IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs at Knoxville on November 19, 2013

GEORGE JONES v. STATE OF TENNESSEE

Appeal from the Circuit Court for Madison County
No. C-12-252 Donald H. Allen, Judge

No. W2013-00684-CCA-R3-PC - Filed February 19, 2014

The Petitioner, George Jones, contends that he received the ineffective assistance of counsel at trial, effectively depriving him of his constitutional right to counsel. Specifically, the Petitioner claims that trial counsel failed to do the following: investigate the facts of and adequately prepare for his case; prepare him for his trial testimony; and advise him of the potential consequences of his decision to testify. After a thorough review of the record and the applicable authorities, we discern no error and affirm the judgment of the post-conviction court.

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

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JERRY L. SMITH and JAMES CURWOOD WITT, JR., JJ., joined

Joseph T. Howell, Jackson, Tennessee, for the appellant, George Jones.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Senior Counsel; James G. Woodall, District Attorney General; and Shaun A. Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

The record reveals that the Petitioner was convicted of aggravated burglary, a Class C felony, and theft of property under $500, a Class A misdemeanor, by a Madison County jury and was subsequently sentenced to an effective term of ten years in the Department of Correction (DOC). The Petitioner appealed that decision, challenging the sufficiency of the evidence, and this court affirmed the convictions on direct appeal. See State v. George Lee Jones, No. W2011-02144-CCA-R3-CD, 2012 WL 3192829 (Tenn. Crim. App. Aug. 6,

2012), perm app. denied (Tenn. Nov. 21, 2012). The following factual background was provided in that opinion:

> The [Petitioner] was indicted on charges of aggravated burglary and theft under $500 after he was spotted at a vacant duplex loading items into his truck.
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> The State's proof at trial revealed that Marvin Reynolds, "the victim," was the owner of a rental duplex located at 131 Elizabeth Street in Jackson, Tennessee, which was unoccupied on August 28, 2010. On that date, a friend of the victim's who lived next door to the duplex informed the victim that someone was removing property from the duplex. In response, the victim went to the duplex, which was "[r]ight around the corner" from his residence, where he met with Officer Kevin Speck of the Jackson Police Department and made a burglary report. The victim said that he did not give anyone permission to enter the duplex or take anything from it.
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> Inside the duplex, the victim discovered that a wall heater, space heater, and the refrigerator were missing. The hot water heater had been damaged and looked as though whoever had taken the other items "planned on coming back to get it." The victim had paid $165 for the refrigerator three years earlier and approximately $165 for each of the two heaters. The broken lines to the hot water heater caused water damage to the floor resulting in a $460 repair bill.
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> At the duplex, Officer Speck observed signs of forced entry and received information that two men were seen loading items from the duplex into a red pickup truck with a dent in the left quarter panel. He put out a "be on the lookout" report for the red truck, and officers subsequently stopped a vehicle matching that description about a half-mile north of the duplex approximately fifteen minutes later. The [Petitioner] and a Mr. White were the occupants of the truck. The [Petitioner] admitted that he had been to the duplex with a man named Danny and had removed a refrigerator from it. Mr. White was ruled out as a suspect and released. Investigator Frank Cagle with the Jackson Police Department was called to the scene, and the [Petitioner] told him that he had taken the refrigerator to his mother's house at nearby 125 Gate Street.
>
> Investigator Cagle placed the [Petitioner] in the back of his patrol car and proceeded to the [Petitioner]'s mother's house where a family gathering was taking place. Someone at the house opened the gate into the fenced

backyard for Investigator Cagle and pointed out the refrigerator. The victim was called to the house, and he identified his property and took possession of it. The wall heater and space heater were never recovered.

The [Petitioner] identified the other man involved in the burglary as Danny Ellison. Investigator Cagle attempted to locate Ellison for three days to charge him with the same offenses, but he was unable to place Ellison at the scene so he discontinued the search. Investigator Cagle interviewed Harvey Donaldson, who lived next door to the victim's duplex, and Donaldson told him that he saw two African-American men, one tall and thin and the other heavyset, remove a refrigerator and some wall heaters from the duplex and load them into a red pickup truck with a large dent on the side. Donaldson was able to identify the [Petitioner] as one of the perpetrators but not Ellison.

The [Petitioner] offered proof at trial from Danny Ellison who explained that he had purchased a refrigerator from a man named Brian for twenty dollars and asked the [Petitioner] to help him move it. The refrigerator was located in a house on Elizabeth Street. According to Ellison, the doors to the house were open as he was told they would be, and he and the [Petitioner] moved the refrigerator and loaded it onto a truck and took it to the [Petitioner]'s house. Ellison explained that the reason he stored the refrigerator at the [Petitioner]'s mother's house was because he was planning to sell the refrigerator to a used appliance store, but it was closed that day. He later learned that the [Petitioner] had been arrested for stealing the refrigerator. Ellison discovered who owned the duplex and went to explain the situation to the victim, a conversation denied by the victim. He said that he paid the victim forty dollars to drop the charges against the [Petitioner], a claim also denied by the victim. He further said that he went to the jail to see if there was a warrant for his arrest, but he did not go the Jackson Police Department to discuss the matter with anyone else.

The [Petitioner] also testified on his own behalf. He stated that Ellison asked him for assistance in moving an appliance, and he obliged. When they arrived at a house on Elizabeth Street, the side door was open and the refrigerator was unplugged. They loaded the refrigerator into his truck, took it to his house, and placed it in his fenced backyard. Soon thereafter, while the [Petitioner] and White were en route to a parts store, the [Petitioner] was stopped by the police. The [Petitioner] told the officer that he had helped someone move something out of a house but denied that he stole anything. He told another officer that the refrigerator was in the backyard of his mother's

> house. The [Petitioner] testified that he did not know that Ellison did not own the refrigerator and that, after finding out that the victim was the true owner, he and Ellison went to talk to the victim and gave him forty dollars.

Id. at *1-2.

On September 28, 2012, the Petitioner filed a pro se petition for post-conviction relief, alleging the following grounds for relief, as relevant to this appeal: trial counsel was ineffective for (1) failing to investigate the case; (2) failing to object to the ten-year sentence imposed by the trial court; and (3) allowing the Petitioner to testify in his own trial. The post-conviction court filed a preliminary order recognizing that the petition for relief stated a colorable claim, finding that the petitioner was indigent, and appointing counsel to represent the Petitioner. The following evidence was presented at the post-conviction hearing on March 4, 2013.

The Petitioner testified that trial counsel did not adequately investigate the charges against him nor did trial counsel inform the Petitioner of the charges against him; the Petitioner stated that he believed that he had been charged with breaking and entering.[1] The Petitioner further testified that trial counsel failed to prepare him for his trial testimony. According to the Petitioner, he and trial counsel never discussed his trial. The Petitioner stated that he and trial counsel met several weeks prior to trial but that they never discussed the trial. Later in his testimony, the Petitioner said, "We discussed that I was innocent[,] and [trial counsel] was going to get the case thr[own] out." The Petitioner testified that he would not have testified if trial counsel had advised him that his decision to testify would result in his criminal history being presented to the jury. He explained, "I would have pleaded the Fifth, sir. No testimony from me." According to the Petitioner, the use of his criminal history was incriminating and made him look guilty to the jury.

Trial counsel testified that he was retained to represent the Petitioner regarding the theft of a refrigerator and breaking into a duplex, which is where the refrigerator was located. Trial counsel further testified that he attempted to obtain a plea agreement in this case but that the Petitioner's criminal history, specifically a recent acquisition of drug charges, impeded those negotiations with the prosecutor. Trial counsel stated that he went over everything he had gleaned from his negotiations with the prosecutor in a subsequent meeting

[1] The Petitioner also makes an unsubstantiated, incoherent argument about trial counsel's having "[a] conflict of interest [with his case] in where the counsel committed to putting those charges of burglary offenses in prison due to his candidacy." Even post-conviction counsel seems to have issues comprehending the Petitioner's contentions on this point and concedes in his brief that the Petitioner is unable to provide a factual basis for this allegation.

with the Petitioner. He explained that he met with the Petitioner several times, during which they discussed the Petitioner's trial testimony; trial counsel physically provided the Petitioner with discovery materials; and, in at least three of those meetings, they went over the facts of the case with some combination of the Petitioner, Mr. Ellison, and the victim. Trial counsel testified that not only did they discuss that the Petitioner's prior convictions could result in his receiving the maximum sentence if convicted but that he had also advised the Petitioner to take a "fairly decent" offer from the State for that very reason. Trial counsel further testified that a jury-out hearing was held to discuss which of the Petitioner's prior convictions were admissible and that, during the hearing, the trial court also "instructed [the Petitioner] about his criminal history and [asked] was he still willing to voluntarily give his testimony. [The Petitioner] insisted on giving his testimony."

The post-conviction court took the evidence under advisement and mailed the parties a letter dated March 8, 2013, explaining its reasons for denying post-conviction relief. On April 1, 2013, the post-conviction court issued an order further detailing its denial of relief, incorporating the letter. In that order, the post-conviction court issued the following findings:

> 1. That the Petitioner failed to prove the allegations in his petition by clear and convincing evidence,
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> 2. That the advice given and services rendered by trial counsel . . . were within the range of competence demanded of attorneys representing defendants in criminal cases,
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> 3. That [the] Petitioner failed to show that his attorney's performance was deficient or that any alleged deficient performance by his attorney somehow prejudiced the [Petitioner],
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> 4. That trial counsel investigated the case, obtained discovery, met with the Petitioner, discussed the Petitioner's case with him on several occasions prior to trial, interviewed witnesses, and called a defense witness at trial,
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> 5. That none of trial counsel's actions or omissions were so serious as to fall below the objective standard or reasonableness under prevailing professional norms,
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> 6. That trial counsel's representation was appropriate, and that he

provided the Petitioner with reasonably effective assistance,

7. That the [Petitioner] was fully advised by the Court and trial counsel of his right to testify, and that the [Petitioner] freely, knowingly, and voluntarily waived his right to testify[2] at trial, and

8. That since the Petitioner has failed to bear his burden of proof in this matter, the Petition should be denied.

The Petitioner filed a timely notice of appeal on March 18, 2013.

ANALYSIS

The Petitioner contends that he received the ineffective assistance of counsel at trial, effectively depriving him of his constitutional right to counsel. Specifically, the Petitioner contends that trial counsel failed to do the following: investigate the facts of and adequately prepare for his case, prepare him for his trial testimony, advise him of the potential consequences of his decision to testify, and properly represent him due to "a conflict of interest . . . based on [trial counsel's] commitment to putting those charged with burglary and related offenses in prison." The State responds that the Petitioner did not offer any evidence that contradicted the post-conviction court's findings and has failed to meet his burden. We agree with the State.

Petitions for post-conviction relief are governed by the Post-Conviction Procedure Act. Tenn. Code Ann. §§ 40-30-101 to -122. To obtain relief, the petitioner must show that his conviction or sentence is void or voidable because of the abridgement of a constitutional right. Tenn. Code Ann. § 40-30-103. The petitioner must prove his factual allegations supporting the grounds for relief contained in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(2)(f); see Dellinger v. State, 279 S.W.3d 282, 293-94 (Tenn. 2009). Evidence is clear and convincing when there is no substantial doubt about the accuracy of the conclusions drawn from the evidence. Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

The post-conviction court's findings of fact are conclusive on appeal unless the

[2] The order reads "waived his right to testify"; however, the Petitioner did testify at trial. This appears to be a typographical error as the incorporated letter states as follows: "the defendant freely, knowingly and voluntarily chose to testify in his own defense."

evidence in the record preponderates against them. See Nichols v. State, 90 S.W.3d 576, 586 (Tenn. 2002) (citing State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999)); see also Fields v. State, 40 S.W.3d 450, 456-57 (Tenn. 2001). The petitioner has the burden of establishing that the evidence preponderates against the post-conviction court's findings. Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). This court may not re-weigh or reevaluate the evidence or substitute its inferences for those drawn by the post-conviction court. Nichols, 90 S.W.3d at 586. Furthermore, the credibility of the witnesses and the weight and value to be afforded their testimony are questions to be resolved by the post-conviction court. Bates v. State, 973 S.W.2d 615, 631 (Tenn. Crim. App. 1997).

I. Ineffective Assistance of Counsel

Ineffective assistance of counsel claims are regarded as mixed questions of law and fact. State v. Honeycutt, 54 S.W.3d 762, 766-67 (Tenn. 2001). Thus, the post-conviction court's findings of fact underlying a claim of ineffective assistance of counsel are reviewed under a de novo standard, accompanied with a presumption that the findings are correct unless the preponderance of the evidence is otherwise. Fields, 40 S.W.3d at 458 (citing Tenn. R. App. P. 13(d)). The post-conviction court's conclusions of law are reviewed under a de novo standard with no presumption of correctness. Id.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the defendant to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687 (1984); see Lockart v. Fretwell, 506 U.S. 364, 368-72 (1993). A defendant will only prevail on a claim of ineffective assistance of counsel after satisfying both prongs of the Strickland test. See Henley, 960 S.W.2d at 580. The performance prong requires a defendant raising a claim of ineffectiveness to show that counsel's representation was deficient, thus fell below an objective standard of reasonableness or was "outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690. The prejudice prong requires a defendant to demonstrate that "there is a reasonable probability that, but for counsel's professional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability means a probability sufficient to undermine confidence in the outcome." Id. Failure to satisfy either prong results in the denial of relief. Id. at 697, 700. The Strickland standard has also been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to "reasonably effective" assistance, that is, within the range of competence demanded of attorneys in criminal cases.

Strickland, 466 U.S. at 687; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). In reviewing counsel's conduct, a "fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 466 U.S. at 689. Deference is made to trial strategy or tactical choices if they are informed ones based upon adequate preparation. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). "Thus, the fact that a particular strategy or tactic failed or even hurt the defense does not, alone, support a claim of ineffective assistance." Cooper v. State, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Based on our review of the record, we agree with the post-conviction court's conclusion that the Petitioner failed to support any of his allegations regarding the deficiencies in trial counsel's representation with clear and convincing evidence and failed to explain how the result of his trial would have been different but for the alleged deficiencies. The Petitioner's failure to demonstrate prejudice alone is a sufficient basis for this court to conclude that the ineffective assistance of counsel claim must fail. See Strickland, 466 U.S. at 697 ("Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one."). In being encouraged to do so by the United States Supreme Court, we will forgo any deficiency analysis as the record so clearly reveals that the Petitioner's evidence demonstrating prejudice was wholly lacking and insufficient to merit relief.

The record reflects that, in the section of the Petitioner's brief designated for his prejudice analysis, the Petitioner simply states, "this deficient performance on the part of trial counsel resulted in prejudice to him. . . . The Petitioner asserts that, had counsel acted accordingly and prepared for his case, the outcome of his trial would have been different." At the evidentiary hearing, the Petitioner testified that, if trial counsel had advised him that his decision to testify meant that his criminal history would be presented to the jury, then he would not have testified at trial, that he "would have pleaded the Fifth[.]" Trial counsel testified that not only did he discuss the Petitioner's testimony with the Petitioner but that a jury-out hearing was held to discuss which of the Petitioner's prior convictions were admissible. Trial counsel further testified that the trial court also "instructed [the Petitioner] about his criminal history and [inquired whether] he still willing to voluntarily give his testimony. [The Petitioner] insisted on giving his testimony." In its order denying relief, the post-conviction credited the testimony of trial counsel over that of the Petitioner and noted that the trial court did, in fact, inform the Petitioner that his prior convictions would be admitted if he chose to testify. Thus, the record belies the Petitioner's claim that he would not have testified if he had known that it would result in his criminal history being presented

to the jury. Other than this one, unsubstantiated claim, the Petitioner proffered no grounds on which, nor evidence that, trial counsel's "deficiencies" prejudiced him. Therefore, the Petitioner has failed to show that he was prejudiced by any deficiency in trial counsel's performance.

CONCLUSION

Based on our review of the record and the applicable law, we affirm the judgment of the post-conviction court.

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D. KELLY THOMAS, JR., JUDGE