

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
March 7, 2023 Session

FILED

05/23/2023

Clerk of the
Appellate Courts

JOSEPH LESTER HAVEN, JR. v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Obion County
No. CC-21-CR-195 Jeff Parham, Judge**

No. W2022-00813-CCA-R3-PC

The Appellee, Joseph Lester Haven, Jr., was originally convicted of rape of a child and two counts of aggravated sexual battery for crimes committed against his stepchildren, for which he received an effective forty-year sentence. After his convictions were affirmed, State v. Joseph Lester Haven, No. W2018-01204-CCA-R3-CD, 2020 WL 3410242, at *1-2 (Tenn. Crim. App. June 19, 2020), the Appellee filed a petition seeking post-conviction relief based on trial counsel's failure to challenge the State's compliance with the Tennessee Code Annotated section 24-7-123, the statute which authorizes a video recording of a child to a forensic interviewer to be introduced as evidence at trial, but only when certain requirements are met. The Obion County post-conviction court granted relief, and the State now appeals. Following our review, we reverse the judgment of the post-conviction court, reinstate the Appellee's convictions, and remand for execution of judgments consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed;
Convictions Reinstated, Case Remanded**

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT H. MONTGOMERY, JR., JJ., joined.

Herbert H. Slatery III, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Colin Johnson, District Attorney General; and Melinda Meador, Assistant District Attorney General, for the Appellant, State of Tennessee.

Adam P. Nelson, Union City, Tennessee, for the Appellee, Joseph Lester Haven, Jr.

OPINION

On January 8, 2018, prior to Appellee's bench trial, a pre-trial motion to determine the admissibility of the video recordings of the forensic interview of the Appellee's minor children was conducted. There was no pre-trial motion filed by the defense challenging any aspect of the video, and it appears the hearing was held for the purpose of the trial court "to make a determination of whether the videos possessed particularized guarantees of trustworthiness." Tenn. Code Ann. § 24-7-123(b)(2)(A)-(K). At the hearing, Ms. Sydni Turner, the forensic interviewer who interviewed both minor child victims in this case, testified that she had previously appeared and testified in court as to her qualifications "at least ten times" and that she had been "qualified" each time. The State asked the forensic interviewer a series of questions consistent with the statutory requirements to qualify as a forensic interviewer. The forensic interviewer agreed that she was employed by the Carl Perkins Center and that the Carl Perkins Center was a qualified child advocacy center. As relevant to the issues raised herein, the following exchange between the State and the forensic interviewer occurred:

Q: And then, the next thing says that you have graduated from an accredited college or university with a bachelor's degree in the field related to social service education, criminal justice, nursing, psychology or other similar profession. What have you done in that regard?

A: Yes, sir. I graduated from the University of Memphis with a bachelor's degree in psychology.

Q: Okay. The next qualification it talks about is had experience equivalent to three years of full[-]time professional work in one or a combination of the following areas such as child protective services, criminal justice, clinical evaluation counseling or forensic interviewing.

A: Yes, sir.

Q: And what -- how do you qualify under that?

A: Based on the date of the forensic interview, I had been an interviewer for one year. And then I've worked with the center on the various social work positions for seven years.

Q: Seven years?

A: Yes, sir.

On cross-examination, trial counsel asked the forensic interviewer a series of questions pertaining to her education and experience. When trial counsel asked the forensic interviewer “you would agree with me that other people will look at this video besides the ones that you told this child about when you were questioning this child[,]” the trial court interjected and asked trial counsel the relevance of the question. In response, trial counsel noted that, based on State v. McCoy, 459 S.W.3d 1 (Tenn. 2014), there was “a lot of discussion about truth[.]” The trial court agreed that it was to make a determination that the videos possessed a particularized guarantee of trustworthiness. When trial counsel replied, “I’m just giving the Court some facts to make that determination[,]” the trial court stated, “I’m going to find that she was qualified pursuant to the statute . . . I mean, I’m sitting here looking at step-by-step on the statute.” After the trial court determined the forensic interviewer was qualified under the statute, trial counsel stated as follows:

Yes, Your Honor. We were familiar with those parameters, but we were also familiar with -- within -- I assume the Court is reading from 24-7-123 . . . A forensic interviewer is not defined by that statute. I don’t know exactly what that means. But, based on those things, Your Honor, we would . . . pass the witness.

The interview was subsequently played during the bench trial, and the Appellee was convicted of the above-noted offenses. The Appellee did not challenge the admissibility of the forensic interview on any ground in his motion for judgment of acquittal, or in the alternative, his motion for a new trial. For the first time on direct appeal, the Appellee argued that the forensic interviews were inadmissible because the forensic interviewer did not meet the statutory requirements of Tennessee Code Annotated section 24-7-123(b)(3). Joseph Lester Haven, No. W2018-01204-CCA-R3-CD, 2020 WL 3410242, at *13. The Appellee specifically argued that the forensic interviewer did not have the equivalent to three years of full-time, professional work in either child protective services, criminal justice, clinical evaluation, counseling, or forensic interviewing or other comparable work with children. Tenn. Code Ann. § 24-7-123(b)(3)(C). Because the forensic interviewer testified at the pre-trial hearing that she only had one year of experience as a forensic interviewer, the Appellee claimed that her testimony that she had worked in “various social work positions” at the Carl Perkins Center for seven years was insufficient to establish the statutory requirements. He further asserted that whatever her position may have been “we know it was not professional work[,]” that she did not meet the statutory definition of social worker, and that she was accordingly not performing social work. Joseph Lester Haven, No. W2018-01204-CCA-R3-CD, 2020 WL 3410242, at *13.

Upon review of this issue, this court agreed with the State, and concluded that the issue was waived for failure to have raised the issue before the trial court. Upon plain error review, this court determined that the forensic interviewer testified that she met the three-

year requirement by having been employed for one year as a forensic interviewer and having “worked with the center on the various social work positions for seven years.” Joseph Lester Haven, No. W2018-01204-CCA-R3-CD, 2020 WL 3410242, at *14. While she did not specify which statutory field or fields her employment fell under, she did testify that her seven years’ employment had qualified her under the statute at issue and that she had been deemed qualified in prior court proceedings. Because trial counsel had the opportunity to cross-examine her regarding which of the statutory fields her work experience fell into, and chose not to, this court concluded there was no evidence in the record on appeal that the admission of the forensic interviews breached a clear and unequivocal rule of law. Instead, the forensic interviewer’s testimony was that she was qualified under the statute by her work experience consisting of one year of forensic interviews and work with the center in various social work positions for seven years. Id.

On October 5, 2021, the Appellee filed a pro se post-conviction petition, and he was appointed counsel on October 7, 2021. On January 11, 2022, an amended petition was filed alleging, among other claims, that trial counsel was ineffective in failing to challenge the State’s compliance with Tennessee Code Annotated section 24-7-123 based on the inadequate qualifications of the forensic interviewer, Ms. Turner. Specifically, the petition alleged that the forensic interviewer was asked about her work experience under section (b)(3)(C), which required three years of qualifying full-time professional work in a specified statutory field, and the forensic interviewer testified to having only one year.

An evidentiary hearing was conducted on May 2, 2022, at which trial counsel was the sole witness. As relevant to the issue raised herein, trial counsel testified that he and the Appellee agreed to waive his right to a jury and proceed with a bench trial. Trial counsel acknowledged that during the pre-trial hearing to determine the admissibility of the videos of the forensic interview he asked the forensic interviewer a series of questions about her employment. Trial counsel was aware that the statute required experience equivalent to three years of full-time professional work in one or a combination of the following areas: child protective services, criminal justice, clinical evaluation, counseling, forensic interviewing, or other comparable work with children. However, trial counsel conceded that he did not ask the forensic interviewer for details about her work experience preceding the forensic interviews conducted in this case. Trial counsel further agreed that he did not ask the forensic interviewer about which of the five specific areas under the statute served to qualify as her three years of full-time professional experience. Trial counsel explained,

I was in the middle of -- and I think it was about five pages, maybe five and a half pages of cross-examination, and I was cut off by the judge who proceeded to make a ruling right there on the spot, saying that the interviews

possessed the indicia of trustworthiness and that -- and then he said that's my call. And I'm not sure -- so . . . that's in the transcript.

Asked if it was his intention to ask those questions, trial counsel said he could not recall. On cross-examination, trial counsel agreed that for purposes of determining "guarantees of trustworthiness," the trial judge reviewed the child forensic videos prior to the hearing. The State then began to read questions from the transcript from the pre-trial hearing that were asked by the State of the forensic interviewer concerning her qualifications. Specifically, the forensic interviewer was asked, "[t]he next qualification it talks about is had experience equivalent to three years of full-time professional work in one or a combination of the following area such as child protective services, criminal justice, clinical evaluation, counseling or forensic interviewing[?]" The forensic interviewer replied, "Yes, sir." The transcript from the pre-trial hearing as well as the curriculum vitae of the forensic interviewer were admitted into evidence. The State emphasized the portion of the curriculum vitae which stated that the forensic interviewer was a member of the "Tennessee Child Advocacy Center, Forensic Interviewers Association, participation in peer review, more than seven years of experience in social work positions with the Carl Perkins Center." The first page of the curriculum vitae was dated January 8, 2018.

The Appellee did not put forth any further proof in support of this issue.

In arguing their position, post-conviction counsel stated he was "not disput[ing] that [the forensic interviewer] had worked for the Carl Perkins Center for the required seven-year period. But merely working for the Carl Perkins Center . . . does not establish the qualification in one of those five statutory fields." In addition, post-conviction counsel brought State v. Martinez, No. W2019-02033-CCA-R3-CD, 2021 WL 2949514, at *1 (Tenn. Crim. App. July 14, 2021), perm. app. denied (Tenn. Nov. 29, 2021), to the court's attention. Post conviction counsel acknowledged that Martinez was not a case involving the admissibility of the child forensic interviews based on section 24-7-123. He relied on Martinez because it involved the same forensic interviewer, and this court provided a detailed employment history for the purpose of determining whether the forensic interviewer could provide expert testimony. Post-conviction counsel deduced that the February 8, 2017 forensic interview in the instant case occurred eight months after the interview in Martinez, which occurred on July 25, 2016. In arguing the prejudicial nature of trial counsel's failure to press the inadequate qualifications of the forensic interviewer, post-conviction counsel highlighted the following excerpt from Martinez:

Ms. Turner said that she began conducting forensic interviews in January 2016 and that as of the date of the Defendant's trial, she had completed 1200 forensic interviews . . . Turner said that prior to becoming a forensic

interviewer, she worked at the Carl Perkins Center for nearly ten years as a Family Advocate working on case management and as an office manager transcribing interviews.

Martinez, 2021 WL 2949514, at *5. Post-conviction counsel argued that trial counsel failed to ask whether the work the forensic interviewer was doing during the seven years prior to the instant forensic interview qualified under this statute and that there was no testimony at the hearing to show that the forensic interviewer was qualified under the statute. Had trial counsel pressed this question, post-conviction counsel opined the outcome of the case would have been different.

In response, the State argued the “noncompliance with the requirements for forensic interviewers . . . is a red herring.” The State asserted the forensic interviewer in the case was expressly asked if she had “sufficient experience” and the witness stated she did. The State argued simply because trial counsel did not press the inquiry on cross-examination did not mean there was no proof on the issue.

An order granting relief was filed on May 31, 2022, and the State filed its notice of appeal on June 20, 2022. This appeal is now properly before this court for review.

ANALYSIS

The State argues the post-conviction court erred in granting post-conviction relief. The State contends the post-conviction court did not determine that trial counsel was deficient and only made commentary that trial counsel did not request to make an offer of proof. Moreover, the State asserts trial counsel was not ineffective based on strategic reasons made by trial counsel not to pursue further questioning of the forensic interviewer. First, trial counsel said the videos were beneficial because, “when combined with the plethora of other statements of the victims, they highlighted inconsistencies and lessened the impact of the overall case.” Second, the State argues trial counsel made a strategic decision not to “push back” against the determination of the trial court to avoid “significant risks.” Finally, the State contends that the Appellee failed to meet his burden of establishing prejudice because he did not present the testimony of the forensic interviewer at the post-conviction hearing, meaning that, to date, the work experience of the forensic examiner remains speculative at best.

In response, the Appellee contends that the post-conviction court’s order granting a new trial should be affirmed. Specifically, he argues that “[d]espite an opportunity to cross-examine the forensic interviewer, trial counsel failed to ask any questions addressing the prosecution’s compliance with the statutory requirements, which allowed the prosecution to introduce evidence that should have been excluded.” The Appellee asserts

that the post-conviction court explicitly found ineffective assistance of counsel based on trial counsel's failure to adequately question the forensic interviewer. The Appellee counters that trial counsel did not make a strategic decision based on trial counsel's testimony that he sought to exclude the videos.

The Sixth Amendment provides, in pertinent part, that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. Const. amend. VI. This right to counsel is “so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment.” Gideon v. Wainwright, 372 U.S. 335, 340 (1963) (quotation omitted). Inherent in the right to counsel is the right to effective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 335, 344 (1980); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970); see also Strickland v. Washington, 466 U.S. 668, 686 (1984).

When making an ineffective assistance of counsel claim, Tennessee Code Annotated section 40-30-110(f) provides that the “petitioner shall have the burden of proving the allegations of fact by clear and convincing evidence.” The “clear and convincing evidence” standard defies precise definition. O’Daniel v. Messier, 905 S.W.2d 182, 188 (Tenn. Ct. App. 1995), superseded by statute, (internal citations omitted). “While it is more exacting than the preponderance of the evidence standard . . . it does not require such certainty as the beyond a reasonable doubt standard.” Id. (internal citations omitted). Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence. See Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.3 (Tenn.1992); Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998). It should produce in the fact-finder’s mind a firm belief or conviction with regard to the truth of the allegations sought to be established. O’Daniel v. Messier, 905 S.W.2d at 188.

A petitioner’s burden of proving the allegations of fact by clear and convincing evidence is a separate inquiry and does not implicate Strickland v. Washington, 466 U.S. at 687. Phillips v. State, 647 S.W.3d 389, 402 (Tenn. 2022); Dellinger v. State, 279 S.W.3d 282, 293-94 (Tenn. 2009). The factual findings of the post-conviction court are binding on an appellate court unless the evidence in the record preponderates against those findings. Dellinger v. State, 279 S.W.3d 282, 294 (Tenn. 2009). The post-conviction court’s application of law to its factual findings is reviewed de novo with no presumption of correctness. Smith v. State, 357 S.W.3d 322, 336 (Tenn. 2011).

If a petitioner meets the burden of establishing the allegations by clear and convincing evidence, the court then must assess the petitioner’s claim under the two-prong analysis established in Strickland. In order 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. Strickland v. Washington, 466 U.S. at 687; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). “[A] failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.” Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996) (citing Strickland, 466 U.S. at 697).

A petitioner successfully demonstrates deficient performance when the clear and convincing evidence proves that his attorney’s conduct fell below “an objective standard of reasonableness under prevailing professional norms.” Id. at 369 (citing Strickland, 466 U.S. at 688; Baxter, 523 S.W.2d at 936). 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).

The post-conviction court order denying relief in this case noted, in relevant part, as follows:

At the original trial the [c]ourt conducted a pre-trial hearing on the proposed introduction of the video. At the hearing the State went through the steps outlined within the statute. When questioned about her experience requirement [the forensic interviewer] stated she had worked at the Carl Perkins Center for approximately seven years in various social work positions. During cross-examination of the witness the trial attorney primarily focused on the CLE requirements, the definition of a forensic interview, the administration (or lack thereof) of the oath, and the general procedures used during the forensic interview. He did not challenge the direct testimony offered by [the forensic interviewer] to the “various social work positions.” At the Post-conviction hearing, trial counsel testified he was cut off by the [c]ourt from questioning [the forensic interviewer’s] qualifications. He did not, however, request the [c]ourt allow an offer of proof to continue the questions during the trial.

Post-conviction counsel later provided this [c]ourt with an opinion released in 2021 from the Western Section of the Court of Criminal Appeals. Specifically, [State v. Martinez, No. W2019-02033-CCA-R3-CD, 2021 WL 2949514, at *1 (Tenn. Crim. App. July 14, 2021), perm. app. denied (Tenn. Nov. 29, 2021)], where the qualifications of [the forensic interviewer] were set out after extensive questioning.

As a result, her qualifications necessary for the introduction of the forensic interviews in the instant case are called into question. Being an office manager would not, under the circumstances, qualify under the statute. However, [the Appellee's] trial counsel did not explore this issue at trial.

...

In the instant case the child testified at trial only to a sexual battery, not to penetration. The proof of the rape came from the Forensic Interview video. Had counsel adequately examined and proven that the Forensic Interviewer was not qualified, then the proof of penetration might not have been introduced and Petitioner's conviction of Child Rape likely would not be sustained. As such, the Petitioner received ineffective assistance of counsel and his conviction is hereby set aside and he is ordered to receive a new trial.

Based upon the above law, the Appellee was required to prove by clear and convincing evidence that trial counsel erred when trial counsel failed to adequately question the forensic interviewer about her qualifications in one of the five statutory fields. In other words, under the circumstances of this case, the Appellee was tasked with proving by clear and convincing evidence that the forensic examiner did not have the required experience equivalent to three years of full-time professional work in one or a combination of the following areas: child protective services, criminal justice, clinical evaluation, counseling, forensic interviewing, or other comparable work with children. If the Petitioner established this fact by clear and convincing evidence, the post-conviction court was then required to apply the Strickland analysis.

Here, the post-conviction court did not expressly find that trial counsel erred in failing to adequately question the forensic interviewer about her qualifications and only made implicit findings in support of its order granting relief. The court stated trial counsel "did not challenge the direct testimony offered by [the forensic interviewer] to the 'various social work positions[.]'" Based on Martinez, the court then "called into question" the qualifications necessary for the introduction of the forensic interviews and declared that "[b]eing an office manager would not . . . qualify under the statute." However, as acknowledged by post-conviction counsel, Martinez did not involve a challenge to the admissibility of the video recording of the child forensic interviews based on the inadequate qualifications of the forensic interviewer. There were no questions asked of the forensic interviewer in Martinez regarding which statutory field or fields her employment fell under section 24-7-123(b)(3)(C), and Martinez did not establish that the forensic interviewer was not qualified under section 24-7-123 (b)(3)(C).

Instead, in Martinez, this court provided a general summary of the employment background of the forensic interviewer for purposes of establishing her as an expert. One excerpt from this court's summary of the forensic interviewer's testimony in Martinez does not relieve the Appellee from his burden of establishing that trial counsel failed to adequately question the forensic interviewer about her qualifications under the statute in this case. Nothing in the record from the post-conviction hearing contradicts the forensic interviewer's testimony from the pre-trial admissibility hearing that she was qualified under the statute by her "work experience consisting of one year of forensic interviews and work with the center in various social work positions for seven years." Indeed, the very question post-conviction counsel criticized trial counsel for failing to ask concerning whether the forensic interviewer's work with the center in "various social work positions" prior to the instant forensic interview qualified under this statute was left unanswered at the post-conviction hearing.

Accordingly, we conclude the record preponderates against the determination of the post-conviction court that trial counsel erred when trial counsel failed to adequately question the forensic interviewer about her qualifications in one of the five statutory fields. The order of the post-conviction court granting the Petitioner a new trial is reversed, the Appellee's convictions are reinstated, and this matter is remanded for proceedings consistent with this opinion.

CONCLUSION

Based on the above reasoning and authority, we reverse the judgment of the post-conviction court, reinstate the Appellee's convictions, and remand for execution of judgments consistent with this opinion.

CAMILLE R. MCMULLEN, JUDGE