

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs July 8, 2014

VINCENT HUNT v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Shelby County
No. 08-06911 Chris Craft, Judge**

No. W2012-01468-CCA-R3-PC - Filed July 18, 2014

Petitioner, Vincent Hunt, was convicted of first degree murder and especially aggravated kidnapping in Shelby County. On direct appeal, his convictions and sentences were affirmed. *See State v. Vincent Hunt*, No. W2009-00165-CCA-R3-CD, 2010 WL 1407236, at *1-5 (Tenn. Crim. App., at Jackson, Apr. 8, 2010), *perm. app. denied*, (Tenn. Sept. 23, 2012). Petitioner then sought post-conviction relief on the basis of ineffective assistance of counsel and that the trial court issued improper jury instructions at trial. The post-conviction court denied relief and Petitioner appeals. After a review of the record and applicable authorities, we determine that Petitioner failed to establish that he is entitled to post-conviction relief. Accordingly, the judgment of the post-conviction court is affirmed.

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

JERRY L. SMITH, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and CAMILLE R. MCMULLEN, JJ., joined.

James P. DeRossitt IV (on appeal) and Mozella T. Ross (at trial), Memphis, Tennessee, for the petitioner, Vincent Hunt.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Amy Weirich, District Attorney General; Chris Lareau, Assistant District Attorney General; and Christopher L. West, Assistant District Attorney General, for the respondent, State of Tennessee.

OPINION

Factual Background

Petitioner was convicted of first degree murder and especially aggravated kidnapping for events that took place in Memphis on March 1, 2007. *Vincent Hunt*, 2010 WL 1407236, at *1. Petitioner spent the morning of March 1 riding in a car with three other men as they conducted drug transactions around Memphis, smoked marijuana, and listened to music. *Id.* at *2. The driver of the car got a telephone call from his girlfriend at some point that afternoon. Next, he heard several gunshots. When he looked at the victim his eyes had rolled back in his head. Then, Petitioner put a gun to the driver's neck and threatened his life. The driver was terrified, swiped an on-coming truck, and jumped out of the car. *Id.* He could see Petitioner climbing over the back seat into the driver's seat as the car continued to roll. Petitioner claimed at trial that he saw the victim with a gun, "got scared" and dove over the seat after the gun. *Id.* at *4. As the men struggled over the gun, it went off. Petitioner denied threatening the driver. Nevertheless, the jury accredited the State's witnesses. As a result of the convictions, Petitioner was sentenced to life for the murder conviction and forty years as a Range II, Multiple Offender for the especially aggravated kidnapping conviction. The sentences were ordered to be served consecutively. *Id.* at *5.

On direct appeal, this Court determined that the evidence was sufficient to support the convictions and that Petitioner's sentence was not excessive. The supreme court denied permission to appeal. *Id.* at *1.

In February of 2011, Petitioner sought post-conviction relief on the basis of alleged ineffective assistance of counsel, improper jury instructions, and a violation of due process. Specifically, in a pro se petition, Petitioner alleged: (1) trial counsel failed to call Delecia Rogers as a witness; (2) trial counsel failed to call defense witnesses for rebuttal; (3) trial counsel failed to seek a psychiatric evaluation for Petitioner; (4) trial counsel failed to request a mistrial when the State constructively amended the indictment; (5) trial counsel failed to dismiss a juror who wrote a note to the judge "stating he has already prejudiced the defendant"; (6) the trial court read the improper jury instructions for especially aggravated kidnapping; and (7) appellate counsel had a conflict of interest. After counsel was appointed, an amended petition was filed raising the following additional grounds for relief: (1) trial counsel did not develop the defense of an accidental shooting; (2) the trial court charged the jury only with the defense of self-defense; (3) trial counsel failed to investigate the case properly; (4) trial counsel failed to communicate effectively with Petitioner; (5) trial counsel failed to withdraw from the case after Petitioner expressed his "level of frustration" with counsel; (6) trial counsel failed to present proof about the bad character and reputation of the

victim; and (7) trial counsel failed to object to the State's introduction of evidence of Petitioner's gang affiliation.¹

The post-conviction court held an evidentiary hearing on the petition. Petitioner testified that he wanted theories of both self-defense and an accidental shooting presented at trial and trial counsel failed to do so. Additionally, Petitioner was disappointed by trial counsel's failure to call an expert to show that the gun could have discharged accidentally. Trial counsel testified he did not see the need for an expert and determined that any evidence would probably be inadmissible.

Petitioner claimed that he met trial counsel "once or twice basically during . . . court hearings" and talked to trial counsel in the hallway prior to entering the courtroom to prepare for his defense. Petitioner actually filed several bar complaints against trial counsel based on the failure of trial counsel to meet with him on a regular basis. Trial counsel testified that he met with Petitioner "either six or seven" times at jail, not counting meeting in the "back room" prior to courtroom appearances.

Petitioner recalled that during trial, one of the prospective jurors passed a note to the judge stating that he had "prejudged" Petitioner's guilt. Petitioner requested that trial counsel have this juror removed for cause. Trial counsel recommended that the juror be kept on the jury because he was a "young black male who detailed cars and felt like he would be more in tune to what goes on in the streets." The next day, the juror insisted that he could be impartial. Petitioner testified at the post-conviction hearing that he thought trial counsel should have exercised a challenge and removed the juror from the jury pool. Trial counsel recalled that both he and Petitioner were concerned by the lack of African-Americans in the jury pool at the time that the juror wrote the note the judge. Additionally, he and Petitioner talked about it and "all were in agreement at the time that we should leave this person on" the jury. They talked about it the next day, and despite Petitioner's concern, trial counsel felt the best strategy would be to keep the juror. Petitioner attempted to raise this issue on appeal but was told that because the issue was not raised at trial it could not be raised on appeal.

Petitioner also argued that his gang affiliation was irrelevant to the trial and that trial counsel should have moved for any evidence of gang affiliation to be excluded from evidence. Trial counsel explained that when Petitioner made the decision to testify at trial, his trial strategy was to bring the gang affiliation up in advance rather than "sit there and pretend like it's not there" because it "undermines the confidence" in your testimony. Trial counsel recalled filing a motion in limine to restrict the usage of prior convictions but did not recall including exclusion of gang related comments in the motion.

¹Petitioner has abandoned several of these allegations on appeal.

Petitioner reiterated that trial counsel failed to call any witnesses on his behalf and that the victim's bad character was not mentioned to the jury. Trial counsel did not recall Petitioner mentioning other witnesses that could testify at trial. In fact, trial counsel explained that it was "not like a street shooting where there are witnesses all around. There were no witnesses to actually what occurred in the car except the only two live witnesses[,the Petitioner] and [the driver]."

At the conclusion of the testimony, the post-conviction court took the matter under advisement. In a written order, the post-conviction court made findings of fact and conclusions of law before denying the petition. Specifically, the post-conviction court determined that Petitioner failed to show that trial counsel was ineffective for failing to call witnesses where Petitioner failed to produce those witnesses at the post-conviction hearing to show that their testimony was both truthful and would have materially aided Petitioner's defense at trial. Similarly, the post-conviction court also determined that Petitioner failed to prove trial counsel was ineffective for failing to retain an expert. The post-conviction court noted Petitioner failed to specifically state for what purpose the expert would have been utilized and failed to produce such an expert at the post-conviction hearing.

Petitioner appeals. On appeal he argues that trial counsel was ineffective for: (1) failing to object to the inclusion of a juror who admitted bias; (2) failing to develop a defense of self-defense; (3) failing to call witnesses to testify on his behalf; and (4) failing to seek to exclude evidence of gang affiliation.

I. Post-Conviction Standard of Review

The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. *See State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). During our review of the issues raised, we will afford those findings of fact the weight of a jury verdict, and this Court is bound by the post-conviction court's findings unless the evidence in the record preponderates against those findings. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *Alley v. State*, 958 S.W.2d 138, 147 (Tenn. Crim. App. 1997). This Court may not re-weigh the evidence, nor substitute its inferences for those drawn by the post-conviction court. *See State v. Honeycutt*, 54 S.W.3d 762, 766 (Tenn. 2001). Questions concerning the credibility of the witness, the weight and value given to their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction court; the appellate court should not reevaluate the evidence. *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997); *see also Black v. State*, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). However, the post-conviction court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

II. Ineffective Assistance of Counsel

Both the federal and state constitutions require that a defendant in a criminal case receive assistance of counsel. *See Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998). When a petitioner seeks post-conviction relief on the basis of ineffective counsel, the petitioner bears the burden of showing that (a) the services rendered by the trial counsel were deficient and (b) that the deficient performance was prejudicial. *See Powers v. State*, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). In order to demonstrate deficient performance, the petitioner must show that the services rendered or the advice given was below “the range of competence demanded of attorneys in criminal cases.” *Baxter*, 523 S.W.2d 930, 936. In order to demonstrate prejudice, the petitioner must show that there is a reasonable probability that, but for counsel’s deficient performance, the result of the proceeding would have been different. *See Strickland v. Washington*, 466 U.S. 668, 694 (1984). “Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim.” *Henley*, 960 S.W.2d 572, 579. Therefore, “[i]f either element of ineffective assistance of counsel has not been established, a court need not address the other element.” *Howell v. State*, 185 S.W.3d 319, 326 (Tenn. 2006).

As noted above, this Court will afford the post-conviction court’s factual findings a presumption of correctness, rendering them conclusive on appeal unless the record preponderates against the court’s findings. *See id.* at 578. However, our supreme court has “determined that issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact ...; thus, [appellate] review of [these issues] is *de novo*” with no presumption of correctness. *Burns*, 6 S.W.3d at 461.

Furthermore, on claims of ineffective assistance of counsel, the petitioner is not entitled to the benefit of hindsight. *See Atkins v. State*, 911 S.W.2d 334, 347 (Tenn. 1994). This Court may not second-guess a reasonably based trial strategy, and we cannot grant relief based on a sound, but unsuccessful, tactical decision made during the course of the proceedings. *See id.* However, such deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *See Cooper v. State*, 847 S.W.2d 521, 528.

At the post-conviction hearing, Petitioner insisted that trial counsel was ineffective because he failed to call Delecia Rogers as a witness at the trial. The post-conviction court determined that Petitioner’s failure to produce this witness at the post-conviction hearing prohibited the court from determining whether her testimony would have been admissible at

trial and, in addition, whether that testimony would have materially aided Petitioner's defense. We agree. It is well-settled that a post-conviction petitioner making a claim regarding the failure to call a witness bears a duty to present the witness at the post-conviction hearing in order to enable this Court to determine whether his or her testimony might have altered the results of the trial. *See Black v. State*, 794 S.W.2d 753, 757 (Tenn. Crim. App. 1990). Because Petitioner failed to produce such witnesses at the hearing, he is not entitled to relief based on a claim that the failure to call such witnesses at trial amounted to ineffective assistance of counsel.

Likewise, we determine Petitioner failed to prove that trial counsel was ineffective for failing to call an expert for testimony related to Petitioner's firearms or mental state. At the hearing, Petitioner failed to specifically state for what purpose the experts would have been utilized and failed to produce such experts at the post-conviction hearing. *See id.* Because Petitioner failed to produce any such witnesses at the hearing, he is not entitled to relief based on a claim that the failure to call such witnesses at trial amounted to ineffective assistance of counsel.

Next, the post-conviction court determined that trial counsel was not ineffective for failing to object to the inclusion of a juror after the juror "approached the judge away from the microphone and indicated that he might have a problem prejudging [Petitioner]." The record reflects that the trial court extensively voir dired the potential juror and that neither the State nor trial counsel chose to question the juror or objected to the seating of the juror. Trial counsel testified at the post-conviction hearing that it was a strategic move to keep the juror on the jury as he was one of the only African-American males in the jury pool. The post-conviction court accredited the testimony of trial counsel. Witness credibility is a matter for the post-conviction court. *Henley*, 960 S.W.2d at 580; *see also Black*, 794 S.W.2d at 755. Moreover, trial counsel made a tactical decision after adequate preparation. We cannot now second-guess this decision. *Atkins*, 911 S.W.2d at 347. Petitioner is not entitled to relief on this issue.

Petitioner next claims that trial counsel was ineffective for failing to raise the issue of self-defense at trial. Petitioner claimed that he was about to be robbed by the victim when he jumped over the back seat and the men struggled over the gun before it went off, shooting the victim. The post-conviction court determined that the defense of self-defense that resulted in an accidental shooting was developed at trial by Petitioner's own testimony. The testimony of the driver and the injuries sustained by the victim, on the other hand, did not support Petitioner's theory. Additionally, the post-conviction court noted that Petitioner "disposed of the murder weapon, eliminating the possibility that an expert could examine it for a penchant for it to 'go off' twice without the trigger being pulled." Additionally, Petitioner did not provide any witnesses at the post-conviction hearing to support his theory

or prove that trial counsel was ineffective for failing to further develop the theory at trial. *See Black*, 794 S.W.2d at 757. Petitioner has, therefore, failed to prove by clear and convincing evidence that trial counsel was ineffective.

Petitioner claims that trial counsel should have called Petitioner's girlfriend as a witness to rebut the State's suggestion that Petitioner's claim of self-defense was fabricated. The post-conviction court noted that Petitioner's girlfriend testified for the State at trial and was cross-examined by counsel for Petitioner. Petitioner has not shown clear and convincing evidence that the failure to call his girlfriend as a witness after she already testified for the State resulted in deficient performance on behalf of trial counsel or prejudice to the defense. Petitioner is not entitled to relief on this issue.

Lastly, Petitioner insists that trial counsel was ineffective for failing to file a motion in limine to exclude references to his gang affiliation. Trial counsel testified that it was a strategy to bring Petitioner's gang affiliation out in direct examination. After Petitioner chose to testify, trial counsel determined that it would be easier to explain his tear drop tattoos and the circumstances surrounding his gang membership on direct because the jury would not think that he was attempting to hide the information. The post-conviction court accredited the testimony of trial counsel in this regard. Witness credibility is a matter for the post-conviction court. *Henley*, 960 S.W.2d at 580; *see also Black*, 794 S.W.2d at 755. Moreover, trial counsel made a tactical decision after adequate preparation. We cannot now second-guess this decision. *Atkins*, 911 S.W.2d at 347. Petitioner is not entitled to relief on this issue.

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

JERRY SMITH, JUDGE