

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE  
Assigned on Briefs May 23, 2023

FILED

06/14/2023

Clerk of the  
Appellate Courts

**JESSICA R. ADKINS v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Washington County  
No. 40416 Lisa Rice, Judge**

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**No. E2020-01213-CCA-R3-PC**

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The petitioner, Jessica R. Adkins, appeals the denial of her post-conviction petition, arguing the post-conviction court erred in finding she received the effective assistance of counsel. After our review of the record, briefs, and applicable law, we affirm the denial of the petition.

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

J. ROSS DYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

Cameron L. Hyder, Elizabethton, Tennessee, for the appellant, Jessica R. Adkins.

Jonathan Skrmetti, Attorney General and Reporter; Katherine C. Redding, Assistant Attorney General; Steven R. Finney, District Attorney General; and Erin McArdle and Tessa N. Lunceford, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

***Facts and Procedural History***

The petitioner's conviction for first-degree felony murder committed during the perpetration of aggravated child neglect arises from the death of her two-month-old daughter. The victim's father, who was tried jointly with the petitioner, was convicted of first-degree felony murder committed during the perpetration of aggravated child abuse and first-degree felony murder committed during the perpetration of aggravated child neglect, and each received a sentence of life imprisonment. *State v. Russell Dean Long*

*and Jessica Renee Adkins*, No. E2012-01166-CCA-R3-CD, 2013 WL 5436529, at \*1 (Tenn. Crim. App. Sept. 27, 2013), *perm. app. denied* (Tenn. Mar. 5, 2014).

This Court previously summarized the proof presented by the State at trial, as follows:

that the victim sustained rib and skull fractures of varying ages, inconsistent with accidental trauma, in the days and weeks before her death; that the injuries were inflicted during times that the [p]etitioner was at work and her co-defendant was caring for the victim and the victim's two-year-old sister at home; that the victim began persistent vomiting, with an inability to keep formula down, approximately one week before the [p]etitioner's discovery of her dead body early on the morning of March 6, 2009; that the [p]etitioner and her co-defendant observed the victim experiencing a seizure in the days before her death; that neighbors repeatedly urged the [p]etitioner and her co-defendant to take the victim for immediate medical care; that the [p]etitioner and her co-defendant had the opportunity to seek medical care for the victim; and that the [p]etitioner repeatedly lied that a pediatrician had examined the victim and diagnosed her with a stomach virus during a March 2, 2009, routine medical visit for the victim's older sister.

*Jessica R. Adkins v. State*, No. E2020-01213-CCA-R3-PC, 2022 WL 122673, at \*1 (Tenn. Crim. App. Jan. 13, 2022), *no perm. app. filed*.

Following the denial of her direct appeal, the petitioner filed a pro se petition for post-conviction relief on March 11, 2015, arguing, in part, that trial counsel was ineffective for failing to sever her case from her co-defendant's, failing to prepare her for trial or explain the ramifications of a guilty verdict, and failing to adequately advise her regarding her right to testify. Counsel was appointed, and the petitioner filed an amended petition in which she argued, in part, trial counsel was ineffective for failing to properly investigate her case. The State filed a response, arguing the petition, though signed and notarized on March 3, 2015, was filed outside of the one-year statute of limitations. An evidentiary hearing was held on October 16, 2019, during which the petitioner, lead counsel, and co-counsel testified.<sup>1</sup> At the beginning of the hearing, the post-conviction court noted

[t]he post-conviction petition was originally filed and received by the clerk March 11, 2015, and the State in its answer indicate[d] that the petition was not timely filed. It's my reading of the appellate opinions dealing with post-

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<sup>1</sup> We limit our recitation of the testimony at the evidentiary hearing to that relevant to the petitioner's issues on appeal.

conviction matters that if it is that close in time they will assume it was attempted to be mailed and they consider the mailing consistent with filing. So, we will proceed with the petition as though it had been timely filed.

The petitioner testified that she did not speak with trial counsel about trial preparation until the day before trial.<sup>2</sup> Although she acknowledged meeting with trial counsel prior to that day, she stated that they did not “discuss anything about the trial” during their initial meetings. The petitioner asked trial counsel to hire a private investigator to assist on her case, but they refused to do so. She testified that a private investigator could have helped her “understand the severity of [the victim’s] injuries” because the petitioner “was not aware that [the victim had] been dropped.”

Regarding severance, the petitioner asked trial counsel to file a motion to sever her case from her co-defendant’s. However, trial counsel told the petitioner that she did not have grounds to file a motion to sever because her co-defendant did not say anything incriminating against her. Although the petitioner agreed that her co-defendant did not make any incriminating statements against her, she believed her case should have been severed because her co-defendant “was the [victim’s] primary caregiver.” On cross-examination, the petitioner agreed that the trial court required the State to redact portions of her co-defendant’s video testimony because it was prejudicial toward the petitioner.

According to the petitioner, trial counsel failed to explain that she could be convicted of felony murder or sentenced to life imprisonment. Instead, trial counsel assured the petitioner that “the worst [she] was going to get was negligent criminal homicide.” Prior to trial, lead counsel told the petitioner that the State was willing to offer her a plea deal of three years for involuntary manslaughter if she would testify that her co-defendant was abusive toward her. The petitioner asked lead counsel what her chances were at trial, and lead counsel stated, “They don’t have a case against you. We can win.” The petitioner relied on lead counsel’s statements and did not discuss the plea further. According to the petitioner, if trial counsel had sufficiently explained the severity of the charges, she would have “absolutely” taken a plea deal.

On the day before trial, lead counsel advised the petitioner of her right to testify, explaining, “What it comes down to, is can you get up there and tell the jury anything different than what they’re going to see in the interview videos?” The petitioner ultimately agreed not to testify. While the petitioner stated neither lead counsel nor co-counsel explicitly told her not to testify, she inferred that it was important that she not testify at trial.

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<sup>2</sup> The petitioner was represented at trial by two attorneys. For clarity, we will refer to them individually as “lead counsel” or “co-counsel” and collectively as “trial counsel.”

Lead counsel testified that he was appointed to the petitioner's case following her indictment. He interviewed the petitioner and obtained discovery, which they reviewed together. Lead counsel did not recall the petitioner's requesting he hire a private investigator, and he did not "expect that an investigator would've uncovered anything in this case that we as the attorneys didn't know." On cross-examination, lead counsel agreed that a private investigator might have assisted in being a conduit with the petitioner to discuss witnesses and strategy; however, lead counsel later clarified that he did not "know of anything that an investigator would've added to the case."

Lead counsel did not recall the petitioner's having a legal basis to file a motion to sever and could not speculate whether it would have benefitted the petitioner to try her case separately from her co-defendant. Lead counsel stated that one benefit to trying the cases together was that the jury had the person who inflicted the injuries on the victim in front of them and might "view [the co-defendant] as being the responsible person and hold [the petitioner] less accountable." Although lead counsel usually preferred to try his clients alone, "that's not always so." On cross-examination, lead counsel testified that he "urged the counsel for the co-defendant to get a severance for us because he had grounds to do so." However, lead counsel could not recall whether the trial court ever ruled on a motion to sever.

According to lead counsel, he clearly explained to the petitioner what she was charged with and what her potential sentence could be. However, lead counsel described the petitioner as "not the most perceptive individual that [he had] ever represented." Lead counsel denied telling the petitioner not to take a plea offer, that the State did not have a case, or that the petitioner would only be convicted of criminally negligent homicide. On cross-examination, lead counsel agreed there were discussions regarding the petitioner's testifying against her co-defendant in exchange for a plea offer, but he could not recall the State making a specific offer.

Regarding the petitioner's right to testify, lead counsel testified that he discussed the pros and cons with the petitioner. On cross-examination, lead counsel stated that if the petitioner wanted to testify, she would have testified. Although he did not recall their exact conversation, lead counsel "came to the conclusion that [the petitioner] would not handle herself well on the witness stand." Specifically, lead counsel was concerned about how the petitioner would respond during cross-examination, especially regarding inconsistencies in her police statement.

Co-counsel testified that she met with the petitioner on numerous occasions and was present during each of the petitioner's hearings between 2009 and 2011. Additionally, co-counsel gave the petitioner her cell phone number so the petitioner could get in touch with

her at all times. Co-counsel did not believe it was necessary to hire a private investigator for the petitioner's case based on the facts, but would have done so if she thought it would be beneficial. Although co-counsel was sure she discussed the issue of severance with the petitioner, she could not recall those discussions.

Co-counsel testified that she and the petitioner had several discussions about the possibility of the petitioner's being convicted of first-degree murder, and co-counsel believed the petitioner understood she faced life in prison if convicted. Although "no one thought [the petitioner] would be convicted of [anything]," co-counsel did not tell the petitioner that the State did not have a case. Co-counsel could not recall the State's extending any specific plea offers.

On cross-examination, co-counsel testified that she and lead counsel met with the petitioner extensively regarding the petitioner's right to testify. They explained what "doors" the petitioner would open if she decided to testify and what could happen if she decided not to testify. According to co-counsel, the petitioner understood it was ultimately her decision to make.

After its review of the evidence presented, the post-conviction court denied relief. On appeal, this Court determined the post-conviction court erred in treating the petition as timely without adequate proof that the petitioner complied with the requirements of Tenn. R. Sup. Ct. 28 § 2(G) and, therefore, vacated the denial of post-conviction relief and remanded the case to the post-conviction court for the purpose of determining whether the petitioner delivered her petition to the appropriate prison officials for mailing within the filing deadline. *See Adkins*, 2022 WL 122673, at \*3.

Upon remand, the post-conviction court conducted an evidentiary hearing to determine the timeliness of the petition for post-conviction relief. In a written order filed on June 10, 2022, the post-conviction court found the petitioner delivered her petition to the appropriate prison officials for mailing within the filing deadline. On October 14, 2022, the petitioner filed a motion to waive the thirty-day timeline for filing of the notice of appeal. By order issued on October 18, 2022, this Court set out the unusual posture of this case and recalled the mandate from the petitioner's original post-conviction to permit a full review of her post-conviction claims.

### *Analysis*

On appeal, the petitioner argues trial counsel was ineffective for failing to hire an investigator, failing to file a motion to sever, failing to explain the severity of her charges, and failing to advise her regarding her right to testify. She also argues her due process rights were violated based on the totality of the errors in the case. The State contends that the post-conviction court properly denied the petition and that the petitioner's due process claim is waived.

The petitioner bears the burden of proving his post-conviction factual allegations by clear and convincing evidence. Tenn. Code Ann. § 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 that 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)).

## **I. Private Investigator**

The petitioner argues trial counsel was ineffective for failing to hire a private investigator. Specifically, the petitioner asserts a private investigator could have corroborated her story that she was unaware of the victim’s injuries and could have acted as a conduit between trial counsel and the petitioner. The State contends the post-conviction court properly found that trial counsel was not ineffective for failing to hire a private investigator.

At the evidentiary hearing, the petitioner testified that she asked trial counsel to hire a private investigator to help her “understand the severity of [the victim’s injuries].” However, trial counsel refused to do so. Lead counsel could not recall the petitioner’s requesting that he hire a private investigator and did not believe that an investigator would have uncovered anything that trial counsel did not already know. Co-counsel testified that it was not necessary to hire a private investigator based on the facts of the petitioner’s case.

Although the petitioner argues that a private investigator was necessary to corroborate her story and facilitate communication with trial counsel, she failed to present any witnesses at the evidentiary hearing or state what information further investigation would have revealed or how it would have altered the outcome of the trial and, therefore, cannot establish prejudice. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Furthermore, the post-conviction court accredited the testimony of trial counsel, and nothing in the record preponderates against its findings. *See Tidwell*, 922 S.W.2d at 500. The petitioner is not entitled to relief on this issue.

## **II. Severance**

The petitioner argues trial counsel was ineffective for failing to file a motion to sever. The petitioner asserts that, because she was tried jointly with her co-defendant, she was viewed in the same light as the actual perpetrator of the victim's death and "denied the strong possibility of acquittal." The State contends the post-conviction court properly found that trial counsel was not ineffective for failing to file a motion to sever.

At the evidentiary hearing, the petitioner stated that she asked trial counsel to move for severance but was told that because her co-defendant did not say anything incriminating against her that she did not have grounds to file. Although she agreed her co-defendant did not incriminate her, the petitioner wanted her case to be severed because her co-defendant was "the [victim's] primary caregiver." Lead counsel testified that he did not think the petitioner had a legal basis for filing a motion to sever. Additionally, lead counsel noted that one benefit of trying the cases together was that the jury might view the co-defendant as "the responsible person." On cross-examination, lead counsel agreed that he urged counsel for the co-defendant to file a motion to sever; however, he could not recall whether such a motion was ever heard by the trial court. Co-counsel could not recall any specific discussions regarding the issue of severance.

As noted above, lead counsel's testimony indicated that he did not file a motion to sever because the petitioner did not have a legal basis to do so. However, he asked the co-defendant's counsel to file a motion to sever because the co-defendant had sufficient grounds. Lead counsel also believed that trying the cases together could benefit the petitioner if the jury saw the petitioner as less accountable than the co-defendant. The post-conviction court accredited the testimony of trial counsel, and nothing in the record preponderates against its findings. *See Tidwell*, 922 S.W.2d at 500. The fact that a trial strategy or tactic failed or was detrimental to the defense does not, alone, support a claim for ineffective assistance of counsel. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). Deference is given to sound tactical decisions made after adequate preparation for the case. *Id.* Furthermore, the petitioner failed to present any proof that she had a legal basis for a motion to sever or that the motion would have been granted. *See Tina Nelson*, No. W2017-00343-CCA-R3-PC, 2018 WL 2261274, at \*3-4 (Tenn. Crim. App. May 17, 2018) (denying relief when petitioner failed to "present any argument that a motion to sever would have been granted"), *perm. app. denied* (Tenn. Sept. 17, 2018); *Black*, 794 S.W.2d at 758 (denying relief for post-conviction relief when there existed "neither factual nor legal basis for the granting of a severance"). The petitioner is not entitled to relief on this issue.

### **III. Severity of Charges**

The petitioner argues trial counsel was ineffective for failing to "explicitly and clearly describe the severity and weight of the charges" against her. The petitioner asserts



that, had she known the severity of the charges and potential outcomes she faced, she would have accepted a plea offer from the State. The State contends the petitioner has failed to meet her burden.

When a petitioner alleges she rejected a plea offer due to the ineffective assistance of counsel, she:

has the burden to show by a reasonable probability that, but for counsel's deficient representation, (1) [s]he . . . would have accepted the plea, (2) the prosecution would not have withdrawn the offer, and (3) the trial court would have accepted the terms of the offer, such that the penalty under its terms would have been less severe than the penalty actually imposed.

*Nesbit v. State*, 452 S.W. 3d 779, 800-01 (citing *Lafler v. Cooper*, 132 S.Ct. 1376, 1385 (2012)).

At the evidentiary hearing, the petitioner testified that trial counsel never explained that she could be convicted of felony murder or sentenced to life in prison. Instead, they assured her that "the worst [she] was going to get was negligent criminal homicide." According to the petitioner, lead counsel told her that the State was willing to offer her three years for involuntary manslaughter if she agreed to testify that her co-defendant was abusive. The petitioner chose not to take the plea offer because lead counsel told her the State did not "have a case" against her. However, if trial counsel had sufficiently explained the severity of the petitioner's charges, she "absolutely" would have accepted the State's offer. To the contrary, lead counsel testified that he explained to the petitioner the charge and potential punishment she was facing. While he recalled discussions with the State regarding a possible plea offer, lead counsel could not recall the State's making a specific offer, and he denied telling the petitioner not to take a plea because the State did not have a case. Co-counsel testified that she and the petitioner had many discussions about the consequences of her felony murder charge and that the petitioner understood she faced life in prison if convicted. While trial counsel did not believe the petitioner would be convicted, co-counsel did not tell the petitioner that the State did not have a case. Co-counsel could not recall the State's extending any specific plea offers to the petitioner. Additionally, other than her own self-serving testimony, the petitioner offered no proof that the State made an actual offer.

The post-conviction court accredited the testimony of trial counsel, stating, "The [c]ourt credits the testimony of trial counsel regarding the issue of the plea offer and [the petitioner's] lack of interest in entering a plea. The [c]ourt also finds that the charges and the potential punishment were explained to [the petitioner]." The record supports the post-conviction court's determinations. We conclude the petitioner has failed to prove any

deficiency in trial counsel's performance and, therefore, is not entitled to relief on this issue.

#### **IV. Right to Testify**

The petitioner argues trial counsel was ineffective for failing to ensure the petitioner comprehended the waiver of her right to testify. Specifically, the petitioner asserts that trial counsel's failure to adequately advise her of her right to testify "resulted in a missed opportunity for the jury to hear the inconsistencies in the State's case." The State contends the post-conviction court properly found that trial counsel was not ineffective for failing to advise the petitioner of her right to testify.

According to the petitioner, lead counsel did not discuss her right to testify until the day before trial, stating, "What it comes down to, is can you get up there and tell the jury anything different than what they're going to see in the interview videos?" She subsequently agreed not to testify, and while neither lead counsel nor co-counsel explicitly told her not to testify, the petitioner inferred from their discussions that it was important to her case that she not testify. Although lead counsel could not recall their exact conversation, he did recall discussing the pros and cons of testifying with the petitioner and coming "to the conclusion that [the petitioner] would not handle herself well on the witness stand." He was especially worried about how the petitioner would respond to questions regarding the inconsistencies in her police statement. Co-counsel testified that she and the petitioner met extensively regarding the petitioner's right to testify and discussed the petitioner's options. According to co-counsel, the petitioner was aware that the decision to testify was ultimately the petitioner's to make.

As noted above, the post-conviction court accredited the testimony of trial counsel, and nothing in the record preponderates against its findings. *See Tidwell*, 922 S.W.2d at 500. Trial counsel and the petitioner discussed the petitioner's right to testify, and lead counsel advised the petitioner that, because of inconsistencies in the petitioner's statement to police, lead counsel was worried about how the petitioner would perform under cross-examination. We conclude lead counsel used proper discretion in advising the petitioner not to testify when he was concerned with the petitioner's inconsistent statements and the likely stringent cross-examination of the petitioner. Also, per the accredited testimony of co-counsel, the petitioner was aware that the ultimate decision of whether or not to testify was the petitioner's alone. The petitioner is not entitled to relief on this issue.

#### **V. Due Process**

Finally, the petitioner argues her due process rights were violated based on the totality of errors in this case. The petitioner asserts that she "continually requested for a

private investigator and for further scrutiny in the courtroom when it came to discrepancies within witness testimony,” and was, therefore, denied a full evaluation of her claims and defense. The State contends the petitioner has waived this claim for failing to raise it on direct appeal. We agree with the State.

Our post-conviction procedure statutes dictate that “[a] ground for relief is waived if a petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented,” except in two circumstances not relevant to this case. Tenn. Code Ann. § 40-30-106(g). Additionally, our supreme court has specifically held that a due process claim raised for the first time in a post-conviction petition is waived for failure to raise it in the trial court or on direct appeal. *Mobley v. State*, 397 S.W.3d 70, 104 (Tenn. 2013). Because the petitioner raised her due process claim for the first time in her post-conviction, the issue is waived.

Additionally, the petitioner appears to claim that she was denied due process based on the cumulative effect of trial counsel’s deficiencies of performance. However, in the post-conviction context, “a petitioner cannot successfully claim [s]he was prejudiced by counsel’s cumulative error when the petitioner failed to show counsel’s performance was deficient.” *James Allen Gooch v. State*, No. M2014-00454-CCA-R3-PC, 2015 WL 498724, at \*10 (Tenn. Crim. App. Feb. 4, 2015) (citations omitted). The record supports the post-conviction court’s determination that there were no errors in trial counsel’s representation of the petitioner. Accordingly, the petitioner is not entitled to relief.

### ***Conclusion***

Based upon the foregoing authorities and reasoning, we affirm the post-conviction court’s judgment denying the petitioner post-conviction relief.

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J. ROSS DYER, JUDGE