

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs May 5, 2020

FILED

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Clerk of the
Appellate Courts

DELARRIS JONES A/K/A CEDRIC JONES v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 13-04830 James M. Lammey, Judge

No. W2019-01182-CCA-R3-PC

The Petitioner, Delarris Jones A/K/A Cedric Jones, appeals the denial of his petition for post-conviction relief, asserting that he received ineffective assistance of trial counsel. 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 and D. KELLY THOMAS, JR., JJ., joined.

Terrell L. Tooten, Cordova, Tennessee, for the appellant, Delarris Jones.

Herbert H. Slatery III, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The Petitioner was convicted of attempt to commit second degree murder, aggravated assault, employing a firearm during the commission of a dangerous felony, possessing a firearm as a person convicted of a felony involving the use of violence, and possessing a firearm as a person convicted of a felony drug offense. The proof at trial showed that the Petitioner shot the victim, his former coworker, at the victim's home. State v. Delarris Jones a/k/a Cedric Jones, No. W2015-01085-CCA-R3-CD, 2016 WL 3251606, at *1 (Tenn. Crim. App. June 6, 2016). The Petitioner was convicted as charged and sentenced to an effective forty-year sentence. Id. On direct appeal, the Petitioner argued

that the evidence was insufficient to support his convictions. Id. This court affirmed the judgments of the trial court. Id.

The Petitioner filed a pro se petition for post-conviction relief on May 17, 2017, in which he alleged that trial counsel had been ineffective by failing to assert a “double jeopardy violation” regarding his felony gun possession charges and that trial counsel should have requested merger of those gun possession convictions. Post-conviction counsel was appointed on September 25, 2017, and an amended petition for post-conviction relief was subsequently filed on January 24, 2019. The amended petition also asserted ineffective assistance of trial counsel due to double jeopardy and due process violations. The post-conviction court held a hearing on the matter on May 30, 2019.

At the evidentiary hearing, trial counsel testified that he “d[id]n’t recall” whether “there was any merging of any of these offenses[.]” He stated that he had been practicing criminal law for “essentially five years” at the time he handled the Petitioner’s case. He had handled “about two or three” trials at that time. The Petitioner did not testify at the hearing.

Following the close of all proof, the State asserted that “there’s case law that supports that there’s no double jeopardy issue with regard to the employing a firearm during a dangerous felony and the . . . convicted felon in possession of a handgun.” Regarding merger, the State further asserted that it “does not make a difference” whether the aggravated assault and criminal attempt second degree murder should have merged because “the sentence was based upon the criminal attempt second degree murder which he was sentenced to eighteen years . . . and the firearm charges, one . . . was a ten year and [one] . . . was [a] twelve year . . . those were to run consecutive to each other,” for a total effective sentence of forty years. The State agreed with the Petitioner that “there may be some support from the facts that those two offenses should merge since the conduct in this case had to do with this one incident of shooting the victim[.]” but maintained that it made “no difference in the effective sentence.”

Post-conviction counsel argued that “the only real remedy [i]n this case would [be] to have a brand new sentencing hearing in its entirety[.]” Counsel asserted that double jeopardy applied because the State told “the jurors this weapon is what makes this a criminal attempt second degree murder, and then turn[ed] around and sa[id] this weapon is employed during the commission of this criminal attempt second degree murder[.]” He explained that the trial court “may have went [sic] higher or lower in his range of sentencing when you have an understanding that you’re only determining two convictions versus determining five convictions.” The State replied that the “remedy has never been in these [merger] cases for there to be a new sentencing hearing[.]” but rather “be returned for a

corrective judgment sheet or for the Court to that operation of law should those to be merged [sic].”

Following these arguments, the trial court noted that the merger issue “wasn’t brought up apparently on appeal.” It agreed with the State that “since [the sentences] were run concurrently[,] it won’t [a]ffect the sentence in any way.” Still, the trial court ultimately entered two amended judgment sheets “merging the convicted felon in possession of a firearm with the other” count of convicted felon in possession of a firearm and the “aggravated assault with criminal attempt murder second degree.” The trial court found that trial counsel was not ineffective because “[m]erging the counts did not affect the effective sentence . . . in any way.” The trial court explained that although trial counsel failing to request merger “was a mistake on his part,” it did not “see the prejudice at all” because “it really doesn’t [a]ffect the outcome of this at all.”

The post-conviction court entered a written order denying relief on June 3, 2019. The court found that the Petitioner had “failed to prove ineffective assistance of counsel[,]” noting that “[m]erging these counts did not affect the effective sentence of forty (40) years in any way” and that even if counsel had been deficient, the “Petitioner was not prejudiced in any way.” The court noted that “specifically, the Petitioner has failed to carry his burden of proof as to either deficient performance or prejudice.”

ANALYSIS

On appeal, the Petitioner asserts that trial counsel was ineffective by “failing to argue that [the Petitioner]’s multiple convictions should not stand based on Double Jeopardy[,]” noting that “based on Double Jeopardy, once [the Petitioner] was convicted on [C]ount 1, all of the other counts should have merged.” The Petitioner also argues that he was “sentenced in a way that violated Double Jeopardy, which in turn, violated his right to Due Process.” The State responds that “the proper remedy has been implemented, and no further relief is warranted” regarding the Petitioner’s merger argument and that the Petitioner has waived any stand-alone claim regarding his due process rights. We agree with the State.

Post-conviction relief “shall be granted when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. § 40-30-103. The petitioner bears the burden of proving factual allegations by clear and convincing evidence. Id. § 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 Wiley v. State, 183 S.W.3d 317, 325 (Tenn. 2006). When reviewing factual issues, the appellate court will not reweigh the evidence and will instead

defer to the post-conviction court's findings as to the credibility of witnesses or the weight of their testimony. Id. However, review of a post-conviction 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 the 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.”).

We initially observe that the Petitioner has waived any claim regarding trial counsel failing to “clearly articulate . . . what his range of punishment was[,]” rendering him “incapable of making any informed decisions how much time he was facing and how he wanted to proceed with his case.” As noted by the State, the Petitioner did not raise such an issue in his pro se petition for post-conviction relief, his amended petition, or at the evidentiary hearing for his petition. See Tenn. R. App. P. 36(a); State v. Johnson, 970 S.W.2d 500, 508 (Tenn. Crim. App. 1996) (“Issues raised for the first time on appeal are considered waived.”). This issue is waived.

Regarding the Petitioner’s complaint that trial counsel was ineffective for failing to argue that his convictions should have been merged, the Petitioner has failed to prove that he received ineffective assistance of counsel. In addressing this claim, the post-conviction court determined that the Petitioner was not prejudiced by trial counsel’s failure to request merger. The court noted that, even assuming *arguendo* that trial counsel was deficient for failing to request merger, the Petitioner was not prejudiced by the failure. The court explained that because the Petitioner’s sentences were already running concurrently, merging the convictions did not affect the length of his sentence in any way. The post-conviction court still merged the convictions at the request of the Petitioner in his petition for post-conviction relief. The Petitioner has failed to prove that he was prejudiced by trial counsel’s failing to request merging of his convictions on the grounds of double jeopardy. Even if he had proven such, the appropriate remedy for a double jeopardy violation would be merger of the convictions, which the post-conviction court already granted, not a new sentencing hearing as requested by the Petitioner. See State v. Addison, 973 S.W.2d 260, 267 (Tenn. Crim. App. 1997) (concluding that both dismissal of the charge and merger of the same offense counts into one judgment of conviction are appropriate remedies when the convictions violate a defendant’s right against double jeopardy). Thus, we affirm the judgment of the post-conviction court. We do note that both the post-conviction court and the State were mistaken in the belief that concurrent sentencing cured all errors in failing to properly merge convictions. It is clear that if two convictions must be merged, there will be only one conviction. Concurrent sentencing for two convictions that should properly be merged results in two convictions, one of which should not exist.

Finally, regarding any stand-alone claim of due process violations or double jeopardy violations, the Petitioner did not raise any such issues on direct appeal, as noted by this court. Cedric Jones A/K/A Delarris Jones, 2016 WL 3251606, at *4 n.1. (“We note that the Defendant does not raise any issue regarding merger or double jeopardy

relative to his convictions. We decline, in our discretion, to address these issues on the basis of plain error.”) Tennessee Code Annotated section 40-30-106(g) states:

A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

- (1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or
- (2) The failure to present the ground was the result of state action in violation of the federal or state constitution.

Tenn. Code Ann. § 40-30-106(g); see also Tenn. Sup. Ct. R. 28, § 2(D) (“A ground for relief is waived if the petitioner or petitioner’s counsel failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented.”). The Petitioner raised this issue for the first time in his pro se petition for post-conviction relief. Accordingly, the issue is waived.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the denial of post-conviction relief.

ALAN E. GLENN, JUDGE