IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 15, 2023

KELLUM WILLIAMS v. STATE OF TENNESSEE

Appeal from the Circuit Court for Montgomery County
No. 63CC1-2016-CR-787 Robert Bateman, Judge

No. M2022-01496-CCA-R3-PC

Petitioner, Kellum Williams, appeals as of right from the Montgomery County Circuit Court's denial of his petition for post-conviction relief, wherein he challenged his convictions for first degree premeditated murder, first degree felony murder, and especially aggravated kidnapping and resulting sentence of life without the possibility of parole plus twenty-five years. Petitioner contends that he was denied the effective assistance of counsel based upon trial counsel's failure to: (1) sufficiently emphasize at trial the theory that the victim died in Montgomery County rather than in Robertson County, as testified to by the State's experts; (2) seek an independent expert "to test samples from the crime scene"; (3) raise as a defense that venue of the trial should have been in Robertson County instead of Montgomery County; and (4) more extensively question witnesses to demonstrate Petitioner's "non-participation in the events leading to [the victim's] death." Petitioner further asserts that he is entitled to relief based upon cumulative error. Following a thorough review, we affirm the judgment of the post-conviction court.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. ROSS DYER, JJ., joined.

Gregory D. Smith, Clarksville, Tennessee, for the appellant, Kellum Jordan Williams.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; Robert J. Nash, District Attorney General; and Art Bieber, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual and Procedural Background[1]

The Montgomery County Grand Jury indicted Petitioner and his co-defendant, Kevin Raynard Forman ("Defendant Forman"), on charges of first degree premeditated murder, first degree felony murder, and especially aggravated kidnapping in the death of Amy Murphy ("the victim"), which occurred after an altercation between Petitioner's wife and the victim on the night of January 31, 2015, at Defendant Forman's apartment in Clarksville.[2] *State v. Williams*, No. M2019-01480-CCA-R3-CD, 2021 WL 1053909, at *2-14 (Tenn. Crim. App. Mar. 19, 2021) (footnotes omitted), *perm. app. denied* (Tenn. June 9, 2021). The following day, the victim's burning body was discovered by the Adams Fire Department in a field off Highway 76W next to Hills Mill in Robertson County, approximately a quarter of a mile from the Montgomery County line. *Id*. at *2. A full summary of the evidence presented at trial can be found in this court's opinion on direct appeal. *Id*. at *2-14.

As particularly relevant to this appeal, Dr. David Zimmerman, the medical examiner who performed the victim's autopsy, testified at trial that the cause of the victim's death was thermal burns, smoke inhalation, and blunt trauma. *Id*. at *10. Further, Dr. Zimmerman identified the circumstances of the victim's death as being that she was "[w]rapped in a tarp and burned." *Id*. The State also presented evidence from Dr. Edward Barbieri, an expert in the field of forensic toxicology, who testified that the average person who does not smoke has one to four percent of a carbon monoxide compound in their body and that a person who smokes may have up to eight or ten percent of the compound in their body. *Id*. Dr. Barbieri testified that the lab where the victim's tissue samples were tested found a thirty-three percent saturation of the compound in the victim. *Id*. Dr. Barbieri stated that, if the victim had not been breathing while exposed to smoke from a fire, she would not have had that level of saturation. *Id*.

Following deliberations, the jury convicted Petitioner as charged. *Id*. at *1. For his convictions for first degree premeditated murder and first degree felony murder, the jury sentenced Petitioner to life without parole, and the trial court merged the premeditated murder conviction into the felony murder conviction. *Id*. at *14. The trial court also sentenced Petitioner to twenty-five years for the especially aggravated kidnapping

[1] To assist in the resolution of this proceeding, we take judicial notice of the record from Petitioner's direct appeal. *See* Tenn. R. App. P. 13(c); *State v. Lawson*, 291 S.W.3d 864, 869 (Tenn. 2009); *Delbridge v. State*, 742 S.W.2d 266, 267 (Tenn. 1987); *State ex rel. Wilkerson v. Bomar*, 376 S.W.2d 451, 453 (Tenn. 1964).

[2] The grand jury also charged Petitioner's wife and two other individuals for their involvement in the offenses. *Williams*, 2021 WL 1053909, at *1.

conviction and ordered consecutive sentencing for a total effective sentence of life without parole plus twenty-five years. *Id.* This court affirmed Petitioner's judgments of conviction, and the Tennessee Supreme Court denied further review. *Id*. at *24.

Petitioner subsequently filed a timely pro se petition for post-conviction relief. After issuing a preliminary order and receiving additional pro se filings from Petitioner, the post-conviction court appointed counsel. Following the appointment of counsel, Petitioner filed two amended petitions alleging, in relevant part, that trial counsel rendered ineffective assistance by failing to request funding for an independent expert to refute testimony presented by the State regarding the time and location of the victim's death and by failing to raise as a defense that venue of the trial should have been in Robertson County instead of Montgomery County based on the evidence presented regarding the place of the victim's death. Petitioner subsequently raised several additional grounds for relief orally, at the start of the post-conviction hearing, including that trial counsel rendered ineffective assistance by failing to adequately cross-examine the State witnesses.

At the hearing, Petitioner testified that, following his arrest, he was incarcerated in the Montgomery County Jail pending trial. He said that trial counsel visited him several times at the jail and that he had no complaints about counsel's contact and communication with him prior to trial. He said that trial counsel had represented him on various charges since 2010. Petitioner agreed that counsel filed several pretrial motions, including a motion to suppress and a motion to sever, and that counsel called several witnesses to testify for the defense at trial. He agreed that trial counsel appealed the denial of his motion to suppress and motion for severance but that the appeal was unsuccessful. He said that he had no complaints about trial counsel's performance in the sentencing phase of his trial or about counsel's handling of his direct appeal.

Petitioner explained that, initially, he was offered an immunity deal during a meeting in Robertson County with the District Attorney. He said that trial counsel drove him to the meeting but that he rejected the offer of immunity. Petitioner testified that, after he was charged, the State filed a death notice in his case, but the State eventually "took it off the table[.]" He explained that, prior to trial, counsel conveyed a forty-year plea offer from the State but that he rejected the offer.

During Petitioner's testimony, the following exchange occurred:

> Q. . . . [I]n regards to the trial, itself, were there any things that you thought were ineffective that either could have happened that didn't or did happen that shouldn't have?

A. Yes. I think that I should of had the opportunity to test the evidence that was presumptive against me.

Q. Okay. What do you mean by that?

A. Like, the samples they had.

Q. Okay. So you were wanting some sort of lab or whatever to make tests?

A. Right. Not just, you know, just take the State's word for it, you know.

Q. Were there any motions filed asking for experts along those lines?

A. No.

Petitioner said he believed that, if counsel had made requests for additional testing of the evidence, the testing would have clarified the victim's cause of death.

Petitioner said that counsel cross-examined the State's witnesses "[a] little bit[,]" explaining that counsel asked the witnesses "particular questions about particular incidents." Petitioner testified:

> I think that as far as the witnesses, I think we should have elaborated a little bit more about particular moments and specifics about what was said and why it was said. Not just, you know, randomly asking questions, you know.

Petitioner averred that, if trial counsel had asked more questions of witnesses, he "would have gotten more or better answers that . . . would have helped clarify some particulars that would have set [Petitioner] apart from the individual who actually committed the crime." When asked what additional questions trial counsel should have asked particular witnesses, Petitioner responded, "All of them. All the questions."

Petitioner stated that the defense theory was that the murder occurred in Montgomery County. He said that he had nothing to do with the murder but admitted that he helped move the victim's body to Robertson County. He acknowledged that trial counsel put his theory of defense in front of the jury but said that counsel was "maybe not as direct as [Petitioner] liked."

Petitioner testified that because the State offered evidence the victim was killed in Robertson County, trial counsel should have challenged venue alternatively. He said that counsel should have argued that, based upon its own proof, the State had not shown that the murder was committed in Montgomery County where he was tried.

Trial counsel testified that he had been practicing law for about fifteen years and that most of his practice had been dedicated to criminal defense. He said that he had tried between fifteen and twenty murder cases. Trial counsel explained that he had known Petitioner for a long time and had represented him on previous non-violent charges. He recalled that he drove Petitioner to Robertson County to discuss the State's offer of immunity with the District Attorney.

When asked if he hired an expert to rebut the State's expert proof, trial counsel testified, "I didn't file any motions to test that additional proof. I was going to handle it and I did handle it in a different way." Trial counsel explained that the defense theory was that the victim died in the kitchen of Defendant Forman's apartment in Montgomery County and that the victim's death was at the hands of Petitioner's wife and Defendant Forman. Counsel continued, "And so throughout the testimony, we concentrated on the length of time that [the victim] laid there in that floor; the dimensions of the kitchen; how much blood had actually left her body." Trial counsel further stated:

> The State's theory was . . . that [Petitioner] and [Defendant] Forman went to Walmart, which they had surveillance video of that, bought tarps, bought ratchet straps. And then went all the way back to this residence, where the murder happened, in my opinion.
>
> And they binded (sic) her up in these tarps and they ratcheted her down, and then they carried her out, and placed her in the van.
>
> And I asked the Medical Examiner a hypothetical: If she was bleeding, you know how long could she bleed . . . or then how long can a person fully encapsulated in plastic?
>
> . . . .
>
> And he said that she -- the chances of her surviving -- that she wouldn't survive.
>
> So I use a commonsense explanation for jurors and that's a . . . technique, it's a trial strategy type of thing; where you have this hired gun

> from the State, who's come here from Pennsylvania, who's never testified, I don't think before the jury -- before a jury before.
>
> So you have this guy that's going to say this specific number and this is a specific thing. But you have all of these other factors.
>
> And you discuss that with the jurors, that you have the right to have -- to use a commonsense perspective. Just because they're certified as an expert, you don't have to deem them to be credible, if everything else goes against what they're saying.
>
> And that's the way I chose to handle it, and it was a trial strategy format. My cross-examinations and the structure of [the] trial all was to prove that [the victim] was dead while in the kitchen. That was it.

Trial counsel said that he argued at trial that Petitioner had no motive to kill the victim and that "there was no prior bad blood"; he argued, however, that both Defendant Forman and Petitioner's wife had a motive. Counsel opined that his trial strategy was appropriate.

At the close of the hearing, the post-conviction court took the matter under advisement. In a written order, the post-conviction court concluded that Petitioner failed to establish by clear and convincing evidence that he was denied the effective assistance of counsel. Regarding Petitioner's claim that trial counsel rendered ineffective assistance by failing to request funding for an independent expert to refute the expert testimony presented by the State regarding the time and location of the victim's death, the post-conviction court found that counsel's decision on how to address the State's expert proof was a tactical decision "made after adequate preparation" and that counsel's performance "did not fall below an objective standard of reasonableness." The post-conviction court further found that Petitioner failed to present any expert testimony at the post-conviction hearing to refute the State's witnesses, Dr. Zimmerman and Dr. Barbieri, regarding the time and location of the victim's death. Accordingly, the court concluded that Petitioner failed to establish prejudice.

Regarding Petitioner's alternative claim that he was denied the effective assistance of counsel based upon counsel's failure to challenge the trial venue of Montgomery County, the post-conviction court found that "such a defense would not be based on law or fact," and therefore, trial counsel's performance was not deficient. As to Petitioner's claim that trial counsel rendered ineffective assistance based upon counsel's failure to properly cross-examine witnesses, the post-conviction court found that Petitioner, "the party with the burden of proof, made vague, non-specific complaints about trial counsel's cross-

examination of witnesses" but that Petitioner failed to present "any specific proof that different cross[-]examination of any witnesses would have changed the outcome of his case." Based upon these findings, the post-conviction court denied relief.

This timely appeal follows.

Analysis

To prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Post-conviction relief cases often present mixed questions of law and fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Appellate courts are bound by the post-conviction court's factual findings unless the evidence preponderates against such findings. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). Additionally, "questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the [post-conviction court]." *Fields*, 40 S.W.3d at 456 (citing *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997)); *see also Kendrick*, 454 S.W.3d at 457. The trial court's conclusions of law and application of the law to factual findings are reviewed de novo with no presumption of correctness. *Kendrick*, 454 S.W.3d at 457.

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases).

As to the first prong of the *Strickland* analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." *Henley*, 960 S.W.2d at 579 (citing *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)); *see also Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996). In order to prove that counsel was deficient, the petitioner must demonstrate "that 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); *see also Baxter*, 523 S.W.2d at 936.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. *Goad*, 938 S.W.2d at 370. Therefore, under the second prong of the *Strickland* analysis, 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*. (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

Both factors must be proven for the court to grant post-conviction relief. *Strickland*, 466 U.S. at 687; *Henley*, 960 S.W.2d at 580; *Goad*, 938 S.W.2d at 370. Accordingly, if we determine that either factor is not satisfied, there is no need to consider the other factor. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (citing *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004)). Review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Henley*, 960 S.W.2d at 579. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. "The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation." *Goad*, 938 S.W.2d at 369. We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006).

1. Failure to emphasize the theory that the victim died in Montgomery County

Petitioner first contends that he was denied the effective assistance of counsel based upon trial counsel's failure to sufficiently emphasize the theory at trial that the victim died in Montgomery County rather than in Robertson County, as testified to by the State's experts. At the post-conviction hearing, trial counsel testified that he attempted to convince the jury of the defense theory that the victim died in Defendant's Forman's apartment in Montgomery County, at the hands of Petitioner's wife or Defendant Forman, before being transported to the field in Robertson County where her body was burned. Trial counsel explained that, as part of his trial strategy, he sought to undermine the State's experts by advancing a commonsense argument that the victim must have succumbed to her wounds on Defendant Forman's kitchen floor based on the length of time that she lay on the floor and how much blood she had left in her body. Counsel asked the medical examiner, Dr. Zimmerman, hypothetical questions regarding the length of time the victim could have survived while bleeding from her neck and wrapped in plastic and got Dr. Zimmerman to concede that the victim would not have survived long. Counsel later emphasized this point in his closing by arguing to the jury that they could use their common sense and were not required to accept the expert opinions. In denying relief, the post-conviction court found that trial counsel made a tactical decision regarding how to address the medical proof "after adequate preparation," and we note that, in his brief, Petitioner has not specified what else

counsel could have done to emphasize the defense theory. Petitioner has not met his burden of showing that counsel's performance fell "below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at 369. He is not entitled to relief based upon this claim.

2. Failure to seek an independent expert "to test samples from the crime scene"

In a footnote in his brief, Petitioner also asserts that trial counsel rendered ineffective assistance based upon counsel's failure to seek an independent expert "to test samples from the crime scene." Petitioner does not specify what "samples" he means, but for the purposes of our discussion, we presume that he is referring to tissue samples taken from the victim. In denying relief on Petitioner's claim that trial counsel rendered ineffective assistance by failing to request funding for an independent expert to refute the expert testimony presented by the State regarding the time and location of the victim's death, the post-conviction court found that Petitioner failed to establish prejudice. We agree. As observed by the post-conviction court, Petitioner failed to present testimony from an expert at the hearing; he also failed to provide any tangible evidence as to what testimony this expert would have provided and failed to show how such expert testimony could have changed the outcome of his trial. This court may not speculate as to the evidence that trial counsel might have introduced at trial. *See Black v. State*, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990); *Starner v. State*, No. M2018-01015-CCA-R3-PC, 2019 WL 3856852, at *10 (Tenn. Crim. App. Aug. 16, 2019), *no perm. app. filed*. As such, Petitioner has failed to establish prejudice under *Strickland*, and he is not entitled to relief on this issue.

3. Failure to challenge venue of Petitioner's trial

Petitioner also asserts that trial counsel rendered ineffective assistance based upon counsel's failure to argue that the State did not prove venue, *i.e.*, that the offenses occurred in Montgomery County rather than Robertson County. He argues that the State's experts testified that the victim died from thermal burns, smoke inhalation, and blunt trauma, which occurred in Robertson County. In denying relief on this claim, the post-conviction court found that "such a defense would not be based on law or fact," and therefore, trial counsel's performance was not deficient.

In *State v. Young*, our supreme court explained:

> Our Constitution provides that an accused must be tried in the county in which the crime was committed. Tenn. Const. art. I, § 9; *see also* Tenn. R. Crim. P. 18(a) ("Except as otherwise provided by statute or by these rules, offenses shall be prosecuted in the county where the offense was

> committed."). "Proof of venue is necessary to establish the jurisdiction of the court, but it is not an element of any offense and need only be proved by a preponderance of the evidence." *State v. Hutcherson*, 790 S.W.2d 532, 535 (Tenn. 1990); *see also* Tenn. Code Ann. § 39-11-201(e) ("No person may be convicted of an offense unless venue is proven by a preponderance of the evidence."). Venue is a question for the jury, *State v. Hamsley*, 672 S.W.2d 437, 439 (Tenn. Crim. App. 1984), and may be proven by circumstantial evidence. *State v. Bennett*, 549 S.W.2d 949, 950 (Tenn. 1977). In determining venue, the jury is entitled to draw reasonable inferences from the evidence. *State v. Johnson*, 673 S.W.2d 877, 882 (Tenn. Crim. App. 1984). Importantly, where different elements of the same offense are committed in different counties, "the offense may be prosecuted in either county." Tenn. R. Crim. P. 18(b).

196 S.W.3d 85, 101-02 (Tenn. 2006). Additionally, Tennessee Code Annotated section 39-33-103(d) provides that "[i]f one (1) or more elements of an offense are committed in one (1) county and one (1) or more elements in another, the offense may be prosecuted in either county. Offenses committed on the boundary of two (2) or more counties may be prosecuted in either county." Tenn. Code Ann. § 39-11-103(d) (2015); *see also* Tenn. R. Crim. P. 18(b).

In *Young*, the court held that venue was proper in Shelby County, where the intent to kill the victim was formed, even though the victim died in Fayette County. *Id*. at 102; *see also Cagle v. State*, 507 S.W.2d 121, 130-31 (Tenn. Crim. App. 1973) (holding that, although the victim's body was found in Jefferson County, "the jury was fully justified in finding . . . that the malicious and deliberate design to kill the deceased . . . took form in the defendant's mind in Hamblen County" where the defendant was tried). Similarly, in this case, the testimony at Petitioner's trial established that the intent for premediated first degree murder was formed in Montgomery County, even if the victim ultimately died in Robertson County. Additionally, the proof showed that the victim's aggravated kidnapping began in Montgomery County such that venue in Montgomery County was appropriate both for aggravated kidnapping and first degree felony murder in the perpetration of kidnapping. Thus, regardless of whether the victim ultimately died in Robertson County, some elements of first degree premeditated murder, first degree felony murder, and aggravated kidnapping clearly occurred in Montgomery County. Petitioner has not shown that counsel's performance was deficient or that the alleged deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687. He is not entitled to relief.

4. Failure to question witnesses more extensively on Petitioner's role in the offenses

Petitioner contends that trial counsel rendered ineffective assistance based upon counsel's failure to question witnesses more extensively on Petitioner's role in the offenses. In denying relief on this claim, the post-conviction court found that Petitioner, "the party with the burden of proof, made vague, non-specific complaints about trial counsel's cross-examination of witnesses" and that Petitioner failed to present "any specific proof that different cross[-]examination of any witnesses would have changed the outcome of his case." The evidence does not preponderate against the post-conviction court's findings. *Kendrick*, 454 S.W.3d at 457.

At the post-conviction hearing, Petitioner testified that, in cross-examining witnesses, counsel "should have elaborated a little bit more about particular moments and specifics about what was said and why it was said. Not just, you know, randomly asking questions[.]" Petitioner averred that, if trial counsel had asked more questions of witnesses, he "would have gotten more or better answers that . . . would have helped clarify some particulars that would have set [Petitioner] apart from the individual who actually committed the crime." When asked what additional questions trial counsel should have asked particular witnesses, Petitioner responded, "All of them. All the questions." Petitioner never identified which witnesses trial counsel should have questioned more extensively. Moreover, he did not specify what additional questions counsel should have asked or what the witnesses would have said in response to counsel's additional questions.

Petitioner has failed to establish that counsel's performance in cross-examining witnesses was deficient or that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Goad*, 938 S.W.2d at 370. Petitioner is not entitled to relief on this claim.

5. Cumulative error

Finally, Petitioner argues that cumulative error warrants reversal in this case. The cumulative error doctrine recognizes that there may be many errors committed in trial proceedings, each of which constitutes mere harmless error in isolation, but "have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant's right to a fair trial." *State v. Hester*, 324 S.W.3d 1, 76 (Tenn. 2010). To warrant review under the cumulative error doctrine, there must have been more than one actual error during the trial proceedings. *Id.* at 77. In other words, only where there are multiple deficiencies does this court determine whether they were cumulatively prejudicial. In this case, because we have not found any errors, cumulative error review is unwarranted. Petitioner is not entitled to relief.

Conclusion

Based on the foregoing, we affirm the post-conviction court's denial of relief.

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ROBERT L. HOLLOWAY, JR., JUDGE