

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs July 18, 2023, at Nashville

ANTOINE HINTON v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Shelby County
No. 16-06788 Chris Craft, Judge**

No. W2022-01135-CCA-R3-PC

The Petitioner, Antoine Hinton, appeals from the Shelby County Criminal Court’s denial of his petition for post-conviction relief from his convictions of first degree felony murder, especially aggravated kidnapping, aggravated kidnapping, employing a firearm during the commission of a dangerous felony, and reckless aggravated assault. The Petitioner is serving an effective life sentence. On appeal, the State contends that the post-conviction court erred when it denied the State’s motion to dismiss the petition. The Petitioner contends that the post-conviction court erred when it denied relief for the Petitioner’s ineffective assistance of counsel claim against: (1) pretrial counsel for advising the Petitioner to give a statement to law enforcement when counsel had a conflict of interests; (2) trial counsel for failing to raise marital privilege, and (3) trial and appellate counsel for failing to secure at trial a jury instruction pursuant to *State v. White* or to raise on appeal the lack of the instruction. 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 JAMES CURWOOD WITT, JR., and TIMOTHY L. EASTER, JJ., joined.

Brett B. Stein, Memphis, Tennessee, for the Appellant, Antoine Hinton.

Jonathan Skrmetti, Attorney General and Reporter; Katharine K. Decker, Senior Assistant Attorney General; Steven J. Mulroy, District Attorney General; Stephen Ragland, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Petitioner’s convictions arise from his actions on August 16, 2015, when the married Petitioner was with one of his girlfriends, Kaili Taylor. The Petitioner accessed Ms. Taylor’s cell phone and read text messages that she had received from Jeremy

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Lampkin. The Petitioner was at Ms. Taylor's apartment and believed that Ms. Taylor and Mr. Lampkin were having an affair. At gunpoint, the Petitioner proceeded to order Ms. Taylor to lure Mr. Lampkin to Ms. Taylor's apartment. During the attempt to lure Mr. Lampkin, the Petitioner forced Ms. Taylor to drive to the Petitioner's apartment, where he beat her and took her purse, which contained a handgun.

While at his apartment, the Petitioner convinced Mr. Lampkin to come to Ms. Taylor's apartment by impersonating Ms. Taylor through text messages sent from her cell phone. They then returned to her apartment. When Mr. Lampkin arrived at the apartment, the Petitioner held him at gunpoint and interrogated him about his relationship with Ms. Taylor. When the Petitioner ordered Mr. Lampkin to "strip," Mr. Lampkin tackled the Petitioner, and this enabled Ms. Taylor to escape the apartment. The Petitioner then fatally shot Mr. Lampkin, fled the apartment, and called his wife to pick him up at a nearby parking lot.

A Shelby County jury convicted the Petitioner of first degree felony murder, especially aggravated kidnapping, aggravated kidnapping, employing a firearm during the commission of a dangerous felony, and reckless aggravated assault, for which he received an effective life sentence. The Petitioner appealed his convictions, and this court affirmed and ordered the trial court to merge the kidnapping convictions. *State v. Antoine Hinton*, No. W2018-01931-CCA-R3-CD, 2020 WL 1426683 (Tenn. Crim. App. Mar. 19, 2020), *perm. app. denied* (Tenn. Sept. 21, 2020). This court determined that the trial court erred in not giving a *White* instruction but that the error was harmless. *Id.*

The Petitioner filed a petition for post-conviction relief alleging that he received the ineffective assistance of counsel. At the post-conviction hearing, the State raised for the first time that the petition had not been properly verified under oath. The post-conviction court denied the State's motion to dismiss the petition and stated that had the State filed the motion before the hearing, the motion would have been granted. The court allowed the Petitioner to state under oath the validity of the petition before proceeding with his testimony and found that the Petitioner's testifying under oath was analogous to the Petitioner's notarized signature on a petition.

At the post-conviction hearing, the Petitioner testified that he was arrested on August 18, 2015, around 6:00 p.m. and taken to the Memphis Police Department. The Petitioner testified when the police tried to interview him, he invoked his right to be represented by an attorney during questioning. The Petitioner stated that his pretrial counsel arrived at the police station around two o'clock in the morning. The Petitioner said that he had about ten minutes with counsel outside the presence of the police. The Petitioner stated that counsel advised him to give a statement to the police to have a chance for a reduced sentence. The Petitioner testified that he gave his statement while counsel was in the room.

The Petitioner testified that at the preliminary hearing, pretrial counsel informed him that he could no longer represent the Petitioner because counsel knew the victim's grandmother. The Petitioner testified that trial counsel and associate counsel represented him at the trial.

On cross-examination, the Petitioner testified that he did not dispute the police report that listed the time he was interviewed as between 1:29 a.m. and 2:30 a.m. The Petitioner testified that he was satisfied with pretrial counsel's representation when giving his statement.

Associate counsel testified that he was a criminal defense attorney and that trial counsel hired him to assist with the Petitioner's case. Associate counsel testified that he became involved with the Petitioner's case a year before trial. He said he visited the crime scenes and the location where the Petitioner was arrested, and he discussed with the Petitioner that the defense would likely need to prove adequate provocation existed to convince the State to seek a lesser charge or sentence. Counsel stated that he had extensive conversations with the Petitioner about whether the Petitioner should testify at the trial.

Associate counsel testified that there was no "vindictiveness" on the part of the State during the trial and that counsel was present every day of the trial. Counsel stated that the Petitioner was not a problematic client and that the Petitioner said at a *Momon* hearing that he had no problems with trial counsel's and associate counsel's representation.

Associate counsel testified that Ms. Taylor's testimony at trial had a significant impact on the jury. He stated that other evidence included the testimony of two neighbors who were at the crime scene. Counsel testified that he believed the trial proof established the Petitioner's guilt.

On cross-examination, associate counsel testified that trial counsel was aware that pretrial counsel was with the Petitioner when the Petitioner gave his statement to the police. Associate counsel stated that the Petitioner never received a plea offer from the State. On redirect examination, counsel testified that he believed the Petitioner's statement to the police was voluntary.

Appellate counsel testified that he represented the Petitioner in his motion for a new trial and on appeal. He stated that he focused on issues preserved at the trial and issues that should have been raised at the trial. He testified that a *White* instruction regarding confinement had not been given during the Petitioner's trial. Counsel stated that he did not raise the *White* instruction issue in the motion for a new trial but raised the issue on appeal. Counsel testified that his associate argued the Petitioner's case on appeal at oral arguments.

In its order denying relief, the post-conviction court considered the Petitioner's ineffective assistance of counsel claims and found that the Petitioner suffered no prejudice.

The only instance of deficient performance that the court determined was that trial counsel should have requested a *White* instruction at the trial and that appellate counsel should have raised the lack of the instruction in the motion for a new trial.

The post-conviction court found that the Petitioner failed to demonstrate that pretrial counsel was ineffective because the Petitioner provided no evidence to support that pretrial counsel's advice to give a statement was deficient. Additionally, the court found that the Petitioner failed to prove that the pretrial counsel's conflict of interests was deficient performance because counsel promptly withdrew from representing the Petitioner when counsel became aware of the conflict.

The post-conviction court determined that the Petitioner suffered no prejudice from the lack of a *White* instruction due to the overwhelming evidence supporting the Petitioner's kidnapping conviction. The court determined that trial counsel were not deficient and that the Petitioner was not prejudiced when counsel did not object to the testimony of the Petitioner's wife. The court found that the Petitioner's wife's testimony did not fall within the spousal privilege statute due to the Petitioner's being involved in two ongoing affairs at the time of the homicide and the wife's testimony that she was relieved her relationship with the Petitioner was over. This appeal followed.

I

Motion to Dismiss at the Hearing

The State contends that the post-conviction court erred in denying its motion to dismiss the post-conviction petition because the petition was not verified under oath. The Petitioner did not respond to the State's claim. We conclude that the court did not err when it allowed the Petitioner to testify under oath and before the hearing as to the validity of the allegations and contents of his petition rather than dismissing the petition.

Post-conviction petitioners must meet certain procedural requirements. The allegation of facts in a post-conviction petition and any amendments must be verified by the petitioner under oath. *Sexton v. State*, 151 S.W.3d 525, 530 (Tenn. Crim. App. 2004); see T.C.A. § 40-30-104(e) ("The petition and any amended petition shall be verified under oath."). A post-conviction counsel's certification of a petition does not satisfy the verification requirement for a post-conviction petition. *Sexton*, 151 S.W.3d at 530. The purpose of the statutory requirement for verification under oath of the allegations within a petition is to "deter or to reduce intentionally false allegations primarily made by petitioners." *Jerry Timberlake v. State*, No. W2008-00037-CCA-R3-PC, 2009 WL 302294, at *2 (Tenn. Crim. App. Feb. 5, 2009) (quoting *Sexton*, 151 S.W.3d at 530). A post-conviction court "shall not dismiss a pro se petition for failure to follow the prescribed form until the court has given petitioner a reasonable opportunity to amend the petition with the assistance of counsel." *Clifton Harrison v. State*, No. E2009-00222-CCA-R3-PC,

2010 WL 3949344, at *2 (Tenn. Crim. App. Oct. 11, 2010) (internal quotations and citations omitted). However, the Petitioner in the present case was represented by counsel when the petition was filed.

The State contends that the post-conviction court abused its discretion in allowing the represented Petitioner to testify to the validity of his petition because the Tennessee Supreme Court has held that “nothing in section [40-30-106(d)] contemplates that counsel will be given an opportunity to correct a deficiency. It is only if the petition was filed by an unrepresented person that a trial court retains any authority to allow the filing of a compliant amended petition.” *Maxwell v. State*, 647 S.W.3d 593, 595 (Tenn. 2019).

The present case, however, has multiple facts that distinguish it from *Maxwell*. The State in *Maxwell* filed a motion to dismiss the post-conviction petition when it responded to the unsworn petition. *Id.* at 594. The petitioner in *Maxwell* never filed a response to the State’s motion, and after fifty days, the petition was dismissed. *Id.* In the present case, the State, in its reply to the petition, acknowledged that the petition met “the threshold requirement.” The State did not raise the petition’s lack of verification until the post-conviction hearing. The post-conviction court stated that it would have granted the State’s motion to dismiss if the motion had been filed before the hearing.

The present case is similar to *Jerry Timberlake*, whose petition was dismissed by the post-conviction court on the State’s motion at the hearing for the petitioner’s failure to verify the petition under oath prior to the hearing. A panel of this court concluded that the post-conviction court should have offered the represented petitioner the opportunity to verify his petition under oath. *Jerry Timberlake*, 2009 WL 302294 at *3; *see Sexton*, 151 S.W.3d at 530 (concluding that plenary review of petitioner’s claims was appropriate despite absence of verification when “[t]he trial court did not notify the petitioner of its concerns until the evidentiary hearing” and “took sworn testimony from the petitioner and her trial attorneys relative to the petitioner’s claims.”); *see also William James Watt v. State*, No. M2015-02411-CCA-R3-PC, 2016 WL 6638856, (Tenn. Crim. App. Nov. 16, 2016) (concluding that even though the original petition and amended petition claims were not verified under oath, the petitioner testified under oath at the hearing, “thereby adopting and attesting to the veracity of the claims in the petition.”), *perm. app. denied* (Tenn. Feb. 16, 2017). Because the State acknowledged in its reply that the petition met the statutory filing requirements and did not move for a dismissal of the petition until the hearing, the post-conviction court did not err in allowing the petition to be verified under oath at the hearing.

II

Ineffective Assistance of Counsel

The Petitioner contends that the post-conviction court erred in denying his ineffective assistance of counsel claims against pretrial, trial, and appellate attorneys. The State responds that the court properly denied the Petitioner's claims. 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.” *Goard 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 ones 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.*

The same legal standard applied to ineffective assistance of appellate counsel claims applies to claims regarding the performance of trial counsel. *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004). Regarding the selection of issues to be raised on appeal, the determination “is generally within appellate counsel’s sound discretion.” *Id.* at 887. This court “should not second-guess such decisions, and every effort must be made to eliminate the distorting effects of hindsight.” *Id.* Deference to tactical choices, however, does not apply if such choices are not “within the range of competence required of attorneys in criminal cases.” *Id.*

When a petitioner claims appellate counsel was ineffective for failing to raise an issue on appeal, this court must consider the underlying appellate issue on its merits. *Id.*

[F]or the reviewing court to determine the merits . . . , a petitioner should present the previously omitted issue in the same form and with the same legal argument(s), that is, applying law to the facts of the case, which petitioner asserts appellate counsel should have done. It is not enough to simply state that appellate counsel should have raised certain issues on appeal and to argue that these issues could have resulted in relief being granted to the petitioner.

Russell Lenox Hamblin v. State, No. M2012-01649-CCA-R3-PC, 2013 WL 5371230, at *8 (Tenn. Crim. App. Sept. 26, 2013), *perm. app. denied* (Tenn. Feb. 24, 2014). Our supreme court has also provided guidance, stating that reviewing courts should consider, in relevant part, whether the omitted issue is “significant and obvious,” whether contrary legal authority exists, whether the omitted issue is stronger than the issues raised on appeal, whether an objection was lodged in connection with the omitted issues, whether the trial court’s determination is subject to deference, whether appellate counsel testified about appeal strategy, whether appellate counsel and the petitioner reviewed potential appellate issues, whether appellate counsel reviewed all of the trial facts, whether the omitted issue involves assignment of error, and appellate counsel’s level of experience. *Carpenter*, 126 S.W.3d at 882, 888 (citing *Mapes v. Coyle*, 171 F.3d 408, 427-28 (6th Cir. 1999)).

A. Pretrial Counsel: Conflict of Interests and Advice to Give a Police Statement

The Petitioner contends that the post-conviction court erred in denying his claim that pretrial counsel was ineffective by advising the Petitioner to provide a statement to police and by not advising the Petitioner of his conflict of interests. The Petitioner argues that counsel knew of the conflict of interests when he advised the Petitioner to provide a

statement to the police. The Petitioner also argues that counsel's advice to the Petitioner to provide a statement was not a strategic decision and fell below the expectations for competent advocacy. The State responds that counsel's advice to give a statement to police was a reasonable strategic decision. Additionally, the State responds that counsel was not aware of his conflict of interests until the preliminary hearing at which time he informed the Petitioner and withdrew. We agree with the State.

We begin by addressing the Petitioner's argument that his pretrial counsel provided ineffective assistance by not disclosing his conflict of interests when the Petitioner gave a statement to police. The post-conviction court found that counsel did not know of his conflict at the time the Petitioner gave his statement. The court found that counsel discovered his conflict at the preliminary hearing when he saw the victim's grandmother, whom he knew from high school, and that he withdrew from representing the Petitioner. The Petitioner presented no evidence that pretrial counsel was deficient in not withdrawing prior to the Petitioner's giving a statement and that the Petitioner was prejudiced. The record supports the post-conviction court's determination on this issue.

The Petitioner claims that pretrial counsel was ineffective in advising him to provide a statement to police. The Petitioner presented no evidence showing what information counsel had when he advised the Petitioner to provide a statement. The post-conviction court found no proof that counsel forced the Petitioner to confess. The Petitioner testified that he informed counsel as to why he was in custody. The record reflects that associate counsel thought showing the Petitioner acted with adequate provocation was important to the defense. Because the problematic autopsy results and witness testimony were not known to the Petitioner and pretrial counsel until after the Petitioner gave his statement, counsel could not have known of the inconsistencies in the Petitioner's statement. The Petitioner presented no evidence to demonstrate that counsel's advice to provide a statement was not an informed and reasonably-based strategy. The record does not preponderate against the post-conviction court's findings that the Petitioner failed to prove deficiency and prejudice by a preponderance of the evidence. The Petitioner is not entitled to relief on this basis.

B. Trial Counsel: Failure to Raise Marital Privilege

The Petitioner contends that the post-conviction court erred in denying his claim that trial counsel were ineffective for not objecting to the Petitioner's wife's testifying about privileged marital communications. The Petitioner argues that Tennessee's statutory privilege for marital communications applied to his wife's testimony at trial and that his counsel were deficient for not objecting to her testimony. The Petitioner argues that the verdict at the trial would have been different had counsel objected to the testimony. The State responds that the court properly denied relief because the testimony of his wife did not satisfy the statutory requirements to invoke the marital communication privilege. We agree with the State.

Tennessee Code Annotated section 24-1-201 states in relevant part:

(c)(1) In a criminal proceeding a marital confidential communication shall be privileged if:

- (A) The communications originated in a confidence that they will not be disclosed;
- (B) The element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties;
- (C) The relation must be one which, in the opinion of the community, ought to be sedulously fostered; and
- (D) The injury to the relation by disclosure of the communications outweighs the benefit gained for the correct disposal of litigation.

The post-conviction court found that the only part of the wife's testimony that could fall under the statutory privilege was her testimony concerning the Petitioner's telling her that he needed her to pick him up because he got into a "scuffle" with the victim where the Petitioner's gun "might have went off." The court found that the wife's testimony did not satisfy three of the elements of the statutory privilege.

The post-conviction court found that the confidentiality of the communications was not essential to the full and satisfactory maintenance of the relationship with the Petitioner's wife or that the relationship ought to be sedulously fostered because the Petitioner committed his crimes while carrying on an adulterous relationship with two women. The court found that the marital relationship was so damaged that the privilege could not be invoked and that disclosure of the communications was not outweighed by the benefit for the correct disposal of the litigation because the Petitioner's wife stated their relationship was "nonexistent" when she gave a statement to police and testified at the trial. The record does not preponderate against the post-conviction court's findings that the Petitioner failed to prove deficiency and prejudice by a preponderance of the evidence. The court's findings support its conclusion that the Petitioner failed to prove his ineffective assistance of counsel claim in this regard. The Petitioner is not entitled to relief on this basis.

C. Trial and Appellate Counsel: Failure to Secure a *White* Instruction

The Petitioner contends that his trial and appellate counsel were ineffective for failing to secure a jury instruction pursuant to *State v. White* and that had the jury received a *White* instruction, the Petitioner would be convicted of a lesser offense. *See State v. White*, 362 S.W.3d 559, 580 (Tenn. 2012). The State responds that the post-conviction

court properly denied relief after finding that even though trial and appellate counsel were deficient, the Petitioner was not prejudiced. We agree with the State.

Our supreme court established a non-exhaustive factor test to determine whether a jury instruction regarding confinement should be given so “juries return kidnapping convictions only in those instances in which the victim’s removal or confinement exceeds that which is necessary to accomplish the accompanying felony.” *Id.* at 578. The *White* court said that in such cases the instruction should provide as follows:

To establish whether the defendant’s removal or confinement of the victim constituted a substantial interference with his or her liberty, the State must prove that the removal or confinement was to a greater degree than that necessary to commit the offense of [insert offense], which is the other offense charged in this case. In making this determination, you may consider all the relevant facts and circumstances of the case, including, but not limited to, the following factors:

- [1] the nature and duration of the victim’s removal or confinement by the defendant;
- [2] whether the removal or confinement occurred during the commission of the separate offense;
- [3] whether the interference with the victim’s liberty was inherent in the nature of the separate offense;
- [4] whether the removal or confinement prevented the victim from summoning assistance, although the defendant need not have succeeded in preventing the victim from doing so;
- [5] whether the removal or confinement reduced the defendant’s risk of detection, although the defendant need not have succeeded in this objective; and
- [6] whether the removal or confinement created a significant danger or increased the victim’s risk of harm independent of that posed by the separate offense.

Id. at 580-81 (footnotes omitted).

The post-conviction court found that trial and appellate counsel were deficient in not raising or preserving the issue during the trial or on appeal. However, the post-conviction court also found that the evidence presented at the trial demonstrated that Ms.

Taylor's confinement exceeded the time necessary to accomplish the underlying felony of aggravated assault. The Petitioner confined Ms. Taylor to her apartment, forced her to drive him to his apartment, confined her within his apartment, forced her to drive him back to her apartment, and confined her to a room within her apartment. The evidence demonstrates that the Petitioner confined Ms. Taylor far longer than he needed to commit aggravated assault. The record does not preponderate against the post-conviction court's finding that the Petitioner was not prejudiced by the lack of a *White* instruction due to the significant period of time the Petitioner confined Ms. Taylor. This court determined as much on the Petitioner's direct appeal. *Antoine Hinton*, 2020 WL 1426683 at *11. Because the Petitioner failed to establish prejudice, the post-conviction court did not err in denying relief on this basis.

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