

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs March 13, 2018

FILED

05/04/2018

Clerk of the
Appellate Courts

ADAM C. BUTLER v. STATE OF TENNESSEE

Appeal from the Circuit Court for Madison County
No. C-17-165 Roy B. Morgan, Judge

No. W2017-01827-CCA-R3-PC

The petitioner, Adam C. Butler, appeals the denial of his petition for post-conviction relief, which petition challenged his 2015 conviction of vandalism of property valued at \$1,000 or more but less than \$10,000. Discerning no error, we affirm.

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

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ALAN E. GLENN and TIMOTHY L. EASTER, JJ., joined.

Joseph T. Howell, Jackson, Tennessee, for the appellant, Adam C. Butler.

Herbert H. Slatery III, Attorney General and Reporter; Andrew C. Coulam, Assistant Attorney General; Jerry Woodall, District Attorney General; and Al Earls, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

A Madison County Circuit Court jury convicted the petitioner of one count of vandalism of property valued at \$1,000 or more but less than \$10,000 for damaging plants and shrubs belonging to a neighbor. *See State v. Adam Christopher Butler*, No. W2015-01843-CCA-R3-CD (Tenn. Crim. App., Jackson, June 8, 2016). At the petitioner's trial, the victim testified that she found the defendant in her yard at 1:45 a.m. wearing a "canister sprayer" on his back that he was using to spray her plants. *Id.*, slip op. at 1-2. The victim confronted the petitioner, who "denied spraying her plants" and claimed that "the next door neighbor had hired him to spray for mosquitoes." *Id.*, slip op. at 2. Within a week, the plants that the victim had observed the petitioner spraying began to show damage, and sometime thereafter most of the vegetation had died. The petitioner testified that he did not spray anything in the victim's yard. *See id.*, slip op. at 4. Instead, he claimed, he had sprayed saltwater to kill poison oak in a hedge that belonged to an

elderly neighbor who had hired the petitioner to do some yardwork. The petitioner also claimed that he sprayed the plants at night so that he could “work[] on the hedge the next day.” *Id.* This court affirmed the petitioner’s conviction and the accompanying four-year community corrections placement. *Id.*, slip op. at 1.

The petitioner filed a timely petition for post-conviction relief alleging, among other things, that he was deprived of the effective assistance of counsel. Following the appointment of counsel, the petitioner refined his claims to allege that his counsel performed deficiently by failing to adequately prepare the petitioner to testify at trial, by failing to secure an expert witness to testify about the effects of certain herbicides on vegetation, by failing to request a forensic mental health evaluation, by failing to conduct adequate pretrial investigation, and by “failing to ensure that the [p]etitioner was duly and adequately informed of the nature and causes of the accusations lodged against him.”

At the September 11, 2017 evidentiary hearing, the petitioner testified that his counsel “didn’t dig into the facts of the chemicals” in order to show the jury that the substance that the petitioner sprayed could not have caused the damage to the victim’s vegetation. He added that counsel should have obtained and presented expert testimony regarding the effect of the chemical that the petitioner had been using. The petitioner also claimed that counsel should have objected to the victim’s testimony that he “was in her yard” and that he “sprayed her yard” when neither was true.

The petitioner testified that trial counsel should have obtained medical and school records that indicated that the petitioner “[h]ad trouble in middle school” as a result of the injuries he received in an earlier car accident. Regarding his claim that counsel failed to adequately prepare him to testify, the petitioner said that counsel should have focused on “the way the chemical works and what went on that night” instead of “going over everything.”

The petitioner asserted that counsel should have interviewed Ms. Smith, the elderly neighbor who had hired him to spray the poison oak on her hedges, saying that “she would have been able to tell [the jury] that [he] was doing [his] job.” The petitioner said that Ms. Smith was very ill at the time of the hearing.

During cross-examination, the petitioner agreed that his mental health records would not have been relevant to any issue at trial. The petitioner maintained that the sprayer he had used on the night in question was still in his possession and that it still contained saltwater so that it might be subjected to expert testing. The petitioner said that trial counsel “just made [him] look bad” on the stand and that he was not able to clearly express some details about the case to the jury as a result.

The petitioner's father, Rodney Butler, who had also testified at the petitioner's trial, testified that counsel should have more thoroughly addressed the issue of the petitioner's "mental capacity and his competency to assist in his own defense," explaining that the petitioner was "just not understanding what's actually being . . . put forth." He said that the petitioner had been previously diagnosed with Attention Deficit Hyperactivity Disorder following a car accident that left him with a skull fracture. He added that the petitioner had a learning disability and that records existed with a number of different providers that might have provided insight into the petitioner's mental health but that trial counsel did not endeavor to obtain those records.

Mr. Butler said that although he did not "know for sure," he did not think that counsel had interviewed Ms. Smith, who, according to Mr. Butler, had provided the chemical to the petitioner. Mr. Butler claimed that he had obtained "an affidavit" from Ms. Smith saying that the petitioner "had the right to be where he was" and that "he was over there to do a job."

Mr. Butler said that counsel failed to familiarize himself with the chemical, explaining, "[Counsel] did not know what [the petitioner] used on that hedge. He didn't know what chemical that was used and misinterpreted it as being salt." Mr. Butler said that he also realized after the trial that the photographs of damage offered by the victim at trial were markedly different than those Mr. Butler took of the damage immediately following the petitioner's arrest. Mr. Butler said that he asked counsel to provide him with any photographs he received as part of the discovery materials so that Mr. Butler "could come up with an idea of what we wanted to talk about," explaining, "See, I'm a scientist, he's a lawyer." Mr. Butler said that he possessed degrees in biology and chemistry. He said that he saw no evidence of any vandalism when he went to the victim's property on "the first day" and that counsel should have objected to evidence at trial indicating that the damage to the victim's plants had been caused by chemicals.

During cross-examination, Mr. Butler testified that he did not have the opportunity to present the evidence he wanted to during the petitioner's trial.

Trial counsel testified that he met with the petitioner "on a couple of occasions" and that he spoke with the petitioner and Mr. Butler via telephone "on several occasions." He reviewed the discovery materials with the petitioner and Mr. Butler. Counsel recalled that he negotiated plea offers for the petitioner but that the petitioner did not accept any offer.

Counsel testified that the thrust of the defense was that the petitioner had not sprayed the victim's vegetation. He recalled that he reviewed the photographs taken

by Mr. Butler and chose not to offer into evidence the photographs that showed damage to the victim's vegetation because he believed that those photographs "[w]ould have hurt" the petitioner's case more than they would have helped it.

Counsel said that he had no reason to question the petitioner's competency to stand trial because he had no difficulty communicating with the petitioner throughout the process and that the petitioner was able to cogently explain his version of events to counsel. Counsel testified that after Mr. Butler provided him with the affidavit from Ms. Smith, he interviewed her and found her in poor health. He said that upon speaking to Ms. Smith, he concluded that her testimony would have hurt the petitioner's case because "she indicated that he was working . . . as late as 9 p.m. but nothing as late as 1 or 2 o'clock in the morning." Counsel acknowledged that he did not endeavor to secure any scientific testing of the vegetation, explaining that several weeks elapsed between the time the plants were damaged and the petitioner was indicted.

During cross-examination, trial counsel said that he could not recall specifically discussing the hiring of "an expert to analyze chemicals" with either the petitioner or Mr. Butler, explaining, "His defense was, I didn't go over there and spray anything, so it would have been a moot point." He acknowledged that "there was . . . maybe an issue" with the petitioner's capacity to assist in his defense, "but nothing as far as his ability to communicate with me or me with him." He added that the petitioner "knew what [counsel's] job was, he knew what the Judge's job was, he knew what the prosecutor's job was and nothing [indicated] that he was unable to appreciate the wrongfulness of his acts." Counsel said that he prepared the petitioner to testify about "what happened that night, did he go over to [the victim's] property and spray vegetation, things of that nature."

Although he could not recall specifically, counsel thought that the petitioner had been "offered misdemeanor vandalism and probation." With regard to his conversation with Ms. Smith, counsel recalled that Ms. Smith "indicated that she really didn't want to come to court based on her health and her husband's health." Counsel said that he did subpoena another of the victim's neighbors, but the court ruled that the testimony was inadmissible following counsel's offer of proof.

At the conclusion of the hearing, the post-conviction court indicated that it recalled the facts of the case very well due to the unusual nature of the case. The court specifically accredited counsel's testimony "as to his recollection of what he did in preparation for this" trial. The court also indicated that it would "consider Mr. Rodney Butler's testimony and [the petitioner's] testimony, but in weighing out again, the [c]ourt finds credibility with [trial counsel's] testimony." Regarding the petitioner's claim that counsel failed to submit photographs of the damage to the victim's vegetation, the court

observed that “the [c]ourt allowed 17 photos . . . during the course of the trial.” The court found no merit to the petitioner’s claim that counsel “didn’t do enough to dig into the chemicals,” observing that the petitioner “testified himself it was a saltwater mixture” and that it does not “take[] a rocket scientist to determine salt and water mixture.” As to the petitioner’s claim that counsel should have presented Ms. Smith as a witness, the court accredited counsel’s testimony that he interviewed Ms. Smith and determined that “she wouldn’t help, in fact, she would hurt.” With regard to the petitioner’s claim that counsel should have obtained the petitioner’s school and mental health records, the court noted that “[t]here’s been no evidence today for the [c]ourt to consider how that would have made a difference.” Finally, the court accredited counsel’s testimony that “there has been no indication that [the] petitioner would be determined to be incompetent for purposes of standing trial.” Ultimately, the post-conviction court concluded that the petitioner had not carried his burden and denied the petitioner’s bid for post-conviction relief.

In this appeal, the petitioner contends that the post-conviction court erred by denying post-conviction relief, reiterating his claim that he received the ineffective assistance of counsel at trial. The State contends that the post-conviction court did not err.

We view the petitioner’s claim with a few well-settled principles in mind. Post-conviction relief is available only “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. A post-conviction petitioner bears the burden of proving his or her factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f). On appeal, the appellate court accords to the post-conviction court’s findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *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). By contrast, the post-conviction court’s conclusions of law receive no deference or presumption of correctness on appeal. *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).

Before a petitioner will be granted post-conviction relief based upon a claim of ineffective assistance of counsel, the record must affirmatively establish, via facts clearly and convincingly established by the petitioner, that “the advice given, or the services rendered by the attorney, are [not] within the range of competence demanded of attorneys in criminal cases,” *see Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975), and that counsel’s deficient performance “actually had an adverse effect on the defense,” *Strickland v. Washington*, 466 U.S. 668, 693 (1984). In other words, 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. Should the petitioner fail to establish either deficient performance or prejudice, he is not entitled to relief. *Id.* at 697; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Indeed, “[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” *Strickland*, 466 U.S. at 697.

When considering a claim of ineffective assistance of counsel, a reviewing court “begins with the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all significant decisions,” *Kendrick v. State*, 454 S.W.3d 450, 458 (Tenn. 2015) (citing *Strickland*, 466 U.S. at 689), and “[t]he petitioner bears the burden of overcoming this presumption,” *id.* (citations omitted). We will not grant the petitioner the benefit of hindsight, second-guess a reasonably based trial strategy, or provide relief on the basis of 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). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

A claim of ineffective assistance of counsel is a mixed question of law and fact. *Kendrick*, 454 S.W.3d at 457; *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010); *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). When reviewing the application of law to the post-conviction court’s factual findings, our review is de novo, and the post-conviction court’s conclusions of law are given no presumption of correctness. *Kendrick*, 454 S.W.3d at 457; *Fields*, 40 S.W.3d at 457-58; *see also State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000).

In our view, the record supports the denial of post-conviction relief. Trial counsel’s accredited testimony established that the petitioner did not exhibit any behavior that caused counsel to doubt the petitioner’s competency to stand trial. Counsel’s accredited testimony also established that he interviewed Ms. Smith prior to the petitioner’s trial and determined that her testimony would not be favorable to the petitioner’s case. The petitioner did not present Ms. Smith as a witness at the evidentiary hearing to contradict counsel’s assertion in any way.¹ In the absence of Ms. Smith’s testimony, any conclusion that her presentation as a witness would have altered the outcome of the petitioner’s trial would be nothing more than speculation. The same analysis applies to the petitioner’s claim that trial counsel should have secured the services of an expert regarding the particular chemical that the petitioner used to spray

¹ Although Mr. Butler and the petitioner indicated that Ms. Smith was in poor health, other arrangements could have been made to secure her testimony for the evidentiary hearing. *See generally* Tenn. R. Crim. P. 15.

Ms. Smith's hedge. The petitioner did not present any expert testimony or other scientific evidence that contradicted trial counsel's accredited testimony that the services of an expert witness would have been unnecessary and likely unhelpful. Again, this court will not speculate about the potential trial impact of testimony or other evidence that is not specifically presented at the evidentiary hearing.

Accordingly, we affirm the judgment of the post-conviction court.

JAMES CURWOOD WITT, JR., JUDGE