

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs at Knoxville October 30, 2018

BRANDON CHURCHMAN v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County

No. 11-03841 W. Mark Ward, Judge

No. W2017-02338-CCA-R3-PC

The Petitioner, Brandon Churchman, filed a post-conviction petition seeking relief from his convictions of reckless homicide, felony murder, and two counts of facilitation of attempted first degree murder and accompanying effective sentence of life plus ten years. The Petitioner alleged that his counsel was ineffective on appeal by failing to challenge the trial court's imposition of consecutive sentencing. The post-conviction court denied the petition, and the Petitioner appeals. Upon review, we affirm the judgment of the post-conviction court.

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

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and TIMOTHY L. EASTER, JJ., joined.

Patrick E. Stegall, Memphis, Tennessee, for the Appellant, Brandon Churchman.

Herbert H. Slatery III, Attorney General and Reporter; Sophia S. Lee, Senior Counsel; Amy P. Weirich, District Attorney General; and Glenda Adams, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Factual Background

On May 21, 2009, the Petitioner and his co-defendant, Alvin Gray, pled guilty to the attempted first degree murder of Lee Broyles, and each was sentenced to twenty-five years of incarceration in the Tennessee Department of Correction. State v. Brandon Churchman, No. W2013-00175-CCA-R3-CD, 2014 WL 12651043, at *1 (Tenn. Crim.

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App. at Jackson, Apr. 28, 2014). The convictions were based on an incident that occurred at a carwash on the night of June 10, 2007, during which the Petitioner and Gray took Broyles' Chrysler 300, and Gray shot him. Id. The Petitioner and Gray were also indicted for first degree premeditated murder, felony murder, two counts of attempted first degree murder, and employment of a firearm during the commission of a dangerous felony for crimes committed in the early morning hours of June 11, 2007. Id.

At trial, the proof revealed that on the evening of June 10, brothers Terrence Edwards and Charles Owens and their cousin, Mel Owens, went to the Premiere Club. Id. at *2. Charles¹ entered the club "briefly," then they spent several hours driving around the club's parking lot and a parking lot across the street to socialize. Id. The men were in Charles' "distinctive lime-gold Crown Victoria, which had several after-market additions." Id. Between 2:00 and 3:00 a.m., the men went to Charles' home and sat in the car in the driveway to talk. Id. Mel was in the driver's seat, Charles was in the front passenger seat, and Edwards was in the backseat. Id. Edwards testified that Mel told the men to "duck. He's fixing to shoot," then began backing out of the driveway. Id. Charles testified that Mel put the car in reverse before warning the men to duck. Id. Charles and Edwards looked around and saw a man who was standing close to the house start moving up the driveway. Id. When the Crown Victoria reached the street and began to drive away, the man shot into the car. Id. Mel appeared distressed, and the brothers asked if he had been shot. Id. Mel was unable to answer but patted his side to indicate he had been injured. Id. Charles helped to steer the vehicle until Mel could no longer press the accelerator, and the vehicle stopped. Id. Charles exited the car to help Mel then informed Edwards that he thought Mel was dead. Id. The brothers then saw a Chrysler drive around a corner and stop. Id. A man exited the Chrysler and fired a gun at them. Id. The brothers ran and hid in a wooded area nearby. Id. Although the brothers were unable to identify the shooter, they identified a photograph of the Chrysler, which matched a description of Broyles' stolen Chrysler. Id. at *3. At 5:00 a.m. on June 11, 2007, Broyles' stolen Chrysler was found in North Memphis within walking distance of the Petitioner's residence and Gray's residence. Id. The Chrysler had been set on fire, and no physical evidence could be recovered from the car. Id.

To link the Petitioner to the shooting, the State introduced the testimony of Gray. Gray said that he and the Petitioner decided to rob Broyles when they saw him at the carwash. Id. at *4. Gray, who had a gun, demanded Broyles' keys. Id. Broyles refused, and Gray hit him with the gun. Id. During a struggle, Broyles dropped the keys, and the defendants got into Broyles' vehicle. Id. Gray was in the driver's seat, and the Petitioner was in the front passenger seat. Id. As the defendants were leaving, Broyles shot at them, and Gray returned fire. Id.

¹ Because some of the witnesses share a surname, we will utilize their first names for clarity. No disrespect is meant to these individuals.

Gray said that he and the Petitioner eventually drove around the Premiere Club. Id. A third man, whom Gray did not know well, joined them. Id. They took turns driving the Chrysler. Id. On their way home, they saw the Crown Victoria, and the Petitioner and the third man discussed taking it. Id. When the Crown Victoria stopped at Charles' home, the Petitioner grabbed Gray's gun, which Gray had left in the front seat. Id. The Petitioner got out of the Chrysler at the house next door to Charles' house and walked toward Charles' house. Id. As the Crown Victoria backed out of the driveway, the Petitioner fired two shots at the car. Id. The Petitioner got back into the Chrysler, and the defendants pursued the Crown Victoria. Id. When it stopped, the Petitioner fired three or four shots toward it from inside the Chrysler. Id. Two men ran from the Crown Victoria. Id. The defendants pulled up near the Crown Victoria, and the Petitioner and Gray got out of the car. Id. They saw the driver was dead, and they decided to leave. Id. The third man drove himself home, then the Petitioner and Gray decided to burn the Chrysler and leave it at a vacant lot located within walking distance of their homes. Id.

The State introduced a video from the carwash that showed part of the attack on Broyles. Id. at *5. The police found four bullet casings and two bullet fragments at the carwash, and one bullet fragment was recovered from Broyles. Id. The police recovered two bullet casings from the street in front of Charles' residence, four bullet casings from the street where the Crown Victoria came to a stop, two bullet fragments from the car, and one bullet fragment from Mel. Id. Testing revealed that all of the casings were fired from the same weapon; however, the weapon was never recovered. Id.

At the conclusion of the trial, the State dismissed the weapons charge. Id. The jury found the Petitioner guilty of reckless homicide as a lesser-included offense of premeditated first degree murder. Id. The jury also convicted the Petitioner of felony murder and two counts of facilitation of attempted first degree murder as charged. Id.

At the sentencing hearing, the trial court merged the reckless homicide conviction into the felony murder conviction and imposed a sentence of life imprisonment. The court sentenced the Petitioner as a Range I, standard offender to concurrent sentences of ten years for each of the facilitation of attempted first degree murder convictions. The trial court ordered that the ten-year sentences were to be served consecutively to the life sentence. The trial court further ordered that the total effective sentence was to be served consecutively to the previously imposed sentence of twenty-five years for the attempted first degree murder of Broyles. On appeal, this court affirmed the Petitioner's convictions. Id. at *1.

Thereafter, the Petitioner filed for post-conviction relief, alleging that his counsel was ineffective at trial by failing to seek joinder of his charges² and by failing to challenge the Petitioner's sentences, particularly the imposition of consecutive sentencing, on appeal.

At the post-conviction hearing, the Petitioner's counsel testified that the Petitioner was indicted for first degree premeditated murder and that prior to trial, the indictment was amended to felony murder. Counsel represented the Petitioner on the felony murder charge. At the time counsel was appointed, the Petitioner had pled guilty to the attempted first degree murder of Broyles. Another attorney represented the Petitioner on that charge.

Counsel said that the attempted first degree murder occurred just a few hours before the shooting that resulted in the felony murder charge. After the Petitioner was convicted of felony murder, he was sentenced to consecutive sentences of life plus thirty or thirty-five years. Counsel represented the Petitioner on direct appeal and acknowledged that he did not raise any sentencing issues in the Petitioner's motion for new trial or his direct appeal. Counsel explained that he decided not to raise any sentencing issues, noting that the trial court had "great discretion" on sentencing issues, and he did not think the Petitioner would get relief.

On cross-examination, counsel acknowledged he did not raise any objections during the sentencing hearing. Counsel said that by the time he was appointed, the Petitioner was serving a twenty-five-year sentence pursuant to a guilty plea. Counsel thought the State had filed motions to enhance the Petitioner's punishment for the first set of charges if he were convicted at trial, and counsel did not "have any mitigating factors to argue."

On redirect, counsel stated that he did not recall having any problems with the trial court's imposition of consecutive sentencing. Counsel did not raise the issue of consecutive sentencing on appeal because the trial court had authority to impose consecutive sentencing to a defendant who had been convicted of multiple violent felonies.

The Petitioner testified that he could not recall the sentencing hearing. The Petitioner acknowledged that counsel continued to represent him on appeal. The Petitioner said that counsel never discussed sentencing with him and did not advise the Petitioner of the issues to be raised on appeal. The Petitioner was unable to contact counsel about the appeal.

² On appeal, the Petitioner has abandoned his claim regarding the joinder issue. Therefore, we will not recount the proof adduced at the post-conviction hearing concerning this claim.

On cross-examination, the Petitioner said that when he was sentenced for the felony murder, his only prior felony conviction was for the attempted first degree murder of Broyles. The Petitioner explained that he pled guilty to criminal responsibility for attempted first degree murder but that he “was just with somebody on the first case, and that individual was the – was the shooter in both cases.”

The Petitioner acknowledged that he did not provide counsel any information that could mitigate his sentence but explained that counsel “didn’t talk to me in that fashion to get that understanding.” The Petitioner said that his parents or other people could have testified that he was not “a reckless individual . . . who’s not caring about . . . humane society in that fashion.” The Petitioner said that the State adduced proof to support consecutive sentencing and that he did not know he could present proof to show that he was not a violent person. The Petitioner said that during his incarceration, he attended social programs and anger management programs, which he thought could have mitigated his sentences. The Petitioner did not remember counsel requesting concurrent sentencing.

The post-conviction court denied relief, finding that the Petitioner failed to prove that his counsel was deficient or that the Petitioner was prejudiced by any alleged deficiency. The Petitioner appeals this ruling.

II. Analysis

To be successful in a claim for post-conviction relief, the 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 the Petitioner seeks post-conviction relief on the basis of ineffective assistance of counsel, “the [P]etitioner 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. Moreover,

[b]ecause [the P]etitioner 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). The same test is used to determine the effectiveness of trial counsel and appellate counsel. See Carpenter v. State, 126 S.W.3d 879, 886 (Tenn. 2004).

On appeal, the Petitioner contends that the trial court did not make the proper findings to impose consecutive sentencing pursuant to State v. Wilkerson, 905 S.W.2d 933 (Tenn. 1995), and that counsel did not raise the sentencing issue on direct appeal. Previously, this court has observed:

“[F]ailure to preserve and/or assert all arguable issues on appeal is not *per se* ineffective assistance of counsel, since the failure to do so may be a part of the counsel’s strategy of defense. Counsel is not constitutionally required to argue every issue on appeal, or present issues chosen by his client. The determination of which issues to present on appeal is a matter of counsel’s discretion.”

State v. Matson, 729 S.W.2d 281, 282 (Tenn. Crim. App. 1986) (quoting State v. Swanson, 680 S.W.2d 487, 491 (Tenn. Crim. App. 1984)).

Generally, “appellate counsel’s professional judgment with regard to which issues will best serve the [Petitioner] on appeal should be given considerable deference[, and

this court] should not second-guess such decisions, and every effort must be made to eliminate the distorting effects of hindsight.” Carpenter, 126 S.W.3d at 887. Our supreme court has set forth the following “non-exhaustive list” of factors which “is useful in determining whether an attorney on direct appeal performed reasonably competently in a case in which counsel has failed to raise an issue”:

- 1) Were the omitted issues “significant and obvious”?
- 2) Was there arguably contrary authority on the omitted issues?
- 3) Were the omitted issues clearly stronger than those presented?
- 4) Were the omitted issues objected to at trial?
- 5) Were the trial court’s rulings subject to deference on appeal?
- 6) Did appellate counsel testify in a collateral proceeding as to his appeal strategy and, if so, were the justifications reasonable?
- 7) What was appellate counsel’s level of experience and expertise?
- 8) Did the petitioner and appellate counsel meet and go over possible issues?
- 9) Is there evidence that counsel reviewed all the facts?
- 10) Were the omitted issues dealt with in other assignments of error?
- 11) Was the decision to omit an issue an unreasonable one which only an incompetent attorney would adopt?

Id. at 888. “A petitioner alleging ineffective assistance of appellate counsel must prove both that (1) appellate counsel was objectively unreasonable in failing to raise a particular issue on appeal, and (2) absent counsel’s deficient performance, there was a reasonable probability that the petitioner’s appeal would have been successful.” Michael Fields v. State, No. E2015-01850-CCA-R3-PC, 2016 WL 5543259, at *8 (Tenn. Crim. App. at Knoxville, Sept. 29, 2016) (citing Smith v. Robbins, 528 U.S. 259, 285-86 (2000)), perm. to appeal denied, (Tenn., Jan. 19, 2017).

The transcript of the sentencing hearing reflects that the trial court found the Petitioner was a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high. Generally, consecutive sentencing is appropriate when a defendant is “a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high.” Tenn. Code Ann. § 40-35-115(b)(4). Our case law reflects that in order to impose consecutive sentencing

based upon finding that a defendant is a dangerous offender, a court must also find that “(1) the sentences are necessary in order to protect the public from further misconduct by the defendant and [that] (2) ‘the terms are reasonably related to the severity of the offenses.’” State v. Moore, 942 S.W.2d 570, 574 (Tenn. Crim. App. 1996) (quoting Wilkerson, 905 S.W.2d at 938); see also State v. Lane, 3 S.W.3d 456, 461 (Tenn. 1999). The trial court noted that the “incident . . . started in one location with at least one gunshot that was fired. Then there was a pursuit to another location where multiple shots were fired” The trial court found that “confinement for an extended period of time is necessary to protect society from the [Petitioner’s] unwillingness to lead a productive life and the [Petitioner’s] resort to criminal activity in furtherance of his anti-societal lifestyle and that the aggregate length of the sentence is reasonably relate[d] to the offenses for which the [Petitioner] stands convicted”

In its order, the post-conviction court noted counsel’s testimony that he did not appeal the trial court’s imposition of consecutive sentencing because he felt the sentences imposed were within the trial court’s discretion. Counsel explained that he focused on other issues which, based on his experience, had more merit. Counsel thought the trial court acted within its discretion by imposing consecutive sentencing. We agree. The post-conviction court found that the Petitioner committed two violent felony offenses within hours of each other. The post-conviction court also found that counsel made a strategic decision not to raise the sentencing issue on appeal. We agree that counsel made a reasonable tactical decision to foregoing challenging the consecutive sentencing on appeal. See Terrence Justin Feaster v. State, No. E2018-00193-CCA-R3-PC, 2018 WL 5734476, at *3 (Tenn. Crim. App. at Knoxville, Nov. 1, 2018), perm. to appeal denied, (Tenn. Jan. 16, 2019); Christopher D. Neighbours v. State, No. M2015-01904-CCA-R3-PC, 2016 WL 6678535, at *11 (Tenn. Crim. App. at Nashville, Nov. 14, 2016). Further, the post-conviction court found after reviewing the transcript of the sentencing hearing “that the trial court, at a minimum, substantially complied with the Wilkerson requirements.” Therefore, the post-conviction court held that the Petitioner failed to prove that counsel was deficient or that the Petitioner was prejudiced by any deficiency. We agree.

III. Conclusion

The judgment of the post-conviction court is affirmed.

NORMA MCGEE OGLE, JUDGE