

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

Assigned on Briefs August 5, 2014

**JASON GARNER v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Shelby County  
Nos. 96-10364, 96-10365 W. Otis Higgs, Jr., Judge**

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**No. W2012-01997-CCA-R3-PC - Filed October 30, 2014**

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The petitioner, Jason Garner, appeals the post-conviction court's denial of his petition for post-conviction relief. He argues that counsel was ineffective for failing to properly investigate a defense of diminished capacity, asserting that his capacity was diminished due to his ingestion of an antibiotic medication. After review, we affirm the denial of the petition.

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

ALAN E. GLENN, J., delivered the opinion of the Court, in which THOMAS T. WOODALL, P.J., and ROGER A. PAGE, J., joined.

Andrea Sipes Lester, Jackson, Tennessee (on appeal); Jason Garner, Pro Se, and James P. DeRossitt, IV (elbow counsel), Memphis, Tennessee (at hearing), for the appellant, Jason Garner.

Herbert H. Slatery, III, Attorney General and Reporter; Renee W. Turner, Senior Counsel; Amy P. Weirich, District Attorney General; and David Zak, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

The petitioner was convicted of second degree murder and especially aggravated robbery and sentenced to twenty years on each offense, to be served consecutively. State v. Jason R. Garner, No. W1999-01679-CCA-R3-CD, 2003 WL 1193253, at \*1 (Tenn. Crim. App. Mar. 14, 2003), perm. app. denied (Tenn. Oct. 6, 2003). This court affirmed the judgments of the trial court on direct appeal, and the Tennessee Supreme Court denied his

application for permission to appeal. The underlying facts of the case were recited by this court on direct appeal as follows:

At approximately 11 a.m. on September 12, 1995, the [petitioner] shot and killed the victim, Charles Bledsoe, and took an undetermined amount of money from the victim's person. The proof established that both men had been staying at a residence occupied by the [petitioner]'s girlfriend, Denise Thacker, and her family. Ms. Thacker was pregnant at the time with the [petitioner]'s child. The testimony established that the victim had introduced Ms. Thacker to a man who could get her a job as a topless dancer, had supplied her with marijuana while she was pregnant, and had attempted to involve her in a plot to rob the "white man" she was prostituting herself to. The [petitioner] and Ms. Thacker both testified that the [petitioner] was aware of these facts and was upset with the victim's involvement in these activities.

Both men left the residence separately that morning, with the [petitioner] going to a friend's house for breakfast. Later, the [petitioner] visited a neighbor's house and found a group present on the porch, including the victim and a man named Joe. The victim was attempting to purchase an expensive herringbone necklace from Joe for \$100. Joe refused and walked away. The [petitioner] told the victim that he knew Joe and he would try to bargain with him for the necklace.

At that point, the victim handed his .22 caliber pistol to the [petitioner] and instructed him to rob Joe of the necklace. According to the [petitioner], he "snapped" because of all the "stuff this man was doing" with his girlfriend, and he turned and shot the victim in the chest with the gun. The victim then ran around the house and jumped a fence, with the [petitioner] following him and continuing to fire the pistol. At some point, the victim collapsed to the ground from the gunshot. In his statement to the police, the [petitioner] stated that the victim, after falling, asked if the [petitioner] wanted his money and then threw the money from his pockets onto the ground. The [petitioner] shot the victim twice more, picked up the money, and walked away.

The [petitioner] returned to the Thacker residence, where he hid the gun in an upstairs closet. He then paid someone to take him to Whitehaven, where he went to the apartment of Shirley Washington. Present at the apartment were Ms. Washington's three children: Yolanda, Alethia, and Samuel.

According to Yolanda's testimony, the [petitioner] told her that he had

pulled a “stang” or robbery and had shot the victim. Yolanda testified that the [petitioner] told her he shot the victim after instructing the victim to “drop off” the money. After taking the victim’s money, “[the petitioner] said he had shot [the victim] again.” He also gave each of the three children part of the stolen money. They all proceeded to Southland Mall, where they made several purchases. After returning to Ms. Washington’s apartment, the [petitioner] went upstairs to lay down, and Yolanda visited Susie Williams’ apartment, which was two doors away. Ms. Williams was the victim’s aunt and, when Yolanda told her that the [petitioner] was responsible for the shooting, Ms. Williams called 911. Ms. Williams related that, while calling the police, the [petitioner] appeared outside her front door and she heard the [petitioner] state, “Charles Bledsoe better know who he’s f\*\*\*ing with. I shot him like a rabbit. I saw smoke from his body and it gave me hype and I kept popping that mother f\*\*\*er.” The police later arrived at Ms.[.] Washington’s apartment and instructed the [petitioner] to come down. He surrendered to them without incident, and was placed under arrest. The post-mortem examination established that the victim’s cause of death resulted from gunshot wounds to the neck and chest. In addition, the victim sustained a gunshot wound to his left thigh.

While in jail, the [petitioner] was also questioned about a separate murder involving his Gangster Disciples acquaintances. The [petitioner] made a statement regarding his street knowledge of that crime. During this statement, the investigator asked if he had any knowledge of other murders. The [petitioner] responded with information about the current crime. He said that he had heard on the street the victim had been ordered by a higher Gangster Disciple to kill the [petitioner]. The [petitioner] then made the statement that this was the real reason he had killed the victim.

On September 24, 1996, a Shelby County Grand Jury indicted the [petitioner] for first degree felony murder and especially aggravated robbery. On May 7, 1999, a jury returned convictions for second degree murder and especially aggravated robbery. A sentencing hearing was subsequently held on November 23, 1999, and the trial court applied three enhancement factors and, after finding that the [petitioner] was a dangerous offender, sentenced the [petitioner] to consecutive sentences of twenty years for second degree murder and especially aggravated robbery. The [petitioner]’s motion for new trial was subsequently denied, with this appeal following.

Id. at \*1-2.

The petitioner filed a *pro se* petition for post-conviction relief on September 27, 2004, and, following the appointment of counsel, an amended petition was filed. Appointed counsel was allowed to withdraw from the petitioner's case in response to complaints from the petitioner and his wife regarding appointed counsel's representation. The post-conviction court then appointed another attorney to represent the petitioner in his post-conviction proceeding. According to the post-conviction court, approximately four years later, it approved the petitioner's request to proceed *pro se* with the second appointed attorney remaining as elbow counsel, and the petitioner, thereafter, filed supplemental issues to be added to his petition. The court conducted an evidentiary hearing on the petition on May 22, 2012.

In his petitions, the petitioner alleged, among other things, that he received ineffective assistance of counsel. On appeal, the petitioner confines himself to arguing that counsel was ineffective for failing to properly investigate his defense of diminished capacity. We will, thus, confine our summary of the evidentiary hearing to testimony that is relevant to that issue.

At the hearing, counsel testified that, in 1996, he was appointed to represent the petitioner in his 1999 death penalty trial after he was indicted for first degree murder and especially aggravated robbery. He recalled that the petitioner told him that "he snapped and just lost his head about himself and fired shots at the [victim]." Their defense at trial was that a lot of animosity had been building up between the petitioner and the victim "for quite some time," and the petitioner was provoked into shooting the victim, making it a voluntary manslaughter. Counsel obtained psychology experts, who evaluated the petitioner. However, counsel said that he did not look into anything with regards to the antibiotic the petitioner was taking because it was a commonly used drug and "it wouldn't have been something that would have struck [him] as unusual."

On cross-examination, counsel testified that the petitioner was charged with a capital crime but convicted of second degree murder and that his main priority had been to keep the petitioner off death row. Counsel noted that both he and co-counsel thought it was "a tremendous victory" to get a second degree murder conviction in light of the proof at trial.

The petitioner admitted that he shot and killed the victim but said that he relied on a two-part defense based on his "past mental history record" and that he was provoked. He complained that counsel was ineffective because he failed to investigate the effect that Ciprofloxacin, "Cipro," an antibiotic, had on him at the time of the offense. He said that he was prescribed Cipro twenty days before the offense and claimed that the drug caused him to "snap" and he "lost touch with reality." He claimed that the murder would not have happened had he not been taking the medication. He said that the drug "cost [sic] [him] to

be vulnerable . . . enough to lose touch with reality.” On the day of the incident, he “felt like [he] had like almost an out of body experience.” The petitioner stated that he had read various articles and pamphlets supporting his contention that Cipro can cause psychosis and breaks from reality. He said that he wanted to have an expert testify at the hearing regarding the effects of Cipro, but the Administrative Office of the Courts would not provide funds for such expert based on precedent from the Tennessee Supreme Court. The petitioner maintained that, had information about Cipro been presented at trial, he would not have been convicted of second degree murder and especially aggravated robbery.

On cross-examination, the petitioner testified that he took Cipro “about eighteen, nineteen, twenty days, something like that, after I caught this.” He acknowledged that he gave a statement to the police on the day that he killed the victim. He admitted that, in his statement, he told the officers that he was not under the influence of any type of drug or alcohol. However, he explained on redirect that he did not “consider medication a drug.” The petitioner acknowledged that he only had a seven-day supply of Cipro and was instructed to take one pill by mouth every twelve hours for infection. However, he explained that he still had pills left at the time of the shooting because he did not take them according to the instructions. He claimed that the medication sometimes made him exhausted and dizzy and other times did not affect him. He denied experiencing any of the common side effects of Cipro, such as nausea, diarrhea, or stomach cramps.

The petitioner testified that he shot the victim, ran after him, climbed a fence, saw the victim lying on the ground, and shot him two more times and that he did not feel any dizziness or nausea while doing so. However, he said that he was paranoid “at the beginning of [the] events.”

After the hearing, the post-conviction court entered a written order denying relief. This appeal followed.

### **ANALYSIS**

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court’s application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed

questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court's findings of fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001); Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687(1984); see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The Strickland standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). Moreover, the reviewing court must indulge a strong presumption that the conduct of counsel falls within the range of reasonable professional assistance, see Strickland, 466 U.S. at 690, and may not second-guess the tactical and strategic choices made by trial counsel unless those choices were uninformed because of inadequate preparation. See Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). The prejudice prong of the test is satisfied by showing a reasonable probability, i.e., a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Courts need not approach the Strickland test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697; see also Goad, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

The petitioner argues that he received the ineffective assistance of counsel because counsel failed to obtain his "medical records and/or research the effects of Ciprofloxacin on

the central nervous system and provid[e] this information to the defense experts for review.” At the hearing, the petitioner testified that he was prescribed an antibiotic, Cipro, twenty days before he murdered the victim. Although he was only prescribed a seven-day supply of the drug, he claimed that he was still taking it at the time of the murder. He denied experiencing any of the common side effects of the drug but claimed that the medication sometimes made him exhausted and dizzy, although not affecting him at other times. He stated that, on the day of the incident, the effects of the drug caused him to become paranoid and to “snap.”

Counsel testified that their theory of defense at trial was that it was a voluntary manslaughter because the petitioner was provoked into shooting the victim. Counsel had the petitioner evaluated by psychology experts, but counsel said that he did not look into anything with regards to the antibiotic the petitioner was taking because it was a commonly used drug and there was nothing unusual about it. Counsel stated that the petitioner had been indicted on a capital offense and was facing the death penalty, so both he and co-counsel considered a second degree murder conviction a victory for the defense.

In ruling on this issue, the post-conviction court found:

[The] [p]etitioner argued that [counsel]’s performance was deficient because [he] failed to present a theory of defense that [the] [p]etitioner’s ingestion of Ciprofloxacin . . . caused him to “snap and behave in an uncharacteristically violent way.” This Court is unconvinced that [counsel] performed deficiently by failing to explore this avenue of defense. Cipro is an antibiotic that was prescribed to [the] [p]etitioner by the Regional Medical Center of Memphis approximately 20 days before the shooting for a urinary tract infection. The fact that [counsel] did not argue that a commonly used antibiotic negated the *mens rea* necessary for [the] [p]etitioner to complete the crime does not fall below any accepted standard of performance expected of competent trial counsel. Because this Court finds that [counsel]’s performance was not deficient, it need not address whether the outcome of [the] [p]etitioner’s case was more likely than not affected by the exclusion of such a defense.

The record supports the post-conviction court’s determination. We cannot conclude that counsel rendered deficient performance for failing to investigate whether a commonly used antibiotic had some effect on the petitioner at the time of the offense that would have negated his *mens rea* to complete the crime, especially when the petitioner’s own testimony was that the medication only affected him sometimes. We also note that the petitioner never specifically testified at the evidentiary hearing that he told counsel about the effect the medication had on him.

## **CONCLUSION**

Based on the foregoing authorities and reasoning, we conclude that the petitioner has not met his burden of showing that he was denied the effective assistance of counsel. Accordingly, we affirm the denial of the petition for post-conviction relief.

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ALAN E. GLENN, JUDGE