

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs October 3, 2023

FILED

10/17/2023

Clerk of the
Appellate Courts

VICTERICKA GILCHREASE v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Shelby County
No. 18-03901 Carolyn Wade Blackett, Judge**

No. W2023-00079-CCA-R3-PC

The Petitioner, Victercika Gilchrease, appeals from the post-conviction court's denial of her petition for post-conviction relief from her guilty plea convictions for second degree murder and two counts of aggravated assault, for which she is serving an agreed, effective twenty-one-year sentence. On appeal, she contends that the post-conviction court erred in denying relief on her ineffective assistance of counsel claims. We affirm the judgment of the post-conviction court.

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

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

James Shae Atkinson, Memphis, Tennessee, for the appellant, Victericika Gilchrease.

Jonathan Skrmetti, Attorney General and Reporter; Brooke A. Huppenthal, Assistant Attorney General; Steve Mulroy, District Attorney General; Carrie Shelton Bush, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

According to the State's recitation of facts at the guilty plea hearing, the Petitioner's convictions relate to an incident in which the Petitioner fired multiple shots at three people, striking and killing Dana Perkins. The Petitioner was charged with first degree murder and pleaded guilty to second degree murder for Mr. Perkins's death. She pleaded guilty to the charged offenses of aggravated assault for firing shots at the other two victims. At the guilty plea hearing, the Petitioner acknowledged her understanding of the charged offenses and the offenses to which she was pleading guilty. She agreed that no one had promised, threatened, or forced her to plead guilty. The trial court outlined the terms of the sentencing pursuant to the plea agreement: fifteen years at 100%, three years at 30% for each of the

two aggravated assault convictions, with all sentences to be served consecutively, for an effective sentence of twenty-one years. The Petitioner acknowledged her understanding of the sentences and the sentencing structure.

The record reflects that the Petitioner filed a Motion for Sentence Reduction, in which she also made allegations that were in the nature of post-conviction claims. Counsel was appointed, who filed a petition for post-conviction relief and an amended petition. The petition and amended petition alleged that the Petitioner received the ineffective assistance of trial counsel in various respects. As relevant to this appeal, the Petitioner alleged that trial counsel provided ineffective assistance because he: (1) failed to explain adequately the terms of the plea offer and incorrectly advised her about its terms, resulting in her entering a guilty plea that was not knowing and voluntary and (2) failed to discuss trial strategy with her, including lesser included offenses and their sentencing consequences.

At the post-conviction hearing, trial counsel testified that he provided the discovery materials to the Petitioner, that they reviewed it together “numerous times,” and that they reviewed the preliminary hearing evidence. He said he and the Petitioner discussed the Petitioner’s version of the relevant events, that they discussed the State’s evidence “[s]everal times,” and that he visited the Petitioner in the jail eleven times and had five telephone conferences with her. He said that they also corresponded when the jail did not accept visitors during the COVID-19 Pandemic and that they spoke “in the back” when the Petitioner had court appearance dates. Counsel said a self-defense theory and plea negotiations became more difficult after he spoke with the medical examiner because the forensic evidence did not support the Petitioner’s claim of self-defense, as the victim had been shot at close range, contrary to the Petitioner’s account of having shot the victim as he came toward her. Counsel said that the State had witnesses who would testify that the Petitioner had been “far away” from the victim, that the victim had taken a gun away from the Petitioner and removed the magazine, and that after the victim returned the gun and the magazine to the Petitioner, she inserted the magazine into the gun and shot the victim.

Trial counsel testified that he had requested a mental evaluation of the Petitioner and that she had been determined to be competent for trial. Counsel said he obtained the trial court’s authorization for a defense neuropsychological expert, who interviewed the Petitioner but could not provide a diagnosis that would be helpful in demonstrating that the Petitioner lacked competency.

Trial counsel testified that the public defender’s investigator contacted at least some of the witnesses identified by counsel in three separate investigation requests. Counsel included witnesses identified by the Petitioner in these requests. Counsel said his practice would have been to pass along to his client any information obtained by the investigator.

Trial counsel testified that he and the prosecutor engaged in extensive plea negotiations. Counsel said he met with both the prosecutor and the prosecutor's supervisor in his efforts to "try to get something knocked down from first degree murder." Counsel said that the prosecutor eventually made a plea offer for the Petitioner to plead guilty to second degree murder with an eighteen-year sentence to be served at 100%. Counsel said this offer did not include any proposed disposition of the aggravated assault charges. He said the prosecutor later offered fifteen years at 100% for second degree murder, "which was as low as [trial counsel] could get," and "six years on aggravated assault." Counsel said that he had attempted throughout the negotiations to get the prosecutor to agree to reducing the first degree murder charge to voluntary manslaughter but that the prosecutor refused.

Trial counsel said that after he received the last plea offer, he discussed it with the Petitioner at the jail. He said that she agreed to accept the offer but that within hours, the Petitioner's sister called to tell him the Petitioner had changed her mind. Counsel said he returned to speak with the Petitioner, who stated that she thought she "was having mental issues." He said he obtained another psychological evaluation of the Petitioner and that the evaluator "cannot refute anything other than she is competent." Counsel said he "spent a lot of time" at the jail around the time of the final plea offer and of the last mental evaluation. He said he and the Petitioner had discussed the State's trial evidence and the possible defense proof. He thought the Petitioner understood her exposure to a possible conviction for first degree murder if she went to trial. Counsel said the problem with going to trial was "it was basically her versus everybody" with regard to an accurate account of the events which transpired on the date of the offenses. Counsel said they discussed the possibility of the Petitioner's testifying at a trial.

Trial counsel testified that he made clear to the Petitioner that the plea agreement required 100% service of the fifteen-year sentence and 30% service of the three-year sentences and that the effective sentence was twenty-one years. Counsel said the trial court reviewed this aspect of the plea agreement with the Petitioner at the guilty plea hearing.

The Petitioner testified that trial counsel gave her the discovery "in pieces." She said counsel reviewed "what they accused [her] of" with her but that he never reviewed the evidence from "the medical examiner people" with her. She acknowledged counsel told her that he had spoken with the medical examiner but said counsel did not tell her what the medical examiner said.

The Petitioner testified about her recollection of the facts of the offenses. She said she had been at the victim's home when two other people entered with knives. She had thought the victim and the other people were not going to let her leave and that the victim had tried to "attack" her. She said she fired a shot but had her head turned and did not know if she struck the victim. She said she had been afraid when she fired the shot.

The Petitioner testified that her telephone conversations with trial counsel had been “short and rushed.” She said he told her that she might receive a life sentence, for which she would serve fifty-one years. She said counsel did not explain things properly to her and did not explain things she asked him. She said counsel “basically” told her that she should accept the plea offer for twenty-one years. She said twenty-one years was “trial time” and that she was not willing “to sign [her] life away.” She said she wanted to testify in order to explain “what happened because it adds up.” She said counsel did not listen or care because he was “just trying to get it over with.” The Petitioner said she had asked counsel for law books for her to read in order to “help him” because he seemed like he did not have time for her case.

The Petitioner testified that trial counsel spoke with jail inmates whose names she gave him as potential defense witnesses. The Petitioner did not recall if she spoke with an investigator.

The Petitioner testified that she had understood the final plea offer to be for an effective fifteen-year sentence. She said trial counsel told her, “[I]n all your time you’re going to do 15.” She said she agreed to “sign for fifteen” because she wanted to “just do anything . . . to get home with [her] kids.” She said she understood “the 15 was going to run together, not running crazy and stuff like . . . having to do all this time and then . . . constantly do time after time.” She said she had understood that the time she had served in pretrial detention was to come “off the back end or something like that” after she served fifteen years and that “it was just 15.” She said that when the judge explained the sentencing structure to her at the guilty plea hearing, she asked counsel if this was the same as the fifteen-year offer they had discussed and that he told her to “just say yeah” to the judge. She said that when she met with counsel before the plea hearing, she felt pressured and as if she did not have an option other than to plead guilty.

The Petitioner testified that trial counsel urged her to accept the plea offer. She said he told her she did not “have a fighting chance” and that he told her “nine times out of ten that [she] was going to get life, life or 15 years.” She said counsel told her that it “basically ain’t no use for [her], like fighting.” She said counsel thought that they had a basis to raise self-defense but that this theory would ultimately prove unsuccessful. She said that counsel kept mentioning the first degree murder charge and that he did not explain the elements of second degree murder or voluntary manslaughter. She said they did not discuss trial strategy. She later acknowledged that she “didn’t sign for 15, [she] signed for more” under pressure. She agreed she signed the guilty plea documents at counsel’s instruction but said she did not read them. She said she understood that she was pleading guilty to the aggravated assault charges as well as second degree murder, but she reiterated that she had understood that she would serve fifteen years.

The Petitioner testified that, in hindsight and with the benefit of legal study in the prison library, she wished she had gone to trial and thought she had a chance to prevail. She said she now had a better attorney and understood that she had options other than pleading guilty or receiving a life sentence.

The Petitioner testified that she could not remember if the trial judge asked her if she had been pressured into pleading guilty. She said trial counsel prompted her answers to the judge's questions. She did not remember the judge asking if she had questions about the plea.

After receiving the evidence, the post-conviction court denied relief in a written order. This appeal followed.

The Petitioner contends that the post-conviction court erred in denying relief on her post-conviction claims. She argues that the court erred in determining that trial counsel's alleged deficient performance did not result in her entering an unknowing and involuntary guilty plea. She also argues that counsel failed to investigate the case adequately, explain her options, and prepare her for a trial. The State responds that the court did not err in denying relief. We agree with the State.

Post-conviction relief is available "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." T.C.A. § 40-30-103 (2018). A petitioner has the burden of proving his factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f) (2018). A post-conviction court's findings of fact are binding on appeal, and this court must defer to them "unless the evidence in the record preponderates against those findings." *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *see Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's application of law to its factual findings is subject to a de novo standard of review without a presumption of correctness. *Fields*, 40 S.W.3d at 457-58.

To establish a post-conviction claim of the ineffective assistance of counsel in violation of the Sixth Amendment, a petitioner has the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). The Tennessee Supreme Court has applied the *Strickland* standard to an accused's right to counsel under article I, section 9 of the Tennessee Constitution. *See State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner must satisfy both prongs of the *Strickland* test in order to prevail in an ineffective assistance of counsel claim. *Henley*, 960 S.W.2d at 580. "[F]ailure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective

assistance claim.” *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). To establish the performance prong, a petitioner must show that “the advice given, or the services rendered . . . are [not] within the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); see *Strickland*, 466 U.S. at 690. The post-conviction court must determine if these acts or omissions, viewed in light of all of the circumstances, fell “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. A petitioner “is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision.” *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); see *Pylant v. State*, 263 S.W.3d 854, 874 (Tenn. 2008). This deference, however, only applies “if the choices are informed . . . based upon adequate preparation.” *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). To establish the prejudice prong, a petitioner must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

When a petitioner alleges the ineffective assistance of counsel in connection with a guilty plea, a petitioner must establish that counsel provided deficient performance and that “there is a reasonable probability that, but for counsel’s errors, he would not have pled guilty and would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Grindstaff v. State*, 297 S.W.3d 208, 217-18 (Tenn. 2009). The critical inquiry is whether counsel’s deficient performance “affected the outcome of the plea process,” not whether a petitioner would have obtained a better outcome at a trial. *Hill*, 474 U.S. at 59; *Grindstaff*, 297 S.W.3d at 217.

The post-conviction court’s order reflects the court’s findings that trial counsel reviewed discovery with the Petitioner and interviewed the witnesses identified by the Petitioner. The court found that the Petitioner had failed to prove that counsel had not developed a reasonable defense strategy. The court found that the Petitioner understood her rights and those she forfeited by pleading guilty, that she understood the terms and consequences of the twenty-one-year plea agreement, and that she failed to show that she unknowingly and involuntarily entered her guilty plea as a result of counsel’s actions.

The post-conviction court’s findings reflect that the court credited trial counsel’s testimony over that of the Petitioner regarding counsel’s efforts to investigate the case and develop a defense strategy. Likewise, the court credited counsel’s testimony and the transcript of the guilty plea hearing as showing the Petitioner’s understanding of her rights and her knowing and voluntary entry of her guilty pleas over the Petitioner’s testimony that she relied on counsel’s erroneous advice and was pressured into pleading guilty. The record does not preponderate against the court’s determinations. *Henley*, 960 S.W.2d at 578; see *Fields*, 40 S.W.3d at 456-57. Upon de novo consideration, we conclude that the

court's application of the law to its factual findings supports its denial of relief. *See Fields*, 40 S.W.3d at 457-58. The Petitioner is not entitled to relief.

In consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

ROBERT H. MONTGOMERY, JR., JUDGE