IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs September 7, 2017

CHARLES D. BELK v. STATE OF TENNESSEE

Appeal from the Circuit Court for Obion County
No. CC-16-CR-47 Jeff Parham, Judge

No. W2017-00700-CCA-R3-PC

The Petitioner, Charles D. Belk, appeals the Obion County Circuit Court's denial of his petition for post-conviction relief from his convictions of introducing a controlled substance into a penal institution, a Class C felony; Class C felony unlawful possession of a weapon; Class D felony unlawful possession of a weapon; possessing marijuana with intent to sell or deliver, a Class E felony; and simple possession, a Class A misdemeanor, and resulting effective sentence of twelve years in confinement. On appeal, the Petitioner claims that he received the ineffective assistance of trial and appellate counsel. Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

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

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which THOMAS T. WOODALL, P.J., and J. ROSS DYER, J., joined.

Kent F. Gearin, Martin, Tennessee, for the appellant, Charles D. Belk.

Herbert H. Slatery III, Attorney General and Reporter; Robert W. Wilson, Assistant Attorney General; Russell Johnson, District Attorney General; and James Cannon, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

This case relates to a search of the Petitioner's home in Union City. According to the affidavit used to obtain the search warrant, a confidential informant (CI) bought crack cocaine from Jalissa McFall on three separate occasions. The first two purchases occurred at McFall's home. For the third purchase, McFall told the CI to drive her to the

residence of "dopeman," who was her supplier, on East Florida Street. McFall entered the residence, returned to the CI's car, and sold him the specified amount of cocaine he had ordered. The affiant observed and electronically monitored the transaction between the CI and McFall. Later, the CI rode with the affiant to East Florida Street and pointed out the exact residence from which McFall had obtained the cocaine. The residence turned out to be that of the Petitioner. On April 26, 2013, police officers executed a search warrant at the Petitioner's home. As a result of the evidence found in the search, the Obion County Grand Jury indicted the Petitioner for possession of cocaine with intent to sell or deliver, a Class B felony, in count one; possession of marijuana with intent to sell or deliver, a Class E felony, in count two; tampering with evidence, a Class C felony, in count three; Class C unlawful possession of a weapon in count four; Class D felony unlawful possession of a weapon in count five; misdemeanor theft in count six; and introducing a controlled substance into a penal institution, a Class C felony, in count seven.

The following relevant facts, as stated in this court's direct appeal opinion of the Petitioner's convictions, are summarized as follows:

> The defendant filed a motion to suppress the evidence obtained pursuant to the search warrant, arguing that the information the officer relied on to obtain the search warrant was based on hearsay. Specifically, he asserted that the officer relied on information given to him by a criminal informant who relied on hearsay from a third party, whose basis of knowledge was never verified. After hearing the testimony of the officer affiant and reviewing the matter, the trial court denied the motion to suppress, finding there was a sufficient basis of knowledge for the issuance of the search warrant.
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> At the defendant's trial, Officer Stan Haskins with the Union City Police Department testified that he assisted with the execution of the search warrant at issue in this case. Upon entering the residence, Officer Haskins saw an African-American male, identified as the co-defendant Michael Genes, in the hallway by the bathroom. Genes did not comply with Officer Haskins' order to get on the ground, and the officer had to physically subdue and handcuff Genes. Meanwhile, the defendant emerged from a bedroom next to the bathroom, and other officers placed him on the ground. After Officer Haskins had secured Genes, he noticed that the tank of the toilet was refilling. He secured the area and saw a torn plastic shopping bag containing a few smaller bags of marijuana beside the toilet.
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> Officer Derrick O'Dell with the Union City Police Department also assisted with the execution of the search warrant in this case. Officer O'Dell testified that he found crack cocaine on top of a plate that was

sitting on cans of soup in a kitchen cabinet, as well as "wadded-up baggies" on top of the microwave. The cocaine was packaged in the corner of a plastic bag, tied off in a knot, and there was residue on the plate. He surmised that the amount of residue and how the cocaine appeared to have been chopped up indicated that it had been processed to sell. After photographing the evidence, Officer O'Dell contacted [Officer Shawn] Palmer, the case agent, who collected the evidence.

Officer O'Dell testified that, in the defendant's bedroom, he photographed a gun, money in a shoe, and two bags of marijuana in the top drawer of a dresser. He also photographed personal paperwork belonging to the defendant and Genes, indicating that both men lived at the address, as well as three bags of marijuana inside a torn white bag on the bathroom floor by the toilet. He noted that the marijuana appeared to be packaged for resale, and each of the three bags contained approximately one ounce of marijuana. He also found a small amount of marijuana, enough for one marijuana cigarette, on Genes' dresser.

Officer Ben Yates of the Union City Police Department also assisted with the execution of the search warrant in this case. Officer Yates searched the defendant's bedroom, where he found money and two small bags of marijuana in the defendant's dresser. He found a pistol containing a hollow-point bullet under the defendant's dresser. Officer Yates went to the Obion County Jail later that day. While there, Officer Yates heard the deputy jailer who was in a cell with the defendant yell for help. Officer Yates ran to the cell to find the deputy jailer holding the defendant away from the toilet, exclaiming that the defendant had thrown something into it. Officer Yates saw plastic bags in the toilet, so he put on latex gloves and pulled the bags out. He handed the bags to Officer [Josh] Lovell, who had joined them in the cell. Officer Yates stated that, although he did not see the defendant get searched at the time of his arrest, it was the police department's policy to search arrestees before placing them in the patrol car. Officer Yates detailed the department's procedure for searching arrestees and surmised that the only way the defendant could have brought the marijuana into the jail would have been to hide it in his rectum.

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Officer Shawn Palmer obtained the search warrant to search the defendant's house. Officer Palmer took possession of the evidence found at the scene and either submitted it for testing or locked it up until the case was completed. He sent the crack cocaine found in the kitchen cabinet to the laboratory for testing. He took possession of and sent for testing three

> individually wrapped bags of marijuana from the bathroom, weighing a combined total of fifty-four grams, and two small bags of marijuana from a dresser drawer in the defendant's bedroom. Officer Palmer believed that the bags of marijuana found in the bathroom were packaged for resale.
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> Officer Palmer stated that $960 in cash was located in a shoe in the closet in the defendant's bedroom, and $400 in cash was found in a pocket of a pair of pants in Genes' closet. Officer Palmer also took possession of a .45 caliber Taurus semi-automatic handgun found in the defendant's bedroom. Officer Palmer collected the bag of crack cocaine from the plate in the kitchen and scraped the remaining crumbs of crack cocaine off the plate into another bag. They did not find any digital scales at the scene, but Officer Palmer said that drug dealers do not always use scales. Officer Palmer subpoenaed the defendant's bank records and learned that the defendant did not have an active account at one of the banks and owed money to the other bank.

State v. Charles Derrick Belk, No. W2014-00887-CCA-R3-CD, 2015 WL 2258398, at *1-3 (Tenn. Crim. App. at Jackson, May 13, 2015), perm. to app. denied, (Tenn. Sept. 21, 2015).

At the conclusion of the trial, the jury found the Petitioner guilty of simple possession, a Class A misdemeanor, as a lesser-included offense of possession of cocaine with intent to sell or deliver in count one; guilty as charged of possession of marijuana with intent to sell or deliver in count two; not guilty of tampering with evidence in count three; guilty as charged of Class C and D felony possession of a weapon in counts four and five; not guilty of theft in count six; and guilty as charged of introducing a controlled substance into a penal institution in count seven. After a sentencing hearing, the trial court merged the two weapon-related convictions and sentenced the Petitioner to an effective twelve years in confinement.

On direct appeal of his convictions to this court, the Petitioner argued that the trial court erred by denying his motion to suppress evidence obtained pursuant to issuance of the search warrant and that the evidence was insufficient to sustain his conviction of introducing a controlled substance into a penal institution. Id. at *4, 7. This court found the evidence sufficient. Id. at *9. Regarding the motion to suppress, this court stated as follows:

> The defendant relies on State v. Marian Rosenboro, No. 03-C-1-9203-CR-00080, 1993 WL 78746 (Tenn. Crim. App. Mar. 18, 1993), pet. reh'g denied (Tenn. June 18, 1993), in support of his argument that the confidential informant relied upon information provided by a third party, Jalissa McFall, who was not shown to meet the requirements of the

Aguilar/Spinelli test. In addition, in his reply brief, the defendant also asserts for the first time that the affidavit did not establish "how long the nexus between the [defendant's] house and the sale would persist."

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As we understand the slender recitation of facts in Marian Rosenboro, upon which the defendant relies in his complaint about the affidavit, the search warrant affidavit stated that "[w]hile at the residence [which later was the subject of the search warrant,] the confidential informant, via the unwitting informant, purchased a quantity of cocaine from an unknown black female resident of the home." 1993 WL 78746, at *1. As we will explain, we do not find Marian Rosenboro relevant to this matter.

According to the affidavit in the present case, the confidential informant had made previous purchases from Jalissa McFall at her residence. Within seventy-two hours of the execution of the search warrant, McFall had instructed the informant to drive her to the location which later was the subject of the search warrant, saying that this was the residence of the "dopeman," who was her "source and supplier of crack cocaine." The informant observed McFall enter the residence and, a "short time later," return to his vehicle. Upon entering the residence, she did not possess crack cocaine, but she did so, and in the amount sought by the informant, when she returned to his car. The informant then met with the affiant and gave him the crack cocaine he had purchased from McFall.

In the present appeal, the affidavit set out in detail the affiant's prior dealings with the informant, which had led to the purchase and seizure of narcotics on multiple occasions, as well as the arrests of two individuals. Further, the affidavit explained the informant's dealings with Jalissa McFall and his obtaining crack cocaine, as well as information officers had regarding prior sales of illegal drugs by McFall and the defendant, as well as the defendant's previous conviction regarding cocaine. In Marian Rosenboro, the affidavit had no corroboration for the "unwitting informant's" claim that he or she had purchased the drugs in the house to be searched. In the present appeal, by contrast, corroborating information was abundant.

In light of the deferential standard of review on appeal attendant to the magistrate's decision, we conclude that the facts contained in the application for the search warrant established a substantial basis on which the magistrate could conclude that the informant had a basis for his

> information that evidence of the defendant's drug trafficking would be found inside the defendant's residence and that the informant's information on this particular occasion was reliable. Moreover, we conclude that the affidavit contains a sufficient nexus of time between the criminal activity and issuance of the warrant.

Id. at *4-7 (footnote omitted).

The Petitioner filed a timely petition for post-conviction relief, claiming that he received the ineffective assistance of trial counsel because counsel failed to challenge the search warrant on the basis that the affidavit used to support the warrant contained no information about the alleged drug exchange inside the residence and did not allege a quantity of drugs received, the actual identity of the seller, or the identity of any other individuals inside the residence. The Petitioner also claimed that he received the ineffective assistance of trial counsel because counsel failed to investigate the abrupt resignation of Officer Palmer from the drug task force, which could have been used for impeachment purposes; failed to obtain a copy of the audio-recorded drug transaction that allegedly occurred between the CI and Jalissa McFall; and failed to challenge the qualifications of the judicial commissioner who issued the warrant for the Petitioner's arrest. The Petitioner claimed that he received the ineffective assistance of appellate counsel on direct appeal of his convictions because counsel "failed to appeal the issue regarding the Judge/Magistrate lacking a substantial basis to support a finding of probable cause to issue a search warrant under a Plain Error Standard." The post-conviction court found that the pro se petition stated a colorable claim and appointed counsel. Post-conviction counsel did not file an amended petition.

At the evidentiary hearing, appellate counsel testified that that he was appointed to represent the Petitioner after trial counsel withdrew and that he traveled to Clifton, Tennessee, one time to meet with the Petitioner in prison to discuss the Petitioner's appeal. Appellate counsel did not remember if he met with the Petitioner "locally." Initially, another attorney from appellate counsel's office was appointed to represent the Petitioner at trial, and she filed a motion to suppress the evidence police seized during the search of the Petitioner's home. Appellate counsel said that he was "sure" he reviewed the motion to suppress before it was filed and that he may have even helped her prepare the motion. Subsequently, the Petitioner retained trial counsel. Appellate counsel acknowledged that there were "two separate layers of hearsay" involved in this case: the CI and Jalissa McFall. On direct appeal of the Petitioner's convictions, appellate counsel argued that the trial court erred by denying the motion to suppress, and he relied heavily on Marian Rosenboro because he thought that case was on point with the issue of double hearsay in the Petitioner's case. Appellate counsel acknowledged that Marian Rosenboro was unpublished and, therefore, only persuasive authority.

Harry Johnson testified that he had been the Obion County Circuit Court Clerk since 2002. He stated that Ellarine Moses was not employed by his office but that she was "an outside source that serve[d] in the capacity as a judicial commissioner." In 2013, Moses was not certified as a judicial commissioner under Tennessee Code Annotated section 40-1-111. Johnson said, though, that Moses "did receive informal training periodically, given by the current General Sessions judge or the former General Sessions judge, and myself at times."

Jerry Vastbinder, the Sheriff of Obion County, testified that the Drug Task Force for the Twenty-Seventh Judicial District used to maintain an office in the sheriff's department and that four computers used by drug task force officers were still in the drug task force office. On the Friday prior to the post-conviction evidentiary hearing, Rick Kelly, an investigator with the district attorney's office, listened to "audio" of drug transactions on Officer Shawn Palmer's computer. Post-conviction counsel asked Sheriff Vastbinder if the audio was related to the Petitioner's case, and Sheriff Vastbinder answered, "I believe so. I did not, myself, listen to it." Sheriff Vastbinder said he did not know if anyone from the district attorney's office attempted to obtain the audio prior to that Friday.

Rick Kelly testified that he was a criminal investigator with the district attorney's office and the Director of the Drug Task Force for the Twenty-Seventh Judicial District. He said that his duties for the drug task force mainly consisted of monitoring money, writing grants, and coordinating meetings for the board of directors and that he did not supervise investigations. At some point after the Petitioner filed his petition for post-conviction relief, Kelly tried to obtain audio of conversations between the CI and Jalissa McFall. Kelly looked for the audio in a particular drug task force computer but was told the computer was "messed up." He later learned the audio was stored in a different computer. Kelly said that on the Friday prior to the evidentiary hearing, he "accessed" the second computer and listened to the audio-recordings stored in it. However, he did not find the conversation between the CI and McFall that the Petitioner was looking for.

Kelly testified that Officer Palmer no longer worked for the drug task force and that Officer Palmer "resigned." He said Officer Palmer "did not resign because of an investigation involving dishonesty."

Shawn Palmer testified that he used to work for the Drug Task Force for the Twenty-Seventh Judicial District and that he was involved in the investigation and prosecution of the Petitioner. On April 23, 2013, Palmer watched the CI and Jalissa McFall drive to a home on East Florida Street. He saw McFall enter the home and return to the CI's car. The drug buy between the CI and McFall occurred inside the car just seconds later. At the time of the drug buy, Palmer knew the Petitioner but did not know the Petitioner lived in the home on East Florida Street. Palmer acknowledged that there was "audio" of the transaction between the CI and Palmer. Post-conviction counsel

asked if Palmer listened to a recording of the audio, and he answered, "Possib[ly], but I doubt it."

Palmer testified that on April 26, 2013, he filed an affidavit in support of a search warrant for the Petitioner's home. The affidavit provided that Palmer was familiar with McFall, that he had spoken with her, and that he had checked her criminal history. McFall had prior convictions, including a conviction for theft, but Palmer did not include the theft conviction in his affidavit. He said he did not mention the theft conviction because it was not related to narcotics. Post-conviction counsel asked if the theft conviction was relevant to McFall's veracity, and Palmer answered, "[Being a] thief doesn't make her a liar."

Trial counsel testified that he had been practicing law almost eighteen years and that the Petitioner retained him in October 2013, about six weeks before trial. Trial counsel met with the Petitioner three or four times in jail to discuss the case. He also reviewed the motion to suppress, which already had been denied by the trial court, and thought the suppression issue was "framed well" in the motion. Trial counsel did not read the trial court's ruling denying the motion because he did not think he had time to "revisit[]" the suppression issue and did not think the trial court was going to change its ruling. Trial counsel also did not read the transcript of the suppression hearing. Nevertheless, he thought he was "pretty well prepared" for trial.

Trial counsel testified that he filed a motion for discovery and that he received discovery materials from the State. He did not think Jalissa McFall was a potential witness for the Petitioner because he thought McFall's testimony would hurt, not help, the defense. Trial counsel acknowledged, though, that he never talked to McFall. Trial counsel said that he read Officer Palmer's affidavit and the search warrant issued for the search of the Petitioner's home. Trial counsel acknowledged that Officer Palmer listened to the drug transaction between the CI and McFall and that such transactions were usually recorded. However, trial counsel never attempted to find out if a recording existed in the Petitioner's case. Trial counsel acknowledged that Officer Palmer was the State's "star" witness and said that he did not remember if Officer Palmer still worked for the drug task force at the time of trial. He said he did not know why Officer Palmer resigned from the drug task force and that he cross-examined the officer about the facts of the case but did not attempt to impeach him with his reasons for leaving the drug task force. On cross-examination, trial counsel acknowledged that for the Petitioner's most serious charge, Class B felony possession of cocaine, the jury convicted the Petitioner of a Class A misdemeanor.

In a written order, the post-conviction court denied the petition for post-conviction relief, finding that "there is no evidence, particularly not clear and convincing evidence, of ineffective assistance of counsel." The Petitioner appeals the ruling of the post-conviction court.

II. Analysis

To be successful in a claim for post-conviction relief, a petitioner must prove the factual allegations contained in the post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). "'Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.'" State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.3 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, the post-conviction court's findings of fact are entitled to substantial deference on appeal unless the evidence preponderates against those findings. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001).

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court's findings of fact de novo with a presumption that those findings are correct. See Fields, 40 S.W.3d at 458. However, we will review the post-conviction court's conclusions of law purely de novo. Id.

When a petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, "the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). To establish deficient performance, the petitioner must show that counsel's performance was below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Generally,

> [b]ecause a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, 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, 938 S.W.2d at 370 (citing Strickland, 466 U.S. at 697).

First, the Petitioner contends that trial counsel was ineffective because he failed to "pursue anything further regarding the Motion to Suppress or the search warrant." However, the Petitioner has not made any argument or cited to any authority in support of his claim. See Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R. 10(b). Regardless, our review of the trial record confirms that the Petitioner filed a motion to suppress the evidence found during the search of the Petitioner's home, arguing that the search warrant was based on "double hearsay" and that the affidavit failed to establish the basis of knowledge for the CI or the veracity and reliability of Jalissa McFall. The trial court denied the motion, and the Petitioner challenged the denial on appeal. This court analyzed the Petitioner's claims and affirmed the ruling of the trial court. The Petitioner has failed to explain what more trial counsel should have done regarding the search warrant or the motion to suppress. Therefore, he has failed to show that trial counsel was deficient or that he was prejudiced by any deficiency.

Next, the Petitioner contends that trial counsel was ineffective because he "never inquired as to whether any audio recordings existed, which was the basis of the search warrant." The Petitioner also contends for the first time on appeal that, had trial counsel inquired into the recordings and discovered they did not exist at the time of trial, he may have been entitled to have the trial court instruct the jury on Tennessee Pattern Jury Instruction 42.23 regarding the loss or destruction of evidence. The State argues that nothing indicates any recordings ever existed. We disagree with the State. Our review of the transcript for the September 6, 2013 suppression hearing reveals that Officer Palmer testified that the April 23 drug transaction between the CI and McFall was audio-recorded and that "I can't testify to the recording right now because I don't have it, but what I do have is what I placed in the search warrant itself was that she was giving him turn-by-turn directions and she was taking him to her dope man." In any event, even if trial counsel was deficient for not attempting to obtain the recording, the Petitioner has failed to explain how the recording itself could have been beneficial to his case and has failed to demonstrate that he was prejudiced by counsel's failure to obtain the recording. Moreover, although a missing evidence instruction would have been favorable to the Petitioner, he has failed to show that providing the instruction would have changed the outcome of the trial. Accordingly, he is not entitled to relief.

The Petitioner also contends that he received the ineffective assistance of trial counsel because counsel did not attempt to impeach Officer Palmer with his reasons for leaving the drug task force. Tennessee Rule of Evidence 608(b) provides that a party may impeach a witness with specific instances of conduct on cross-examination if the conduct is probative of the witness's character for truthfulness. See Tenn. R. Evid. 608(b). However, Rick Kelly testified that Officer Palmer did not resign from the drug task force due to dishonesty. Trial counsel testified that he could not remember if Officer Palmer resigned from the drug task force before trial and that he did not know why the officer resigned. The Petitioner called Palmer to testify on his behalf at the evidentiary

hearing but failed to question him about his reasons for leaving the drug task force. Therefore, we find no merit to this claim.

The Petitioner contends that trial counsel was ineffective for failing to challenge his arrest warrant because it was signed by a judicial commissioner who was not certified pursuant to Tennessee Code Annotated section 40-1-111. Initially, we note that six arrest warrants were issued in this case and that the judicial commissioner at issue signed only one of them, the warrant for the Petitioner's introducing a controlled substance into a penal institution. Regardless, as the State points out, "all questions as to the sufficiency of the [arrest] warrant are foreclosed by the finding of an indictment." Jones v. State, 332 S.W.2d 662, 667 (Tenn. 1960). "Neither an illegal warrantless arrest nor an arrest made under color of an invalid warrant invalidates or otherwise affects the validity of an indictment or presentment returned by a grand jury subsequent to the arrest." State v. Marvin Anthony Matthews, No. 02-C-01-9206-CC-00141, 1989 WL 407329, at *3 (Tenn. Crim. App. at Jackson, Mar. 24, 1993). Accordingly, we also find no merit to this claim.

Finally, the Petitioner contends that he received the ineffective assistance of appellate counsel because counsel "failed to sufficiently challenge the search warrant on appeal by neglecting to bring up the doctrine of plain error." As we stated above, though, the Petitioner has failed to explain what more trial counsel should have done with regard to the suppression issue. Likewise, he has failed to explain what more appellate counsel should have done. Thus, he has failed to show that appellate counsel was deficient or that he was prejudiced by any deficiency.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the post-conviction court's denial of the petition for post-conviction relief.

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NORMA MCGEE OGLE, JUDGE