

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 25, 2023

FILED

08/15/2023

Clerk of the
Appellate Courts

BILLY HILL v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 113263 Steven W. Sword, Judge

No. E2022-01061-CCA-R3-PC

A Knox County jury found the Petitioner, Billy Hill, guilty of second degree murder. He later filed a petition for post-conviction relief alleging that his trial counsel was ineffective by advising him not to testify at trial. The post-conviction court denied relief, finding that trial counsel's advice was based on a sound strategy developed after thoroughly investigating the case. On appeal, we respectfully affirm the judgment of the post-conviction court.

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

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

J. Liddell Kirk, Madisonville, Tennessee, for the appellant, Billy Hill.

Jonathan Skrmetti, Attorney General and Reporter; Edwin Alan Groves, Jr., Assistant Attorney General; Charme P. Allen, District Attorney General; and Steven C. Garrett and Ta Kisha Fitzgerald, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

A. TRIAL PROCEEDINGS

In March 2014, the Petitioner was tried for the 1986 murder of his mother. On direct appeal, this Court summarized the proof introduced at his trial in detail. *State v. Hill*, No.

E2015-00811-CCA-R3-CD, 2017 WL 532481 (Tenn. Crim. App. Feb. 9, 2017), *perm. app. denied* (Tenn. June 7, 2017). Relevant to this appeal, three witnesses testified that the Petitioner confessed to killing his mother.

Specifically, Ms. Shannon Wells, the Petitioner's first wife, testified that on September 12, 1986, she and the Petitioner lived together in a Knoxville apartment. *Id.* at *4. Around midnight, the Petitioner and another man returned home distressed, and the Petitioner had blood on his clothes. When asked what happened, he said, "[T]he b---- made me do it." *Id.* In a later argument occurring sometime after the victim's death, the Petitioner grabbed Ms. Wells's hair, put a knife to her throat, and warned her about his capacity for violence, reminding her what happened to his mother. *Id.* Ms. Wells said that she was terrified by the Petitioner's actions. *Id.*

Ms. Barbara Holsinger, the Petitioner's second wife, testified that she and the Petitioner had an argument in 1991, during which she suffered injuries. *Id.* at *3. During this incident, the Petitioner confessed that he had stabbed his mother and staged her killing to look like a burglary. *Id.* The Petitioner also revealed that he had waited in a bedroom closet for his mother to return home and change clothes, and he then attacked her, stabbing her multiple times. *Id.*

Finally, Mr. Julio Allen testified that he met the Petitioner in jail in 2013. They discussed their respective charges, and the Petitioner admitted that he was in jail "because of this b---- that got killed." *Id.* at *3. The Petitioner confessed to killing his mother for insurance money over twenty years ago while under the influence of drugs and after they had "a falling out." *Id.* He claimed to have stabbed the victim multiple times and then staged the scene to look like a robbery. *Id.*

At the conclusion of the trial, a Knox County jury found the Petitioner guilty of the second degree murder of his mother. The trial court sentenced him to serve twenty-four years in confinement, and this Court affirmed the judgment on appeal. *Hill*, 2017 WL 532481, at *1.

B. POST-CONVICTION PROCEEDINGS

On June 14, 2018, the Petitioner filed a *pro se* petition for post-conviction relief. Following the appointment of counsel, the Petitioner filed an amended petition asserting that his trial counsel was ineffective by advising him not to testify at trial. The post-conviction court held a hearing on the petition on June 24, 2022.

1. Trial Counsel's Testimony

At the post-conviction hearing, trial counsel testified that he had been appointed to represent the Petitioner about a year and a half before the trial. Trial counsel met with the Petitioner, who was in custody, to review pretrial discovery with him. The discovery revealed the State's intention to call the Petitioner's ex-wives to testify against him. Similarly, trial counsel was aware that Mr. Allen would also testify at trial.

Trial counsel discussed the anticipated testimony from these witnesses with the Petitioner. Although the Petitioner adamantly denied the accusations of his ex-wives, trial counsel said that their trial testimony "was pretty close to what [he] expected."

Trial counsel testified that he "absolutely" had discussions with the Petitioner about testifying at trial. However, trial counsel emphasized that the decision to testify was ultimately the Petitioner's decision. As trial counsel testified,

And I -- if I'm not mistaken, in my discussions with Mr. Hill, I was concerned that -- Mr. Hill had some very strong opinions about how this thing happened and how this investigation went wrong and how they ended up focused on him. And I found it very difficult to start a line of questioning and not end up off on a tangent about one of those issues. . . .

. . . .

He wanted to tell his story. You know, and I don't blame him for that, but he wanted to tell it in ways that I didn't -- I think for an accused to testify, that story's got to be -- it's got to make good sense and it's got to be -- come off as being sincere and not trying to, you know, make up for something you feel was done to you. And I think if you -- if you can't do that, it's going to hurt. And I felt, in this case, that I didn't think it was going to be possible for Mr. Hill to testify in a way that didn't hurt.

Although trial counsel confirmed that the Petitioner would likely have been willing to testify, he nevertheless advised the Petitioner not to testify at trial.

2. The Petitioner's Testimony

The Petitioner also testified at the post-conviction hearing. The Petitioner agreed that trial counsel discussed the possibility that his ex-wives might testify against him. He also testified that he "was planning the whole time to put everything out, talk about

everything that was going on around [his] mother's house, the things [he] was into, the guys [he] was having problems with."

The Petitioner stated that he wanted to testify, but trial counsel

was afraid that I was going to get too emotional, get angry, because . . . after I get the discovery, I start seeing where the police had evidence of other people, but they still pressured me. And I feel like that my mother . . . was killed and it wasn't me. And they didn't do a d---- thing about it. That's just the bottom line.

. . . .

Well, at first, he – you know, he didn't want me to [testify], you know. We had an evidence hearing and me and the District Attorney, I guess, had a few words. And he was afraid I would get angry, you know. And I'm very angry because what I've had to go through.

When asked why he ultimately decided not to testify, the Petitioner replied, "I was scared. I never faced 51 years[,] and I was scared. And he told me, if I was going to testify, he wasn't going to prepare me, I was on my own." The Petitioner stated that he would have testified had trial counsel advised him to do so.

3. Denial of Post-Conviction Relief and Appeal

After the hearing, the post-conviction court took the matter under advisement, and on July 5, 2022, the court issued a written order denying the Petitioner's claim for three principal reasons. First, the post-conviction court found that trial counsel's advice "concerning the Petitioner testifying was based upon reasonable grounds after a thorough investigation of the case and development of a sound trial strategy." The court then concluded that "the Petitioner has failed to show by clear and convincing evidence that his counsel was deficient in his performance concerning the advice on not testifying at trial."

Second, the post-conviction court found that the Petitioner entered a knowing and voluntary waiver of the right to testify at trial. The court noted that the trial court conducted a *Momon* hearing¹ during which "[t]he Petitioner indicated that he understood he had the right to testify and was making the decision to not testify on his own free will."

¹ In *Momon v. State*, 18 S.W.3d 152, 162 (Tenn. 1999), our supreme court "adopted a prophylactic procedure designed to ensure that a defendant's waiver of the fundamental right to testify is voluntary, knowing, and intelligent." *Mobley v. State*, 397 S.W.3d 70, 90 (Tenn. 2013). In this procedure,

Finally, the post-conviction court found that the Petitioner failed to show that the trial's outcome would have been different had he testified. Indeed, the court observed that the result of the trial likely would have been worse for the Petitioner had he testified:

[The Petitioner] was charged with first-degree murder. The jury rejected this claim, but also rejected the defense claim that someone else committed the offense. Had the Petitioner testified, there would have been a significant risk that the jury would have found him guilty of the charged offense of premeditated murder.

The Petitioner filed a timely notice of appeal on August 4, 2022. In this appeal, the Petitioner argues that the post-conviction court erred in finding that trial counsel's advice to the Petitioner not to testify was based upon sound strategy. The Petitioner argues that while trial counsel attempted to undermine the credibility of the three witnesses who testified about his confessions, only he could have directly denied making those statements. Because these three witnesses were critical to the State's case, the Petitioner argues that the advice not to testify "was unreasonable and was deficient performance."

For its part, the State argues that the post-conviction petition should be dismissed because it was filed beyond the one-year statute of limitations and is untimely. It also argues that the Petitioner received the effective assistance of counsel. The State asserts that the post-conviction court correctly found that trial counsel's advice was based upon a sound strategy and that the Petitioner failed to show that the trial's outcome would have been different had he testified. On our review, we respectfully disagree that the petition is untimely, and we affirm the post-conviction court's judgment in all respects.

STANDARDS OF APPELLATE REVIEW

Our supreme court has recognized that "the first question for a reviewing court on any issue is 'what is the appropriate standard of review?'" *State v. Enix*, 653 S.W.3d 692, 698 (Tenn. 2022). In this case, the parties present two issues under the Post-Conviction Procedure Act, Tenn. Code Ann. § 40-30-101, *et seq.* The first is whether the post-conviction petition was timely filed within the one-year statute of limitations. This question is one of law that we review under a de novo standard of review. *See, e.g., McCoy v. State*, No. W2019-00574-CCA-R3-PC, 2020 WL 1227304, at *1 (Tenn. Crim. App. Mar. 11, 2020), *no perm. app. filed*.

trial counsel may make inquiry of the defendant in open court outside the presence of the jury, or the defendant may execute a written waiver of the right to testify. *Momon*, 18 S.W.3d at 162, 175. In this case, the trial court and trial counsel conducted the *Momon* hearing with the Petitioner in open court after the conclusion of the State's proof.

The second issue is whether the post-conviction court properly denied relief because the Petitioner failed to show that he received the ineffective assistance of counsel. As our supreme court has made clear,

Appellate review of an ineffective assistance of counsel claim is a mixed question of law and fact that this Court reviews de novo. Witness credibility, the weight and value of witness testimony, and the resolution of other factual issues brought about by the evidence are entitled to a presumption of correctness, which is overcome only when the preponderance of the evidence is otherwise. On the other hand, we accord no presumption of correctness to the post-conviction court's conclusions of law, which are subject to purely de novo review.

Phillips v. State, 647 S.W.3d 389, 400 (Tenn. 2022) (citations omitted).

ANALYSIS

The Tennessee Post-Conviction Procedure Act (“the Act”) provides an avenue for relief “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. A post-conviction petitioner has the burden of proving his or her allegations of fact with clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). For evidence to be clear and convincing, “it must eliminate any ‘serious or substantial doubt about the correctness of the conclusions drawn from the evidence.’” *Arroyo v. State*, 434 S.W.3d 555, 559 (Tenn. 2014) (quoting *State v. Sexton*, 368 S.W.3d 371, 404 (Tenn. 2012)).

A. TIMELINESS OF THE POST-CONVICTION PETITION

As a threshold issue, the State argues that the petition should be dismissed because the original post-conviction petition was untimely filed. *See* Tenn. Code Ann. § 40-30-102(a). In general, “a person in custody under a sentence of a court of this state must petition for post-conviction relief under this part within one (1) year of the date of the final action of the highest state appellate court to which an appeal is taken[.]” Tenn. Code Ann. § 40-30-102(a). Our supreme court has recognized that “the one-year statutory period is an element of the right to file a post-conviction petition and that it is not an affirmative defense that must be asserted by the State.” *State v. Nix*, 40 S.W.3d 459, 464 (Tenn. 2001), *abrogated on other grounds by Reid ex rel. Martiniano v. State*, 396 S.W.3d 478, 511-13 (Tenn. 2013). Indeed, the Act expressly provides that “the one-year limitations period is

an element of the right to file the action and is a condition upon its exercise.” Tenn. Code Ann. § 40-30-102(a).

That said, there are circumstances in which a petition may be deemed timely filed, even if it is actually filed after the one-year statute of limitations has expired. For example, pursuant to the so-called “mailbox rule,” an incarcerated person may timely file a post-conviction petition by delivering it “to the appropriate individual at the correctional facility within the time fixed for filing.” Tenn. R. Sup. Ct. 28, § 2(G). Also, if a defendant has “been deprived by his counsel of a reasonable opportunity to seek post-conviction relief, due process considerations may have tolled the limitations period during this time when the appellee was unable to seek such relief.” *Williams v. State*, 44 S.W.3d 464, 465 (Tenn. 2001). Nevertheless, “[g]iven the post-conviction statute’s language conferring jurisdictional import to the timely filing of a petition, it is essential that the question of timeliness be resolved before any adjudication on the merits of the petitioner’s claims may properly occur.” *Saulsberry v. State*, No. W2002-02538-CCA-R3-PC, 2004 WL 239767, at *1 (Tenn. Crim. App. Feb. 9, 2004) (citing Tenn. Code Ann. § 40-30-102(b)), *perm. app. denied* (Tenn. June 1, 2004).

In this case, the “final action of the highest state appellate court” occurred when the supreme court denied the Petitioner’s application for permission to appeal on June 7, 2017. Thus, the petition could have been timely filed only if it were filed on or before June 7, 2018. *See Pruitt v. State*, No. W2021-01214-CCA-R3-PC, 2022 WL 3337104, at *2 (Tenn. Crim. App. Aug. 12, 2022), *no perm. app. filed*. However, because the petition was not filed until seven days later on June 14, 2018, the State argues that it was untimely filed.

Importantly, the parties proceeded in the post-conviction court as though the petition were timely filed, and no party, including the State, addressed the possible jurisdictional issue posed by the ostensibly late filing. Indeed, the Petitioner did not respond to the State’s argument that his case should be dismissed due to lack of jurisdiction. Accordingly, because the record was unclear on this jurisdictional issue, we stayed the appeal and remanded the case to the post-conviction court for additional findings on whether the petition was timely filed.

At the hearing on remand, the Petitioner testified that he delivered his petition to the appropriate prison official on June 7, 2018, the last day of the limitations period. The State did not cross-examine the Petitioner, call any witnesses, or challenge the petition’s timeliness. After the hearing, the post-conviction court entered a written order crediting the Petitioner’s testimony and concluding that the petition was timely filed.

Following the hearing on remand, the State has not further contested the timeliness of the post-conviction petition. Accepting the credibility findings of the post-conviction court, we affirm its judgment that the petition was timely filed. *Dellinger v. State*, 279

S.W.3d 282, 292 (Tenn. 2009) (“It is well established that appellate courts do not reassess credibility determinations.”). The State’s argument that we lack jurisdiction is, respectfully, without merit.

B. TRIAL COUNSEL’S ADVICE NOT TO TESTIFY

In his sole issue on appeal, the Petitioner argues that the post-conviction court erred in finding that he received the effective assistance of counsel when trial counsel advised him not to testify at trial. Article I, section 9 of the Tennessee Constitution establishes that every criminal defendant has “the right to be heard by himself and his counsel.” Similarly, the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, guarantees that all criminal defendants “shall enjoy the right . . . to have the [a]ssistance of [c]ounsel.” “These constitutional provisions guarantee not simply the assistance of counsel, but rather the reasonably effective assistance of counsel.” *Nesbit v. State*, 452 S.W.3d 779, 786 (Tenn. 2014). Accordingly, a petitioner’s claim that he or she has been deprived “of effective assistance of counsel is a constitutional claim cognizable under the Post-Conviction Procedure Act.” *Moore v. State*, 485 S.W.3d 411, 418 (Tenn. 2016); *see also Howard v. State*, 604 S.W.3d 53, 57 (Tenn. 2020).

“To prevail on a claim of ineffective assistance of counsel, a petitioner must establish both that counsel’s performance was deficient and that counsel’s deficiency prejudiced the defense.” *Moore*, 485 S.W.3d at 418-19 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). A petitioner may establish that counsel’s performance was deficient by showing that “‘counsel’s representation fell below an objective standard of reasonableness.’” *Garcia v. State*, 425 S.W.3d 248, 256 (Tenn. 2013) (quoting *Strickland*, 466 U.S. at 688). As our supreme court has also recognized, this Court must look to “all the circumstances” to determine whether counsel’s performance was reasonable and then objectively measure this performance “against the professional norms prevailing at the time of the representation.” *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015) (quoting *Strickland*, 466 U.S. at 688).

“If the advice given or services rendered by counsel are ‘within the range of competence demanded of attorneys in criminal cases,’ counsel’s performance is not deficient.” *Phillips*, 647 S.W.3d at 407 (quoting *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). Notably, because this inquiry is highly dependent on the facts of the individual case, “[c]onduct that is unreasonable under the facts of one case may be perfectly reasonable under the facts of another.” *State v. Burns*, 6 S.W.3d 453, 462 (Tenn. 1999).

In addition, a petitioner must establish that he or she has been prejudiced by counsel’s deficient performance such that counsel’s performance “‘render[ed] the result of the trial unreliable or the proceeding fundamentally unfair.’” *Kendrick*, 454 S.W.3d at 458

(quoting *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993)). In other words, a petitioner “must establish ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Davidson v. State*, 453 S.W.3d 386, 393-94 (Tenn. 2014) (quoting *Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Howard*, 604 S.W.3d at 58 (quoting *Strickland*, 466 U.S. at 694).

Importantly, when considering a claim of ineffective assistance of counsel, this Court begins with “the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all strategic and tactical significant decisions.” *Davidson*, 453 S.W.3d at 393. “The petitioner bears the burden of overcoming this presumption.” *Kendrick*, 454 S.W.3d at 458. This Court 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.” *Berry v. State*, 366 S.W.3d 160, 172 (Tenn. Crim. App. 2011) (citation omitted). Of course, “the fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation.” *Goad*, 938 S.W.2d at 369. However, this Court will give deference to the tactical decisions of counsel only if counsel’s choices were made after adequate preparation of the case. *Moore*, 485 S.W.3d at 419.

In this case, trial counsel was concerned about whether the Petitioner would be a good witness. He thought that the Petitioner would not answer questions directly and would instead “end up off on a tangent” about the investigation and law enforcement’s focus on him. Indeed, after a mock cross-examination, trial counsel did not think that the Petitioner “would be able to tell the story in a way that would be received well by the jury.” Trial counsel believed that he could effectively impeach the credibility of the State’s principal witnesses and that the Petitioner’s “testimony would go off the rails[.]”

In his post-conviction testimony, the Petitioner asserted that his trial testimony was needed to rebut that he confessed to his mother’s murder. However, the Petitioner acknowledged that trial counsel was concerned about his testimony: “[trial counsel] was afraid that I was going to get too emotional, get angry, because, you know, I mean, after I get the discovery, I start seeing where the police had evidence of other people, but they still pressured me.” The Petitioner also recalled that trial counsel “was afraid I would get angry, you know. And I’m very angry because what I’ve had to go through.”

This Court has previously recognized that trial counsel may make a reasonable strategic decision to advise a defendant not to testify when counsel believes that the defendant will not make “a good witness.” See *Jones v. State*, No. W2019-02186-CCA-R3-PC, 2021 WL 2172984, at *14 (Tenn. Crim. App. May 27, 2021), *perm. app. denied* (Tenn. Sept. 22, 2021). For example, we have noted this principle when the defendant

“tended not to answer questions directly and failed to see [his] actions from the perspective of others.” *Kent v. State*, No. M2017-01532-CCA-R3-PC, 2018 WL 2189706, at *14 (Tenn. Crim. App. May 14, 2018), *no perm. app. filed*. We have also recognized the principle when trial counsel was concerned that the defendant’s inability to control his temper would have affected his testimony. *See Freeman v. State*, No. E2021-01039-CCA-R3-PC, 2022 WL 2678878, at *8 (Tenn. Crim. App. July 12, 2022), *perm. app. denied* (Tenn. Dec. 14, 2022).

In this case, the post-conviction court found that trial counsel’s advice to the Petitioner not to testify was “based upon reasonable grounds after a thorough investigation of the case and development of a sound trial strategy.” The record fully supports these findings. As such, we affirm the post-conviction court’s conclusion that trial counsel’s performance was not deficient when he advised the Petitioner not to testify at trial.

Because a post-conviction petitioner bears the burden of establishing *both* deficient performance and resulting prejudice, “a court need not address both concepts if the petitioner fails to demonstrate either one of them.” *Garcia*, 425 S.W.3d at 257. Because the Petitioner has not shown that trial counsel rendered deficient performance, we pretermit any claim by the Petitioner that he suffered prejudice from trial counsel’s advice. *Phillips*, 647 S.W.3d at 401 (“The petitioner must prove sufficient facts to support both the deficiency and prejudice prongs of the *Strickland* inquiry—or, stated another way, the post-conviction court need only determine the petitioner’s proof is insufficient to support one of the two prongs to deny the claim.”).

CONCLUSION

In summary, we hold that the post-conviction court properly found that the Petitioner was not denied the effective assistance of counsel during his trial. Accordingly, because the Petitioner’s conviction or sentence is not void or voidable because of the violation of a constitutional right, we respectfully affirm the denial of post-conviction relief in all respects.

TOM GREENHOLTZ, JUDGE