

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 10, 2023

FILED

10/19/2023

Clerk of the
Appellate Courts

QUINTAVIOUS MONTEZ PATTON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2015-B-865 Steve R. Dozier, Judge

No. M2023-00207-CCA-R3-PC

The Petitioner, Quintavious Montez Patton, appeals the denial of his petition for post-conviction relief, arguing that the post-conviction court erred in finding that he received effective assistance of trial counsel. Based on our review, we affirm the judgment of the post-conviction court denying the petition.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and KYLE A. HIXSON, JJ., joined.

Dustin Faeder, Nashville, Tennessee (at hearing and on appeal), for the appellant, Quintavious Montez Patton.

Jonathan Skrmetti, Attorney General and Reporter; Caroline Weldon, Assistant Attorney General; Glenn R. Funk, District Attorney General; and Jenny Charles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

In 2017, the Petitioner was convicted by a Davidson County Criminal Court jury of first degree felony murder, voluntary manslaughter, attempted especially aggravated robbery, and attempted aggravated robbery. His convictions were affirmed by this court on direct appeal, and no Rule 11 application was filed. *State v. Patton and Swanier*, No. M2018-01462-CCA-R3-CD, 2020 WL 1320718, at *1 (Tenn. Crim. App. Mar. 19, 2020).

The Petitioner's convictions arose out of his participation with his cousin, Rayvon Walker, and a codefendant, Donte Swanier, in a March 14, 2014 attempted robbery that resulted in the shooting death of Moises Zarate. *Id.* Mr. Walker pled guilty to facilitation of felony murder for his role in the crimes and testified against the Petitioner at trial, identifying the Petitioner as the gunman. *Id.* at *2-4. Co-Defendant Swanier also identified the Petitioner as the gunman in a pretrial statement to the police, and the State successfully moved to sever his case from the Petitioner's in anticipation of his testimony against the Petitioner. *Id.* at *1. However, a few days prior to the scheduled June 2017 trial date, Co-Defendant Swanier recanted his statement. *Id.* The State then moved to consolidate the cases, and the two men were ultimately tried together in October 2017. *Id.*

At trial, Mr. Walker testified that on the day of the shooting, he, the Petitioner, Co-Defendant Swanier, and the Petitioner's girlfriend, Diana Reyes, rode around together in Co-Defendant Swanier's vehicle to several locations, including a car wash, a Shell gas station, a K-Mart, and a Knights Inn motel. *Id.* at *2-3. At some point, one member of the group came up with the plan that Mr. Walker and the Petitioner would use Co-Defendant Swanier's gun to commit a robbery. *Id.* at *3. The group then drove to a neighborhood, where they saw two Hispanic men standing beside a vehicle. *Id.* The Petitioner "quickly came up with a plan to use the gun to get the two men on the ground[,] and Mr. Walker exited the vehicle and grabbed one of the men while the Petitioner ran up to the other man. *Id.* The man that Mr. Walker grabbed began "tussling" with Mr. Walker. *Id.* The Petitioner "ordered the victim to let Mr. Walker go, but the victim did not comply, so [the Petitioner] shot the victim." *Id.* Afterward, the Petitioner and Mr. Walker got back into Co-Defendant Swanier's vehicle, and the group returned to the Knights Inn. *Id.*

Mr. Walker identified a photograph of himself, the Petitioner, Co-Defendant Swanier, and Ms. Reyes at the car wash. *Id.* at *2. He confirmed that he wore his hair in dreadlocks at the time and said that the Petitioner also wore his hair in dreadlocks, but that the Petitioner's dreadlocks were shorter and a portion of his hair was dyed blond. *Id.* Mr. Walker also identified the Petitioner from surveillance videos obtained by the police of the Shell gas station, the Knights Inn, and the K-Mart. *Id.* at *2-3.

Adran Zanarripa, the shooting victim's cousin, testified at trial that he and the victim were moving items from the victim's truck to Mr. Zanarripa's truck when one man grabbed the victim around the neck and a second man pointed a gun at Mr. Zanarripa and ordered him not to move. *Id.* at *1. As he fled into the house, Mr. Zanarripa heard gunfire. *Id.* He described the first man as a young black male approximately 5'11" with a thin build and with his hair in long dreadlocks. *Id.* He described the gunman as a young, thin, black male who was lighter-skinned than the first man. *Id.*

Among other evidence introduced by the State at trial was an agreed stipulation that the Metropolitan Nashville Police Department (“MNPDP”) had obtained a warrant on March 7, 2014, to place a GPS tracking device on Co-Defendant Swanier’s silver Hyundai Elantra. *Id.* at *4. MNPDP Detective Joseph High, an expert in the field of “mobile device call record analysis and analysis of GPS devices” identified records containing data retrieved from the GPS tracking device, which showed that Co-Defendant Swanier’s vehicle was within eighty yards of the victim’s location at the time the victim was shot. *Id.* at *5. Detective High explained that officers used the information from the GPS tracking device to follow the movements of Co-Defendant Swanier’s vehicle on the day of the shooting. *Id.* Based on that information, they were able to obtain surveillance videos from businesses and confirm the defendants’ presence at those locations. *Id.*

On May 25, 2021, the Petitioner filed a timely pro se petition for post-conviction relief in which he raised a number of claims, including ineffective assistance of counsel. Following the appointment of post-conviction counsel, he filed an amended petition in which he alleged that trial counsel was deficient for, among other things, failing to file a motion in limine to exclude store surveillance video that showed the Petitioner stealing a bottle of water; failing to subpoena the Petitioner’s girlfriend, Diana Reyes, as a witness for trial; failing to secure funding for expert witnesses; and failing to call the Petitioner as a witness in his own defense. The Petitioner further alleged that the trial counsel’s deficiencies in representation “individually and cumulatively, resulted in his conviction.”

At the December 13, 2022 evidentiary hearing, the Petitioner testified that he was “clueless” and did not “really understand” what was being said during his *Momon*¹ hearing. He stated that he responded “Huh?” when initially asked if he voluntarily and personally waived his right to testify because he wanted to testify. He said he answered “Yeah” when asked a second time because he thought that waiving his right to testify was similar to raising his hand to assert that he wished to testify. He acknowledged that he signed “some sort of paperwork” but said that he did not know what he was signing. He testified that he expected to be able to testify to tell the jury his side of the story.

The Petitioner testified that on the day of the shooting, he, Mr. Walker, Ms. Reyes, and Co-Defendant Swanier stopped at a Shoney’s restaurant, where Mr. Walker got out of the vehicle and returned with a white man who joined the group in Co-Defendant Swanier’s vehicle. The Petitioner stated that when they arrived at the location of the shooting, Mr. Walker and the white man exited the vehicle while the Petitioner remained in the back seat with Ms. Reyes. The Petitioner said that he and Ms. Reyes were “chilling” together and possibly having sexual intercourse at the time. He stated that he did not hear anything and was unaware of anything that happened outside the vehicle. When Mr. Walker and the

¹ See *Momon v. State*, 18 S.W.3d 152 (Tenn. 1999).

white man returned, they said nothing about a shooting and did not appear upset. The group next went to a liquor store and then to a McDonald's restaurant, where they dropped off the white man. The Petitioner testified that surveillance videos from the Shoney's and the McDonald's restaurants would have proved the existence of the white man. He stated that the police detective obtained surveillance video from "all of the other places but those two[,]" and that he wanted to know why the police detective failed to obtain the Shoney's and McDonald's surveillance videos.

The Petitioner testified that the prosecutor based the Petitioner's identity as the gunman on "the victim [Mr. Zanarripa] saying blond hair." The Petitioner stated that the Spanish language interpreter erroneously translated Mr. Zanarripa's use of the word "guero" as "blond" instead of "white boy." The Petitioner complained that his trial counsel "presented zero proof" in his defense. When post-conviction counsel pointed out that there was "quite a bit of testimony" at trial that the word "guero" can mean either skin or hair color and asked if the Petitioner was asserting that the word "was somehow misinterpreted and not properly flushed out" by trial counsel, the Petitioner responded, "Yes, sir. I mean, [trial counsel] did interrogate the witness. And he clarified himself that he never said the word blond and that it was misinterpreted and misstated."

The Petitioner testified that if trial counsel had examined the GPS evidence, he could have shown the jury that Co-Defendant Swanier's vehicle never sped from the shooting scene, contradicting the testimony of a witness who reported seeing a car flee at a high rate of speed. The Petitioner also believed that trial counsel should have sought funding for a gunshot residue expert to show that there was no gunshot residue on the Petitioner's clothes; should have subpoenaed Ms. Reyes, who would have testified that the Petitioner was not involved in the shooting; should have tried harder to avoid consolidation of the Petitioner's case with Co-Defendant Swanier's to avoid the Petitioner's being prejudiced by the evidence against his co-defendant, which included an incriminating rap video made by Co-Defendant Swanier; and should have done a better job of impeaching Mr. Walker's testimony with his prior inconsistent statements.

On cross-examination, the Petitioner acknowledged that he testified at his transfer hearing in juvenile court and never mentioned anything about a white man. He also conceded that Ms. Reyes told the police that he got out of the vehicle at the shooting scene. He insisted, however, that Ms. Reyes also provided a different statement in which she said that he did not get out of the vehicle and indicated his belief that she would have provided that later version at trial. Finally, he acknowledged that his trial counsel cross-examined Mr. Zanarripa, including on the meaning of the Spanish word "guero." On redirect examination, the Petitioner agreed that his major complaint was that he wanted to testify to tell the jury his side of the story but did not get the chance to do so.

Trial counsel testified that in one of the numerous videos played at trial, the Petitioner could be seen bypassing the counter after taking a bottle of what appeared to be Sprite from a store. He explained that “[I]t was something that . . . happened fast and [his] impression of it was the jury kind of knew . . . who these kids were and it wasn’t as meaningful[.]” After the video was played, he requested that it be redacted prior to being admitted as an exhibit, and his request was granted. When asked if he believed the jury should not have seen the video, he responded that he had filed a motion in June of 2018 “regarding prior bad acts[.]” which answered that question. He did, however, get the remedy at trial that he requested, and he later raised the matter as an issue on direct appeal. In hindsight, he thought he perhaps should have requested a “more impactful remedy[.]” but he did not know if one would have been granted.

Trial counsel testified that he filed a motion to exclude the GPS data, but it was denied. He said that he did not believe that a defense GPS expert would have helped the Petitioner’s case. The fact that the victim was shot and that the perpetrators were escaping the area was not a contested issue at trial, and he did not think that the speed at which the suspect vehicle was traveling was an issue on which the jury was focused. Trial counsel stated that his defense consisted of attempting to show that the Petitioner was not the individual with Mr. Walker when the victim was shot. “So a car leaving at any rate of speed was kind of a hill we didn’t want to die on.” Moreover, he did not want to focus attention on the GPS data because he did not want the jury to start wondering why the police were tracking the defendants.

Trial counsel testified that it was his habit to have a client wait to sign the waiver of the right to testify until the close of the State’s proof when it was time for the client to make his decision at the *Momon* hearing: “And so that would have been something that we would have taken a second to talk about.” In addition, he and the Petitioner talked “pretrial a number of times” about whether the Petitioner would testify, and testifying was “not something that [the Petitioner] indicated he wanted to do.” Trial counsel conceded that the waiver language could be confusing to someone unused to the term, but said that he would have asked the Petitioner directly whether or not he wanted to testify during their private conversations on the topic.

On cross-examination, trial counsel testified that he began practicing law in April 2012 and that his practice was almost exclusively criminal. At the time he was appointed to represent the Petitioner, he had tried two first degree murder cases. He met with the Petitioner and the Petitioner’s parents on the day that he was appointed and also visited the Petitioner several times in the jail. Trial counsel identified the jail log reflecting his visits, which was admitted as an exhibit to the hearing. He said that it appeared accurate as far as

the dates of his visits, but that the jail did not accurately record time in and out, typically listing every visit as forty minutes in length when some were longer and others shorter.

After listening to the audio of the *Momon* hearing several times, trial counsel agreed that the transcript was inaccurate, as the audio reflected that the Petitioner responded “yes” when he asked if he understood and “no” when he asked if the Petitioner had any questions about his decision on testifying. Trial counsel repeated that he and the Petitioner would have talked about the Petitioner’s decision on testifying not only in the courtroom prior to the hearing, but also on multiple occasions prior to trial. He said he and the Petitioner enjoyed a good relationship, and he had no memory of the Petitioner’s having waffled over his decision not to testify:

And so yeah, no, I didn’t - - hearing it today that he wishes that he had testified is - - and I say this, occasionally I have people who want more of a discussion as to if they should or should not and defendants who just say they don’t want to. And this is not one where we had much of a back and forth and he didn’t want to.

Trial counsel testified that the Petitioner was very forthcoming about what had happened, which helped in his formulation of a defense strategy. Based on information supplied by the Petitioner and gleaned from Co-Defendant Swanier’s behavior, he determined that Co-Defendant Swanier had manipulated the younger Petitioner and Mr. Walker into “doing his dirty work” for him while Co-Defendant Swanier kept himself removed from the action and out of harm’s way. Trial counsel stated that Ms. Reyes was the one who suggested that they target Hispanic victims because Hispanics usually have a lot of cash on them. According to the Petitioner’s account to trial counsel, it was the Petitioner who was grabbed by one of the Hispanic victims and Mr. Walker who shot the victim. Trial counsel testified that the Petitioner never told him that there was a white man involved in the crime. Instead, he and the Petitioner discussed the strategy of creating doubt as to the identity of the Petitioner as one of the two men who exited the vehicle by “draw[ing] out that Mr. Zanarripa had said . . . something with where it sounded like he was talking about a white person on the 911 call[.]”

Trial counsel testified that he wished that the State had called Ms. Reyes as a witness, explaining that if the State had called her, he thought they could “really make a mess out of the State’s case” due to her inconsistent statements. He said that he asked his investigators to search for Ms. Reyes, but they never located her. However, given her inconsistent statements and the fact that one of her statements implicated the Petitioner, he would not have risked calling her as witness for the defense.

Trial counsel agreed that he failed to notice the Petitioner's theft of the bottle when he watched the surveillance video pretrial because the episode was so "fleeting." He acknowledged that the issue was cured by a redacted version of the video being admitted as an exhibit. He testified that he saw no reason to hire a GPS expert or an expert to counter Detective High's call detail records. There was nothing to indicate that the data was inaccurate, and he did not know what benefit would have been gained by calling his own experts. He believed, however, that he was successful in cross-examining Detective High about discrepancies between his time-line testimony and the time reflected on the data, which he thought helped to suggest to the jury that Detective High was not being truthful in his testimony.

Upon redirect examination by post-conviction counsel, trial counsel testified that he was satisfied with his decision not to present any evidence on behalf of the Petitioner. He said he believed that the jury came "really close to acquitting [the Petitioner] on these charges" pointing out that the jury convicted the Petitioner of voluntary manslaughter as opposed to first degree premeditated murder. In trial counsel's opinion, had the jury known that felony murder carried a life sentence, it would not have convicted the Petitioner of the felony murder charge. Trial counsel testified that Mr. Zanarripa at one point appeared to say "white boy but then came back and wanted it to be blond because that's the photo that he had seen." He said he "made a very, very big point on that" in closing argument and on cross-examination, "hammer[ing]" the witness on his use of the word *guero*, which, according to trial counsel, "is Mexican slang for white boy."

The Petitioner, recalled as a witness by post-conviction counsel, testified that he told trial counsel that there was a white man with them that day, and that it was not just a strategy they discussed of attempting to suggest that a white man was present. The Petitioner also disputed trial counsel's characterization of his relationship with trial counsel as good, testifying that he tried to have trial counsel removed from his case and that he filed a complaint against trial counsel with the Board of Professional Responsibility. He stated that he told trial counsel that he wanted to testify at trial, but trial counsel said, "nah, nah, that ain't a good idea, like it wasn't even an option." He said that was the reason he did not testify.

On February 26, 2023, the post-conviction court entered an order denying the petition. Among other things, the post-conviction court accredited the testimony of trial counsel about his multiple conversations with the Petitioner about whether the Petitioner wanted to testify, as well as trial counsel's acknowledgment that the audio of the *Momon* hearing showed that the Petitioner's responses during the hearing were different from the responses reflected in the transcript. The post-conviction court, therefore, rejected the Petitioner's assertion that he "was unilaterally prevented from testifying at trial." With

respect to trial counsel's failure to file a 404(b) motion in limine to exclude the "bad act" evidence of the Petitioner's theft of a bottle, the post-conviction court first implicitly found that trial counsel was not deficient in his performance, noting that the image was "fleeting" and that trial counsel appropriately addressed the issue at trial by successfully requesting that the video be redacted prior to being admitted into evidence. The post-conviction court further found that even if trial counsel was deficient in his representation for failing to recognize the "fleeting" image where the Petitioner appeared to steal the bottle, the Petitioner failed to show that he suffered prejudice given the "scant seconds" the episode lasted and the substantial evidence of the Petitioner's guilt adduced at trial.

The post-conviction court found that the Petitioner failed to show either a deficiency in trial counsel's performance or resulting prejudice to his case based on trial counsel's failure to call Ms. Reyes as a defense witness and to seek funding for expert witnesses on the GPS and cell phone records. In doing so, the post-conviction court noted trial counsel's explanations that it was a strategic choice not to call Ms. Reyes and that he saw nothing that could have been gained by his own expert witnesses on the GPS data and cell phone call records. The post-conviction court found that there was no cumulative effect of alleged errors to be analyzed because the Petitioner failed to show that trial counsel was deficient in his performance on any of the grounds he raised. Finally, the post-conviction court found that additional allegations raised in the pro se petition were waived for lack of proof presented in the post-conviction hearing. Accordingly, the post-conviction court denied the petition for post-conviction relief. Thereafter, the Petitioner filed a timely notice of appeal to this court.

ANALYSIS

On appeal, the Petitioner contends that trial counsel provided ineffective assistance by failing to file a motion in limine to exclude the "prior bad act" evidence of the Petitioner's theft of the bottle; by failing to present any defense, including his failure to call as defense witnesses the Petitioner and Ms. Reyes; and by failing to obtain funding for an expert to challenge the GPS tracking evidence. The Petitioner additionally asserts that trial counsel "should have done a better job cross-examining" Mr. Walker and "should have objected to the incriminating rap video of [Co-Defendant] Swanier" that was introduced at trial.

Post-conviction relief "shall be granted when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. The petitioner bears the burden of proving factual allegations by clear and convincing evidence. *Id.* at § 40-30-110(f). When an evidentiary hearing is held in the post-conviction setting,

the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. *See Wiley v. State*, 183 S.W.3d 317, 325 (Tenn. 2006). When reviewing factual issues, the appellate court will not reweigh the evidence and will instead defer to the post-conviction court's findings as to the credibility of witnesses or the weight of their testimony. *Id.* However, review of a post-conviction court's application of the law to the facts of the case 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, which presents mixed questions of fact and law, is reviewed de novo, with a presumption of correctness given only to the post-conviction court's findings of fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001); *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the same standard for determining ineffective assistance of counsel that is applied in federal cases also applies 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.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, *see Strickland*, 466 U.S. at 690, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. *See Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982).

The prejudice prong of the test is satisfied by showing a reasonable probability, *i.e.*, 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.

Courts need not approach the *Strickland* test in a specific order or even “address both components of the inquiry if the defendant makes an insufficient showing on one.” 466 U.S. at 697; *see Goad*, 938 S.W.2d at 370 (stating that “failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim”).

In denying the petition for post-conviction relief, the post-conviction court accredited the testimony of trial counsel that the Petitioner, after multiple conversations on the topic, expressed his desire not to testify in his own defense, as reflected by his responses at the *Momon* hearing. The post-conviction court deferred to trial counsel’s strategic choices not to call Ms. Reyes as a defense witness and not to seek funding for expert defense witnesses to counter the GPS and cell phone data. After noting the fleeting seconds of the store surveillance video that appeared to show the Petitioner’s theft of a bottle, the post-conviction court found that, even assuming that trial counsel was deficient for not filing a motion in limine to exclude the image, the Petitioner was unable to show that it caused prejudice to his case.

The record fully supports the findings and conclusions of the post-conviction court. Although the Petitioner testified that he wanted to tell the jury his side of the story, trial counsel’s testimony established that trial counsel had multiple direct conversations with the Petitioner about his right to testify and the Petitioner consistently indicated that he had no desire to do so. Trial counsel also provided a reasonable explanation for why he would not have called Ms. Reyes as a defense witness, even had his investigators located her, and why he saw no reason to seek funding for expert witnesses to counter the GPS or cell phone data. Trial counsel testified that he effectively cross-examined the State’s witnesses at trial and believed that he was successful in his defense to the extent that the jury found the Petitioner guilty of the lesser-included offense of voluntary manslaughter rather than premeditated murder.

As for trial counsel’s failure to file a motion in limine to exclude the video of the Petitioner’s apparent theft of a bottle from the store, trial counsel explained that the image was fleeting and he believed likely of no consequence to the jury. Nonetheless, he successfully requested that the video be redacted before being made an exhibit and raised the issue on direct appeal. In our review of the video on direct appeal, we observed that it was hard to determine whether the Petitioner actually took a bottle from the store. *Patton*,

2020 WL 1320718, at *11. Finally, we note that the Petitioner failed to cross-examine trial counsel about his alleged failure to object to the introduction of the rap video and failed to present any evidence on the issue. Accordingly, we agree with the post-conviction court that the Petitioner failed to meet his burden of demonstrating that he is entitled to post-conviction relief based on his claim of ineffective assistance of counsel. We further agree that the Petitioner has not shown that he is entitled to post-conviction relief based on the doctrine of cumulative error, and that all other claims raised in his pro se petition are waived for failure to present any proof or argument at the evidentiary hearing.

CONCLUSION

Based on our review, we affirm the judgment of the post-conviction court denying the petition for post-conviction relief.

JOHN W. CAMPBELL, SR., JUDGE