

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
August 29, 2023 Session

FILED

09/08/2023

Clerk of the
Appellate Courts

STATE OF TENNESSEE v. JUSTIN L. KISER

**Appeal from the Criminal Court for Union County
No. 5231 Zachary R. Walden, Judge**

No. E2023-00093-CCA-R3-PC

The petitioner, Justin L. Kiser, appeals the denial of his petition for post-conviction relief, which petition challenged his five convictions of especially aggravated kidnapping, alleging that he was deprived of the effective assistance of counsel. Discerning no error, we affirm the post-conviction court's denial of post-conviction relief.

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

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN, P.J., and JILL BARTEE AYERS, J., joined.

Jordan Long, Tazewell, Tennessee (on appeal), and Andrew Crawford, Knoxville, Tennessee (at trial), for the appellant, Justin L. Kiser.

Jonathan Skrmetti, Attorney General and Reporter; Abigail H. Rinard, Assistant Attorney General; Jared R. Effler, District Attorney General; and Tyler Hurst, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Union County Grand Jury indicted the petitioner with five counts of especially aggravated kidnapping related to a home invasion during which five victims were confined against their will at gunpoint by two masked men. *State v. Justin L. Kiser*, No. E2019-01296-CCA-R3-CD, slip op. at 1 (Tenn. Crim. App., Knoxville, Feb. 25, 2020). One of the perpetrators, later identified as James Teague, was shot and killed by one of the victims during the incident. *Id.* This court summarized the evidence on direct appeal:

The [petitioner] and Mr. Teague entered the home in the middle of the night. Mr. Teague entered John Glenn and Ms.

[Cherry] Johnson's bedroom and held them at gunpoint with a shotgun. The [petitioner] stood in the doorway in the living room and held Mr. [Tyler] Barr and Mr. [Cody] Cheshire at gunpoint using a pistol. The [petitioner] also pointed his pistol at Anthony Glenn to keep him in the living room and at Kathy Helton to keep her from moving out of her bedroom doorway. The [petitioner] also pointed the pistol at Ms. Johnson as she attempted to locate a bat to use against Mr. Teague. Amy Boles attempted to enter the living room with Ms. Helton. Ms. Helton and Ms. Johnson testified that they did not feel as if they could move around in or leave the residence while the [petitioner] pointed the pistol at them. The evidence establishes that the [petitioner] used a deadly weapon to confine the individuals and substantially interfere with their liberty. Moreover, using the theory of criminal responsibility, the [petitioner] was responsible for Mr. Teague's confining John Glenn and Ms. Johnson in their bedroom.

Id., slip op. at 7. At the preliminary hearing, the State called Crystal Williams, Mr. Teague's girlfriend, to testify. *Id.*, slip op. at 2. Ms. Williams testified that she and Mr. Teague had been staying at the petitioner's home for several days prior to the incident. *Id.* Ms. Williams further testified that on the night of the incident, she witnessed the petitioner return to his home "shaken up" and wearing a "scary clown mask" which she had seen him wear on a previous occasion to frighten her dog. *Id.*, slip op. at 7.

The jury convicted the petitioner as charged, and, after a sentencing hearing, the trial court sentenced the petitioner to 21 years of confinement. *Id.*, slip op. at 1. This court affirmed the petitioner's convictions and sentences on appeal. *Id.*

The petitioner filed a timely pro se petition for post-conviction relief, raising myriad claims of ineffective assistance of counsel, three of which are presented for our review. After the appointment of counsel, the petitioner filed an amended petition for relief and the post-conviction court held an evidentiary hearing.

At the October 19, 2022 evidentiary hearing, the petitioner testified that trial counsel represented him at his preliminary hearing, during which Ms. Williams testified against the petitioner and identified him as one of the two masked perpetrators involved in the incident. The petitioner further testified that after the preliminary hearing, trial counsel advised him that, because the victims could not identify him, Ms. Williams' testimony was the only evidence which could sustain a conviction against him and that if she was not present to testify at trial, he would "be okay." The petitioner stated that at no point did trial counsel advise him it was possible for the State to introduce Ms. Williams' testimony despite her unavailability at trial. The petitioner explained that after the preliminary

hearing, the State was unable to locate Ms. Williams and that several warrants for her arrest were issued from Knox County. The petitioner also testified that at no point did he and trial counsel discuss the possibility of seeking court funds to hire a private investigator to locate Ms. Williams to ensure she would be available to testify at trial.

The petitioner testified that he met and communicated with trial counsel on multiple occasions before his trial. The petitioner testified that though the State made several plea offers, he rejected each one in reliance upon trial counsel's assertions that he would be acquitted if Ms. Williams was unavailable to testify at trial. The petitioner explained that he tried to accept the State's final plea offer but did so after the deadline for acceptance had passed. The petitioner further testified that had he been advised by trial counsel that Ms. Williams' preliminary hearing testimony would be admissible despite her unavailability at trial, he would have accepted a plea offer.

On cross-examination, the petitioner testified that trial counsel cross-examined Ms. Williams at the preliminary hearing. The petitioner explained that this cross-examination inquired into a number of topics with the intent to impeach Ms. Williams' testimony. The petitioner further testified that his late acceptance of the State's final plea offer was due to a problem with his cellular telephone which prevented him from contacting trial counsel. The petitioner stated that once he was able to contact trial counsel, trial counsel advised him that his acceptance was ineffective because the plea deadline had passed. The petitioner maintained that he declined all previous plea offers because he believed that he would be acquitted if Ms. Williams was unavailable to testify in-person at trial.

Trial counsel testified that he was aware of the State's difficulties in locating Ms. Williams and that he hoped that, if it was unable to locate her, the State would ultimately dismiss the case against the petitioner. Trial counsel explained that despite this hope, he always believed that Ms. Williams would be found and would testify in-person against the petitioner at trial. Trial counsel testified that he was taken by surprise when the State filed a motion to declare Ms. Williams unavailable and that he was unaware of the outstanding warrants for Ms. Williams' arrest until the filing of such motion. Trial counsel further testified that he never considered requesting court funds to hire a private investigator to locate Ms. Williams and agreed that he did not discuss this possibility with the petitioner.

Trial counsel explained that he cross-examined Ms. Williams at the preliminary hearing but could not recall the specifics. Trial counsel testified that after the State prevailed on its motion to declare Ms. Williams unavailable, the trial court assured him that he would be provided the opportunity to further impeach Ms. Williams' preliminary hearing testimony at trial. Trial counsel testified that his trial impeachment of Ms. Williams' preliminary hearing testimony included statements regarding her general credibility as a witness and evidence regarding the outstanding warrants for her arrest.

Trial counsel further testified that throughout the course of his representation of the petitioner, the petitioner maintained that he was innocent and repeatedly rejected the State's plea offers. Trial counsel testified that shortly before trial, the State made a final plea offer for the petitioner to serve six months' split confinement followed by a period of probation, though he was unsure of the duration of such probation. Trial counsel testified that upon informing the petitioner of this offer, the petitioner grew upset and began cursing about the State. Trial counsel stated that he responded by advising the petitioner to take time to consider the offer and to call him back once he had done so. Trial counsel explained that though he recalled a deadline of some sort associated with the State's final plea offer, he was unsure of its specifics or whether it had been set by the State or the trial court. Trial counsel testified that he attempted to contact the petitioner after informing him of the State's final plea offer on several occasions but was unable to do so.

On cross-examination, trial counsel testified that Ms. Williams was the only witness to positively identify the petitioner at trial. Trial counsel denied advising the petitioner that he would absolutely be acquitted if Ms. Williams was unavailable to testify in-person at trial. Trial counsel explained that he was generally aware of Tennessee Rule of Evidence 804 but that he did not discuss it with the petitioner prior to the State's filing of its motion to declare Ms. Williams unavailable. Trial counsel testified that after the State filed its motion, he researched Tennessee Rule of Evidence 804 and advised the petitioner that Ms. Williams' live testimony would be preferable to her recorded testimony at trial. Trial counsel nevertheless maintained that he always believed the State would be able to locate Ms. Williams to produce her as a witness at trial. Trial counsel explained that the surprise he felt at the State's motion to declare Ms. Williams unavailable as a witness arose because it was filed only eight days prior to the date the trial was to begin.

Trial counsel further explained that although he was unsure if the petitioner ever attempted to accept the State's final plea offer, he was nevertheless sure that such acceptance, if it existed, would have been provided to trial counsel after the deadline had passed.

In its written order denying post-conviction relief, the post-conviction court found that trial counsel was unaware of Tennessee Rule of Evidence 804, and though this lack of awareness fell below the objective standard of reasonableness which trial counsel is to be held, the court nevertheless concluded that it resulted in no prejudice to the petitioner. The court further found that because there was nothing in the record to indicate that either the petitioner or trial counsel believed Ms. Williams would be unavailable at trial prior to the State's filing its motion to declare her unavailable, it would have been impossible for the petitioner to have repeatedly rejected the State's plea offers from a belief that she would either be unavailable or her preliminary hearing testimony would be introduced at trial. Instead, the court accredited trial counsel's testimony that the petitioner's continued rejection of the State's plea offers stemmed from his maintaining his

innocence. The court also found that the deadline for accepting the plea offer had been set by the trial court and that the petitioner's first indication of any intent to accept the State's plea offer came one day after the deadline had passed. Finally, the court found that any breakdown in communications between the petitioner and trial counsel was caused by the petitioner's own circumstances—namely, the defect with his cellular telephone.

In this timely appeal, the petitioner argues that trial counsel performed deficiently by failing to advise him that Ms. Williams' testimony could still be admissible against him at trial despite her unavailability, by failing to seek court funds to acquire a private investigator to locate Ms. Williams and ensure she was available to testify at trial, and by failing to seek an extension of the plea deadline.

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; *Goard 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).

Turning to the merits of the petitioner’s claim, we conclude that he has failed to prove by clear and convincing evidence sufficient facts to support his claim that trial counsel’s representation was deficient. First, the petitioner asserts that trial counsel failed to advise him that it was possible for the State to introduce Ms. Williams’ testimony in spite of her unavailability to testify in-person, and that such failure amounted to deficient performance because the petitioner relied upon it in rejecting plea offers. Although the post-conviction court found it “clear that trial counsel was unaware of [Evidence Rule] 804,” it nevertheless found incredible the petitioner’s testimony that he would have accepted the State’s plea offers had he been advised of the Rule’s implications on his case. The post-conviction court instead accredited trial counsel’s testimony that the petitioner “declined plea agreements based on his professed innocence.” Because the petitioner has failed to establish that he would have accepted a plea offer had trial counsel informed him of the possibility of the admission of Ms. Williams’ prior testimony despite her unavailability, he has failed to establish that he was prejudiced by trial counsel’s omission.

Next, the petitioner asserts that trial counsel failed to seek funds for a private investigator to locate Ms. Williams in order to make her available to testify in-person at trial and that such failure amounted to ineffective assistance by reducing the petitioner’s capacity to make an informed decision as to whether to go to trial. We disagree. The post-conviction court found that seeking a private investigator to make Ms. Williams available to testify against the petitioner could have harmed the petitioner’s case. Trial counsel’s accredited testimony also shows that despite the State’s motion to declare Ms. Williams unavailable, he always believed that she would be found in time for the trial. Trial counsel’s decision to avoid seeking to locate a witness whose testimony he believed to be potentially harmful to the petitioner’s case is precisely the sort of reasonable, strategic decision to which trial counsel is afforded deference. *See Adkins*, 911 S.W.2d at 347. Further, the record does not support the petitioner’s claim that Ms. Williams’ unavailability impacted his capacity to make an informed decision as to whether to go to trial. Instead, the record demonstrates that the petitioner repeatedly rejected the State’s plea offers because he maintained his innocence. Trial counsel impeached Ms. Williams’ preliminary hearing testimony at trial, and the petitioner has failed to present any evidence or witness to indicate that an in-person impeachment of Ms. Williams’ testimony would have yielded a different outcome had she been located by a private investigator. Consequently, the petitioner has failed to show that he was prejudiced by counsel’s actions. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990) (“When a petitioner contends that

trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing.”).

Finally, the petitioner asserts that trial counsel failed to seek an extension of the plea deadline after the petitioner tried to accept the State’s final plea offer and that such failure amounted to ineffective assistance by depriving the petitioner of the opportunity to effectively accept the State’s offer. The petitioner’s testimony established that he did not attempt to accept the State’s plea offer until after the deadline had passed and that such lateness was caused by a defect in the petitioner’s cellular telephone which prevented him from contacting trial counsel. The petitioner has presented no evidence that trial counsel knew that the petitioner needed an extension, particularly in light of the fact that the petitioner had repeatedly rejected prior plea offers. Furthermore, nothing in the record suggests that the State would have been inclined to continue plea negotiations past the deadline or that the trial court would have been inclined to grant a motion to extend the plea deadline had one been made. Consequently, the petitioner has failed to establish that trial counsel performed deficiently or that he was prejudiced by trial counsel’s actions.

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

JAMES CURWOOD WITT, JR., JUDGE