

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs April 01, 2014

RICARDO DALE v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Shelby County
No. 02-01377 James C. Beasley, Jr., Judge

No. W2013-01589-CCA-R3-PC - Filed July 11, 2014

The petitioner, Ricardo Dale,¹ filed a petition in the Shelby County Criminal Court, seeking post-conviction relief on the basis of ineffective assistance of counsel. The post-conviction court denied the petition, and the petitioner appeals this ruling. 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 is Affirmed.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which JERRY L. SMITH and D. KELLY THOMAS, JR., JJ., joined.

Vicki M. Carriker (on appeal) and Michael E. Scholl (at trial), Memphis, Tennessee, for the appellant, Ricardo Dale.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Senior Counsel, Amy P. Weirich, District Attorney General, and Kirby May, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On June 19, 2003, the petitioner was convicted of aggravated robbery and attempted first degree murder. The trial court sentenced the petitioner to twenty-five years for each conviction and ordered the sentences to be served consecutively. On direct appeal, this court

¹The initial post-conviction petition lists the petitioner's name as "Recardo Dale." The amended petition, the notice of appeal, and the appellant's brief list his name as "Ricardo Dale."

summarized the proof adduced at trial as follows:

Tori Davis testified that she was sitting on her front porch when she saw a man, whom she later identified as [the petitioner], flag down a car in front of her house. [The petitioner], whose face was visible in the streetlight, crossed the street and walked up to the car. Ms. Davis said that she heard one gunshot followed by a second shot at which point Ms. Davis went into her house and closed the front door. While she checked on her son, Ms. Davis attempted to call 911 but did not get through. A few minutes later, the 911 operator called back and told Ms. Davis that the incident had already been reported.

Ms. Davis said that the victim's car was parked about twenty feet from her front porch. She knew of [the petitioner] because she had seen him in the neighborhood where his mother lived. She did not know the victim who was driving the car but knew his passenger, John Wilson. Ms. Davis said that Mr. Wilson fled from the car when the shooting began and ran up the hill behind the street.

Ms. Davis said that she went down the street to Church's Fried Chicken to get something to eat. The police were interviewing people in the restaurant about the shooting, and someone pointed her out as a witness. Ms. Davis said that she did not at first voluntarily talk with the police because her children were at home asleep. She later gave a statement, however, and told the police that [the petitioner] was the shooter. The police showed her a photographic line-up, and she identified [the petitioner] as the assailant.

Marcus Martin, the victim, said he arrived at John Wilson's house around 10:00 p.m. in his white 1989 Oldsmobile. Mr. Martin said he was shot the first time as Mr. Wilson was opening the car door. Two more shots were fired through the open back window. Mr. Martin put the car in park and fell out of the car into the street where he was shot one more time in the arm. Mr. Martin said that the shooter got in the car and said, "I finally got this car." After his car pulled out, Mr. Martin heard some voices across the street say, "Lay down or

we're going to kill you.” Mr. Martin, however, ran to Church’s Fried Chicken for help.

Mr. Martin said that he could not identify his assailant. All he saw was a person with a hat and a bandana wrapped around the lower half of his face. Mr. Martin denied that there was a streetlight near the location of the incident and said that the shooter approached his car from the curb rather than from across the street. Mr. Martin conceded that he knew [the petitioner] because he had gone to school with him. He said he never looked at the shooter, however, because he was in shock. Mr. Martin said that his car was found in Mississippi. Mr. Martin said that the steering wheel, music recordings and radio were gone. The center pieces of the car’s hubcaps were on the front seat.

John Wilson said that he had just gotten into Mr. Martin’s car when the first shot was fired. He exited the car and ran across the street and up a hill to safety. Mr. Wilson said that he waited a few minutes and then went to his mother’s house. His mother called 911. Mr. Wilson said that he did not see who shot Mr. Martin and did not hear anybody say anything. Mr. Wilson admitted that he knew [the petitioner] by name but said that he did not look in the shooter’s direction before he ran. On cross-examination, Mr. Wilson said that the shooter approached from the curb. Mr. Wilson further denied seeing anyone try to flag Mr. Martin down.

Officer Angela Muhammad said that Mr. Martin was still conscious when she arrived at Church’s Fried Chicken. Mr. Martin told Officer Muhammad that he did not know who shot him. A few members of the crowd that had gathered at the fast-food restaurant told Officer Muhammad that they would not discuss the incident because the shooter’s friends were listening to see who talked to the police. Officer Muhammad said she asked everyone to leave. About ten minutes later, two women approached and told Officer Muhammad that they had seen what happened.

Sergeant Brad Ragland said that [the petitioner] called

him two days after the incident and said that he had heard Sergeant Ragland was looking for him. [The petitioner] told Sergeant Ragland that his friends would vouch for his whereabouts at the time the shooting occurred. Sergeant Ragland asked [the petitioner] to come down to the police station, but [the petitioner] did not show up. Sergeant Ragland showed Ms. Davis a photographic line-up on the day that [the petitioner] called, and, without hesitation, Ms. Davis identified [the petitioner] as the shooter.

Sergeant Ragland entered the information concerning Mr. Martin's car on NCIC and received a call a few days later informing him that Mr. Martin's car was in Mississippi. A fingerprint belonging to [the petitioner] was discovered on a center hubcap piece in the car. [The petitioner] was arrested on May 17, 2001. [The petitioner] said that he did not know the victim and had never been around Mr. Martin's car. [The petitioner] continued to maintain his innocence even after confronted with the fingerprint evidence.

On cross-examination, Sergeant Ragland admitted that Ms. Davis was an evasive and uncooperative witness. On redirect, however, Sergeant Ragland explained that he did not think Ms. Davis was untruthful, just scared. Sergeant Ragland said that he put two extra patrols on duty around Ms. Davis' house after the incident.

Jerry Sims, a fingerprint examiner with the Memphis Police Department, testified that the fingerprint from the right thumb lifted from the center hubcap piece discovered in the victim's car matched [the petitioner's] right thumb print which was on file in the department, and identified as file no. 257794. Bobby Spence, a fingerprint technician with the Shelby County Sheriff's Department, obtained [the petitioner's] fingerprints in court during the trial. Mr. Spence then compared [the petitioner's] fingerprints with the fingerprints in file no. 257794. Mr. Spence testified that the two sets of fingerprints matched, and that [the petitioner] was thus the same person whose fingerprints were on file in file no. 257794.

State v. Recardo Dale, No. W2003-02391-CCA-R3-CD, 2005 WL 94362, at *1-3 (Tenn. Crim. App. at Jackson, Jan. 10, 2005). This court affirmed the petitioner’s convictions but modified his consecutive sentences to twenty-two years for each conviction, for a total effective sentence of forty-four years. Id. at *9. On May 23, 2005, our supreme court denied the petitioner’s application for permission to appeal.²

Thereafter, on May 19, 2006, the petitioner, acting through counsel, filed a petition for post-conviction relief, alleging that his trial counsel was ineffective. On June 5, 2009, the petitioner filed an amended post-conviction petition. A hearing on the petition was held on March 1, 2013.

At the hearing, the petitioner testified that trial counsel, who worked in the public defender’s office, was appointed to represent him. The petitioner acknowledged that he spoke with trial counsel prior to trial and that they discussed aspects of the case. Trial counsel employed an investigator, Sam Evans. The petitioner never spoke with Evans, but trial counsel did. Evans interviewed the State’s key witnesses: Tori Davis; John Wilson; and Marcus Martin, the victim. Although Wilson and Martin knew the petitioner, only Davis was able to identify the petitioner as the perpetrator.

The petitioner said that prior to trial, his brother presented an affidavit to Davis. The affidavit stated that Davis “never actually saw [the petitioner] shoot anyone,” that she told the police what [she] heard from other people,” and that she “had no direct knowledge of who shot [the victim].” Davis signed the affidavit, and it was notarized. The petitioner recalled that the State and trial counsel questioned Davis about the affidavit at trial. She acknowledged signing the affidavit but denied preparing it.

The petitioner said that Evans interviewed Davis before trial and that during the interview, Davis said that she could not identify the petitioner as the perpetrator. Thereafter, the interview was transcribed, and trial counsel provided the petitioner with a copy of the transcription prior to trial.³ According to the transcript, Davis said, “I didn’t see no face. Only thing I could say – only thing I could say is it was a skinny person.” During cross-examination, trial counsel asked Davis if she had spoken with Investigator Evans but did not

²Upon denying the petitioner’s application for permission to appeal, our supreme court designated the opinion “Not for Citation.” See Tenn. Sup.Ct. R. 4(E)(1) (“If an application for permission to appeal is hereafter denied by this Court with a ‘Not for Citation’ designation, the opinion of the intermediate appellate court has no precedential value.”).

³A copy of the affidavit and transcripts of the interview and the trial were entered as exhibits to the hearing.

question her about the contents of the interview.⁴

The petitioner complained that trial counsel failed to call Evans as a witness at trial to impeach Davis. The petitioner said that at trial, trial counsel informed the court that he had tried to contact Evans but that ““he’s had a stroke and he’s virtually an invalid and [the defense] couldn’t call him.”” Nevertheless, the petitioner believed trial counsel should have asked for a continuance until Evans was well enough to testify.

The petitioner said that his fingerprints were on a hubcap that was found on the seats of the car taken from the victim. Trial counsel was unable to have the hubcap tested because it had been destroyed accidentally; however, the State had a record of the fingerprints retrieved from the hubcap. The petitioner learned of the destruction on the first day of trial. The petitioner said that although the hubcap had been destroyed, trial counsel did not move to strike the fingerprint evidence. Additionally, the State took the petitioner’s fingerprints during trial, without objection by trial counsel. The petitioner asserted that he wanted to have the hubcap analyzed and tested by defense experts but that he did not get a chance to discuss

⁴The trial transcript reflects the following colloquy occurred during on cross-examination:

[Trial counsel:] Do you remember having a phone conversation with an investigator from my office?

[Davis:] I can’t remember.

[Trial counsel:] Did you talk to anybody on the telephone about this?

[Davis:] I can’t remember. A lot of folks call.

[Trial counsel:] About this case?

[Davis:] I can’t remember.

[Trial counsel:] So a lot of folks called you about this case?

[Davis:] No. But I can’t remember if I talked to an investigator on my phone. But I can remember a while back a man came to my house talking about the case.

[Trial counsel:] You remember telling him I didn’t see no face?

[Davis:] No, I did not.

it with trial counsel. The petitioner maintained that trial counsel should have requested funding for an expert to refute the State's fingerprint evidence.

On cross-examination, the petitioner acknowledged that he met with trial counsel "on more than one occasion." He further acknowledged that Davis identified him at trial and at the preliminary hearing as the perpetrator. Additionally, he acknowledged that the trial transcript reflected that Sergeant Ragland testified that he had placed patrols around Davis's house because she had been contacted by people in the neighborhood about testifying.

The petitioner said that trial counsel refused to stipulate that the fingerprints the State had on his "R&I card" were the petitioner's fingerprints. Accordingly, the State took the appellant's fingerprints during trial and compared them to the fingerprints on file and the fingerprints found on the hubcap.

On redirect examination, the petitioner clarified that Evans tape-recorded the interview with Davis. Trial counsel did not introduce the recording at trial in order to ask Davis whether it was her voice on the recording.⁵

According to the petitioner, the fingerprint analyst, Jerry Sims, testified at trial that the computer system was designed to provide twenty-four possible candidates for matching fingerprints; however, because the petitioner's fingerprint matched the fingerprints on the hubcap on twenty separate points of comparison, no other candidate was investigated. The petitioner said that the defense had no opportunity to test or compare the prints.

Trial counsel testified that he had been practicing law for over thirty years and that he had worked for the public defender's office almost continuously since 1989. Trial counsel said that he and the petitioner got along well.

Trial counsel stated that Davis denied making the statements in the affidavit. Trial counsel said that he had listened to the tape recording of Evans's interview with Davis and acknowledged that Davis's interview was contrary to her trial testimony. Trial counsel said that he had dealt with a similar issue in a trial occurring not long before the petitioner's and that the witness asserted, "I told your investigator that because I knew who he was working for and I wanted to get him out of my face." He maintained that Davis was an extremely reluctant witness who was "terrified" to testify because "maybe it was gang related." Accordingly, trial counsel foresaw the distinct possibility of Davis repudiating the interview the same way she did the affidavit, which counsel thought would be embarrassing and damaging to the petitioner's case. Therefore, trial counsel did not introduce the tape-

⁵The tape recording was not made an exhibit to the post-conviction hearing.

recorded interview.

Trial counsel said that he did not call Evans as a witness because of Evans's poor health. Counsel said that it did not occur to him to request a continuance because "it was everybody's considered opinion that Mr. Evans was never going to recover, that the effects of the stroke were so massive that he was never going to be available as a witness." Trial counsel did not know if Evans ever recovered.

Counsel said that the victim and Wilson were not able to identify the appellant as the perpetrator. The victim said that the perpetrator was around 5'10" or 6' tall and weighed over 200 pounds. Davis, who identified the petitioner, said the perpetrator was "skinny." During trial, counsel attempted to point out the discrepancies in the descriptions and the poor lighting conditions at the time of the offense.

Trial counsel stated that prior to trial, he and the prosecutor looked for the hubcap and discovered that it had been destroyed. Trial counsel said they were "dumbfounded." He learned that the wrong case number had been assigned accidentally to the hubcap, that the clerk's office believed the hubcap pertained to a case that was concluded, and that it was destroyed. However, the card on which the fingerprint technician preserved the fingerprints taken from the hubcap was not destroyed. Counsel said that he "incorporated the lack of physical evidence" in his closing argument. Counsel did not make a motion to exclude the fingerprint evidence because he saw no grounds for such a motion.

Trial counsel acknowledged that he did not hire an expert to examine the fingerprint evidence. He explained that, generally, fingerprint technicians required a minimum of seven matching points of comparison in order to confirm the identity of the person who left the print. In the instant case, the technician found at least twenty matching points of comparison. Accordingly, counsel feared that a fingerprint expert would "bolster[] the State's circumstantial case."

On cross-examination, trial counsel said that he was prepared for trial, that he interviewed the witnesses, and that he frequently spoke with the petitioner. Trial counsel thought that Davis was scared to testify, which made her a reluctant witness. Trial counsel said, "If I had pressed her too hard I was afraid she'd burst into tears and that would destroy whatever good I'd done in what little cross examination I had gotten from her." Trial counsel did not think further cross-examination of Davis would have been beneficial to the petitioner's case. Trial counsel recalled that Davis said she could not read well and thought the affidavit she was signing contained the same information she had told the police.

Trial counsel said that the prints on the fingerprint card matched those on the

petitioner's "R&I card." Because trial counsel refused to stipulate that the fingerprints on the "R&I card" were the petitioner's, the trial court, over trial counsel's objection, allowed the petitioner's fingerprints to be taken and compared to the fingerprint card and the "R&I card" during trial. Trial counsel said he believed "that once the print is taken off an object by a Crime Scene Officer . . . that print is not longer on that object." Accordingly, trial counsel felt that the destruction of the hubcap was a "[t]errible oversight," but that it was not fatal. Moreover, a witness testified about the destruction of evidence.⁶

The post-conviction court denied the petition, finding that the petitioner failed to establish his claims of ineffective assistance of counsel by clear and convincing evidence. On appeal, the petitioner challenges this ruling.

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

⁶Trial counsel did not name the witness who testified about the destruction of the hubcap; however, the record reveals that the witness was Carl Townsend, the supervisor of the Criminal Court Property Room.

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 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).

On appeal, the petitioner contends that his counsel was ineffective in two ways. First, trial counsel should have challenged the admissibility of the fingerprint evidence. Specifically, the petitioner complains that “[t]rial counsel never examined the physical evidence or had that evidence tested by an expert.” The petitioner alleges that trial counsel had a duty to hire an expert to explain fingerprint analysis.

The post-conviction court found that although the hubcap had been inadvertently destroyed prior to trial, the fingerprint from the hubcap had already been “lifted and preserved.” The court further found that after an expert analyzed the fingerprint, he found over twenty matching points of comparison and identified the fingerprint as belonging to the petitioner. The court cited and agreed with trial counsel’s testimony that no legal basis existed to suppress the fingerprint evidence. The court stated, “The fact that the actual hubcap was destroyed does not affect the validity of the identification of the actual print.” Nothing in the record preponderates against the post-conviction court’s findings. Moreover, we note that the petitioner did not have a fingerprint expert testify at the post-conviction hearing regarding any potential errors that were employed in the fingerprint collection or testing processes that were used in the instant case. Generally, “[w]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing.” Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). We may not speculate on the potential benefit the petitioner might have offered received, nor may we guess as to the evidence further investigation by an expert may have uncovered. Id. Accordingly, the petitioner has

failed to demonstrate that counsel was ineffective or that he suffered any prejudice in this regard.

Next, the petitioner complains that trial counsel's cross-examination of Davis was insufficient and that counsel should have impeached Davis with the affidavit and the interview conducted by Evans. Specifically, the petitioner contends that trial counsel should have used the tape recording of Evans's interview to impeach Davis or should have requested a continuance until Evans's health improved.

Although the petitioner contends that trial counsel should have used the tape recording to impeach Davis, he failed to introduce the recording as an exhibit. Accordingly, this court is unable to review the quality or contents of the recording or the accuracy of the transcription. Moreover, regarding the petitioner's complaints about a continuance until Evans recovered, he generated no proof at trial that Evans's health ever improved. Indeed, trial counsel testified that he believed Evans did not recover.

In its findings, the post-conviction court noted trial counsel's testimony that Davis acknowledged her signature on the affidavit but that she denied preparing it. Specifically, Davis asserted that she could not read very well and that she mistakenly thought the affidavit she was provided by the petitioner's brother contained the version of events that she told the police. The post-conviction court further accredited trial counsel's testimony that Davis was scared, that she was a reluctant witness, and that he made a strategic decision not to "push" her. The post-conviction court found that by denying the contents of the affidavit, Davis's "credibility [was] placed at issue" by making the "point . . . that she had recanted her identification once and was now recanting her recantation." The court found that counsel's cross-examination of Davis was effective and was a valid trial strategy. This court has stated that, "[w]hen reviewing trial counsel's actions, this court should not use the benefit of hindsight to second-guess trial strategy and criticize counsel's tactics." Irick v. State, 973 S.W.2d 643, 652 (Tenn. Crim. App. 1998). On appeal, this court may not second-guess the tactical or strategic choices of counsel unless those choices are based upon inadequate preparation, nor may we measure counsels behavior by "20-20 hindsight." See State v. Hellard, 629 S.W.2d 4, 9 (Tenn. 1982). Moreover, "[a]llegations of ineffective assistance of counsel relating to matters of trial strategy or tactics do not provide a basis for post-conviction relief." Taylor v. State, 814 S.W.2d 374, 378 (Tenn. Crim. App. 1991). Nothing in the record preponderates against the post-conviction court's findings.

III. Conclusion

In sum, we conclude that the petitioner has failed to prove his claims of ineffective assistance of counsel. Therefore, we affirm the judgment of the post-conviction court.

NORMA McGEE OGLE, JUDGE