

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs October 3, 2023

FILED

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Clerk of the
Appellate Courts

EDWARD DEAN v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County

No. 15-04695 Paula L. Skahan, Judge

No. W2022-01513-CCA-R3-PC

The petitioner, Edward Dean, appeals the denial of his post-conviction petition, arguing the post-conviction court erred in finding he received the effective assistance of counsel. After our review of the record, briefs, and applicable law, we affirm the denial of the petition.

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

J. ROSS DYER, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

Shae Atkinson, Memphis, Tennessee, for the appellant, Edward Dean.

Jonathan Skrmetti, Attorney General and Reporter; Lacy E. Wilbur, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; and Tanisha Johnson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

On direct appeal, this Court summarized the facts surrounding the petitioner's convictions for attempted second degree murder, employing a firearm during the commission of a dangerous felony, and unlawful possession of a firearm by a convicted felon, as follows:

Charlean McKenzie, the victim, testified that she met the [petitioner] in 2014 and dated him for approximately five or six months. At the time of the shooting, she was living in a southeast Memphis home with her mother,

her daughter, her two grandchildren, and her “baby boy.” The [petitioner] had a separate residence, but each of them regularly spent nights at the other’s home. The [petitioner] came to her home at about 10:00 or 11:00 a.m. on March 25, 2015 but then left. She and everyone else in her household were in bed by 10:00 p.m. that night following a family gathering that they had held earlier in the day. At 10:30 or 11:00 p.m., she heard a knock at the door, got up, and opened the door to find the intoxicated [petitioner], who was accompanied by his nephew. The [petitioner] was incoherent and obviously upset about something, but he was talking more to his nephew than to her. She and the [petitioner] never argued.

The victim testified that the [petitioner’s] nephew left and she went to her bedroom, followed immediately by the [petitioner]. She said she lay down on her bed facing the wall, and the [petitioner] sat on the edge of the bed beside her. She then heard the [petitioner] say, “[B]****, I’m going to kill you.” The light was off, and she was at first unsure whether he was talking to her or to someone on the phone, so she got up and turned on the overhead light. As she did so, the [petitioner] reached into the pocket of his jacket that was hanging in the closet, pulled out a gun, and “opened fire” at her.

The victim testified that the [petitioner] fired five times directly at her, with the first shot striking her in the mouth, three shots striking her in the chest, and one shot striking her in the liver. She remembered each and every shot[.]

....

The parties admitted by stipulation the CD of the [petitioner’s] March 26, 2015 1:13 a.m. 911 call, which was published to the jury. In the call, the [petitioner] said he had shot the victim and that he was going to “own up to [his] responsibility because she disrespected [him].” At other points during the call, the [petitioner] repeated that the victim had disrespected him, said that he was not “running from nothing,” and mentioned that the victim was also “wrong for what she did.”

....

The State’s final witness was Sergeant Hailey, who essentially repeated his suppression hearing testimony about the [petitioner’s] desire to make a statement, his advising the [petitioner] of his rights, the format he

followed in questioning, the [petitioner's] condition at the time he gave the statement, and the police department's policy of not taking statements from intoxicated individuals. He identified the [petitioner's] signed waiver and written statement, which were admitted as exhibits and published to the jury. In the March 26, 2015 statement, which was signed at 5:41 a.m., the [petitioner] said that he had recently moved into the victim's home, which was "when all the chaos started." When asked to describe the events that transpired, the [petitioner] related:

We were lovey dubbie [sic] all week since she's been on vacation. But today she was acting funny toward me. She asked was I going to ride with her to get her nails done, I told her yea and when I said that she didn't go. I started cleaning the inside of my car and she started wiping out her car. I told her that I was going to kick it with my brother and when I got back she started tripping with me again. We got in a very heated argument. I told her that you brought me over here and this the way you going to do it, treat me. I went into the bedroom to lie down and she came in behind me. The argument just got so heated and it just went down. I got so mad and I grabbed the gun and I just started shooting her. I just left the house ran and I got tired. I call the Police and I told them to come and get me cause I don't believe in running. I answered the Police questions and then they brought me down here.

When asked if he knew why he shot the victim, the [petitioner] replied: "I guess I was sending a message to her. She's going to know that you don't do people like that." Earlier in his statement, the [petitioner] estimated that he had fired approximately three shots at the victim and said that he "wasn't trying to kill her or nothing."

On cross-examination, Sergeant Hailey acknowledged that the [petitioner] told him that he had been drinking. He further acknowledged that the [petitioner] did not volunteer, and he did not ask, how much the [petitioner] had to drink. He repeated his direct examination testimony that he asked the [petitioner] if he was clear-headed and able to understand the seriousness of the situation, and reiterated on redirect examination that the [petitioner] gave no indications of being intoxicated or too impaired to give a statement.

The [petitioner] testified that he and the victim were in a romantic relationship for five months in which the victim alternated nights between her own home and the [petitioner's] apartment. That schedule ended, however, after the victim's son told them that his best friend had been killed at the [petitioner's] apartment complex and that he did not believe it was a safe place for the victim to live. In addition, the [petitioner] was later mugged at the complex. The [petitioner], therefore, placed his belongings in storage, gave up his apartment, and moved into the home that the victim shared with her son, her daughter, her mother, and her brother, even though he was reluctant to do so because he feared a loss of privacy.

The [petitioner] testified that the victim changed after he moved in with her, becoming "bossy" and not paying him any attention. On the morning before the shooting, the two of them were cleaning their respective vehicles when she asked him if he wanted to accompany her to the nail salon. He told her that he would, but two minutes later she changed her mind, telling him that she was going to reschedule her appointment, which caused him to become suspicious. Later that evening, he left and went to his brother's home, where he drank two pints of 80-proof vodka and four 24-ounce cans of beer. On his drive back to the victim's home, he sideswiped a car and hit a curb, which caused a tire blowout. The [petitioner] identified a photograph of his vehicle that showed the tire blown out.

The [petitioner] testified that he left his vehicle in a Walgreen's parking lot and called his nephew to come pick him up. When he and his nephew arrived at the victim's home, he knocked on the door because he did not have a key, and the victim had not answered his phone calls. The victim answered the door, told him that he smelled "like a liquor store," and began yelling at him. His nephew left in order to avoid their argument, and he went to the bedroom he shared with the victim. The victim followed him and continued the argument, telling him that he was drunk, that he could not stay there, and that the [petitioner] needed to call his nephew to come back and get him. The victim then began telephoning his nephew herself. The [petitioner] testified that he went to the closet, retrieved the gun he had bought after he was mugged, turned, and shot the victim. He denied that he threatened to kill her or said anything to her before shooting her. Afterwards, he ran from the house, throwing the gun down in his flight, and went to the service station where he called the police and waited to turn himself in.

The [petitioner] testified that the officers took him to 201 Poplar, where he gave Sergeant Hailey a statement. He said he told Sergeant Hailey

that he had been drinking but did not tell him how much alcohol he had had and that the detective did not ask him. After his statement, he was taken to the jail portion of 201 Poplar and from there, placed in the “detox” area of the jail.

The [petitioner] testified that he suffered from cardiomyopathy and high blood pressure and was on medication for those conditions at the time of the shooting. He said that his prescription medication, when combined with alcohol, made him feel even “more intoxicated.” Since the shooting, he had met with two doctors about his mental health: Dr. Katie Price, who met with him once for approximately 45 minutes; and Dr. John McCoy, who met with him three different times, with each meeting lasting longer than his single meeting with Dr. Price. Among other things, Dr. McCoy questioned him about his drinking history and habits. The [petitioner] testified that he began drinking as a teenager and that he drank varying amounts every day. He described himself as “very drunk” at the time of the shooting and said that he never had any intention to kill the victim. In fact, he said that he “wasn’t thinking at all” when he shot her.

On cross-examination, the [petitioner] acknowledged that he went to the closet to retrieve his gun to shoot the victim, fled from the victim’s home after the shooting, rid himself of the weapon, called 911, and related to the 911 operator what had happened, including that he had shot the victim because she had disrespected him. The [petitioner] further acknowledged having assured Sergeant Hailey that he understood his rights and wished to make a statement and having provided a detailed account of the shooting in his written statement. He also conceded that he shot the victim five times and had to pull the trigger for each shot. He insisted, however, that he was not aiming but instead “recklessly shooting.” He testified that the victim was lying when she said that he told her before the shooting that he was going to kill her and that Officer Jefferson lied when he testified that he told him that he had “shot the b****.” Finally, he acknowledged that, despite having the opportunity, he never told Sergeant Hailey that he shot the victim because he was so drunk.

On redirect examination, the [petitioner] testified that if he had intended to kill the victim, he could have “just grabbed [her] and just boom, boom, boom, you know?”

....

After their first phase of deliberations, the jury found the [petitioner] guilty of attempted second degree murder and employing a firearm during the commission of a dangerous felony. Following proof of the [petitioner's] prior conviction for reckless endangerment with a deadly weapon, the jury again deliberated and found the [petitioner] guilty of unlawful possession of a firearm by a convicted felon. The trial court subsequently sentenced the [petitioner] to an effective term of twenty-eight years in the Department of Correction.

State v. Dean, No. W2018-01363-CCA-R3-CD, 2020 WL 1899612, at *3-9 (Tenn. Crim. App. Apr. 17, 2020), *no perm. app. filed*.

On direct appeal, this Court affirmed the petitioner's convictions for attempted second-degree murder and employing a firearm during the commission of a dangerous felony but reversed his conviction for unlawful possession of a firearm by a convicted felon. *Id.* at 1. The petitioner subsequently filed a pro se petition for post-conviction relief, arguing, in part, that trial counsel was ineffective for failing to adequately meet with the petitioner, failing to pursue an intoxication defense, failing to "obtain record of Shelby County Jail Administrator who placed [the petitioner] in detox," and failing to visit the scene of the petitioner's car accident. Following the appointment of counsel, an evidentiary hearing was held on July 29, 2022, during which trial counsel and the petitioner testified.¹

Trial counsel testified that he was appointed to the petitioner's case in August 2015. According to trial counsel, he spoke to the petitioner at each court date and also visited him in the jail. Although trial counsel hired an investigator to assist with the case, he did not send the investigator to the scene of the petitioner's car accident due to the length of time that had passed since the wreck. Additionally, trial counsel attempted to verify whether the petitioner was in detox at the jail following his arrest, but the petitioner's jail intake records did not state whether or not the petitioner was placed in detox. Trial counsel conceded that he did not attempt to view jail recordings to verify where the petitioner was housed when he was brought into the jail. Trial counsel testified that he communicated any offers from the State with the petitioner and that they had extensive discussions about going to trial versus taking an offer.

On cross-examination, trial counsel testified that he filed a motion for discovery and provided the petitioner with a copy of the discovery packet. Although he did not go "through every page of discovery" with the petitioner, trial counsel stated that they would have discussed anything he thought was important or that the petitioner did not understand.

¹ We limit our recitation of the testimony at the evidentiary hearing to that relevant to the petitioner's issues on appeal.

Trial counsel could not recall the exact number of times he visited the petitioner at the jail. However, he stated that he visited the petitioner before the case was set for trial and that he “would have been down there pretty much day after day getting him ready for trial leading up to it.”

Because the defendant had admitted to drinking excessive amounts of alcohol on the day of the shooting, trial counsel’s strategy was to argue that he was intoxicated at the time of the offense and that there was no premeditation. After speaking with co-workers and the prosecutor, he hired an expert to testify on the petitioner’s behalf. On cross-examination, trial counsel agreed that the petitioner testified at trial regarding his intoxication level on the night of the shooting. He also agreed that he cross-examined the police officers regarding the petitioner’s intoxication and that he entered a photograph showing the damage to the petitioner’s vehicle from the accident that night. Trial counsel could not recall why the petitioner’s nephew did not testify at trial.

The petitioner testified that after trial counsel was appointed the petitioner requested that trial counsel interview the owner from the liquor store, investigate the crime scene and the scene where the petitioner crashed his vehicle, and obtain evidence proving that he was placed in detox at the jail. Additionally, the petitioner stated that the mugshot that was taken when he was arrested was “hid[den]” and replaced with an older mugshot. The petitioner contended the mugshot taken on the night of the shooting showed his intoxication level. The petitioner also testified that he did not receive a copy of his discovery materials until after his trial. On cross-examination, the petitioner agreed trial counsel filed a motion for discovery and reviewed the discovery with the petitioner. However, trial counsel did not leave a copy of the discovery with the petitioner.

Regarding trial strategy, the petitioner testified that trial counsel did not cross-examine the officers “about the toxicology and stuff like that.” On cross-examination, the petitioner conceded that the victim and the officers testified that the petitioner had been drinking and that trial counsel introduced a photograph of the petitioner’s wrecked vehicle.

After its review of the evidence presented, the post-conviction court denied relief, and this timely appeal followed.

Analysis

On appeal, the petitioner argues trial counsel was ineffective for failing to obtain proof of the petitioner’s intoxication and failing to communicate with the petitioner. The petitioner also argues the post-conviction court failed to make the required findings in its order denying post-conviction relief. The State contends the post-conviction court properly denied relief.

I. Post-Conviction Court's Findings²

The petitioner contends the post-conviction court failed to make specific findings of fact and conclusions of law regarding trial counsel's failure to "obtain records of Shelby County Jail Administrator who placed [the petitioner] in detox" and failure to visit the scene of the petitioner's car accident. Tennessee Code Annotated section 40-30-111(b) provides as follows:

(b) Upon the final disposition of every petition, the court shall enter a final order, and except where proceedings for delayed appeal are allowed, shall set forth in the order or a written memorandum of the case all grounds presented, and shall state the findings of fact and conclusions of law with regard to each such ground.

Although this requirement is mandatory, "the failure of the trial judge to abide by the requirement does not always mandate a reversal of the trial court's judgment." *State v. Swanson*, 680 S.W.2d 487, 489 (Tenn. Crim. App. 1984) (citing *Brown v. State*, 445 S.W.2d 669 (Tenn. Crim. App. 1969)). The purpose of the statute is to facilitate appellate review of the post-conviction court's decision. Therefore, a remand is not required when the record is otherwise adequate for review, even if the trial court failed to comply with the rule. *Id.*

Initially, we note, although these issues were raised in the petitioner's post-conviction petition, the petitioner did not raise them on appeal. Therefore, any error in the post-conviction court's failure to adequately address these issues was clearly harmless. Furthermore, in the post-conviction court's order denying relief, the post-conviction court listed both claims as subsections under ineffective assistance of counsel. After thoroughly reviewing the testimony from the evidentiary hearing, the post-conviction court held that trial counsel "prepared for trial, had a trial strategy, went over the discovery with [the petitioner], and filed the requisite pretrial motions in the case." Additionally, at the conclusion of the section of the post-conviction court's order addressing the petitioner's ineffective assistance of counsel claims, the post-conviction court found "trial counsel's performance was not deficient in any way, nor did it prejudice [the p]etitioner." Therefore, these issues were adequately addressed by the post-conviction court.

Moreover, even if we were to find the post-conviction court's findings were not sufficient, the proof presented does not support the merits of the petitioner's claim. The

² For the sake of clarity, we have reordered and renumbered the issues from the order they appeared in the petitioner's brief.

petitioner failed to present any proof, other than his own testimony, that established he was placed in detox. Also, the petitioner failed to present any proof showing how visiting the accident scene would have affected his trial and, thus, the jury's verdict. Therefore, the petitioner failed to meet his burden and is not entitled to relief.

II. Ineffective Assistance of Counsel

The petitioner bears the burden of proving his post-conviction factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). The findings of fact established at a post-conviction evidentiary hearing are conclusive on appeal unless the evidence preponderates against them. *Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996). This Court will not reweigh or reevaluate evidence of purely factual issues. *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997). However, appellate review of a trial court's application of the law to the facts 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 presents mixed questions of fact and law. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Thus, this Court reviews the petitioner's post-conviction allegations *de novo*, affording a presumption of correctness only to the post-conviction court's findings of fact. *Id.*; *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceedings. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the standard for determining ineffective assistance of counsel applied in federal cases is also applied 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. In order for a post-conviction petitioner to succeed, both prongs of the *Strickland* test must be satisfied. *Id.* Thus, courts are not required to even "address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.*; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (stating that "a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

A petitioner proves a deficiency by showing “counsel’s acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms.” *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the *Strickland* test is satisfied when the petitioner shows there is a reasonable probability, or “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. However, “[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

A. Failure to Obtain Proof of Intoxication

The petitioner argues trial counsel was ineffective for failing to obtain sufficient proof of his intoxication. Specifically, the petitioner contends trial counsel failed to investigate the facts surrounding his admission into detox at the county jail, to interview employees from the liquor store and potential witnesses from the car accident, and to investigate his mugshot from his arrest. The State contends the petitioner failed to meet his burden.

At the evidentiary hearing, trial counsel testified that he attempted to verify whether the petitioner was placed into detox following his arrest and obtained the petitioner’s jail intake records in an effort to do so; however, the intake records failed to state whether or not the petitioner was taken to detox. Trial counsel admitted that he did not attempt to view jail recordings to verify where the petitioner was housed following his arrest. Trial counsel testified that he did not send his investigator to the crime scene or to the scene of the petitioner’s car accident due to the length of time that had passed. The petitioner testified he requested that trial counsel obtain evidence that he was placed in detox at the jail, interview the owner of the liquor store, and investigate the crime scene and the scene of the car accident. The petitioner also testified that the mugshot that was taken when he was arrested showed his intoxication level. Although it was “hid[den]” and replaced with an older mugshot, trial counsel failed to investigate its whereabouts.

Implicit in the post-conviction court’s order denying relief is an accreditation of trial counsel’s testimony, and nothing in the record preponderates against the post-conviction court’s factual findings. *See Tidwell*, 922 S.W.2d at 500. Furthermore, although the petitioner argues trial counsel should have located and interviewed several witnesses as well as the petitioner’s mugshot, the petitioner failed to present them at the evidentiary

hearing and, therefore, cannot establish prejudice. *See Black v. State*, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). The petitioner is not entitled to relief on this issue.

B. Failure to Communicate

The petitioner argues trial counsel was ineffective for failing to adequately communicate with him. Specifically, he contends trial counsel failed to meet with him as needed and provide him with a copy of his discovery materials. The State contends the petitioner has failed to prove that trial counsel was deficient or that the petitioner was prejudiced.

At the evidentiary hearing, trial counsel testified he spoke with the petitioner at each court date and visited the petitioner in the jail. On cross-examination, trial counsel stated that, although he could not recall the exact number of times he visited the petitioner in the jail, he visited him before the case was set for trial, and he also “would have been down there pretty much day after day getting him ready for trial leading up to it.” Trial counsel testified he filed a motion for discovery and provided the petitioner with a copy of the discovery. Although they did not go through every page, trial counsel discussed the items that he thought were important and also let the petitioner ask questions after reviewing the materials. The petitioner testified that he did not receive a copy of his discovery materials. However, on cross-examination, the petitioner agreed that trial counsel filed a motion for discovery and that he and trial counsel reviewed discovery together.

As discussed above, implicit in the post-conviction court’s order denying relief is an accreditation of trial counsel’s testimony, and nothing in the record preponderates against the post-conviction court’s factual findings. *See Tidwell*, 922 S.W.2d at 500. Additionally, the petitioner has failed to prove by clear and convincing evidence his factual claim that he did not receive discovery. The petitioner is not entitled to relief on this issue.

Conclusion

Based upon the foregoing authorities and reasoning, the judgment of the post-conviction court is affirmed.

J. ROSS DYER, JUDGE