

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs at Knoxville December 20, 2022

SHARRAD SHARP v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Shelby County
No. 15-00284 John W. Campbell, Judge**

No. W2022-00232-CCA-R3-PC

The Petitioner, Sharrad Sharp, appeals from the Shelby County Criminal Court’s denial of his petition for post-conviction relief from his aggravated sexual battery and child abuse convictions, for which he is serving a sixteen-year sentence. On appeal, he contends that he received the ineffective assistance of counsel because trial counsel failed to request a limiting jury instruction regarding the victims’ forensic examination interviews. We affirm the judgment of the post-conviction court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and TOM GREENHOLTZ, JJ., joined.

Phyllis Aluko, District Public Defender; and Harry E. Sayle III (on appeal) and John Zastrow (at hearing), Assistant District Public Defenders, for the Appellant, Sharrad Sharp.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Steve Mulroy, District Attorney General; Joseph Griffith, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Petitioner was charged in a twenty-five-count indictment with abusing four of his children. The State dismissed four counts before the trial. Initially, the jury convicted the Petitioner of nine counts related to three of the children, and he was acquitted of the remaining counts. The trial court imposed an effective thirty-seven-year sentence. On appeal, this court reversed and dismissed six of the convictions, which the State conceded and this court concluded were void because the indictment failed to provide the Petitioner with adequate notice of the charged offenses. This court affirmed the remaining convictions related to two children and affirmed the remaining sixteen-year sentence. *State*

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v. Sharrad Sharp, No. W2018-00156-CCA-R3-CD, 2019 WL 960431, at *1-9 (Tenn. Crim. App. Feb. 26, 2019), *perm. app. denied* (Tenn. Aug. 16, 2019).

As relevant to the present post-conviction case, the Petitioner alleged in the previous appeal that the trial court erred in admitting evidence of the victims' forensic interviews as prior consistent statements. This court was limited to plain error review due to trial counsel's failure to raise the issue in the motion for a new trial and concluded that plain error relief was not required. *Id.* at *9-11. The court also denied relief on issues related to the sufficiency of the evidence to support the remaining convictions and to consecutive sentencing. *Id.* at *12-14. The supreme court denied the Petitioner's application for permission to appeal. *State v. Sharrad Sharp*, No. W2018-00156-SC-R11-CD (Tenn. Aug. 16, 2019) (order).

The Petitioner filed a timely pro se post-conviction petition. Post-conviction counsel was appointed and filed amended petitions. The Petitioner also filed two pro se amended petitions. As relevant to the present appeal, the Petitioner alleged in his initial pro se petition that he received the ineffective assistance of trial counsel because "[c]ounsel failed to request [an] instruction that the jury could only consider the forensic interviews for the purpose of assessing [the] victims['] credibility." An amended petition filed by post-conviction counsel incorporated the issues raised in the previous petitions but did not otherwise restate this claim. The record reflects that the Petitioner was represented by and dissatisfied with a series of appointed attorneys and filed motions for several of them to be dismissed. Despite being represented by counsel, the Petitioner also filed two pro se amended petitions, one of which reiterated his claim that "[t]rial counsel never requested a limiting instruction" regarding the jury's consideration of the victims' forensic interviews. Thereafter, counsel who represented him at the post-conviction hearing filed an additional amended petition which incorporated by reference the previous petitions but did not expressly restate the claim based upon the failure to request a limiting instruction.

At the hearing, the Petitioner raised two issues: (1) insufficiency of three counts of the indictment to state an offense and (2) ineffective assistance of trial counsel. With regard to the ineffective assistance claim, the Petitioner testified about several complaints he had with trial counsel's preparedness for the trial. The Petitioner testified that he had no complaints about appellate counsel's representation.

Our review of the transcript of the post-conviction hearing reveals that the Petitioner did not testify about any complaint related to trial counsel's failure to request a limiting instruction regarding the jury's consideration of the victims' forensic interviews. Rather, the Petitioner testified that, in his opinion, evidence of the forensic interviews should not have been admitted to "[b]olster the statement" and because the interviews were prejudicial. However, he thought that if the interviews were admitted, they should not have been redacted. In his opinion, the jury would not have convicted him if the recordings had

not been redacted. He said inconsistencies existed between “the statements that was made at trial and the statements that was made in the police forensic interviews.” He said he would have wanted to know before the trial about the victims’ inability to “get their story straight.” He said the admissibility of the forensic interviews was not raised until the day of the trial. He said he thought the issues trial counsel raised in the motion for new trial were “frivolous.”

Both trial counsel and appellate counsel testified at the post-conviction hearing. Neither was asked about trial counsel’s failure to request a limiting instruction relative to the forensic interviews. Post-conviction counsel did not mention the issue in his opening statement or closing argument.

After receiving the evidence at the hearing, the post-conviction court filed an order denying relief. The order addressed the various allegations of ineffective assistance of counsel raised by Petitioner at the hearing, but it was silent as to the issue raised in two of the pro se petitions, and incorporated by reference by post-conviction counsel’s amended petitions, regarding trial counsel’s failure to request a limiting instruction regarding the jury’s consideration of the victims’ forensic interviews. The order addressed a tangential issue that was raised at the hearing, the Petitioner’s complaint “that trial counsel did not file a motion to exclude the forensic interview of the victim or object to the court about redactions that were made to the video when the interview was played in court.” The post-conviction court found that trial counsel “filed pre-trial motions to exclude the forensic interview[.]” The court found generally that the Petitioner

has not shown by clear and convincing evidence that counsel was ineffective in her representation of the petitioner. The proof shows that counsel was prepared for trial, had reviewed all the discovery, and crafted a reasonable trial strategy based upon what the petitioner wanted as a defense. Counsel met with the petitioner and discussed the case on several occasions.

Post-conviction relief is available “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.” T.C.A. § 40-30-103 (2018). A petitioner has the burden of proving his factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f) (2018). A post-conviction court’s findings of fact are binding on appeal, and this court must defer to them “unless the evidence in the record preponderates against those findings.” *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *see Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court’s application of law to its factual findings is subject to a de novo standard of review without a presumption of correctness. *Fields*, 40 S.W.3d at 457-58.

To establish a post-conviction claim of the ineffective assistance of counsel in

violation of the Sixth Amendment, a petitioner has the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see *Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). The Tennessee Supreme Court has applied the *Strickland* standard to an accused's right to counsel under article I, section 9 of the Tennessee Constitution. See *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner must satisfy both prongs of the *Strickland* test in order to prevail in an ineffective assistance of counsel claim. *Henley*, 960 S.W.2d at 580. "[F]ailure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). To establish the performance prong, a petitioner must show that "the advice given, or the services rendered . . . are [not] within the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); see *Strickland*, 466 U.S. at 690. The post-conviction court must determine if these acts or omissions, viewed in light of all of the circumstances, fell "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. A petitioner "is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision." *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); see *Pylant v. State*, 263 S.W.3d 854, 874 (Tenn. 2008). This deference, however, only applies "if the choices are informed . . . based upon adequate preparation." *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). To establish the prejudice prong, a 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." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

On appeal, the Petitioner has raised a single issue: "Whether the [Petitioner] received ineffective assistance of counsel because trial counsel failed to request a jury instruction in order to limit the jury's consideration of the forensic examination of the [victims] to the issue of credibility, and not as to substantive evidence?" The State's brief addresses the "effectiveness of trial counsel in dealing with the admission of the forensic interviews." The State does not address the Petitioner's appellate issue regarding counsel's failure to request a limiting instruction related to the forensic interviews, as distinguished from the claim raised at the hearing and addressed in the post-conviction court's order regarding whether counsel provided ineffective assistance in failing to have the forensic interviews excluded as evidence. The Petitioner argues that the court erred in "ruling" that he failed to carry his burden of proving that trial counsel performed deficiently in failing to request a limiting instruction and that the court erred in "ruling" that he failed to prove prejudice from the failure to request the limiting instruction.

“Ineffective assistance of counsel is generally ‘a single ground for relief’ under the post-conviction statute.” *Thompson v. State*, 958 S.W.2d 156, 161 (Tenn. Crim. App. 1997); *see Cone v. State*, 927 S.W.3d 579, 582 (Tenn. Crim. App. 1995). Therefore, “the fact that such violation may be proved by multiple acts or omissions by counsel does not change the fact that there remains only one ground for relief.” *William Edward Blake v. State*, No. 1326, 1991 WL 35744, at *2 (Tenn. Crim. App. Mar. 19, 1991); *see Thompson*, 958 S.W.2d at 161; *Kalpesh Patel v. State*, No. M2018-01885-CCA-R3-PC, 2019 WL 5618962, at *8 (Tenn. Crim. App. Oct. 31, 2019).

The Petitioner was afforded an evidentiary hearing, at which he testified at length about his complaints regarding trial counsel’s performance and the effects he perceived her performance had on the outcome of his trial. Despite his having alleged in two pro se petitions that trial counsel provided ineffective assistance because she did not request a limiting instruction which restricted the jury’s consideration of the victims’ forensic interviews, he presented no evidence about this allegation at the hearing. He did not mention, nor was he asked, about this specific alleged shortcoming of counsel. Likewise, neither trial nor appellate counsel was questioned about trial counsel’s failure to request a limiting instruction. The post-conviction court considered the ineffective assistance of counsel issue and made factual findings related to specific allegations raised at the hearing. In denying relief on the basis of the ineffective assistance of counsel, the court found that the Petitioner had failed to prove both deficient performance and prejudice.

We acknowledge that the post-conviction court was required to make findings of fact in its dispositional order. *See* T.C.A. § 40-30-111(b) (Supp. 2022) (“Upon the final disposition of every petition, the court shall enter a final order, and except where proceedings for delayed appeal are allowed, shall set forth in the order or a written memorandum of the case all grounds presented, and shall state the findings of fact and conclusions of law with regard to each ground.”); Tenn. Sup. Ct. R. 28, § 9(A) (“The order shall contain specific findings of fact and conclusions of law relating to each issue presented.”). In the present case, the post-conviction court made findings of fact addressing the ineffective assistance of counsel allegations raised at the hearing and concluded that the evidence presented at the hearing failed to show, by clear and convincing evidence, that trial counsel had performed deficiently and that the Petitioner had been prejudiced by counsel’s performance. The Petitioner had the burden to prove his ineffective assistance of counsel claim by clear and convincing evidence. *See* T.C.A. § 40-30-110(f). However, he presented no evidence or argument to support his assertion that trial counsel provided ineffective assistance in failing to request a limiting instruction. On appeal, the record does not preponderate against the post-conviction court’s factual findings regarding the deficiency and prejudice prongs of the Petitioner’s ineffective assistance of counsel claim. The post-conviction court had no duty to make a factual finding as to an allegation of ineffective assistance of counsel which was not pursued at the hearing, either by presenting evidence or by providing argument to explain in the record

the basis for relief. *Cf. Vernon Walton v. State*, No. W2019-00379-CCA-R3-PC, 2020 WL 864161, at *5 (Tenn. Crim. App. Feb. 19, 2020) (“Because the Petitioner failed to pursue these allegations by offering evidence to support them at the hearing, the post-conviction court had no obligation to address them in its order, other than by denying post-conviction relief.”), *perm. app. denied* (Tenn. July 21, 2020).

The Petitioner is not entitled to relief on this basis. In consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

ROBERT H. MONTGOMERY, JR., JUDGE