IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs at Knoxville December 15, 2015

CHAUQUINN BERNARD v. STATE OF TENNESSEE

Appeal from the Circuit Court for Tipton County
No. 7777 Joe H. Walker, III, Judge

No. W2015-00987-CCA-R3-PC - Filed January 28, 2015

Petitioner, Chauquinn Bernard, pleaded guilty to felony possession of marijuana pursuant to Tennessee Code Annotated section 39-17-418(e) and received the agreed-upon sentence of four years in the Tennessee Department of Correction, to be served concurrently with a ten-year sentence for aggravated burglary that he was already serving. He filed a petition for post-conviction relief alleging ineffective assistance of counsel and involuntariness of his guilty plea. Following an evidentiary hearing, the post-conviction court denied relief. In this appeal, petitioner argues that the post-conviction court erred in finding that he received effective assistance of counsel. Following our review, we affirm the judgment of the post-conviction court.

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

ROGER A. PAGE, J., delivered the opinion of the Court, in which JOHN EVERETT WILLIAMS and D. KELLY THOMAS, JR., JJ., joined.

Lyle A. Jones, Covington, Tennessee, for the Appellant, Chauquinn Bernard.

Herbert H. Slatery III, Attorney General and Reporter; Meredith DeVault, Senior Counsel; D. Michael Dunavant, District Attorney General; and Sean G. Hord, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Procedural History

The record reflects that petitioner pleaded guilty to aggravated burglary on June 29, 2012, and received the agreed-upon sentence of ten years as a persistent offender. His

sentence was suspended to probation. In 2013, petitioner was subsequently indicted for felony possession of marijuana that occurred on October 21, 2012. His probation was revoked on March 6, 2013, and he was transported to the Tennessee Department of Correction.

The State filed a notice in the instant case indicating that petitioner should be sentenced as a career offender. Under the terms of the plea agreement between petitioner and the State, petitioner was sentenced to four years as a persistent offender, which reduced his release eligibility from sixty percent to forty-five percent.

Petitioner filed a petition for post-conviction relief alleging that he received ineffective assistance of counsel, which resulted in an involuntary guilty plea. Through appointed counsel, he filed an amended petition.

II. Facts

The court held an evidentiary hearing on the petition for post-conviction relief on April 20, 2015. Petitioner's first witness was plea counsel,[1] who testified that the public defender's office was appointed to represent petitioner in the trial court, and plea counsel appeared on petitioner's behalf on the day he entered the guilty plea. He recalled that petitioner was charged with felony possession of marijuana. Petitioner was in the custody of the department of correction on the day of the plea, and he was transported to court for a status hearing. While in court, the State made an offer for petitioner to serve a four-year sentence concurrently with the ten-year sentence he was serving in the department of correction.

Plea counsel spoke with petitioner and reviewed his prior criminal record with him. He attempted to confirm that petitioner met the criteria for being charged by the State as a career offender, but he learned that petitioner should have been charged as a persistent offender. Using that mistake to his advantage, trial counsel secured a lesser sentence during plea negotiations. Plea counsel reviewed the facts of the case and learned that petitioner had been arrested on a warrant and that the search that yielded the drugs was incident to the arrest. His file contained discovery, although he did not have the laboratory report in his file at the time of the evidentiary hearing. Plea counsel could not recall whether a plea agreement was being discussed or whether it had been secured, but his understanding was that petitioner intended to plead guilty. When he reviewed the

[1] The District Public Defender's Office was appointed to represent petitioner in his marijuana case. The record reflects that three attorneys participated in the representation of petitioner. The attorney who apparently had the primary responsibility for the case was not called as a witness; we will refer to her as "appointed counsel." We will refer to her colleague, who had some interaction with petitioner while his case was pending, as "trial counsel," and we will designate the attorney who stood in for appointed counsel and/or trial counsel at the plea acceptance hearing as "plea counsel."

terms of the plea agreement and noticed the discrepancy, the State offered four years to be served concurrently, and that was when petitioner decided to plead guilty.

Plea counsel acknowledged that he did not personally review the laboratory report with petitioner, but he "thought" the State could prove that the substance was, indeed, marijuana. He recalled that "it was kind of one of those [offers] where he can plead . . . today if not, then, . . . there's no more. At least there's no more offer." Because the plea offer provided for a concurrent sentence and would not extend petitioner's time in prison, he recommended that petitioner enter a guilty plea. As a persistent offender, petitioner faced four to six years in prison, which could have been aligned consecutively with his ten-year sentence.

On cross-examination, plea counsel opined that the State had a strong case against petitioner. There was no arguable issue about the search and seizure. He did not typically recommend that a client plead guilty unless the State had a compelling case. Plea counsel explained that he "had literally inherited" petitioner's case that day and that if other attorneys in his office spoke with petitioner previously, the laboratory report could have been in their possession. The State introduced the report into evidence, which confirmed that the substance was 0.80 grams of marijuana. Plea counsel recalled that petitioner had been on probation at the time he committed the instant offense; he negotiated a plea offer that reduced petitioner's sentence from six years to be served at sixty percent to four years to be served at forty-five percent release eligibility.

Petitioner called trial counsel next, who testified that although he spoke with petitioner at some point, petitioner was actually represented by a different attorney in the public defender's office. Trial counsel met with petitioner along with the other attorney, and he wrote petitioner a letter at some time. The file contained no notations about the number of meetings the other attorney had with petitioner while he was in jail, but trial counsel characterized that as being "not uncommon." Trial counsel recalled that petitioner's probation for a prior offense was revoked, and he was transported to the department of correction. Trial counsel did not personally review trial strategy with petitioner except to explain to him that "[y]es, it is a simple possession. Any scrap for simple possession, [and] if it's your third conviction, i[t']s a felony offense." Trial counsel remembered that petitioner and the other attorney had a dispute because petitioner could not understand why such a small amount of a controlled substance could result in a conviction. The other attorney became frustrated trying to communicate with petitioner about that point, which is why trial counsel addressed the issue with petitioner. Trial counsel said that he never would have considered going to trial on this case. He read from his file:

> [Petitioner] was arrested on Tipton County warrant 12CR2777. While checking for weapons, Herrington discovered a clear plastic bag

containing a green leafy substance. [Petitioner] stated the substance was marijuana.

Petitioner then testified on his own behalf and claimed that he never met with trial counsel or the other attorney to discuss trial strategy or potential defenses. He said that the first conversation he had about the instant case was when trial counsel said that he would handle petitioner's case in court. Petitioner said, "When I was fixing to get ready to come to court here, whoever was representing me came to Whiteville [and] told me he was going to give me 64 years for marijuana. I told him it wasn't nothing but just a little scrap. I didn't have nothing but a joint."[2]

Petitioner said that he apologized for his offense and promised never to "smoke weed." He further stated that he "never signed for no ten years on an aggravated burglary charge."

On cross-examination, petitioner agreed with the State that he admitted that the substance in his possession was marijuana.

The State recalled plea counsel and confirmed that plea counsel reviewed the terms of the plea agreement with petitioner before he signed it. Plea counsel said that petitioner understood that he was pleading to a felony and that he was agreeing to a four-year sentence to be served concurrently with his ten-year sentence. Plea counsel reviewed petitioner's rights with him and briefly reviewed the facts of the case with petitioner. Plea counsel said that there was no confusion about the terms of the plea or petitioner's rights on the day he pleaded guilty.

The post-conviction court denied relief by written order dated April 27, 2015. In the order, the court found that petitioner had failed to show that his legal representation was deficient "in any regard." The court further opined that petitioner "understood the significance and consequences of the particular decision to plea[d] guilty and [that] the decision was not coerced. [Petitioner] was fully aware of the direct consequences of the plea, including the sentence actually received." The court also concluded that petitioner failed to demonstrate that any promise or inducement was made for the purpose of influencing his decision to plead guilty, other than the State's agreeing to a sentence to be served at a lesser range. The post-conviction court stated that petitioner had failed to establish in what ways his attorneys failed to investigate his case or how he was prejudiced thereby.

[2] The record reflects that there was some discrepancy as to petitioner's sentencing range. In contrast with petitioner's testimony, as a persistent offender, petitioner's range of punishment for felony possession of marijuana, a Class E felony, would have been four to six years. If sentenced as a career offender, the sentence would have been six years. Tenn. Code Ann. § 40-35-108(c), -112(c).

III. Analysis

Petitioner's sole issue on appeal is whether the post-conviction court erred in finding that he received effective assistance of counsel.

To obtain relief in a post-conviction proceeding, a petitioner must demonstrate that his or her "conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. A post-conviction petitioner bears the burden of proving his or her factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). "'Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.'" *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010) (quoting *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009)).

Appellate courts do not reassess the post-conviction court's determination of the credibility of witnesses. *Dellinger v. State*, 279 S.W.3d 282, 292 (Tenn. 2009) (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)). The post-conviction court's findings of fact are conclusive on appeal unless the preponderance of the evidence is otherwise. *Berry v. State*, 366 S.W.3d 160, 169 (Tenn. Crim. App. 2011) (citing *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997)). However, conclusions of law receive no presumption of correctness on appeal. *Id.* (citing *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001)). As a mixed question of law and fact, this court's review of petitioner's ineffective assistance of counsel claims is de novo with no presumption of correctness. *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011) (citations omitted).

The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and article I, section 9 of the Tennessee Constitution require that a criminal defendant receive effective assistance of counsel. *Cauthern v. State*, 145 S.W.3d 571, 598 (Tenn. Crim. App. 2004) (citing *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975)). When a petitioner claims that he received ineffective assistance of counsel, he must demonstrate both that his lawyer's performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Finch v. State*, 226 S.W.3d 307, 315 (Tenn. 2007) (citation omitted). It follows that if this court holds that either prong is not met, we are not compelled to consider the other prong. *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004).

To prove that counsel's performance was deficient, petitioner must establish that his attorney's conduct fell below an objective standard of "'reasonableness under prevailing professional norms.'" *Finch*, 226 S.W.3d at 315 (quoting *Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006)). 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 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."

Id. at 315-16 (quoting *Baxter*, 523 S.W.2d at 934-35). On appellate review of trial counsel's performance, this court "must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from the perspective of counsel at that time." *Howell v. State*, 185 S.W.3d 319, 326 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 689).

To prove that petitioner suffered prejudice as a result of counsel's deficient performance, he "must establish a reasonable probability that but for counsel's errors the result of the proceeding would have been different." *Vaughn*, 202 S.W.3d at 116 (citing *Strickland*, 466 U.S. at 694). "A 'reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). As such, petitioner must establish that his 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 *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999)).

A guilty plea must be entered knowingly, voluntarily, and intelligently. *Lane*, 316 S.W.3d at 562; *see North Carolina v. Alford*, 400 U.S. 25, 31 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242-44 (1969). If a plea is not knowingly, voluntarily, and intelligently entered, the guilty plea is void because the defendant has been denied due process. *Lane*, 316 S.W.3d at 562 (citing *Boykin*, 395 U.S. at 243 n.5). To make such a determination, the court must examine "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *Id*.

"[A] plea is not voluntary if it results from '[i]gnorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats.'" *Id.* at 563 (quoting *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993)). Thus, the transcript of the plea colloquy must affirmatively show that a defendant's decision to plead guilty was both

voluntary and knowledgeable. *Id.* The trial court must ensure that the defendant entered a knowing and intelligent plea by thoroughly "'canvass[ing] the matter with the accused to make sure that he has a full understanding of what the plea connotes and of its consequences.'" *Id*. (quoting *Blankenship*, 858 S.W.2d at 904).

The entirety of petitioner's argument is this:

> In this case, counsel's performance was deficient. His performance fell below the norm expected of criminal defense lawyers, and but for his deficiencies, appellant would not have entered his plea of guilty.
>
> [Petitioner] pled guilty to the felony offense of Simple Possession. This plea of guilty was not a knowing and voluntary plea because counsel never considered a trial, never went over potential strategy, never went over discovery, and never discussed potential defenses.
>
> The proof at the post-conviction hearing did show that the services rendered by counsel were below the range of competence demanded of attorneys in criminal cases. Further, the deficiencies of counsel actually did have an adverse effect on the case, inducing [petitioner] to plead guilty.

We are unpersuaded by petitioner's argument, which we note is devoid of citations to supporting authorities. *See* Tenn. R. App. P. 27; Tenn. R. Ct. Crim. App. 10(b). The record reflects that although trial counsel did not discuss trial strategy with petitioner, he thoroughly explained to petitioner why he could be convicted of felony simple possession. Plea counsel further reviewed the circumstances of petitioner's arrest and the ensuing search incident to arrest and advised petitioner that there was no plausible argument to be made with regard to search and seizure, which could have potentially been a defense if supported by the facts. Trial counsel, through his experience in the practice of criminal law, opined that he would never have considered going to trial on facts such as those presented by petitioner's case. That is not to say, however, that if he were petitioner's appointed counsel, he would not have taken the case to trial had petitioner insisted upon doing so or that petitioner's appointed counsel would not have considered doing so.

In addition, with regard to discovery, there is no proof in the record that neither of the attorneys reviewed discovery with petitioner. When asked about reviewing discovery, petitioner instead responded about appointed counsel's attempt to have a bond set for him on the marijuana charge; he did not deny having reviewed discovery. He cannot prove this factual allegation by clear and convincing evidence.

The post-conviction court reviewed the plea submission colloquy and specifically found that petitioner understood the significance and consequences of his decision to plead guilty and that the decision was not coerced. While we do not have the benefit of the transcript of the plea colloquy, no evidence was presented at the post-conviction hearing to contradict this finding. *See* Tenn. R. App. P. 24 (noting that it is petitioner's duty "to prepare [a] record which conveys a fair, accurate, and complete account of what transpired in the trial court regarding the issues which form the basis of the appeal"). The post-conviction court correctly noted that the entry of a guilty plea to avoid the risk of greater sentence exposure does not render the plea involuntary. *Hicks v. State*, 983 S.W.2d 240, 248 (Tenn. Crim. App. 1998).

In this case, the post-conviction court credited counsel's testimony over petitioner's testimony. In sum,

> [t]he evidence does not preponderate against the findings of the post-conviction court. It appears the petitioner is suffering from a classic case of 'Buyer's Remorse,' in that he is no longer satisfied with the plea for which he bargained. A plea, once knowingly and voluntarily entered, is not subject to obliteration under such circumstances.

Robert L. Freeman v. State, No. M2000-00904-CCA-R3-PC, 2002 WL 970439, at *2 (Tenn. Crim. App. May 10, 2002).

CONCLUSION

Based on our review of the record, the briefs of the parties, and the applicable legal authority, we affirm the judgment of the post-conviction court.

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ROGER A. PAGE, JUDGE