

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
January 10, 2023 Session

FILED

02/10/2023

Clerk of the
Appellate Courts

BRANDON RICHMOND BOWLING v. STATE OF TENNESSEE

Appeal from the Circuit Court for Rutherford County
Nos. F-80858, F-77418 James A. Turner, Judge

No. M2022-00158-CCA-R3-PC

Brandon Richmond Bowling, Petitioner, was charged in a twelve-count indictment with six counts of rape, two counts of sexual battery, two counts of aggravated rape, one count of first degree felony murder, and one count of first degree premeditated murder for his role in the death of H.M.¹, a 22-year-old woman. The State filed an intent to seek a sentence of life without the possibility of parole. Prior to trial, counsel for Petitioner filed a motion to suppress video evidence of an incident found on Petitioner's phone. The motion was never litigated. Petitioner pled guilty to one count of aggravated rape and one count of second degree murder in exchange for dismissal of the remaining charges. As a result, Petitioner received an effective sentence of 40 years at 100%. Petitioner filed a petition for post-conviction relief raising the issue that trial counsel's failure to advise him that the search warrant justifying the search of his cell phone was constitutionally defective rendered his guilty plea involuntary. After a hearing, the post-conviction court denied relief. We affirm the judgment of the post-conviction court because Petitioner has failed to satisfy the burden to establish that he is entitled to post-conviction relief. Furthermore, the record establishes that trial counsel's strategy of filing the motion, initiated negotiations that resulted in a very favorable resolution for Petitioner. Accordingly, the judgment of the post-conviction court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR. and JILL BARTEE AYERS, JJ., joined.

William D. Massey, Memphis, Tennessee, for the appellant, Brandon Richmond Bowling.

¹ It is the policy of this Court to refer to victims of sexual offenses by their initials.

Jonathan Skrmetti, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Jennings H. Jones, District Attorney General; and Trevor Lynch, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Petitioner was indicted by the Rutherford County Grand Jury in April of 2017 with six counts of rape, two counts of sexual battery, two counts of aggravated rape, one count of felony murder and one count of premeditated first degree murder. The State filed a notice of an intent to seek a sentence of life without the possibility of parole.

In January of 2018, defense counsel filed a motion to suppress evidence found on Petitioner's phone, including video evidence of a rape. In the motion, counsel argued that the affidavit filed in support of the search warrant did not establish a nexus between the criminal activity and Petitioner's phone. The trial court never ruled on the motion.

In early February of 2018, Petitioner pled guilty to one count of aggravated rape and one count of second degree murder in exchange for dismissal of the remaining charges. As part of the agreement, Petitioner received concurrent sentences of 40 years for second degree murder and 15 years for rape. The sentences were to be served at 100% and Petitioner agreed to waive his sentencing range and plead as a Range II offender.

Plea Hearing

At the guilty plea hearing, counsel for the State relayed the facts that would have been presented had the case gone to trial as follows:

On August the 7[], 2015, [H.M.'s] lifeless body was found inside of her apartment on Brown Avenue in Murfreesboro, Tennessee. When the police arrived, they observed that [H.M.'s] body is in the bed. She is face down. They observed that a pillow case has been placed over her head. The pillow case was stained with blood.

They also observed more blood on the bed itself. One particular stain near [H.M.'s] shoulder draws the attention of the investigators. The blood stain appears to be a bloody fingerprint. The print is preserved and sent to the T.B.I. for examination.

There are also strong indications that the victim had been raped. Those observations included blood around [H.M.'s] genital area and multiple hairs on the buttocks of [H.M.]. The hairs do not appear to be hers. Also, there appeared to be semen stains on the body of [H.M.].

The hairs were submitted to the Bode Cellmark Labs for examination. The semen stains were collected and sent to the T.B.I. Crime Lab for examination.

After processing the crime scene, [H.M.'s] body was sent to Nashville where an autopsy was performed. The autopsy determined that [H.M.] died from blunt force trauma and asphyxiation. The report listed multiple contusions and lacerations of the head, as well as multiple distinct linear wounds to the neck.

The medical examiner also performed a rape kit. The rape kit was submitted to the T.B.I. for examination.

The first forensic examination to be concluded was that of the bloody fingerprint. The T.B.I. determined that the bloody fingerprint belonged to [Petitioner].

On August the 14[,], 2015, Murfreesboro Detective Sergeant Tommy Massey arrested 22[-]year-old M.T.S.U[.] student [Petitioner] and charged him with the murder and rape of [H.M.]. Later other forensic reports were completed. The lab determined that the swabs from the rape kit contained the D.N.A. of [Petitioner]. The Bode Cellmark Lab completed their examination of the foreign hairs found on [H.M.]. The results were that the lab was able to obtain D.N.A. from the hair. And it was determined that the hair and the D.N.A. from the hair belonged to [Petitioner].

Perhaps the strongest piece of evidence was obtained when the police searched [Petitioner's] cell phone. The cell phone contained a video recording which showed [Petitioner] raping a semi-conscious [H.M.]. It was shortly after the rape that [H.M.] died.

These facts led to this indictment charging [Petitioner] with the murder and rape of [H.M.]. All of these events occurred here in Rutherford County, in the State of Tennessee, and prior to this indictment.

After hearing the factual basis for the case, Petitioner agreed that the facts were “essentially true and correct.” He acknowledged that he understood the terms of the plea agreement, including the fact that he was pleading outside the sentencing range. Petitioner confirmed that he had discussed the plea with his attorneys and that he had also discussed the facts of the case and the elements of the crimes with which he had been charged. Petitioner acknowledged his understanding that he was waiving his right to a trial and various appellate rights, and that he was pleading guilty freely and voluntarily. The trial court accepted the pleas.

Petitioner filed a petition for post-conviction relief on February 8, 2019. The petition made various allegations, including that the guilty plea was involuntary, that the conviction was based on the violation of various constitutional rights, and that trial counsel was ineffective. The initial petition did not raise any issue with regard to the motion to suppress.

Petitioner filed an amended petition in November of 2019. In the amended petition, additional allegations of ineffective assistance of counsel were raised by Petitioner. In January of 2021, Petitioner filed a supplemental issue to add to the amended petition, alleging for the first time that trial counsel failed to advise him that the warrant justifying the search of the cell phone was constitutionally defective. Petitioner relied on this Court’s decision in *State v. McLawhorn*, 636 S.W.3d 210 (Tenn. Crim. App. 2020), to support his position. Prior to the evidentiary hearing on the petition for post-conviction relief, counsel for Petitioner indicated that they intended to strike all of the grounds asserted in the petitions with the exception of the claim related to the search warrant.

Post-Conviction Hearing

At the post-conviction hearing in December of 2021, counsel for Petitioner informed the post-conviction court that they intended to “withdraw the issues raised in the initial pleadings” and to proceed on “the validity of the affidavit in support of the search warrant.”

Trial counsel testified that he had practiced criminal law for around twenty-five years at the time of the hearing. Trial counsel was a past president of the Tennessee Association of Criminal Defense Lawyers and was death penalty certified. Trial counsel reported handling between 40-45 jury trials, 50-60 homicide cases, and 4 death penalty cases to verdict. Trial counsel was retained to represent Petitioner. Petitioner’s family later hired a different attorney to help trial counsel with the case. Additional trial counsel did not testify at the hearing.

Trial counsel testified that he held in-person meetings with Petitioner because he felt that was an important part of representing a client. Trial counsel explained that he deemed it important to give his clients a lot of information so that they could make informed decisions about their cases.

Trial counsel met with Petitioner at the jail “a number” of times. Additionally, they had conversations on several occasions about the pending charges, the proof that the State would introduce at trial, the possible sentence, the trial process, and possible trial strategy. Trial counsel did not recall specifically if he discussed the details of case law with Petitioner with regard to the validity of the search warrant, but trial counsel explained that he would have explained to Petitioner that there was an issue with the search warrant and that trial counsel was going to challenge it.

Trial counsel explained his method for preparing for cases and provided a copy of a document he created to help guide his meetings with Petitioner. Trial counsel testified that he reviewed discovery documents with Petitioner and explained the elements of the charged offenses, lesser included offenses, and possible sentences. Trial counsel explained that he would have discussed the facts of the case with Petitioner and whether Petitioner should testify at trial.

Trial counsel acknowledged that the facts of the case put Petitioner at the scene, including DNA analysis connecting Petitioner to semen found in the victim’s vagina, anal area, and buttocks. Petitioner’s pubic hair was also found on the victim’s body and one of Petitioner’s fingerprints was found at the scene in the victim’s blood. Trial counsel hired an independent source to review the DNA analysis and this source confirmed the findings of the State.

Trial counsel recalled receiving photographs as part of discovery. The photographs showed the injuries to the victim, including “damage” to the back of her head. Trial counsel also reviewed the autopsy report, which indicated that the victim died from blunt force trauma and strangulation. The autopsy report also indicated that the victim had defensive wounds. Trial counsel explained that the photographs made it difficult for Petitioner to argue that the actions were negligent or the result of a reckless homicide. Trial counsel knew that the State was likely to use the photographs at trial.

Trial counsel acknowledged Petitioner gave an interview to the police after his arrest. Trial counsel described the interview as “problematic” because Petitioner said several inaccurate things during the interview. The worst piece of evidence, however, was the video. Trial counsel described it as “damning.” Trial counsel explained that if the video were introduced at trial, Petitioner would likely have been convicted of first degree

murder and probably sentenced to life without parole. Trial counsel testified that Petitioner was aware of this possibility.

Trial counsel discussed the video “several times” with Petitioner. These discussions included the content of the video, the possible ways the State could use the video, and the proof in addition to the video. Trial counsel acknowledged that there was a better chance for a conviction on a lesser included offense if the video was suppressed but that the State had a lot of evidence against Petitioner even without the video. Trial counsel described it as a “tough case” and explained that a first degree murder conviction was possible even without the video. Trial counsel testified that even if Petitioner was not convicted of premeditated murder, he could have been convicted of felony murder based on the rape and aggravated rape charges. In any event, Petitioner faced a lengthy sentence.

Trial counsel filed a motion to suppress the video to assist in negotiations with the State. Trial counsel also knew that if the matter went to trial, he did not want the jury to see the video. Trial counsel felt that the motion had merit because the affidavit did not establish a nexus between Petitioner’s phone and the charges. Trial counsel discussed the motion to suppress with Petitioner but did not recall the extent of their conversation. Trial counsel denied telling Petitioner that the motion would definitely be successful.

Trial counsel said that Petitioner never stated he would insist on a trial. In trial counsel’s recollection, Petitioner wanted a plea deal. Shortly after trial counsel filed the motion to suppress, the State offered a plea deal of 40 years for second degree murder with a concurrent sentence of 15 years for aggravated rape and the dismissal of all other counts. Trial counsel was satisfied with the State’s offer and explained it in detail to Petitioner, taking the time to discuss the options if Petitioner chose to reject the offer. Trial counsel recalled there was “no question” that Petitioner understood the plea agreement. Petitioner wanted to talk to his parents about the plea agreement, and trial counsel set up a discussion so that Petitioner could do so. Petitioner agreed to take the plea.

Petitioner admitted that he met with trial counsel multiple times and that they discussed the facts, the defenses, and the motion to suppress. Despite all of this, Petitioner testified that he would not have accepted the plea agreement and would have insisted on going to trial if trial counsel had only told him the video would be suppressed. Petitioner claimed trial counsel never gave him a “direct answer” on the possible success of the motion and failed to explain the legal issues with the motion.

Petitioner admitted that he entered a negotiated plea to a lesser charge after the motion to suppress was filed. Petitioner testified that it was his own decision to accept the guilty plea. Petitioner also admitted that he understood he could still be convicted at a trial

even if the video were suppressed. Despite this knowledge, Petitioner testified that he would have insisted on going to trial.

The post-conviction court entered a written order denying post-conviction relief. In the order, the post-conviction court recounted the charges in the indictment that led to Petitioner's guilty plea. The post-conviction court noted that counsel for Petitioner filed a motion to suppress the "damaging piece of evidence" found on Petitioner's phone but that the motion was never argued.

The post-conviction court went through the various petitions, amended petitions, and supplemental petitions filed by Petitioner for post-conviction relief. The post-conviction court found that Petitioner "struck all grounds for post-conviction relief except for the allegation of ineffective assistance of counsel" in counsel's "fail[ure] to advise him of the strength of the motion to suppress." The post-conviction court stated Petitioner insisted that the failure of trial counsel led to an involuntary and unknowing guilty plea and that if he "had known that the subject video would not have been shown to a jury, then he would have demanded a trial."

The post-conviction court deemed trial counsel a credible witness with a lot of criminal defense experience. The post-conviction court found that the "motion to suppress carrie[d] significant merit" and that the question to answer was "to what extent is a trial counsel required to advise a client on the merits of an evidentiary motion so that a criminal defendant can make an informed decision to enter a plea or go to trial?" The post-conviction court recapped trial counsel's insistence that he "absolutely discussed what this case looked like with and without the video."

The post-conviction court summarized Petitioner's argument in which he insisted that his plea was involuntary because it was "based on the poor advice of trial counsel" and that Petitioner would have gone to trial had it not been for trial counsel's error. The post-conviction court found "no error" because trial counsel testified that he informed clients appropriately and ethically without "[p]redicting precise outcomes" and that Petitioner wanted to hold trial counsel to a standard that exceeded "20/20 hindsight." The post-conviction court went on to find that even if trial counsel were ineffective, it would not have prejudiced Petitioner because the proof against Petitioner was overwhelming. In fact, the post-conviction court ruled that trial counsel's strategic decision to file the motion to suppress actually "caused the State to negotiate away from seeking life without the possibility of parole." In conclusion, the post-conviction court determined that Petitioner failed to prove his claim by clear and convincing evidence and denied relief.

Petitioner appealed.

Analysis

On appeal, Petitioner contends that he is entitled to post-conviction relief because his trial counsel was ineffective for failing to argue the motion to suppress the evidence found on his phone or “adequately advise [Petitioner] of the strength” of the motion prior to the guilty plea. He asserts that “[b]ut for counsel’s failure to litigate [the motion to suppress] the outcome would have been different” because Petitioner would not have pled guilty. Petitioner also asserts that trial counsel also failed to advise him of the merit of the motion. The State responds that trial counsel’s performance was not deficient and that Petitioner was not prejudiced by counsel’s failure to litigate the motion to suppress.

To be successful in a claim for post-conviction relief, a petitioner must prove the factual allegations contained in the post-conviction petition by clear and convincing evidence. *See* Tenn. Code Ann. § 40-30-110(f). “Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *State v. Holder*, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. *See Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, the post-conviction court’s findings of fact are entitled to substantial deference on appeal unless the evidence preponderates against those findings. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

A claim of ineffective assistance of counsel is a mixed question of law and fact. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court’s findings of fact de novo with a presumption that those findings are correct. *See Fields*, 40 S.W.3d at 458. However, we will review the post-conviction court’s conclusions of law purely de novo. *Id.*

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, “the petitioner bears the burden of proving both that counsel’s performance was deficient and that the deficiency prejudiced the defense.” *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To establish deficient performance, the petitioner must show that counsel’s performance was below “the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). To establish prejudice, 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.” *Strickland*, 466 U.S. at 694. Further,

[b]ecause a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.

Goad, 938 S.W.2d at 370 (citing *Strickland*, 466 U.S. at 697). Moreover, in the context of a guilty plea, “the petitioner must show ‘prejudice’ by demonstrating that, but for counsel’s errors, he would not have pleaded guilty but would have insisted upon going to trial.” *Hicks v. State*, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998); *see also Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

Petitioner submits trial counsel was ineffective for failing to litigate the motion to suppress the evidence found on his phone. Specifically, Petitioner cites a Tennessee Supreme Court case issued *after* his guilty plea in which the court clarified the standard required in a post-conviction proceeding raising failure to litigate a Fourth Amendment claim. *See Phillips v. State*, 647 S.W.3d 689 (Tenn. 2022). Petitioner contends that he needed to prove that his motion to suppress would have been successful, the failure to file the motion was objectively unreasonable, and that but for the omission there is a reasonable probability that the verdict would have been different. *Id.* at 404 (citing *Khalil-alsalaami v. State*, 486 P.3d 1216, 1239 (Kan. 2021)). The case cited by Petitioner discussed the failure of counsel to file or litigate a motion to suppress; it was not a case where counsel filed a motion to suppress as a tactical method in order to gain leverage to negotiate a plea offer.

In evaluating an attorney’s performance, we “must be highly deferential and should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Burns*, 6 S.W.3d at 462 (citing *Strickland*, 466 U.S. at 689). In addition, we must avoid the “distorting effects of hindsight” and must “judge the reasonableness of counsel’s challenged conduct on the facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466 U.S. 689-90. Moreover, “[n]o particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” *Id.* at 688-89. However, “deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation.” *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (quoting *Goad*, 938 S.W.2d at 369).

The post-conviction court found that trial counsel was a credible witness. Even though the post-conviction court found that the motion to suppress had merit, the post-conviction court deemed the failure to litigate the motion did not rise to the level of ineffective assistance of counsel. In order to prove prejudice on a claim that trial counsel was ineffective in failing to pursue a motion to suppress, the petitioner must show by clear and convincing evidence that “(1) a motion to suppress would have been granted and (2) there was a reasonable probability that the proceedings would have concluded differently if counsel had performed as suggested.” *Terrance Cecil v. State*, No. M2009-00671-CCA-R3-PC, 2011 WL 4012436 at *8 (Tenn. Crim. App. Sept. 12, 2011), *no perm. app. filed*. Accordingly, “[i]t is a petitioner’s burden to submit evidence (and not just his testimony surmising on the merits of a pre-trial suppression motion) that the suppression motion would have been granted and that there is a reasonable probability that the trial proceedings would have concluded differently if trial counsel had pursued a motion to suppress evidence.” *Charles Bradford Stewart v. State*, No. M2015-02449-CCA-R3-PC, 2017 WL 2645651, at *14 (Tenn. Crim. App. June 20, 2017), *perm. app. denied* (Tenn. Oct. 4, 2017); *see Demarcus Sanders v. State*, No. W2012-01685-CCA-R3-PC, 2013 WL 6021415, at *4 (Tenn. Crim. App. Nov. 8, 2013), *perm. app. denied* (Tenn. Mar. 17, 2014).

Based on the proof presented at the post-conviction hearing, it is clear that trial counsel made a reasonable and well-informed decision not to litigate the motion to suppress because it opened the door to negotiating a plea offer for Petitioner, who was facing life without parole for multiple charges, and we will not second-guess trial counsel’s strategy. *See Burns*, 6 S.W.3d at 462 (citing *Strickland*, 466 U.S. at 689); *House*, 44 S.W.3d at 515 (quoting *Goad*, 938 S.W.2d at 369). Trial counsel testified that while the video was the most “damning” piece of evidence, there was plenty of other evidence of Petitioner’s guilt, including the identification of both Petitioner’s bloody fingerprint next to the victim’s body and Petitioner’s semen in and on the victim’s body. Trial counsel reviewed discovery with Petitioner and thoroughly discussed the options with Petitioner prior to his pleas and the plea colloquy reflects that Petitioner entered the pleas with an understanding of the terms and what that meant to the pending motion to suppress. Moreover, Petitioner’s reliance on *State v. McLawhorn*, 636 S.W.3d 210 (Tenn. Crim. App. 2020), to prove that his motion to suppress would have been successful is misplaced. *McLawhorn* was not decided until over two years after Petitioner pled guilty. “[T]rial counsel cannot be held to a standard of being clairvoyant concerning a case not yet decided.” *Robert Anthony Fusco v. State*, No. M2016-00825-CCA-R3-PC, 2017 WL 6316621, at *8 (Tenn. Crim. App. Dec 11, 2017) (quoting *Darryl Lee Elkins and Rhonda Grills v. State*, Nos. E2005-02153-CCA-R3-PC and E2005-02242-CCA-R3-PC, 2008 WL 65329, at *6 (Tenn. Crim. App. Jan. 7, 2008), *perm. app. denied* (Tenn. May 27, 2008)), *no perm. app. filed*. In other words, trial counsel can hardly be found ineffective for failing to argue a legal theory which did not have any support in statute or in the law at the time.

CONCLUSION

The record does not preponderate against the post-conviction court's conclusions that Petitioner failed to establish either a deficiency in trial counsel's performance or prejudice from counsel's alleged deficiency. Petitioner is not entitled to relief.

TIMOTHY L. EASTER, JUDGE