

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

Assigned on Briefs February 5, 2019

FILED

02/15/2019

Clerk of the  
Appellate Courts

**OSCAR POLK, JR. v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Hardeman County  
No. 6180 J. Weber McCraw, Judge**

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**No. W2018-01072-CCA-R3-PC**

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The Petitioner, Oscar Polk, Jr., appeals from the denial of post-conviction relief, alleging that trial counsel was ineffective in failing to argue at trial that the Petitioner was not tested for gunshot residue. Upon our review, we affirm the judgment of the post-conviction court.

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

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, P.J., and J. ROSS DYER, J., joined.

Lloyd R. Tatum, Henderson, Tennessee, for the appellant, Oscar Polk, Jr..

Herbert H. Slatery III, Attorney General and Reporter; Courtney N. Orr, Assistant Attorney General; Mark E. Davidson, District Attorney General; and Jerry Norwood, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

The Petitioner's convictions stem from a 1997 shooting at DeJaVu nightclub where two victims died and two victims were injured from gunshot wounds. State v. Oscar Polk, Jr., No. W1999-01935-CCA-R3-CD, 1999 WL 1532148, at \*1 (Tenn. Crim. App. Dec. 20, 1999). The Petitioner was convicted by a jury of two counts of first degree murder and two counts of aggravated assault, for which he received two life sentences and two four-year sentences, respectively, to be served concurrently. Id. The Petitioner appealed his convictions, which were affirmed by this court. Id. The following facts were adduced at trial and recited in this court's opinion from the direct appeal.

The evidence presented at trial established that on July 26, 1997, the [Petitioner] went to a local gathering place known as "Luther Griggs"

where he encountered Hester Harris and Ricco Lake. According to witnesses, the [Petitioner] asked Mr. Harris why Mr. Harris no longer spoke to him. An argument ensued, after which the [Petitioner] stood in the road, broke a beer bottle, and said something to the effect of, “Some of you boys going to die tonight.” The [Petitioner] then left Luther Griggs. Later that evening, the [Petitioner] went to a local club known as DeJaVu. Mr. Harris and Mr. Lake also went to DeJaVu that evening. According to witnesses, the people on the dance floor at DeJaVu began to engage in a form of dancing known as “gangster walking.” During this dance, people on the dance floor began bumping into each other. At some point, the disc jockey turned on the main lights and asked the people on the dance floor to calm down. After the main lights were turned off, several shots were fired. Mr. Harris, Mr. Lake, Crystal Brown, and Sheena Cashier were shot. Mr. Harris and Mr. Lake died as a result of their gunshot wounds.

At trial, Dennis Tucker testified that he had seen both the [Petitioner] and Kenneth Bills with guns when they ran out of DeJaVu after the shooting. Roshanta Harris testified that she realized the [Petitioner] had a gun seconds before he started shooting. She testified that she was approximately six or seven feet from the [Petitioner] when he began shooting. Another trial witness, Tony Walker, testified that he was standing on the dance floor next to the [Petitioner] at the time of the shooting. Mr. Walker stated that he had seen the [Petitioner] shooting a gun and had seen Mr. Harris and Mr. Lake fall to the ground. Mr. Walker further testified that the [Petitioner] had fired four shots in the direction of Mr. Harris and Mr. Lake and two shots in the direction of the disc jockey booth. Mr. Walker stated that at the time of the shooting he was also standing near Mr. Bills, but he had not seen Mr. Bills with a gun. Antrail Robertson and Michikia Beauregard were also present at the time of the shooting and both testified that they had seen the [Petitioner] firing a gun. Neither witness had seen anyone else with a gun at that time.

Oscar Polk, Jr., 1999 WL 1532148, at \*1.

On December 19, 2000, the Petitioner filed a pro se petition for post-conviction relief, which was not amended by retained counsel, alleging that he was denied effective assistance of counsel. The Petitioner’s post-conviction hearing did not occur until May 10, 2018. There is no explanation in the record for the lengthy delay between the filing of the petition for post-conviction relief and the evidentiary hearing. The record simply indicates that the Petitioner filed a “Motion to Place Matter on the Docket” on May 26, 2017, which stated that the Petitioner failed to prosecute his pro se petition in 2000

because “his source of funding disappeared,” that the case was “retired” on January 4, 2007, and that the Petitioner “is now able to go forward with this matter.” At the May 10, 2018 post-conviction hearing, trial counsel explicitly stated that he would be “proceeding on the original petition” filed by the Petitioner. In its order denying post-conviction relief, the post-conviction court stated, “The post-conviction [petition] was timely filed in December 2000, and for reasons unknown to this Court, the petition was not timely set or heard by the trial court.”

**Post-Conviction Hearing.** At the May 10, 2018 post-conviction hearing, the Petitioner confirmed that he testified at trial that he was at the DeJaVu nightclub the night of the shooting but did not have a gun or shoot the victims. He said other people in the club had guns that night and that several witnesses testified to such at trial. He said he left the club with a girlfriend and the next day he went to the police station with his parents to explain that he had “no involvement” in the shooting. He testified that he did not shower or change clothes in between leaving the nightclub and going to the police station. He confirmed that the police did not test him for gunshot residue but agreed that, had they done so, they would have received negative results. He confirmed that the police did not find a gun on his person or connected to him. Regarding trial counsel’s performance, he testified that there was a “lengthy” pre-trial hearing wherein several witnesses testified regarding the shooting. He did not recall trial counsel reviewing the hearing transcript in preparation for trial. He testified that trial counsel did not argue at trial that the police did not test him for gunshot residue. The Petitioner also testified that some of the trial witnesses failed to adhere to the rule of sequestration. He said, “[i]t came to our attention that witnesses were sitting together discussing the case even after a witness done testified. You know, they all was sitting together and discussing what each other had said[.]” He confirmed that trial counsel brought this to the trial court’s attention but was unsure whether trial counsel requested a mistrial. He stated that the case proceeded and asserted that the issue of the witnesses convening should have been argued on appeal.

On cross-examination, the Petitioner testified that one of the issues in his petition for post-conviction relief was that trial counsel failed to adequately investigate his case. Although he could not say what steps trial counsel actually took to investigate before trial, he asserted that he should have been apprised of every step taken. He also asserted that trial counsel should have cross-examined the trial witnesses more effectively regarding their recollection of the shooting. Presented with the trial transcript, the Petitioner confirmed that trial counsel requested and was denied a mistrial based on the issue of witnesses talking with each other. He again asserted that trial counsel should have included this issue on appeal. The Petitioner also asserted that the evidence was insufficient to support his convictions but agreed that five witnesses testified that they

saw the Petitioner with a gun during the shooting. On redirect, the Petitioner testified that he did not meet with trial counsel regarding his appeal after he was sentenced.

Trial counsel testified and recalled conducting the preliminary hearing in the Petitioner's case but did not recall requesting a transcript of the hearing. He testified that he reviewed his file before this post-conviction hearing, but he did not review the preliminary hearing because "no issues regarding the preliminary hearing w[ere] made a part of the petition [for post-conviction relief]." Regarding his preparation for trial, trial counsel testified that his office had a full-time investigator, and thus, he did not need to request funds to hire an outside investigator. Trial counsel confirmed that his co-counsel made an objection to speculative testimony by a State's witness, which was sustained by the trial court, but he did not request a limiting instruction. Trial counsel explained that he made the decision whether to request limiting instructions for sustained objections on a "case-by-case basis" because it could cause the jury "to think on [the testimony] more and consider it more."

Trial counsel confirmed that he did not file the Petitioner's appeal and that another attorney took over as appellate counsel. Trial counsel agreed that the issue of witnesses talking with each other "was important enough" to request a mistrial but that it was up to appellate counsel to determine which issues to argue on appeal. He explained that appellate counsel had full access to his files for the Petitioner's case. Trial counsel also confirmed that his general practice was to point out any investigative deficiencies at trial. Asked whether he should have argued at trial that the police failed to test the Petitioner for gunshot residue, trial counsel stated, "I have not put any thought into that and wouldn't speculate to it because it was not part of your petition [for post-conviction relief]."

On cross-examination, trial counsel confirmed that he worked with his investigator in preparation for the Petitioner's trial and apprised the Petitioner of the case status throughout the case. Regarding the Petitioner's allegation that trial counsel failed to cross-examine witnesses effectively regarding their recollection of the shooting, trial counsel said, "I . . . wouldn't want that to be constantly at the forefront of the jury's mind, but we also brought witnesses in to testify to other people having weapons . . . at the club." Trial counsel said he was prepared for trial and that he advised the Petitioner of his constitutional rights. On redirect, trial counsel agreed that the Petitioner's case "was a jump ball case," that "[t]he jury could have bought either side[,] and that "[t]hey bought the State's side."

After the hearing, the post-conviction court took the case under advisement and subsequently issued a written order denying post-conviction relief. The post-conviction court found that trial counsel provided "adequate assistance" and a "reasonable defense"

for the Petitioner, even though the defense was not ultimately accepted by the jury. The court also found that the Petitioner failed to show deficient performance or prejudice to his case. The court concluded that “[t]he facts did not permit a reasonable finding of not guilty. Eyewitnesses testified that [the Petitioner] was the shooter and the jury accredited the testimony of the State’s witnesses.” It is from this order that the Petitioner now appeals.

### ANALYSIS

The Petitioner argues that he received ineffective assistance of counsel based on trial counsel’s failure to argue at trial that the Petitioner was not tested for gunshot residue. He specifically argues that “trial counsel missed a golden opportunity to argue reasonable doubt to the jury” based on the failure to test for gunshot residue. The State responds that the Petitioner waived this issue by failing to include it in his petition for post-conviction relief. Specifically, the State argues that “[t]he post-conviction court did not discuss trial counsel’s failure to argue the lack of a gunshot residue test in its order, and it did not make any specific findings regarding whether trial counsel was ineffective for failing to present that argument to the jury.” In the alternative, the State argues that the post-conviction court properly denied relief and that the Petitioner failed to show how trial counsel’s actions were deficient or prejudicial.

The following portions of the Post-Conviction Procedure Act (the Act), govern our analysis and resolution of this case. A petitioner filing for post-conviction relief must comply with the following:

(d) The petitioner shall include all claims known to the petitioner for granting post-conviction relief and shall verify under oath that all the claims are included.

(e) The petitioner shall include allegations of fact supporting each claim for relief set forth in the petition and allegations of fact explaining why each ground for relief was not previously presented in any earlier proceeding. The petition and any amended petition shall be verified under oath. Affidavits, records or other evidence available to the petitioner supporting the allegations of the petition may be attached to it.

Tenn. Code Ann. §§ 40-30-104(d), (e). Moreover, Tennessee Supreme Court Rule 28, Section 5(E)(3) provides that “[t]he petition shall contain . . . each and every error that petitioner asserts as a ground for relief[.]” Rule 28 further requires that the hearing be limited to the issues raised in the petition. See Rule 28 § 8(D)(4).

The record shows that this issue, whether trial counsel was ineffective in failing to argue at trial the lack of gunshot residue testing, was neither included in the Petitioner's post-conviction petition nor ruled upon by the post-conviction court. Although the petition includes a general claim of counsel's failure to investigate the case, the Petitioner has technically waived consideration of the precise issue presented. See Long v. State, 510 S.W.2d 83, 85 (Tenn. Crim. App. 1974) (a petitioner may not seek post-conviction relief on grounds not raised in the petition or amended petition); see also Tenn. Code Ann. § 40-30-110(f) ("There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived."). Although this issue was raised during the post-conviction hearing, it was not developed in any meaningful way. See Marlon Yarbrow v. State, No. W2017-00125-CCA-R3-PC, 2018 WL 4441364, at \*8 (Tenn. Crim. App. Sept. 17, 2018) (issue preserved for appellate review even when not explicitly included in petition for post-conviction relief only when it is litigated at the hearing and ruled upon by the post-conviction court); Kenneth Hayes v. State, No. W2016-01522-CCA-R3-PC, 2017 WL 3106918 at \*8 (Tenn. Crim. App. July 21, 2017) (citing collection of cases in which this court has allowed a petitioner to present an issue for the first time at a post-conviction evidentiary hearing, even if it was not listed in his petition, and still obtain appellate review of the issue); Shawn Simmons v. State, M2013-00987-CCA-R3-PC, 2013 WL 1225857, at \*5 n.3 (Tenn. Crim. App. March 27, 2013). In fact, the only testimony regarding this issue was from the Petitioner who claimed that when he went to the police station the day after the shooting he had on the same clothes from the night of the shooting. He insisted that had his clothing been tested, the results would have been negative. When trial counsel was asked about this issue, he was unable to discuss it, citing its omission from the petition. Under these circumstances, we have no hesitation concluding that the Petitioner has waived consideration of this issue.

Waiver notwithstanding, the Petitioner failed to establish deficient performance or prejudice to his case as a result of trial counsel's failure to argue the lack of gunshot residue testing at trial. As an initial matter, the Petitioner failed to produce any gunshot residue testing at the hearing to confirm his conclusory testimony. Moreover, at least six people testified at trial that the Petitioner had a gun when the shooting occurred. Two eyewitnesses observed the Petitioner shoot in the direction of the victims, and two other eyewitnesses observed him with a gun and did not observe anyone else with a gun. Given the overwhelming proof at trial, we agree with the post-conviction court and conclude that the Petitioner has failed to establish how trial counsel's failure to argue the lack of gunshot residue testing would have changed the outcome of his trial. Accordingly, the Petitioner is not entitled to relief.

**CONCLUSION**

Based on the foregoing reasoning and analysis, we affirm the judgment of the post-conviction court.

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CAMILLE R. McMULLEN, JUDGE