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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs November 16, 2022

JOSHUA E. WEBB v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 108359 G. Scott Green, Judge

No. E2022-00243-CCA-R3-PC

The petitioner, Joshua E. Webb, appeals the denial of his petition for post-conviction relief, which petition challenged his Knox County Criminal Court jury convictions of especially aggravated kidnapping, aggravated burglary, and aggravated robbery, arguing that he was denied the effective assistance of counsel. Discerning no error, we affirm.

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

JAMES CURWOOD WITT, JR., P.J., delivered the opinion of the court, in which TIMOTHY L. EASTER, and JOHN W. CAMPBELL, SR., JJ., joined.

J. Liddell Kirk (on appeal) and John Boucher (at hearing), Knoxville, Tennessee, for the petitioner, Joshua E. Webb.

Herbert H. Slattery, III, Attorney General and Reporter; David H. Findley, Assistant Attorney General; Charme P. Allen, District Attorney General; and Kevin Allen[1] and Nathaniel Ogle, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

A Knox County Criminal Court jury convicted the petitioner and his co-defendants, Kris Theotis Young and Larry Jereller Alston, of especially aggravated kidnapping, aggravated burglary, aggravated robbery, and possession of a firearm with the intent to go armed during the commission of a dangerous felony. Our supreme court summarized the facts of the case:

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[1] General Allen, who represented the State in the underlying case, also represented the State during the initial evidentiary hearing on the petitioner's petition for post-conviction relief. General Ogle took over when it became apparent that General Allen was a necessary witness.

Ashley Dawn Hill, a neighbor of the victim's, testified that on April 15, 2010, she was sitting on her front porch on Chicago Avenue when she saw three men walking down the middle of the street. As they approached the victim's house, the men unsuccessfully tried to stop a vehicle. Ms. Hill saw the men walk up to the victim as she was getting into her car and heard one of the men say, "Excuse me." Ms. Hill looked down momentarily and then heard the victim scream. When she looked up, she saw one of the men reach into the victim's car and grab her purse. The victim got out of her car and ran to her house, and the men followed her inside. At that point, Ms. Hill telephoned 911. The jury heard a recording of Ms. Hill's 911 call, which was consistent with her trial testimony.

The victim testified that on April 15, 2010, around 1:45 p.m., she left her home to get into her car, which was parked on the street, and saw three men, later identified as the [the petitioner and his co-defendants], walking toward her. As she was getting into the car, one of the men asked if she knew a certain girl. The victim told him that she did not and turned to get into the car. She testified, "The next thing I know there were guns to my head." One of the men demanded that she give them her pocketbook and "get to the house." She recalled that two of the men had pistols and the other had a sawed[-]off shotgun stuffed down his pants. As she put it, "the big one," later identified as Mr. Young, was the one who took her purse. After obtaining the purse, the men then "pushed [the victim] to go open the door to the house." The victim was frightened and shaking so badly that it was difficult to unlock the door, but once she did, the men pushed her inside.

Once inside the house, the men pushed the victim onto the living room couch and told her "not to move." One of the men said, "Don't let her out," and they then began ransacking her home. As the victim recalled, "They wanted my money; they wanted my jewelry; they wanted anything I had." The men dumped the contents of her pocketbook onto a table, taking $140 cash and her bank card. One of the [men] demanded that she give him her "bank number." Confined to the couch, she complied with his demands. Several minutes later, as one of the [men] was carrying a flat-screen television

> out the front door, he noticed that the police had arrived. Upon seeing the police, the man shouted, dropped the television, and ran toward the kitchen. As he ran away, the victim escaped out the front door.
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> . . . . Mr. Alston was initially taken into custody at the back of the house, while Mr. Young and [the petitioner] remained inside . . . . Police searched Mr. Alston and recovered $110 in cash and the victim's bank card. On [the petitioner], police found two five-dollar bills, a lighter, his wallet, a gold-type of bracelet, and a prescription pill bottle bearing the victim's name. Mr. Young had a black cell phone, his wallet, and $25 in cash.

State v. Alston, 465 S.W.3d 555, 558-59 (Tenn. 2015) (*Alston II)*.

Following the jury's verdicts of guilty, the trial court set aside the verdicts of especially aggravated kidnapping, aggravated burglary, and possession of a firearm with the intent to go armed during the commission of a dangerous felony. *Id.* at 559. The trial court concluded that the convictions of especially aggravated kidnapping and aggravated burglary violated principles of due process and then "reasoned that the firearms convictions could not stand in light of the dismissal of the especially aggravated kidnapping and aggravated burglary convictions, which were the predicate dangerous felonies for the firearms offenses." *Id.* at 559-60.

On direct appeal, this court "reversed the trial court's setting aside the jury verdicts of especially aggravated kidnapping and aggravated burglary," concluding that our supreme court's ruling in *State v. White*, 362 S.W.3d 559 (Tenn. 2012), applied to the case because it was in the appellate pipeline when *White* was filed and that although "the trial court erred by failing to provide the jury instruction promulgated by *White* " as to the petitioner's convictions of aggravated robbery and especially aggravated kidnapping, the error was harmless beyond a reasonable doubt. We concluded that the *White* instruction was not required with regard to the conviction of aggravated burglary. We affirmed the trial court's setting aside the firearms conviction on grounds other than those relied on by the trial court. *State v. Larry Jereller Alston, Kris Theotis Young, and Joshua Edward Webb*, No. E2012-00431-CCA-R3-CD (Tenn. Crim. App., Knoxville, Feb. 13, 2014) (*Alston I*), *aff'd*, 465 S.W.3d 555 (Tenn. 2015).

Upon the initial application for permission to appeal, our supreme court remanded the case to this court for reconsideration in light of the supreme court's holding in *State v. Cecil*, 409 S.W.3d 599 (Tenn. 2013). Following our reconsideration of the case on remand, this court again reached the same result. The supreme court then granted permission to appeal "to determine whether a jury instruction pursuant to *White* must be given when a defendant is accused of a kidnapping accompanied by an aggravated burglary" and to "address whether the erroneous failure to instruct the jury in this case, pursuant to *White*, was harmless beyond a reasonable doubt." *Alston II*, 465 S.W.3d at 560. The supreme court affirmed this court's conclusion that "a kidnapping charge accompanied by an aggravated burglary charge, standing alone, does not warrant a *White* instruction." *Id.* at 564. The high court also affirmed our conclusion "that the absence of a *White* instruction was harmless beyond a reasonable doubt" as to the other convictions. *Id.* at 567. The supreme court reinstated the convictions of especially aggravated kidnapping and aggravated burglary and remanded the case for sentencing. *Id.*

The petitioner filed a timely petition for post-conviction relief on June 24, 2016, alleging, among other things, that he was deprived of the effective assistance of counsel. Following the appointment of counsel, the petitioner filed an amended petition for post-conviction relief on June 9, 2021.[2] In the amended petition, the petitioner claimed that the kidnapping statute was unconstitutionally vague, that the evidence was insufficient to support his conviction of aggravated kidnapping, that his conviction of aggravated kidnapping violated double jeopardy principles, that the jury instructions failed to submit all the legal issues to the jury, and that he was deprived of the effective assistance of counsel.

At the evidentiary hearing,[3] Alexander Brown testified that he was appointed to represent the petitioner in the general sessions court and that his representation continued as the case moved into the criminal court until Mr. Brown was permitted to withdraw. Mr. Brown recalled that the petitioner was eager to reach a plea agreement from the beginning and that, while the case was still in the general sessions court, the State extended an offer that included "six years to serve." Mr. Brown said that he accepted the offer on the petitioner's behalf but that "it was contingent on [the co-defendants'] pleading." He recalled that the co-defendants' "attorneys didn't want to do anything that day, because

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[2] The post-conviction court initially appointed Mr. Kirk to represent the petitioner on July 8, 2016. The State filed an answer to the petition on February 8, 2019, and Mr. Kirk moved to withdraw on February 18, 2019. The court granted the motion and appointed Mr. Boucher to represent the petitioner. Mr. Boucher filed the amended petition on June 8, 2021. Mr. Boucher withdrew after the hearing, and the court appointed Mr. Kirk to represent the petitioner on appeal.

[3] Because much of the evidence was overlapping, the court heard evidence on both the petitioner's and Mr. Young's petitions for post-conviction relief in a single, bifurcated hearing on June 10 and November 19, 2021.

they didn't feel comfortable that they knew enough about what was going on. So we had a hearing instead." Following the return of the indictment, "a new offer was made" that was also "an all or nothing -- everybody had to plea."

During cross-examination, Mr. Brown agreed that the co-defendants were attempting to mount a defense based upon the victim's being a drug dealer.

By agreement of the parties, Mr. Brown's testimony from the hearing on Mr. Alston's post-conviction petition was admitted into evidence and exhibited to his testimony. At Mr. Alston's hearing, Mr. Brown testified that the offer extended by the State in the criminal court "put [the petitioner] in the middle of the thing," which Mr. Brown found unsatisfactory given the petitioner's willingness to cooperate with the State from the beginning. Mr. Brown attempted to negotiate a better offer. Mr. Brown testified that Assistant District Attorney General Kevin Allen "took the position" that "he wasn't going to let the white guy have a better deal than the black guys, 'cause he didn't want it to look like he was being a racist and favor him." *Larry Alston v. State*, No. E2017-02528-CCA-R3-PC, 2018 WL 6992435, at *3-4 (Tenn. Crim. App., Knoxville, Nov. 27, 2018) (*Alston III*).

Mike Whalen, who began representing the petitioner after Mr. Brown withdrew, testified that "by the time I got in [the case] the plea offers had been rejected and we were going to trial." Mr. Whalen said that it was his understanding that the offer extended by the State required all three defendants to plead guilty. He said that the petitioner actually broached the issue with him and that "it was my understanding that while some of the stuff wasn't conveyed to everyone, some people knew about it and some people didn't." Mr. Whalen recalled that it was his impression that the petitioner "found out secondhand from somebody else about some of it." At that point, Mr. Whalen spoke with the State and confirmed that "there is no offer." Mr. Whalen said that package plea offers like the one made in this case did not "seem a fair thing to me, because there are three individuals in this case being tried." He observed, however, that "I don't know that that's a valid issue to raise on appeal, because the answer is the State doesn't have to make you an offer at all." Mr. Whalen maintained that Mr. Brown should have communicated the offer to the petitioner even if he intended to try and negotiate a better agreement.

The petitioner testified that he "didn't hear any plea offers until Mike Whalen became my attorney" and that "then it was just to tell me basically that I had one and it's off the table and we don't have a choice now." He said that he would have taken either of the offers made by the State because he wanted to "just face the punishment and get it over with."

Assistant District Attorney General Kevin Allen testified that no plea offers were extended by the State during the 11 days that this case was pending in the general sessions court. He specifically denied making an offer that would have included a sentence of six years for the petitioner. General Allen said that, after the return of the indictment, the victim expressed anxiety about testifying, so he discussed with her the possibility of extending a plea offer to each of the defendants in the case. He talked with the victim about extending an all-or-nothing offer so that she could be assured that, if the offer was accepted, she would not have to testify. They then discussed the relative culpability of the three defendants, and the victim indicated that Mr. Young "was the leader," that Mr. Alston "didn't seem to be an active participant," and that the petitioner "was somewhere in the middle." Based on this assessment, General Allen made an offer that provided for an eight-year sentence for Mr. Alston, a 10-year sentence for the petitioner, and a 12-year sentence for Mr. Young. General Allen recalled that he conveyed the offers to counsel and that Mr. Brown, counsel for the petitioner, immediately indicated that he was "not willing" to agree to any offer that had the petitioner serving more time than Mr. Alston. He added, "Mr. Brown was never able to accept the fact that the victim had informed me the culpability levels were the way they were" and "insisted that his client was not going" to accept the plea offer as structured. General Allen said that he interpreted Mr. Brown's remarks as a counter offer and informed Mr. Brown "this is a counter, and you are, therefore, rejecting my offer." After his conversation with Mr. Brown, "I then withdrew the offer." He let the other attorneys know the offer had been withdrawn.

During cross-examination, General Allen reiterated that no offer had been made while the case was pending in the sessions court and again specifically denied that a six-year offer had been extended to the petitioner. General Allen agreed that Mr. Brown was angry about the terms of the all-or-nothing offer but denied that Mr. Brown was angry because that offer was higher than any previous offers, insisting that there had been no previous offers. He added that the petitioner "wanted to be disconnected from the other two" and, to this end, had offered "to testify on behalf of the State." General Allen said, however, that he "didn't need anybody to testify for me," given the other evidence available to him. He testified that he could not have reextended the offer after Mr. Brown withdrew from representing the petitioner because his supervisor would not allow it.

In its written order denying post-conviction relief, the post-conviction court observed that although the petitioner raised myriad claims for relief in his petition, he presented evidence only in support of his claim that Mr. Brown failed to communicate the all-or-nothing plea offer to the petitioner. The court concluded that it was "not clear from this record" whether Mr. Brown had, in fact, communicated the all-or-nothing offer to the petitioner but found that, it was "abundantly clear" "that the State withdrew the offer prior to acceptance by all three codefendants." Citing this court's opinion in *Alston III*, the post-conviction court found that the petitioner could not prevail on his claim of the ineffective

assistance of counsel because the State was free to withdraw the offer, "even without the repudiation."

In this timely appeal, the petitioner contends that Mr. Brown performed deficiently by rejecting the plea offer before communicating it to the petitioner and that he was prejudiced by counsel's actions because he would have accepted the offer.

We view the petitioner's claim with a few well-settled principles in mind. Post-conviction relief is available only "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. A post-conviction petitioner bears the burden of proving his or her factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f). On appeal, the appellate court accords to the post-conviction court's findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997). By contrast, the post-conviction court's conclusions of law receive no deference or presumption of correctness on appeal. *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).

Before a petitioner will be granted post-conviction relief based upon a claim of ineffective assistance of counsel, the record must affirmatively establish, via facts clearly and convincingly established by the petitioner, that "the advice given, or the services rendered by the attorney, are [not] within the range of competence demanded of attorneys in criminal cases," *see Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975), and that counsel's deficient performance "actually had an adverse effect on the defense," *Strickland v. Washington*, 466 U.S. 668, 693 (1984). In other words, the 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Should the petitioner fail to establish either deficient performance or prejudice, he is not entitled to relief. *Id.* at 697; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Indeed, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697.

When considering a claim of ineffective assistance of counsel, a reviewing court "begins with the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all significant decisions," *Kendrick v. State*, 454 S.W.3d 450, 458 (Tenn. 2015) (citation omitted), and "[t]he petitioner bears the burden of overcoming this presumption," *id.* (citations omitted). We will not grant the petitioner the benefit of hindsight, second-guess a reasonably based trial strategy, or provide relief on the basis of a sound, but unsuccessful, tactical decision made during the

course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

To be sure, trial counsel should communicate any plea offers from the State to the client. *See Missouri v. Frye*, 566 U.S. 134, 145 (2012) (holding "that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused."). That being said, to obtain relief on his claim of ineffective assistance of counsel based upon counsel's failure to communicate a plea offer, the petitioner had to establish "a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel"; "a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law"; and "a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.* at 147.

Here, the petitioner has established that he would have taken the offer, and, based on their testimony in support of their own post-conviction petitions, that his co-defendants would have accepted the offer. He has failed to establish, however, that the plea would have been entered without the State canceling the offer, which the State could have done even after all the defendants had accepted the offer. Plea agreements, barring certain circumstances not present here, only become "enforceable once the condition precedent is met; that is, the trial judge accepts the agreement" and remain "revocable until accepted by the trial court." *State v. Street*, 768 S.W.2d 703, 711 (Tenn. Crim. App. 1988). Mr. Brown's testimony indicated that he expressed dissatisfaction with the terms of the offer during his conversation with General Allen. General Allen testified that he viewed Mr. Brown's attempt at negotiating a lower sentence for the petitioner as a rejection of the offer and, accordingly, withdrew it immediately after speaking to Mr. Brown. As the Supreme Court has observed, "The art of negotiation is at least as nuanced as the art of trial advocacy, and it presents questions further removed from immediate judicial supervision." *Premo v. Moore*, 562 U.S. 115, 125 (2011). Consequently, the Court has been reluctant "to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process." *Frye*, 566 U.S. at 144. The offer at issue was essentially extended and withdrawn in the same conversation, giving Mr. Brown no time to communicate the offer to the petitioner before it was withdrawn by the State. Because the State actually withdrew the offer, the petitioner cannot establish prejudice because he cannot establish that the State would not have withdrawn the offer. As the post-conviction court observed, this court had already considered Mr. Brown's actions with regard to the offer and the State's withdrawal of the offer in *Alston III*. There, we concluded that the

State did not act improperly "when withdrawing the plea agreement" because "there is no constitutional right to plea bargain," and, accordingly, "[t]he decision to extend, or, conversely, withdraw a plea offer at any time prior to its acceptance by the trial court lies solely within the discretion of the prosecutor." *Alston III*, 2018 WL 6992435, at *5 (quoting *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977)). We concluded that the State could have withdrawn the offer at any point before it was accepted by the trial court "even without the repudiation." *Id.* No evidence presented at the evidentiary hearing in this case justifies a conclusion different from the one we reached in *Alston III*.

Accordingly, the judgment of the post-conviction court is affirmed.

JAMES CURWOOD WITT, JR., PRESIDING JUDGE