledged that his trial counsel discussed with him the facts of the case. The Petitioner, however, expressed his belief that the victim's allegations were unbelievable. He said that his trial was continued several different times and that trial counsel met with him only on his scheduled trial dates. He stated that he and trial counsel exchanged a few letters, but trial counsel did not provide him any information in the letters other than his trial dates.

The Petitioner testified that he told trial counsel that he and the victim were next-door neighbors, that he was outside with other individuals when the disruptive victim came home drunk, and that he and the victim got into a physical fight after the others had left. He said he never had a gun and did not rob the victim, but the victim knew he was on probation and "put that robbery charge" on him "to be vindictive to get [him] off the street." He said he wanted trial counsel to contact the other individuals who were present when the victim came home drunk, but trial counsel acted as if he did not believe his story.

The Petitioner acknowledged that he had an extensive history of felony convictions prior to the instant case. He said he had pled guilty in his former cases because he was

guilty. He was not guilty in the instant case, so he refused the State's plea offer. He said he told trial counsel from the beginning that he would plead guilty only to assault. When shown four crime scene photographs that were not introduced at trial, the Petitioner testified that they would have shown that it was a fight rather than a robbery. The Petitioner explained his rationale, testifying that if he had demanded the victim's money at gunpoint, the victim would have immediately given it to him instead of becoming involved in an altercation.

The Petitioner testified that he told trial counsel that he wanted to testify to present his side of the story. He said that trial counsel told him, "Well, man, it's on you. Man, if you want to do that, you can do that." He stated that he told the trial court that he wanted to testify, but during the break, trial counsel convinced him that he should not take the stand. When he was brought back out, he told the trial court that he no longer wanted to testify because trial counsel had "really kind of got [him] worried about what the District Attorney was going to ask [him.]" He wished, however, that he had not changed his mind, and, had he known of the photographs before trial, he would have definitely taken the stand and used the photographs to explain his side of the story.

On cross-examination, the Petitioner acknowledged that he changed his mind about testifying after the trial court ruled that the State could ask him about eleven of his thirty-seven prior felony convictions, including his convictions for theft, burglary, and aggravated assault in which he shot a victim in the arm with a gun.

On February 7, 2022, the post-conviction court entered an order denying the petition on the basis that the Petitioner failed to meet his burden of demonstrating ineffective assistance of counsel. Among other things, the post-conviction court found that "some" of the Petitioner's testimony was credible, but that trial counsel's testimony was "very credible."

ANALYSIS

The Petitioner argues on appeal that trial counsel provided ineffective assistance by advising him not to testify in his own defense and by pursuing the defense theory of mistaken identity. The State argues that the post-conviction court properly denied the petition because the Petitioner failed to meet his burden of demonstrating that trial counsel was deficient in his performance or that he was prejudiced due to trial counsel's alleged deficiencies. We agree with the State.

Post-conviction relief "shall be granted 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." Tenn. Code Ann. § 40-30-103. The

petitioner bears the burden of proving factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. *See Wiley v. State*, 183 S.W.3d 317, 325 (Tenn. 2006). When reviewing factual issues, the appellate court will not reweigh the evidence and will instead defer to the post-conviction court's findings as to the credibility of witnesses or the weight of their testimony. *Id.* However, review of a post-conviction court's application of the law to the facts of the case is de novo, with no presumption of correctness. *See Ruff v. State*, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed de novo, with a presumption of correctness given only to the post-conviction court's findings of fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001); *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

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 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel 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.

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; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, *see Strickland*, 466 U.S. at 690, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices 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.

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.” 466 U.S. at 697; *see 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”).

The post-conviction court denied the petition after finding that the Petitioner failed to meet his burden of proof of demonstrating that he was denied the effective assistance of counsel. Specifically, the post-conviction court found that the Petitioner failed to show that trial counsel was deficient with respect to his advice about testifying and failed to show either a deficiency of performance or resulting prejudice with respect to his decision to pursue a misidentification defense.

The record fully supports the findings and conclusions of the post-conviction court. Trial counsel’s testimony, which was accredited by the post-conviction court, established that trial counsel advised the Petitioner not to testify, but left it to the Petitioner to make the ultimate decision. The Petitioner acknowledged as much during his evidentiary hearing testimony, explaining that he changed his mind about testifying after learning which prior convictions could be introduced and becoming worried about the State’s cross-examination. Although the Petitioner testified that he would have testified had he known before trial of the crime scene photographs, which he believed supported his story of a simple fight, trial counsel testified that he found nothing noteworthy about the photographs.

Trial counsel also offered a reasonable explanation for why he pursued a mistaken identification defense and testified that he vigorously cross-examined the victim on his ability to correctly identify the Petitioner and on the inconsistencies in his statements. As the post-conviction court observed, a reviewing court will not second-guess the sound trial strategy of defense counsel unless it was based on inadequate preparation. *See Strickland*, 466 U.S. at 689; *Hellard*, 629 S.W.2d at 9. There is nothing in the record to suggest that trial counsel was anything but fully prepared to try the case. The Petitioner has not shown that trial counsel was deficient in his representation or that he suffered any prejudice due to trial counsel’s alleged deficiencies. We, therefore, affirm the denial of the petition for post-conviction relief.

CONCLUSION

Based on our review, we affirm the judgment of the post-conviction court denying the petition for post-conviction relief.

JOHN W. CAMPBELL, SR., JUDGE