

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs April 11, 2023

FILED

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Clerk of the
Appellate Courts

CURTIS O'NEAL SHELTON, JR., v. STATE OF TENNESSEE

Appeal from the Circuit Court for Montgomery County
No. 63CC1-2016-CR-1226 William R. Goodman, III, Judge

No. M2022-00849-CCA-R3-PC

A Montgomery County jury convicted Petitioner, Curtis O'Neal Shelton, Jr., of two counts of first degree felony murder, one count of especially aggravated burglary, four counts of especially aggravated kidnapping, three counts of aggravated kidnapping, and seven counts of attempted aggravated robbery. After merging the two felony murder convictions, the trial court sentenced Petitioner to an effective term of life in prison plus twenty years. Petitioner appealed, and this court affirmed his convictions and sentence. Petitioner then filed a petition for post-conviction relief, which the post-conviction court dismissed after a hearing. On appeal, Petitioner argues that his trial counsel was ineffective for failing to (1) communicate with Petitioner effectively; (2) raise sufficient, proper objections to the State's evidence; (3) introduce evidence on Petitioner's behalf; and (4) file a timely motion for new trial. After review, we affirm the post-conviction court's judgment.

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

MATTHEW J. WILSON, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and CAMILLE R. MCMULLEN, JJ., joined.

Daniel P. Ufford, Clarksville, Tennessee, for the appellant, Curtis O'Neal Shelton, Jr.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Robert Nash, District Attorney General; and Arthur Bieber, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts and Procedural History

A. Facts from Trial

As summarized by this court on direct appeal, this case concerns a home burglary

that Petitioner and two codefendants committed in Clarksville on July 21, 2013, where the home's occupants were forcibly detained and Miles Hendrick, the victim, was shot and killed. *State v. Curtis O. Shelton, Jr.*, No. M2020-00072-CCA-R3-CD, 2021 WL 4876275, at *1 (Tenn. Crim. App., Oct. 19, 2021), *no perm. app. filed*. At a jury trial, Kentavius Cheeks, a codefendant who had pleaded guilty, testified as State's witness and identified Petitioner as the shooter. *Id.* Petitioner's recorded statement to law enforcement, where he admitted to the burglary and shooting Hendrick but claimed it was an accident, was played for the jury. *Id.* Petitioner was convicted of two counts of first degree felony murder, one count of especially aggravated burglary, four counts of especially aggravated kidnapping, three counts of aggravated kidnapping, and seven counts of attempted aggravated robbery. *Id.* After merging the two felony murder convictions, the trial court sentenced Petitioner to an effective term of life in prison plus twenty years. *Id.*

B. Procedural History

Although amended judgments of conviction were entered August 15, 2018, trial counsel ("Counsel") did not file a motion for new trial until December 6, 2018. The trial court treated the motion as a post-conviction petition. Counsel was allowed to withdraw as Petitioner's attorney, and the trial court appointed Petitioner's current attorney to represent him in the initial post-conviction proceedings. On September 30, 2019, Petitioner filed an amended motion for new trial, and he also filed a post-conviction petition in which he sought a delayed direct appeal and alleged Petitioner had received the ineffective assistance of counsel. On October 3, 2019, the trial court granted Petitioner a delayed direct appeal. The trial court denied Petitioner's motion for new trial. We affirmed Petitioner's convictions and sentence on appeal. *See id.* at *15-19.

On May 11, 2022, the post-conviction court held an evidentiary hearing on the petition for post-conviction relief. On May 24, 2022, the post-conviction court entered a detailed written order denying all of Petitioner's ineffective assistance of counsel claims. Petitioner's timely appeal follows.

II. Analysis

Appealing from the denial of post-conviction relief, Petitioner challenges whether he received effective assistance of counsel. He argues Counsel was ineffective for failing to (1) communicate with Petitioner effectively, which led to Counsel's and Petitioner's being unprepared at trial; (2) raise sufficient, proper objections to the State's evidence; (3) introduce evidence on Petitioner's behalf; and (4) file a timely motion for new trial.

A. Standard of Review

To obtain post-conviction relief, a petitioner must establish his or her “conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of the United States or Tennessee Constitution.” Tenn. Code Ann. § 40-30-103. A petitioner bears the burden of proving the factual allegations contained in the petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); *see Dellinger v. State*, 279 S.W.3d 282, 296 (Tenn. 2009). “Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998) (citing *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)).

Appellate courts do not reassess the post-conviction court’s determination of the credibility of witnesses. *Dellinger*, 279 S.W.3d at 292 (citing *R.D.S. v. State*, 245 S.W.3d 356, 362 (Tenn. 2008)). Assessing the credibility of witnesses is a matter entrusted to the post-conviction judge as the trier of fact. *R.D.S.*, 245 S.W.3d at 362 (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). On appeal, a post-conviction court’s findings of fact will not be disturbed unless the evidence contained in the record preponderates against the findings. *Brooks v. State*, 756 S.W.2d 288, 289 (Tenn. Crim. App. 1988); *Clenny v. State*, 576 S.W.2d 12, 14 (Tenn. Crim. App. 1978). However, conclusions of law are given no presumption of correctness on appeal. *Dellinger*, 279 S.W.3d at 293; *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001). An ineffective assistance of counsel claim presents a mixed question of law and fact. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). As a mixed question of law and fact, this court’s review of a petitioner’s ineffective assistance of counsel’s claims is de novo with no presumption of correctness. *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011) (citations omitted).

Both the Constitutions of the United States and the State of Tennessee guarantee criminal defendants the right to effective assistance of counsel. U.S. Const. amend VI; Tenn. Const. art. I, § 9. Under the Sixth Amendment to the United States Constitution, when a petitioner raises an ineffective assistance of counsel claim, the burden is on the petitioner to show both (1) counsel’s performance was deficient and (2) the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockart v. Fretwell*, 506 U.S. 364, 368-372 (1993). The *Strickland* standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). To prevail on such a claim, a petitioner must prove both prongs of the *Strickland* test, and failure to prove either is “a sufficient basis to deny relief on the claim.” *See Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). “[A] court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.” *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996).

To prove that counsel's performance was deficient, a petitioner must establish that his attorney's conduct fell below an objective standard of reasonableness or "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. As our supreme court held:

"[T]he assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence...Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations."

Finch v. State, 226 S.W.3d 307, 315-16 (Tenn. 2007) (quoting *Baxter v. Rose*, 523 S.W.2d 930, 934-35 (Tenn. 1975)). A reviewing "court may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation." *Alley v. State*, 958 S.W.2d 138, 149 (Tenn. Crim. App. 1997) (citing *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)). A reviewing court cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994).

To prove prejudice, a petitioner must demonstrate "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." *Id.* As such, a petitioner must establish that his or her attorney's deficient performance was of such magnitude that he was deprived of a fair trial and that the reliability of the outcome was called into question. *Finch*, 226 S.W.3d at 316 (citing *Burns*, 6 S.W.3d at 463).

B. Issues

At the post-conviction hearing, Counsel and Petitioner were called to testify. Counsel testified that he represented Petitioner at trial. Prior to Petitioner's representation by counsel, Petitioner was represented by another attorney, who had filed a motion to suppress statements Petitioner had made to law enforcement, which the trial court denied. After the trial court's denial, the Petitioner's original attorney moved to withdraw, and Petitioner's family hired counsel to represent Petitioner. Counsel testified he met with Petitioner "several times and quite a bit" during his representation of Petitioner, and that he discussed "all of the elements of the case," including the State's proof against Petitioner

“and any other relevant matters,” with Petitioner before trial. Counsel said he would “not be in a position to agree or disagree” with Montgomery County Jail records suggesting Counsel visited Petitioner in jail once for three hours shortly before Petitioner’s trial began. Counsel did not recall filing any specific motions before trial, but he claimed he filed “whatever [he] considered to be reasonable and necessary under the circumstances.”

Counsel did not recall the number of objections he made during trial or the content of any specific objection raised, but he testified he “made vigorous objections, many and plentiful during the course of trial, based on the State’s conduct in the trial. . . . But in every instance in Mr. Curtis Shelton’s trial, I pressed forward with absolute aggression.” When asked about any defenses he raised at trial, counsel testified he presented “[a]ll of the defenses that were available to Mr. Shelton.” Specifically, Counsel stated “[t]he only defense that I can think we relied on principally, was that this was an accidental shooting. But there was conflict[ing] testimony regarding that issue that was adduced at trial.”

Counsel was aware Petitioner’s previous attorney had moved to suppress Petitioner’s statements to law enforcement. After the trial court had denied Petitioner’s suppression motion, counsel agreed with the State’s assessment that Petitioner’s statement to police was “pretty damaging” to Petitioner’s case and “[s]ubstantially” limited Petitioner’s possible defenses. Counsel explained that Petitioner’s statement was corroborated by the testimony of codefendant Cheeks and other witnesses at trial, and Counsel saw no basis for an additional challenge to the trial court’s ruling on Petitioner’s statements. Counsel also declined to attack Petitioner’s statement at trial, as he did not want to “keep reminding any jurors, or any Court, or any person involved with the Court of a damaging statement. To keep repeating a damaging statement [by] my client, that would have been ineffective assistance of counsel.”

Regarding trial preparation, Counsel testified,

. . . I did everything in my power to prepare him for trial, including having his haircut right in the courtroom. And I recall discussing with him his right to testify, at that time. I specifically discussed his rights against self-incrimination. I specifically discussed whether he would be an available or a good person to testify in a trial, where, again, he is in possession of a gun that he says went off accidentally, that ultimately resulted in the death of another.

Counsel explained the positive and negative aspects to Petitioner about his potential testimony, but Counsel left the ultimate decision whether to testify to Petitioner, who chose not to testify.

Counsel testified he did not file a timely motion for new trial because after trial, Petitioner “did not want to proceed forward. He had been through several attorneys and—and an exhausting trial. He did not want an appeal. He flat out wanted to do nothing.”

Petitioner also testified at the post-conviction hearing. Petitioner testified that apart from trial, he met with Counsel three times during Counsel’s representation. Petitioner described the first two meetings as brief ones during which Petitioner signed “power of attorney” documents, and the third meeting occurred “right before trial.” He stated he did meet with Counsel and reviewed all of the evidence “just that once,” but denied viewing videos or Petitioner’s own statement to police prior to trial. Petitioner admitted to discussing with Counsel Petitioner’s right to testify “[r]ight there at the desk.” Petitioner claimed he wrote letters to trial counsel which went unanswered, and he claimed trial counsel did not review the video of Petitioner’s statement to police with Petitioner before trial.

Petitioner identified one potential witness, Lakeshia Goodson, as someone whom he wanted Counsel to call. However, Petitioner claimed he “[n]ever had the chance to” tell trial counsel about this person. Petitioner said Ms. Goodson could have offered relevant testimony “[b]ecause she was with me . . . every day . . . before hand, I was around her.” Specifically, Petitioner asserted Ms. Goodson could have described Petitioner’s actions the night of the offenses. In his testimony before the post-conviction court, Petitioner never stated he informed trial counsel of Ms. Goodson in any of the letters he claims to have written trial counsel. Petitioner also took exception to the manner in which trial counsel handled the testimony of codefendant Cheeks, particularly when the codefendant testified Petitioner was in a gang. Petitioner claimed he was never able to discuss Petitioner’s supposed lack of gang affiliation with Counsel.

No other witnesses testified at the hearing.

1. Failure communicate with Petitioner effectively

Regarding Counsel’s and Petitioner’s alleged lack of communication, Petitioner’s own testimony refutes this claim. Petitioner admits they met three times before trial in the jail, and he reviewed the State’s evidence with Counsel. Also, Counsel testified he met with Petitioner several times discussing the evidence, the charges, and necessary information. The post-conviction court’s order details Counsel’s testimony, and notes two visits by Counsel to the jail in facility records, along with Counsel’s meeting with Petitioner several times including during Petitioner’s court appearances. The court recounted Counsel “filed all pleadings which he believed were necessary.” Regarding Petitioner’s claim that Counsel was ineffective for failing to challenge Petitioner’s statements to law enforcement, the court found Petitioner’s previous attorney had filed a motion to suppress. The trial court

had denied the motion, and the ruling was affirmed on appeal. Specifically, the post-conviction court found “[t]here is no proof [Counsel] could have done anything different from Petitioner’s first attorney” in challenging the admissibility of Petitioner’s statements.

In this appeal, Petitioner argues that more communication between Petitioner and Counsel could have led Counsel to challenge Petitioner’s inculpatory statements to law enforcement. At the post-conviction hearing, Counsel explained why he chose not to draw further attention to this evidence to the jury, in that Petitioner appeared to voluntarily provide “damaging” statements. The post-conviction court could not find that this tactic deprived Petitioner of a fair trial. In choosing this strategy, trial counsel appeared to be adequately prepared, and we cannot second-guess counsel’s tactics. *See Hellard*, 629 S.W.2d. at 9. Accordingly, the post-conviction court correctly denied Petitioner’s claim.

2. Failure to Raise Sufficient, Proper Objections to the State’s Evidence

In his brief, Petitioner argues Counsel was ineffective for lodging an insufficient number of “proper” objections before and during trial. At the post-conviction hearing Petitioner did not take exception to any objection Counsel did raise—rather, Petitioner only argued the number of Counsel’s objections was insufficient. In his hearing testimony, Petitioner did reference codefendant Checks’ supposed lying and the introduction of evidence regarding Petitioner’s supposed gang activity, but Petitioner’s self-serving testimony was the only proof suggesting such evidence was objectionable. The post-conviction court did not find such testimony credible, thus Petitioner has failed to establish Counsel should have objected to this proof. In its order, the post-conviction court found Petitioner had offered no “specific items of testimony or other evidence in support of this contention,” and failed to prove his claim. Otherwise, Petitioner has pointed to no specific portion of the transcript at which he thought an objection should have been raised. Attorneys are not required to make objections for objections’ sake. *Id.* at 11 (“...[C]ounsel cannot be faulted for failing to make a futile attempt to exclude evidence which was obviously admissible”). Petitioner has not established trial counsel was deficient in his handling of objections or that trial counsel’s failure to object prejudiced Petitioner. Thus, Counsel did not render ineffective assistance as to this issue.

3. Failure to Introduce Evidence on Petitioner’s Behalf

Next, Petitioner contends Counsel was ineffective for not presenting certain evidence at trial. The only such evidence identified by Petitioner at the post-conviction hearing was the potential testimony of Lakeshia Goodson, whom Petitioner suggested could have provided an alibi defense. At the post-conviction hearing, Counsel was not asked about Ms. Goodson’s potential trial testimony, and she did not testify at the post-conviction hearing. The post-conviction court found Petitioner had offered no proof as to

the nature of Ms. Goodson's testimony. Neither this court nor a post-conviction court may speculate about the substance of any witness testimony not presented at the evidentiary hearing. *See Black v. State*, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). To prove prejudice under *Strickland*, a petitioner must produce the witness at the post-conviction hearing. *Id.* If Petitioner had wanted the post-conviction court to consider Ms. Goodson's testimony, he should have called her as a witness at the hearing. He did not, and Petitioner's claim must fail.

4. Failure to File a Timely Motion for New Trial

Couched in terms of "the cumulative effect," Petitioner attempts to gain relief from his conviction and sentence on Counsel's failure to file a motion for new trial. The post-conviction court did find Counsel's performance to be deficient for failing to file the motion, but denied Petitioner relief. Specifically, the court cited our supreme court's decision in *Howard v. State*, 604 S.W.3d 53 (Tenn. 2020), which held that a post-conviction court is to consider whether a petitioner was actually prejudiced when trial counsel fails to file a timely motion for new trial. The court correctly noted Petitioner was granted a delayed appeal, where this court considered whether Petitioner's statements were admissible, whether the evidence was sufficient to support his convictions, and sentencing issues. As such, the court correctly found Petitioner could not show he was prejudiced by trial counsel's inactions.

Having found no error in Petitioner's first three claims, no cumulative error can be present. "To warrant assessment under the cumulative error doctrine, there must have been more than one actual error committed in the trial proceedings." *State v. Hester*, 324 S.W.3d 1,77 (Tenn. 2010). And in a post-conviction case, "a petitioner cannot successfully claim he was prejudiced by trial counsel's cumulative error when the petitioner failed to show trial counsel's performance was deficient." *Demetrius Grimes v. State*, No. E2021-00120-CCA-R3-PC, 2022 WL 557739 at *8 (Tenn. Crim. App., Feb. 24, 2022) (quoting *Thomas Edward Clardy v. State*, No. 2017-01193-CCA-R3-PC, 2019 WL 5046032 at *7 (Tenn. Crim. App., Oct. 17, 2018)). Moreover, pursuant to the post-conviction's court's granting of a delayed appeal, Petitioner's case was subjected to full appellate review of his late-filed motion for new trial. *See State v. Curtis O. Shelton, Jr.*, No. M2020-00072-CCA-R3-CD, 2021 WL 4876275, (Tenn. Crim. App., Oct. 19, 2021). Therefore, as correctly noted by the post-conviction court, Petitioner suffered no prejudice by Counsel's failure to timely file the motion for new trial. He is not entitled to relief.

III. Conclusion

Based on the foregoing and the record as a whole, we affirm the post-conviction court's denial of relief.

MATTHEW J. WILSON, JUDGE.