

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs November 7, 2023

JOSEPH FLOYD v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 10-03845 Lee V. Coffee, Judge

No. W2023-00436-CCA-R3-PC

The Petitioner, Joseph Floyd, appeals from the denial of his petition seeking post-conviction relief from his convictions of driving under the influence (two counts) and reckless driving. He received an effective sentence of eleven months and twenty-nine days, which was suspended after service of seven days. In this appeal, the Petitioner argues that trial counsel was ineffective in failing to call his ex-girlfriend as a witness at trial and claims she would have established that the Petitioner was not the driver at the time of the offense. The Petitioner also argues the post-conviction court erred in denying relief because the court initially “advised [the Petitioner] that it would accept an affidavit of [his ex-girlfriend] as a substitute for live testimony” and later denied the Petitioner relief for failure to produce witnesses at the evidentiary hearing.¹ Upon 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

CAMILLE R. MCMULLEN, P.J., delivered the opinion of the court, in which JILL BARTEE AYERS and JOHN W. CAMPBELL, SR., JJ., joined.

William D. Massey and Seth M. Segraves, Memphis, Tennessee for the Petitioner, Joseph Floyd.

Jonathan Skrmetti, Attorney General and Reporter; Katherine C. Redding, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

¹ Although the Petitioner raised other issues in his petition and at the evidentiary hearing, those issues have not been raised in this appeal and are therefore waived.

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02/22/2024

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OPINION

On December 20, 2009, at around 6:00 or 7:00 p.m., Mark Scales, the victim, drove his Jeep into an intersection after the light turned green and was struck by a van. The primary issue at the Petitioner's subsequent trial, and again on post-conviction review, was whether the Petitioner was the driver of the van. The victim testified that the van traveled from the opposite direction and attempted to make a left-hand turn across his lane of traffic. The van did not stop and hit the victim on the front driver's side door. State v. Floyd, No. W2011-01796-CCA-R3-CD, 2013 WL 3130954, at *1 (Tenn. Crim. App. June 14, 2013), perm. app. denied (Tenn. Oct. 16, 2013). The victim suffered extensive injuries from the crash, and he was unable to identify the driver of the van.

Brian Hill, an eyewitness to the crash, testified at trial that he was in the turn lane when the accident occurred and that he saw a head-on collision. Id. at *2. He said that the van was turning left at the intersection and that the Jeep was traveling straight through the intersection. Hill "checked on the [Petitioner], who was in the driver's seat" of the van. Hill said a "big guy" was in the passenger seat and the passenger was able to get out of the van. However, the driver's side door would not open and the Petitioner got out through the passenger side door. Hill heard the Petitioner say to the passenger that the passenger was driving. When Hill attempted to open the Petitioner's door, he smelled alcohol coming from the Petitioner and the passenger. Hill observed that the Petitioner and the passenger were "belligerent," and he returned to the victim. Id. Hill testified that the Petitioner began walking down the sidewalk away from the accident. Hill told a police officer that the Petitioner was involved in the accident and the officer stopped the Petitioner. Hill opined that after the Petitioner was returned to the scene, the Petitioner might have sat in the passenger seat of the van. Hill advised the police that the Petitioner was driving the van.

When Memphis Police Officer Mehdi Farzam arrived at the scene, the driver's seat of the van was empty, but Robert Sims, a large man, was sitting in the passenger seat. Officer Farzam testified that Hill told him that the Petitioner drove the van. Officer Farzam testified that the Petitioner was intoxicated, was belligerent, and smelled of alcohol. He said the Petitioner denied being involved in the accident. Officer Farzam spoke to Sims, who owned the van but denied driving it. Id. at *3.

Memphis Police Officer Cornell McKinnie testified that when he arrived at the scene, the ambulance was ready to take the Petitioner to the hospital and that Officer McKinney followed the ambulance. He said that at the hospital, he heard the Petitioner say, "I shouldn't have been driving," and that the Petitioner did not know he was within hearing distance. Id. at *5.

Based on the above proof, the Petitioner was convicted as charged, and this court affirmed his convictions on direct appeal. Id. at *6. Given the testimony of Hill, who observed the Petitioner sitting in the driver's seat after the crash, and the comment by the Petitioner that he "should not have been driving," this court rejected the Petitioner's claim that the evidence failed to show that he was driving the van at the time of the accident. Id. at *7-8.

On October 13, 2014, the Petitioner filed a pro se petition seeking post-conviction relief, and the State filed its response November 20, 2014. The Petitioner, through counsel, filed a Memorandum of Facts and Law Supporting Continuing Jurisdiction on Petition for Post-Conviction Relief on February 19, 2015, and the State filed its response on April 20, 2015. The petition was dismissed by the post-conviction court without an evidentiary hearing after finding that the Petitioner was not in custody after his period of probation ended November 20, 2014, and thus not under the jurisdiction of the post-conviction court. The post-conviction court found that the Petitioner was unable to present how his expired sentence caused any "substantial collateral consequences[.]" The Petitioner appealed, and this court reversed and remanded for an evidentiary hearing to be held on the merits of the petition for relief. Floyd v. State, No. W2015-02232-CCA-R3-PC, 2016 WL 4545955, at *2 (Tenn. Crim. App. Aug. 30, 2016).²

We will limit our recitation of the testimony offered at the January 27, 2022 evidentiary hearing to the issues raised in this appeal. Although the Petitioner subpoenaed trial counsel to testify, trial counsel was unavailable, and the parties agreed to proceed without his testimony. The Petitioner also attempted to have his ex-girlfriend, Linda Powell, testify via Zoom, but technical issues arose and prevented her testimony. The post-conviction court allowed, and the parties agreed, for an affidavit to serve as a substitute for her in-person testimony.

The Petitioner testified at the evidentiary hearing that his ex-girlfriend would have testified on his behalf at trial. The Petitioner said that she witnessed the Petitioner and Sims leave the Petitioner's home earlier that day. Sims had arrived and asked the Petitioner to accompany him to a club to pick up a check Sims earned working as security. The Petitioner had been sitting at home drinking Crown Royal and had originally told Sims no. However, his ex-girlfriend persuaded the Petitioner to ride with Sims. The van belonged

² The post-conviction court also attributed much of the delay in this case to the COVID-19 pandemic and trial counsel's refusal to cooperate with the subpoena process due to personal legal issues unrelated to this case.

to Sims, and the Petitioner entered it on the passenger side. The Petitioner denied driving the van on the night of the offense.

The Petitioner was aggrieved because during the trial, trial counsel did not call his ex-girlfriend to testify to the facts as detailed in her affidavit. After the close of the State's proof at trial, trial counsel advised the Petitioner not to testify and explained that the Petitioner had "won." Trial counsel looked at the witnesses waiting to testify and said, "Y'all can go." The Petitioner told trial counsel that he wished to testify, but trial counsel told him to "follow his instructions." The Petitioner had been previously sworn in and asked about his decision not to testify, but he stated that he only decided not to testify under the instructions of his attorney.

On cross-examination, the Petitioner agreed that trial counsel vigorously cross-examined the officers who arrived at the scene of the accident as well as impeached the officers with their preliminary hearing testimony. Specifically, trial counsel established inconsistencies and omissions from the officer's reports. The Petitioner agreed that their trial strategy was to "attack" the investigation and impeach the credibility of the witnesses at the scene of the accident.

At the close of the Petitioner's testimony, the post-conviction court again acknowledged the difficulty with the Zoom technology. The court permitted post-conviction counsel to obtain the affidavit of the Petitioner's ex-girlfriend, as previously discussed, as well as affidavits of any other witness the Petitioner believed could attest that he was not the driver at the time of the accident in this case. The court stated it would not consider the Petitioner's matter until it had received the affidavit and the State had the opportunity to respond, if necessary.

A one-paragraph affidavit of Linda Powell, the Petitioner's ex-girlfriend, was subsequently submitted to the court and provided as follows:

On [December 22, 2009], I observed [the Petitioner] leave 3425 Dove Creek Cove, Memphis TN 38116, with Robert Sims. Sims picked [the Petitioner] up in a greenish Dodge Caravan. [The Petitioner] hopped in the van on the passenger side around 4:45 p.m. At about 18:00 hours, [the Petitioner] called me to come get him and stated he had been in an accident. As I walked up to the scene, I passed Sims and asked him what happened, he stated he didn't know [be]cause he left the scene. I asked him where was [the Petitioner], [and] he stated in the police car. I arrived about 18:09 and asked the officer could I speak to [the Petitioner] who was in the police

vehicle. I asked [the Petitioner] where was Sims and he stated Sims bailed out of the van and ran off. The police took [the Petitioner] to 201 Poplar.

On February 24, 2023, the post-conviction court issued an extensive written order denying relief which provided, in pertinent part, the following findings of fact:

At the evidentiary hearing, the Petitioner testified that his ex-[girlfriend] Linda Powell could have testified that he was not intoxicated when Ms. Powell last saw the Petitioner. The Petitioner testified further that Red Warren saw the Petitioner enter the passenger side of a van when the Petitioner had left a pool hall/bar. Further, the Petitioner asserted that Mr. Warren and Ms. Powell could testify that he never drove the vehicle that was involved in this accident. The Petitioner admitted that trial counsel [] had issued a subpoena for those two (2) particular witnesses and that the witnesses had appeared at trial. Ms. Powell submitted an affidavit for the post-conviction court's consideration. The Petitioner testified that Mr. Warren could not be located and was afraid to attend court.

On cross examination, the Petitioner admitted that Ms. Powell and Mr. Warren could not testify as to what had happened when he left the club and could not testify whether he was driving the vehicle at the time of the accident because the witnesses were not present. The Petitioner admitted that trial counsel had vigorously cross-examined witnesses and had impeached some of the witnesses with inconsistent testimony provided during a preliminary hearing. Lastly, the Petitioner indicated that he was confused as to why two (2) jurors had been dismissed and that the Petitioner thought that the jury was "hung" and could not reach a verdict.

[Trial counsel], under indictment for unrelated conduct that occurred years after this trial, was not present for this evidentiary hearing. After years of attempting to perfect service on [trial counsel] via of a subpoena, both parties agreed to proceed with the evidentiary hearing.

The post-conviction court determined that the Petitioner "had been unable to establish how the calling of any other witnesses would have made a difference in the outcome of the trial" and that trial counsel "made a well-founded strategic choice to challenge the sufficiency of the evidence and the credibility of the witnesses in this case." The court determined further that "[t]rial counsel made a well-founded decision not to call Ms. Powell and Mr. Warren as their testimony would not have been helpful as to whether the [Petitioner] was intoxicated or in physical control of a motor vehicle at the time of the collision." Finally,

the court determined that the Petitioner had “wholly failed to prove prejudice.” On March 24, 2023, the Petitioner filed a timely notice of appeal, and this case is properly before this court for review.

ANALYSIS

We must first address the Petitioner’s overarching concern, presented as issue one, that the post-conviction court “erred by denying the [Petitioner] relief for failing to call witnesses to testify at the evidentiary hearing when the court advised the [Petitioner] that it would accept an affidavit from [his ex-girlfriend] as sworn testimony because the court was having technical difficulties.” The Petitioner relies on two comments taken from the section of the court’s order denying relief entitled “Failure to Produce/Subpoena Witnesses.” The first comment by the court provided, “As Petitioner failed to produce witnesses at the evidentiary hearing, the Petitioner asks the court to engage in rank speculation as to how any additional witnesses could have made a difference in the outcome of this trial.” The second comment by the court provided, “Other than his unsubstantiated testimony the Petitioner failed to call any witnesses whom the Petitioner believes might have potentially exculpatory testimony regarding the circumstances of his arrest or conviction.” Based on these two comments, the Petitioner suggests that the court did not abide by its agreement to give the affidavit by his ex-girlfriend “the same weight as live testimony[.]”

We disagree with the Petitioner’s characterization of the comments made by the post-conviction court. The record reflects that the court agreed to accept the affidavit of the Petitioner’s ex-girlfriend due to technical issues with Zoom. The court also invited post-conviction counsel to submit any other affidavit of a witness who could substantiate the Petitioner’s claim that he was not the driver at the time of the offense. The Petitioner challenges the “weight” the court afforded the affidavit provided by the Petitioner’s ex-girlfriend. However, the affidavit details only what occurred prior to and after the accident, which adds minimal value to the Petitioner’s case. As conceded by the Petitioner and acknowledged by the court, the Petitioner’s ex-girlfriend was not present at the scene at the time of the accident and could not testify as to who was driving. Taken in context, the above two comments reflect the court’s observation that without any additional witnesses or proof, the Petitioner was asking the court to speculate that he was not the driver of the van. Accordingly, the post-conviction court properly considered the affidavit of the Petitioner’s ex-girlfriend, and the Petitioner is not entitled to relief.

The Petitioner next argues trial counsel was ineffective in failing to call his ex-girlfriend as a witness to testify at trial. He contends that her testimony would have shown: (1) that the Petitioner rode as a passenger of the van on the day of the accident; (2) that the

van belonged to Robert Sims; and (3) that Robert Sims was attempting to leave the scene of the accident and “distance himself from possible liability.” The Petitioner insists this testimony would have changed the outcome of his trial because “any proof regarding his status as a passenger on the day of the accident would . . . corroborate that the Defendant did not drive [Sim’s] van” on the night of the offense. The State responds that the decision not to call the Petitioner’s ex-girlfriend as a witness was reasonable and did not contribute to the trial strategy goal of attacking the State’s witnesses and police investigation. We agree with the State.

A claim for post-conviction relief based on alleged ineffective assistance of counsel presents mixed questions of law and fact. Mobley v. State, 397 S.W.3d 70, 80 (Tenn. 2013) (citing Calvert v. State, 342 S.W.3d 477, 485 (Tenn. 2011)). In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. Jaco v. State, 120 S.W.3d 828, 830 (Tenn. 2003). A post-conviction court’s findings of fact are conclusive on appeal unless the evidence in the record preponderates against them. Calvert, 342 S.W.3d at 485 (citing Grindstaff v. State, 297 S.W.3d 208, 216 (Tenn. 2009); State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999)). The post-conviction court’s application of law to its factual findings are reviewed de novo without a presumption of correctness. Mobley, 397 S.W.3d at 80 (citing Grindstaff, 297 S.W.3d at 216; Finch v. State, 226 S.W.3d 307, 315 (Tenn. 2007); Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006)).

The right to the effective assistance of counsel is guaranteed by both the United States Constitution and the Tennessee Constitution. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. To prevail on an ineffective assistance of counsel claim, the petitioner must establish that: (1) his lawyer’s performance was deficient; and (2) the deficient performance prejudiced the defense. Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Strickland v. Washington, 466 U.S. 668, 687 (1984). A petitioner successfully demonstrates deficient performance when the petitioner establishes that his attorney’s conduct fell “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)). Prejudice arising therefrom is demonstrated once the petitioner establishes “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. at 370 (quoting Strickland, 466 U.S. at 694).

There is a strong presumption that trial counsel’s conduct “falls within the wide range of reasonable professional assistance[,]” and “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered

sound trial strategy.” State v. Honeycutt, 54 S.W.3d 762, 767 (Tenn. 2001) (quoting Strickland, 466 U.S. at 689). We must also avoid the “distorting effects of hindsight” and “judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” Strickland, 466 U.S. at 689-90. “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” Id. at 688-89. However, “deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation.” House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (quoting Goad, 938 S.W.2d at 369).

As an initial matter, we agree with the post-conviction court, and conclude that, in effect, the Petitioner is attempting to relitigate the sufficiency of the evidence supporting his conviction which was previously determined and rejected by this court on direct appeal. Nevertheless, upon review of the petition and evidence, the post-conviction court determined that trial counsel “made a well-founded strategic choice to challenge the sufficiency of the evidence and the credibility of the witnesses in this case.” The court further determined that “[t]rial counsel made a well-founded decision not to call [the Petitioner’s ex-girlfriend] as [her] testimony would not have been helpful as to whether the [Petitioner] was intoxicated or in physical control of a motor vehicle at the time of the collision.”

Although the Petitioner argues the decision not to call the Petitioner’s ex-girlfriend could not be attributed to trial strategy because trial counsel did not testify at the post-conviction hearing, the record fully supports the determination of the post-conviction court. As previously discussed, the Petitioner’s ex-girlfriend was not physically present at the time of the accident and would have been unable to testify regarding the Petitioner’s control of the van at the time of the accident. She saw the Petitioner and Sims as they left her home earlier that day around 4:45 p.m. and did not see the Petitioner again until after the accident over an hour later. Given the marginal relevance of her testimony, it was reasonable to infer that trial counsel relied on the deficiencies he had established in the State’s case. Moreover, even assuming trial counsel was deficient in failing to call the Petitioner’s ex-girlfriend as a witness, the Petitioner failed to establish that the testimony of his ex-girlfriend would have changed the outcome of his trial. The record shows that an eyewitness to the accident reported that the Petitioner had been driving the van, and an officer overheard the Petitioner say he should not have been driving. Because the Petitioner has failed to establish that he was deprived of his right to the effective assistance of counsel, he is not entitled to relief.

CONCLUSION

Based on the above reasoning and authority, we affirm the judgment of the post-conviction court.

CAMILLE R. MCMULLEN, PRESIDING JUDGE