IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs June 4, 2013

TELLY SAVALAS JOHNSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 0609031 Carolyn Wade Blackett, Judge

No. W2012-00955-CCA-MR3-PC - Filed November 20, 2013

Petitioner, Telly Savalas Johnson, was convicted by a Shelby County jury of five counts of criminal attempt to commit first degree murder. Petitioner was sentenced by the trial court to an effective sentence of 75 years in the Tennessee Department of Correction. On direct appeal, this court affirmed Petitioner's convictions and sentences. The facts underlying Petitioner's convictions can be found in this court's opinion in *State v. Telly Savalas Johnson*, No. W2009-00764-CCA-R3-CD, 2010 WL 3245284 (Tenn. Crim. App. at Jackson, filed Aug. 17, 2010), *perm. app. denied* (Tenn. Jan. 12, 2011). In summary, the proof showed that Petitioner shot a .380 caliber pistol multiple times into a van which contained two adults and three minor children. One of the children was struck in the leg by a bullet. Petitioner filed a timely petition for post-conviction relief, alleging that he was denied the right to the effective assistance of counsel. Following an evidentiary hearing, the post-conviction court denied relief. After a thorough review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

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

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and JEFFREY S. BIVINS, JJ., joined.

Telly Savalas Johnson, Wartburg, Tennessee, *Pro Se*.

Robert E. Cooper, Jr., Attorney General and Reporter; Jeffrey D. Zentner, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Dean Decandia, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Post-conviction hearing

The evidence presented at the post-conviction hearing included the testimony of Petitioner and the testimony of Petitioner's trial counsel. The following testimony is relevant to the issues raised on appeal. Petitioner testified that he did not feel that his trial counsel properly represented him. He testified that trial counsel did not request a jury instruction on the lesser-included offense of reckless endangerment. He testified that counsel advised him not to testify at trial because "they was gonna [sic] bring up [his] background." Petitioner acknowledged that he told the trial court that he voluntarily chose not to testify.

Petitioner's trial counsel testified that he requested a jury instruction on "every conceivable lesser-included offense [he] could think of to preserve that issue for appeal[,]" including reckless endangerment, attempted second degree murder, and aggravated assault, which trial counsel submitted, was not even a lesser included offense of attempted first degree murder. Trial counsel testified that "the facts of the case were overwhelming."

Trial counsel testified that Petitioner denied "for weeks and weeks and weeks" that he was present at the shooting, and Petitioner claimed that he was babysitting for his cousin, but Petitioner would not provide trial counsel with his cousin's name. Trial counsel testified that Petitioner decided not to testify at trial. Trial counsel advised Petitioner to wait until the close of the State's proof to make that decision. He also advised Petitioner that if Petitioner chose to testify, his prior record was "not that bad," because it did not include any violent felonies. Petitioner eventually told trial counsel that he was shooting at the car because he believed that the driver had stolen it from him. Trial counsel testified that he told Petitioner that the jury could infer from that testimony that Petitioner intended to kill the driver and that the other four passengers could have been killed. Trial counsel testified that Petitioner's response was that he shrugged his shoulders and grinned.

In a written order denying post-conviction relief, the trial court found that Petitioner failed to show by clear and convincing evidence that trial counsel rendered deficient representation and that Petitioner in any event failed to prove he was prejudiced by counsel's alleged deficiencies.

Analysis

On appeal Petitioner asserts that trial counsel rendered ineffective assistance of counsel on two issues: 1) trial counsel failed to raise at trial or on appeal the trial court's

failure to charge two lesser-included offenses, and 2) trial counsel failed to have Petitioner testify in his own defense.

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. *See* Tenn. Code Ann. § 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).

To establish entitlement to post-conviction relief via a claim of ineffective assistance of counsel, the post-conviction petitioner must affirmatively establish first 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 second that his counsel's deficient performance "actually had an adverse effect on the defense[,]" *Strickland v. Washington*, 466 U.S. 668, 693, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (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." *Id*. 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 reviewing a claim of ineffective assistance of counsel, 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).

Claims of ineffective assistance of counsel are mixed questions of law and fact. *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. *Fields*, 40 S.W.3d at 457-58; *see also State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000).

Petitioner contends that the trial court erred by not instructing the jury on the offense of attempted voluntary manslaughter and misdemeanor reckless endangerment, and Petitioner further asserts that the trial court erred by giving a jury instruction on the offense of attempt to commit reckless endangerment. Petitioner asserts that trial counsel was deficient for failing to raise the issue of improper jury instructions in the motion for new trial or on direct appeal.

The principles for determining the effectiveness of counsel at trial and on appeal are the same in a post-conviction proceeding. *See Campbell v. State*, 904 S.W.2d 594, 596 (Tenn. 1995). 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 before the state's highest court. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000). *In Carpenter v. State*, 126 S.W.3d 879 (Tenn. 2004), our supreme court stated the following regarding review of allegations of ineffective assistance by appellate counsel.

> Appellate counsel are not constitutionally required to raise every conceivable issue on appeal. *King v. State*, 989 S.W.2d 319, 334 (Tenn. 1999); *Campbell v. State*, 904 S.W.2d 594, 596-97 (Tenn. 1995). Indeed, "experienced advocates have long 'emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most a few key issues.'" *Cooper v. State*, 849 S.W.2d 744, 747 (Tenn. 1993) (quoting *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983)); *see also Smith v. Robbins*, 528 U.S. 259, 288, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). The determination of which issues to raise on appeal is generally within appellate counsel's sound discretion. *Jones*, 463 U.S. at 751, 103 S. Ct. 3308; *King*, 989 S.W.2d at 334; *Cooper*, 849 S.W.2d at 747. Therefore, appellate counsel's professional judgment with regard to which issues will best serve the appellant on appeal should be given considerable deference. *See Campbell*, 904 S.W.2d at 597; *see also Strickland*, 466 U.S. at 689, 104 S. Ct. 2052. We should not second-guess such decisions, and every effort must be made to eliminate the distorting effects of hindsight. *See Campbell*, 904 S.W.2d at 597; *see also Strickland*, 466 U.S. at 689, 104 S. Ct. 2052; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). Deference to counsel's tactical choices, however, applies only if such choices are within the range of competence required of attorneys in criminal cases. *Campbell*, 904 S.W.2d at 597.

> If a claim of ineffective assistance of counsel is based on the failure to raise a particular issue, as it is in this case, then the reviewing court must determine the merits of the issue. *See*, *e.g.*, *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Obviously, if an issue has no merit or is weak, then appellate counsel's performance will not be deficient if counsel fails to raise it. Likewise, unless the omitted issue has some merit, the petitioner suffers no prejudice from appellate counsel's failure to raise the issue on appeal. When an omitted issue is without merit, the petitioner cannot prevail on an ineffective assistance of counsel claim. *See United States v. Dixon*, 1 F.3d 1080, 1083 (10th Cir. 1993).

Carpenter, 126 S.W.3d at 887.

We note that Petitioner failed to make the trial court's jury charge an exhibit to the post-conviction hearing or otherwise include the jury instructions in the record, nor did he present any evidence at the post-conviction hearing to support a jury instruction on the lesser-included offenses he says trial counsel should have asked the judge to charge. Trial counsel testified at the post-conviction hearing that he requested "every conceivable lesser-included offense [he] could think of to preserve that issue for appeal." The post-conviction court found that "the jury was presented with lesser included offenses for Criminal Attempt First Degree but convicted Petitioner of the indicted charge."

In the present case, we need not definitively resolve the issue of counsel's alleged deficiency, because the petitioner has not established prejudice based on his trial counsel's failure to request, and/or failure to raise on appeal the trial court's denial of trial counsel's request for jury instructions on attempted voluntary manslaughter and misdemeanor reckless endangerment. If post-conviction relief had been granted with a new trial ordered, consideration by the jury of lesser-included offenses would be controlled by *State v. Davis*, 266 S.W.3d 896 (Tenn. 2008). In fact, Petitioner states in his brief that his trial concluded November 6, 2008, approximately three weeks after *Davis* was filed, and thus *Davis* was in effect at the time of trial. In any event, in *Davis* our supreme court explicitly held,

> We hold that, where a criminal defendant is entitled to jury instructions on lesser-included offenses, the trial court shall instruct the jury to consider the offenses in order from greatest to least within each count of the indictment and that it shall not proceed to consider any lesser-included offense until it has first made a unanimous determination that the defendant is not guilty of the immediately-preceding greater offense.

Id. at 910. Based upon the clear and specific holding of our supreme court in *Davis*, and upon the well settled law that juries are presumed to follow the instructions of the trial court, *see State v. Shaw*, 37 S.W.3d 900, 904 (Tenn. 2001), it could not be reversible error if the trial court failed to charge either of the submitted lesser-included offenses.

By the same reasoning, Petitioner cannot show that his trial counsel's failure to request a lesser-included offense was prejudicial; the jury's conviction of the greater charge prohibited any consideration of a lesser charge, and consequently as a matter of law there was no possibility whatsoever-much less a reasonable probability-that but for counsel's failure to request the lesser-included offense the result of the proceeding would have been different.

Accordingly, in this case, even if the other offenses had been charged, the jury was prohibited from considering them because the jury convicted Petitioner of the charged offense of attempted first degree murder, thereby prohibiting, under *Davis*, the jury from even considering any lesser-included offense of attempted second degree murder. Petitioner is not entitled to relief on this issue.

Petitioner also contends that trial counsel was deficient for failing to call Petitioner as a witness to testify on his own behalf at trial. Petitioner acknowledged at the post-conviction hearing that he voluntarily decided not to testify. Trial counsel testified that he discussed with Petitioner whether to testify, and throughout his representation, Petitioner indicated that he did not want to testify. Trial counsel encouraged Petitioner not to make a final decision until the State rested its case-in-chief. Trial counsel testified that he carefully "*Momonized*" Petitioner to ensure that Petitioner personally and voluntarily waived his right to testify at trial. *See Momon v. State*, 18 S.W.3d 152 (Tenn. 1999) (in which our supreme court adopted procedural guidelines that call for defense counsel to request a jury-out hearing to demonstrate that a defendant's waiver of his constitutional right to testify has been knowingly, intelligently, and voluntarily made.). The transcript of the post-conviction hearing indicates that the colloquy of the *Momon* hearing was admitted as an exhibit to the hearing; however, the transcript of the colloquy between Petitioner and trial counsel is not actually included in the record. Nevertheless, the trial court accredited trial counsel's testimony. Petitioner has not shown that counsel was deficient. Petitioner is not entitled to relief on this issue.

In conclusion, the trial court's order denying post-conviction relief is affirmed.

_____

THOMAS T. WOODALL, JUDGE