IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 6, 2022

ALEXANDER JACKSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 14-04482 Jennifer Johnson Mitchell, Judge

No. W2022-00289-CCA-R3-PC

The Petitioner, Alexander Jackson, appeals the Shelby County Criminal Court's denial of his post-conviction petition, seeking relief from his convictions for two counts of rape and his resulting sentence of nine years in confinement. On appeal, the Petitioner contends that he received the ineffective assistance of trial counsel. Upon 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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and KYLE A. HIXSON, JJ., joined.

Rosalind Elizabeth Brown, Memphis, Tennessee, for the appellant, Alexander Jackson.

Jonathan Skrmetti, Attorney General and Reporter; Samantha L. Simpson, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

In September 2014, the Shelby County Grand Jury indicted the Petitioner for two counts of rape under alternate theories.[1] The first count alleged that the Petitioner sexually penetrated the victim and knew or had reason to know that she did not consent, and the second count alleged that the Petitioner sexually penetrated the victim and knew or had reason to know that she was physically helpless. The Petitioner went to trial in April 2015.

[1] Although the Petitioner has not requested that we take judicial notice of the record from the direct appeal of his convictions, we choose to do so in this case. *See State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009).

The evidence at trial showed that on April 29, 2011, the victim and a friend, Melodi Herron, went out for drinks. *State v. Alexander Jackson*, No. W2015-01741-CCA-R3-CD, 2016 WL 4136073, at *1 (Tenn. Crim. App. Aug. 3, 2016). The Petitioner telephoned the victim and asked if he could wash a load of clothes at her home, which he did weekly, and the victim said yes. *Id.* When the victim and Ms. Herron returned to the victim's residence about 3:00 a.m., the victim was intoxicated from having consumed eight or nine alcoholic beverages. *Id.* She took two Benadryl pills to help her sleep and went to bed. *Id.* Ms. Herron slept in a twin bed in the victim's bedroom while the Petitioner and a male friend of the victim, Terry Boyland, stayed up playing video games in the living room. *Id.* Later that morning, the victim woke to a man on top of her. *Id.* He had a "cover" over his head, and his penis was inside her vagina. *Id.* The victim screamed, pulled off the cover, and saw that the man was the Petitioner. *Id.*

The victim testified that she yelled at the Petitioner and that he ran out of the room, saying, "'[N]o, you wanted it, you wanted it.'" *Id.* The victim responded that she had not wanted to have sex with the Petitioner. *Id.* The Petitioner told the victim that he had come into her bedroom to ask if he could have some noodles and that "she had urged him to come to her." *Id*. The victim said the Petitioner claimed that he "had rejected her four times before he relented and had sex with her." *Id.* The victim did not believe the Petitioner. *Id*. After the Petitioner left the victim's bedroom, the victim telephoned the Petitioner's cousin, whom she had dated previously, because she knew "that was where the [Petitioner] would go." *Id.* She also telephoned the police and went to a rape crisis center, where a nurse collected evidence for a rape kit. *Id.* The victim reiterated that she did not consent to having sex with the Petitioner. *Id*. An agent from the Tennessee Bureau of Investigation testified that semen was on the victim's vaginal, anal, and thigh swabs, and that DNA on the swabs matched the Petitioner. *Id.* At the conclusion of the proof, the jury convicted him of both counts of rape, a Class B felony. *Id.* The trial court sentenced him as a Range I, standard offender to nine years for each conviction and merged the two counts.

On direct appeal of his convictions to this court, the Petitioner claimed that a statement made by the prosecutor during closing arguments violated his right against self-incrimination and rose to the level of plain error. *Id.* at *2. This court concluded that the prosecutor's statement "was clearly an argument that the State's proof was un-contradicted," which was permissible under published case law. *Id.* at *3. Accordingly, this court affirmed the judgments of the trial court. *Id.*

After this court affirmed the convictions, the Petitioner filed a timely pro se petition for post-conviction relief. The post-conviction court appointed counsel, and post-conviction counsel filed an amended petition. Relevant to this appeal, the Petitioner alleged in the petitions that he received the ineffective assistance of counsel because trial counsel coerced him not to testify and because trial counsel failed to call witnesses to

impeach the victim's credibility, which would have supported the Petitioner's theory that his sexual encounter with the victim was consensual.

At the evidentiary hearing, the Petitioner testified that the victim was the ex-girlfriend of his cousin, Donald Hunt. On April 19, 2011, the Petitioner and Mr. Boyland stayed at the victim's home while the victim and Ms. Herron went out for drinks. The Petitioner had known the victim four or five years, and they were friends. The Petitioner said that when the victim and Ms. Herron returned, the victim was "tipsy a little bit, because she had been drinking." About 6:00 a.m., the Petitioner was in the victim's kitchen. The victim came into the kitchen and told him "to go get in the bed." The Petitioner did so, and the victim got into bed with him. The Petitioner said that he and the victim had consensual sex and that Ms. Herron, who "was in the next bed over," did not wake during the encounter. After having sex, the victim told the Petitioner not to say anything to anyone, but the Petitioner told her that he was going to telephone Mr. Hunt "to let him know." The victim did not want Mr. Hunt to know she had sex with the Petitioner, so she woke Ms. Herron and "started hollering and going on." The victim tried to insinuate the Petitioner had raped her.

The Petitioner testified that a court-appointed attorney represented him at his preliminary hearing but that he hired trial counsel in January 2013. The Petitioner went to trial in 2015, was not in jail while awaiting trial, and met with trial counsel whenever he made payments to trial counsel for trial counsel's retainer fee. The Petitioner did not finish paying the retainer fee until close to his trial date. He said that he and trial counsel "really didn't have enough time to sit down and just talk about everything" and that he did not know if trial counsel had enough time to prepare for trial. The Petitioner received discovery materials, but the victim's report from the rape crisis center "was all blacked out," and the discovery did not contain any witness statements, police reports, or 911 calls.

The Petitioner testified that he called 911 the day after the alleged rape. He told the 911 operator that the victim claimed he had raped her and that "I need y'all to go pick her up and get her checked out." The Petitioner told trial counsel that he thought his cellular telephone records would be relevant at trial to show he called 911. Trial counsel told the Petitioner to get the records, but the Petitioner's service provider told him that he needed a court order to obtain the records. Trial counsel did not subpoena the records.

The Petitioner testified that he told trial counsel about Mr. Hunt. Mr. Hunt would have testified for the Petitioner that Mr. Hunt asked the victim what happened and that the victim told Mr. Hunt, "[I]f [the Petitioner] would've kept his big mouth closed he wouldn't be locked up now." The victim also told Mr. Hunt "a lot of things . . . after the fact." Trial counsel talked with Mr. Hunt the day before trial, but trial counsel told the Petitioner that he was not going to call Mr. Hunt as a witness. The Petitioner acknowledged that trial

counsel cross-examined the victim about her intoxication and how many alcoholic beverages she consumed. The Petitioner said that the victim "knew what was happening" and that she "was looking me dead in my face" while they were having sex. At trial, though, she testified that she woke to the Petitioner on top of her. The Petitioner wanted to tell the jury what really happened, but trial counsel told him that he did not have to testify and that he should not testify because the State could ask him about his criminal history. The Petitioner said that this was his first trial and that he did not testify because trial counsel "told me I shouldn't."

On cross-examination, the Petitioner testified that he went to the police department several times after the alleged rape to give a statement but that the police refused to talk with him. Eventually, a detective told him to "just come back tomorrow." When the Petitioner returned to the police department, the police arrested him. The Petitioner wanted to give the police a written or recorded statement, but the detective told him, "We not doing no word for word statement." The Petitioner acknowledged that the trial court questioned him at trial about whether he was going to testify and that he told the trial court his decision not to testify was voluntary. The defense's theory was that the victim and the Petitioner had consensual sex, and the victim testified that the Petitioner told her the sex was consensual. However, the victim's account of what occurred differed from the Petitioner's account. The Petitioner said that the day before the incident, the victim had said in front of a group of eight or nine people that she "wanted to have sex with [the Petitioner] so bad." The Petitioner did not give the names of those witnesses to trial counsel because he did not know their names. The Petitioner said that a woman with Mr. Hunt also heard the victim say things that could have been helpful to the defense, but the Petitioner could not remember the woman's name.

The Petitioner testified that trial counsel talked with him about his prior convictions for drug and theft offenses. Although trial counsel told the Petitioner that the State would use the convictions to impeach the Petitioner, the Petitioner wanted to tell the jury his story. Nevertheless, he followed trial counsel's advice and did not testify. On redirect-examination, the Petitioner testified that he and trial counsel never discussed hiring an expert to testify about the effects of alcohol and Benadryl on a person's memory or their effects on the victim.

Trial counsel testified for the State that he had been practicing law since 1977. During that time, he had handled cases involving Class A and B felonies, including sexual assault and rape. The Petitioner retained trial counsel, and trial counsel received discovery. Trial counsel said that he had not reviewed the Petitioner's file in years. However, in 2013, it was trial counsel's practice "to make copies of the discovery start to finish and mail it to my client or hand it to my client directly." Trial counsel said that he met with the Petitioner "a good number of times, certainly sufficient to be prepared for trial." The Petitioner's

mother accompanied the Petitioner to the meetings "on many occasions, if not every time." Trial counsel said that he "[a]bsolutely" would have gone over discovery with the Petitioner and that they "would have gone over every document" in the Petitioner's file.

Trial counsel testified that it was his "recollection" that he talked with the witnesses before trial. He said it was his practice to speak personally with witnesses who were going to give testimony that was helpful to the defense. Trial counsel would have asked an investigator to speak with adverse witnesses. The theory of defense was that the victim and the Petitioner had consensual sex. Trial counsel said that the Petitioner was "a very compliant client," that he was easy to contact and speak with, and that he was "a nice person." Trial counsel said that he thought he had witness statements to use on cross-examination at trial and that he remembered "having to walk a fine line between intoxication and downright impairment that would have meant the [victim] . . . was incapacitated and could not consent." Trial counsel acknowledged that he tried to argue the victim's memory was faulty due to the alcohol and Benadryl she had consumed but that she was not too intoxicated to consent.

Trial counsel testified that he did not remember talking with the Petitioner about the Petitioner's 911 call or telephone records. However, trial counsel may have asked the Petitioner to get his telephone records from his service provider because there was no record of the Petitioner's 911 call. Trial counsel acknowledged that he would have subpoenaed the telephone records if necessary and said that "[i]t's cumbersome, but . . . it can be done." Trial counsel also could have asked the trial court for expert services. Trial counsel did not think the defense needed an expert in this case because an expert would have been "harmful" to the Petitioner's claim that the victim consented to sex. Trial counsel said that he did not remember whether the Petitioner's version of events was revealed to the jury during the testimony at trial but that trial counsel's goal would have been "to try to get our story out through cross-examination."

Trial counsel testified that he would have given the Petitioner his opinion on whether the Petitioner should testify but that the decision ultimately rested with the Petitioner. Trial counsel said that he did not remember talking with the Petitioner about the Petitioner's criminal history but that the Petitioner's criminal record would have factored into trial counsel's recommendation about whether the Petitioner should testify.

On cross-examination, trial counsel testified that in addition to the victim's testimony about the crime, the defense also had to contend with proof from other witnesses who were present in the victim's home at the time of the crime. Those witnesses had been awakened by the victim's screaming about being sexually assaulted. The defense also had to handle the issue of how alcohol and Benadryl affected the victim. Trial counsel said that he thought the issue related to the victim's ability to consent, not her memory, and that

he did not remember cross-examining her about the impact of alcohol and Benadryl on her memory. Trial counsel said that he did not think an expert would have been helpful to the defense and that his "approach to the case was to not get an expert involved." Trial counsel also did not hire an investigator. Trial counsel said that he spoke with witnesses and that "it was reasonable" to assume he talked with Mr. Hunt. Trial counsel did not remember why he did not have Mr. Hunt testify at trial.

On redirect-examination, trial counsel acknowledged that an expert could have opined that the victim was too intoxicated to consent, which would have hurt the defense. On recross-examination, trial counsel acknowledged that he did not even consult with an expert.

Peggy Kahn, the Petitioner's mother, testified for the Petitioner that she went with the Petitioner to speak with trial counsel "only a few times." The Petitioner's grandmother went with the Petitioner more often than Ms. Kahn. Ms. Kahn said that when she did go with the Petitioner, she was never in the room with the Petitioner and trial counsel during their meetings. The meetings "didn't last very long," and the Petitioner complained about not being able to discuss everything he wanted with trial counsel. Trial counsel told the Petitioner to get the Petitioner's cellular telephone records so that the Petitioner would have proof of his 911 call. On cross-examination, Ms. Kahn testified that she spoke with trial counsel outside his office. Trial counsel told her several times that "this is going to be an open [and] shut case."

On February 9, 2022, the post-conviction court entered a written order denying the petition for post-conviction relief. First, the court addressed the Petitioner's claim that he received the ineffective assistance of counsel because trial counsel coerced him not to testify. The post-conviction court accredited trial counsel's testimony that he informed the Petitioner about what could happen if the Petitioner testified and that he gave the Petitioner his opinion about whether the Petitioner should testify. The post-conviction court also accredited trial counsel's testimony that the decision about whether to testify ultimately rested with the Petitioner. The post-conviction court stated that it would not second-guess trial counsel's tactical and strategic decisions and concluded that the Petitioner failed to show that trial counsel rendered deficient performance.

As to the Petitioner's claim that trial counsel was ineffective for failing to call witnesses to impeach the victim's credibility, the post-conviction court noted that the Petitioner did not know the names of most of the potential witnesses and that the witnesses did not testify at the hearing. As to the Petitioner's claim that he wanted Mr. Hunt to testify, the post-conviction court accredited the Petitioner's testimony that trial counsel spoke with Mr. Hunt and accredited trial counsel's testimony on his decision not to call Mr. Hunt to testify. The post-conviction court found that trial counsel made a tactical decision and

again stated that it would not second-guess trial counsel's decisions. The post-conviction court noted that Mr. Hunt did not testify at the evidentiary hearing and concluded that the Petitioner failed to show that trial counsel was deficient.

ANALYSIS

On appeal, the Petitioner contends that the post-conviction court erred by denying his petition because trial counsel was ineffective for advising him not to testify at trial, failing to "pursue" witnesses he suggested, not hiring an investigator, and not hiring an expert to develop testimony on the impact of alcohol and Benadryl on the victim's memory. The State argues that the Petitioner failed to show that trial counsel coerced him not to testify and that trial counsel reasonably advised the Petitioner not to testify to prevent the State from impeaching the Petitioner with his prior convictions. The State further argues that trial counsel spoke with Mr. Hunt and that trial counsel made a tactical decision not to call Mr. Hunt to testify. Finally, the State argues that the Petitioner has waived his issues regarding trial counsel's failure to hire an investigator or an expert because the Petitioner did not raise them in his post-conviction petitions and the post-conviction court did not address the issues in its order denying relief.

Post-conviction relief "shall be granted when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. The petitioner bears the burden of proving factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. *See Wiley v. State*, 183 S.W.3d 317, 325 (Tenn. 2006). When reviewing factual issues, the appellate court will not reweigh the evidence and will instead defer to the post-conviction court's findings as to the credibility of witnesses or the weight of their testimony. *Id.* However, review of a post-conviction court's application of the law to the facts of the case is de novo, with no presumption of correctness. *See Ruff v. State*, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed de novo, with a presumption of correctness given only to the post-conviction court's findings of fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001); *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of

counsel that is applied in federal cases also applies in Tennessee). The *Strickland* standard is a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, *see Strickland*, 466 U.S. at 690, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. *See Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982).

The prejudice prong of the test is satisfied by showing a reasonable probability, i.e., a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

Courts need not approach the *Strickland* test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697; *see Goad*, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

Turning to the instant case, the post-conviction court accredited trial counsel's testimony that he advised the Petitioner not to testify because the State could impeach the Petitioner with his prior convictions but that the ultimate decision rested with the Petitioner. The Petitioner himself testified that trial counsel told him the State would impeach him with his convictions and that trial counsel recommended he not testify. In addition, during trial, the trial court examined the Petitioner about his decision not to testify and he stated that he made a voluntary decision that he did not want to testify. The record supports the

post-conviction court's conclusion that trial counsel made a reasonable, strategic decision to advise the Petitioner not to testify and that the Petitioner took trial counsel's advice. Therefore, we agree with the post-conviction court that the Petitioner failed to show trial counsel rendered deficient performance.

Regarding the Petitioner's claim that trial counsel was ineffective for failing to have Mr. Hunt testify, the post-conviction court accredited trial counsel's testimony that he spoke with Mr. Hunt but decided not to call Mr. Hunt as a witness at trial. Although the post-conviction court found that trial counsel made a strategic decision not to have Mr. Hunt testify, we note that trial counsel thought he talked with Mr. Hunt but that trial counsel could not remember why he decided not to call Mr. Hunt as a witness. In any event, Mr. Hunt did not testify at the evidentiary hearing. In order "[t]o succeed on a claim of ineffective assistance of counsel for failure to call a witness at trial, a post-conviction petitioner should present that witness at the post-conviction hearing." *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008) (citing *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990)). "As a general rule, this is the only way the petitioner can establish that . . . the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner." *Id*. (quoting *Black*, 794 S.W.2d at 757). Therefore, the record does not preponderate against the post-conviction court's determination that the Petitioner failed to show that he received the ineffective assistance of counsel.

Finally, the State is correct in that the Petitioner did not claim in either of his post-conviction petitions that trial counsel was ineffective for failing to hire an investigator or an expert. Moreover, although post-conviction counsel questioned the Petitioner and trial counsel during the evidentiary hearing about hiring an investigator and an expert, post-conviction counsel did not make any arguments concerning the issues, and the post-conviction court did not address the issues in its order denying relief. *See* Tenn. R. App. P. 36(a). Regardless, the Petitioner did not have either potential witness testify at the evidentiary hearing, and we cannot speculate as to how they would have helped the defense. Accordingly, we conclude that the Petitioner has failed to show that he received the ineffective assistance of trial counsel.

CONCLUSION

Based on our review, we affirm the judgment of the post-conviction court.

JOHN W. CAMPBELL, SR., JUDGE