IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs April 25, 2023

DEMORRIS SANCHEZ MCKENZIE v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 119037 Kyle A. Hixson, Judge

No. E2022-01226-CCA-R3-PC

Petitioner, DeMorris Sanchez McKenzie, sought relief from his convictions and effective life sentence for first degree premeditated murder, being a felon in possession of a firearm, and driving on a revoked license. Petitioner alleged that he received the ineffective assistance of trial and appellate counsel. Having reviewed the entire record and the briefs of the parties, we affirm the judgment of the post-conviction court.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and TOM GREENHOLTZ, J., joined.

J. Liddell Kirk, Madisonville, Tennessee, for the appellant, Demorris Sanchez McKenzie.

Jonathan Skrmetti, Attorney General and Reporter; Courtney N. Orr, Assistant Attorney General; Charme P. Allen, District Attorney General; and Takisha Fitzgerald, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

Petitioner was convicted by a Knox County Criminal Court jury of one count of first degree premeditated murder, one count of being a felon in possession of a firearm, and one count of driving on a revoked license. *State v. DeMorris McKenzie*, No. E2018-02226-CCA-R3-CD, 2020 WL 3251173, at *1 (Tenn. Crim. App. June 16, 2020), *perm. app. denied* (Tenn. Nov. 16, 2020). For his convictions, Petitioner was sentenced to concurrent sentences of life imprisonment, two years, and six months, respectively. *Id.* On direct

appeal, Petitioner challenged the sufficiency of the evidence of his identity as the perpetrator and the trial court's decision to allow a witness, Karen Smith, to testify as to what she saw in a security video of the apartment complex parking lot where the shooting occurred. *Id*. A panel of this Court affirmed Petitioner's convictions, concluding that, although the trial court erred by allowing Ms. Smith to identify Petitioner in the video, the error was harmless in light of the State's other evidence at trial, particularly another witness' identification of Petitioner as the shooter. *Id.* at *4.

Petitioner filed a timely pro se petition for post-conviction relief and an amended petition following the appointment of post-conviction counsel. In his amended petition, Petitioner alleged that appellate counsel was ineffective for not challenging the sufficiency of the evidence of premeditation and the admission of Ms. Smith's testimony under Rules 401 and 403 of the Tennessee Rules of Evidence.[1]

A summary of the evidence presented at trial is relevant to our discussion of the issues in this appeal. In the early morning hours of February 27, 2016, the victim's mother, Barbara Stooksbury, awoke to the sound of people arguing. *Id*. at *1. She saw Petitioner and the victim in the kitchen, and Petitioner was holding a "long gun." *Id*. The two men went outside, and Ms. Stooksbury heard two gunshots. *Id*. Ms. Stooksbury said that she, the victim, and the victim's girlfriend had been drinking alcohol that day and they had taken Xanax. *Id*. Ms. Stooksbury testified she did not know Petitioner before the incident, but she identified him in a photographic lineup as the person she saw holding a rifle in the kitchen. *Id*.

Elizabeth Johnson testified that she and the victim bought Xanax from Petitioner earlier that day. *Id*. After Ms. Stooksbury went to sleep, she and the victim attempted to purchase crack cocaine from Petitioner. *Id*. The victim stayed inside the apartment while Ms. Johnson met Petitioner in the parking lot and bought crack cocaine from him. *Id*. When Ms. Johnson returned to the apartment, she and the victim determined that it was "fake" because she and the victim were unable to "get high" from the drugs. *Id*. Ms. Johnson contacted Petitioner to return to the apartment. *Id*.

When Petitioner returned, the victim went outside to meet him, and Ms. Johnson watched them from the window. *Id*. The victim and Petitioner entered the apartment, and

[1] On direct appeal, this Court concluded that Petitioner waived consideration of the issue of the relevance and degree of unfair prejudice of Ms. Smith's testimony under Rules 401 and 403 by failing to provide any argument or citation to the relevant authority in his brief on appeal. *DeMorris McKenzie*, 2020 WL 3251173, at *5. In this appeal, Petitioner essentially abandons the issue of appellate counsel's failure to adequately raise the issue on appeal, acknowledging that Petitioner is "bound by the previous determination that [Ms. Smith's] identification of [Petitioner] as the shooter was harmless[.]"

Ms. Johnson saw that Petitioner had a "big-[ ] gun." *Id*. Petitioner gave the victim more drugs, but Ms. Johnson testified they were also "fake." *Id*. Petitioner then returned the victim's money. *Id*.

Petitioner and the victim then went outside, and "[n]ot five minutes after that, [Ms. Johnson] hear[d] the first gunshot and [she took] off running out the door." *Id*. While hiding between two cars, Ms. Johnson heard the victim say, "why'd you do that, man? I'm going to die." *Id*. She then saw Petitioner walk around his vehicle to the victim and shoot him again before leaving the scene. *Id*. Ms. Johnson called 911 and attempted to give the victim CPR. *Id*. She testified that the victim "had a hole in his neck and he was bleeding from his stomach." *Id*. Ms. Johnson identified Petitioner in a photo lineup as the person who shot the victim, but she told police she knew Petitioner as "a guy named Crazy." *Id*. An apartment complex security video of the incident was played for the jury. Karen Smith, the property manager, testified over the objection of trial counsel as to what was depicted in the video. *Id*. at *2.

At the post-conviction hearing, post-conviction counsel requested that the court take judicial notice of the appellate record from Petitioner's direct appeal. Neither party presented any witnesses or other proof. The post-conviction court heard the arguments of counsel and entered a written order denying relief. Regarding appellate counsel's failure to challenge the sufficiency of the evidence of premeditation, the court stated, "[t]he court cannot find that the premeditation issue is clearly stronger or weaker than those presented." Considering the evidence at trial, the post-conviction court found that "the jury could infer a plan to kill by the fact that the petitioner arrived at the unarmed victim's apartment with a firearm." The court further noted that the video "seems to demonstrate that the petitioner possessed a calm and collected demeanor immediately before the shooting." Additionally, the court found that the video showed the victim "doubling over" and Petitioner "calmly and slowly walk[ing] around another vehicle before pausing in front of the victim and firing another shot, eighteen seconds after the first one[.]" Petitioner then "calmly enter[ed] his vehicle and dr[o]ve away."

The post-conviction court stated, "given the unlikelihood of success on the premeditation issue, the court cannot find that the decision to omit it was an unreasonable one which only an incompetent attorney would adopt." Accordingly, the post-conviction court concluded appellate counsel was not deficient for omitting the issue, nor would inclusion of the issue have changed the outcome of the direct appeal.

Analysis

Petitioner appeals, arguing that the post-conviction court should have granted relief based on appellate counsel's failure to challenge the sufficiency of the evidence of

premeditation. The State responds that Petitioner did not present any proof at the post-conviction hearing to support his claim and that the trial proof overwhelmingly supported premeditation.

The petitioner bears the burden of proving his post-conviction factual allegations by clear and convincing evidence. T.C.A. § 40-30-110(f). The findings of fact established at a post-conviction evidentiary hearing are conclusive on appeal unless the evidence preponderates against them. *Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996). This Court will not reweigh or reevaluate evidence of purely factual issues. *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997). However, appellate review of a trial court's application of the law to the facts 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 presents mixed questions of fact and law. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Thus, this Court reviews the petitioner's post-conviction allegations de novo, affording a presumption of correctness only to the post-conviction court's findings of fact. *Id*.; *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceedings. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting the standard for determining ineffective assistance of counsel applied in federal cases is also applied 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. In order for a post-conviction petitioner to succeed, both prongs of the *Strickland* test must be satisfied. *Id*. Thus, courts are not required to even "address both components of the inquiry if the defendant makes an insufficient showing on one." *Id*.; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (stating that "a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.").

A petitioner proves a deficiency by showing "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing

professional norms." *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the *Strickland* test is satisfied when the petitioner shows there is a reasonable probability, or "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. However, "[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id*. at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

The test used to determine whether appellate counsel was constitutionally effective is the same test applied to claims of ineffective assistance of counsel at the trial level. *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004). To establish a claim of ineffective assistance of counsel, the petitioner must show that: 1) counsel's performance was deficient; and 2) counsel's deficient performance prejudiced the outcome of the proceedings. *Strickland*, 466 U.S. at 687; *see Carpenter*, 126 S.W.3d at 886.

"Appellate counsel [is] not constitutionally required to raise every conceivable issue on appeal." *Carpenter*, 126 S.W.3d at 887 (citing *King v. State*, 989 S.W.2d 319, 334 (Tenn. 1999)). Generally, appellate counsel has the discretion to determine which issues to raise on appeal and which issues to leave out. *Id*. Thus, courts should give considerable deference to appellate counsel's professional judgment with regard to which issues will best serve the petitioner on appeal. *Id*. Appellate counsel is only afforded this deference, however, "if such choices are within the range of competence required of attorneys in criminal cases." *Id*.

When a claim of ineffective assistance of counsel is based on the failure of appellate counsel to raise a specific issue on appeal, the reviewing court must determine the merits of the issue. *Id*. "If an issue has no merit or is weak, then appellate counsel's performance will not be deficient if counsel fails to raise it." *Id*. Similarly, if the omitted issue has no merit then the petitioner suffers no prejudice from counsel's decision not to raise it. *Id*. If the issue omitted is without merit, the petitioner cannot succeed in his ineffective assistance claim. *Id*. The petitioner bears the burden of establishing that the omitted issue had merit. *Id*. at 888.

Turning to the merits of the issue of whether the evidence at trial was sufficient to prove the element of premeditation, we apply certain well-settled principles. When reviewing a challenge to a conviction based on the sufficiency of the evidence, a court "must determine whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *State v. Parker*, 350 S.W.3d 883, 903 (Tenn.

2011) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)). In making this determination, the prosecution receives "the strongest legitimate view of the evidence . . . as well as all reasonable and legitimate inferences that may be drawn from that evidence." *State v. Davis*, 354 S.W.3d 718, 726 (Tenn. 2011) (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). A verdict of guilt removes the presumption of innocence and creates a presumption of guilt. The defendant bears the burden of showing the evidence was insufficient to sustain the guilty verdict. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)). "This Court does not reweigh or reevaluate the evidence." *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997) (citing *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978)).

First degree murder is "[a] premeditated and intentional killing of another[.]" T.C.A. § 39-13-202(a)(1) (2006). "Premeditation" is defined in our criminal code as an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation. *Id*. § 39-13-202(d).

Whether premeditation exists in any particular case is a question of fact for the jury to determine based upon a consideration of all the evidence, including the circumstantial evidence surrounding the crime. *See State v. Suttles*, 30 S.W.3d 252, 261 (Tenn. 2000); *State v. Bland*, 958 S.W.2d 651, 660 (Tenn.1997); *State v. Pike*, 978 S.W.2d 904, 914 (Tenn. 1998). Our supreme court has listed a number of factors which, if present, may support the jury's inference of premeditation. Among these are the defendant's declaration of an intent to kill the victim; the use of a deadly weapon upon an unarmed victim; the establishment of a motive for the killing; the particular cruelty of the killing; the infliction of multiple wounds; the defendant's procurement of a weapon, preparations to conceal the crime, and destruction or secretion of evidence of the killing; and the defendant's calmness immediately after the killing. *Jackson*, 173 S.W.3d at 409; *State v. Thacker*, 164 S.W.3d 208, 222 (Tenn. 2005); *Leach*, 148 S.W.3d at 54; *Nichols*, 24 S.W.3d at 302; *Bland*, 958 S.W.2d at 660.

As the State points out, Petitioner did not present any proof at the post-conviction hearing, electing to rely solely on the appellate record. Without the testimony of appellate counsel, Petitioner cannot show that counsel's decision not to challenge the sufficiency of the proof of premeditation was not strategic. *See, e.g.*, *O'Neal Johnson v. State*, No. W2020-00638-CCA-R3-PC, 2021 WL 2010771, at *9 (Tenn. Crim. App. May 20, 2021) ("Appellant counsel was not called as a witness at the post-conviction hearing so neither the post-conviction court nor this court can speculate on the reasons appellate counsel did

not raise the sentencing issue on appeal or what his testimony would have been."), *perm. app. denied* (Tenn. Aug. 6, 2021).

In any event, we agree with the trial court that Petitioner has not established that appellate counsel's omission of the issue was deficient or that inclusion of the issue would have changed the outcome of the direct appeal. The proof at trial, viewed in the light most favorable to the State, showed that after Ms. Johnson and the victim realized the drugs they purchased from Petitioner were fake, they asked Petitioner to return to their apartment. Petitioner returned with a rifle. Petitioner and the victim argued about the drugs, and Petitioner shot the victim. The victim fell to the ground, and Petitioner walked around a vehicle and shot him once more. Petitioner then left without rendering any aid or calling for help. Based on this evidence, the jury could reasonably have concluded that the killing was premeditated. Accordingly, the judgment of the post-conviction court is affirmed.

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TIMOTHY L. EASTER, JUDGE