

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs September 10, 2013

ARTURO RIVERA v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 11-01859 Carolyn Wade Blackett, Judge

No. W2013-00484-CCA-R3-PC - Filed December 3, 2013

Petitioner, Arturo Rivera, appeals from the trial court's dismissal of his petition for post-conviction relief following an evidentiary hearing. Petitioner attacked his conviction for aggravated robbery. Petitioner had pled guilty to the charge and received a 7.2-year sentence as a mitigated offender pursuant to a negotiated plea agreement. On appeal, Petitioner asserts that his trial counsel rendered ineffective assistance of counsel which directly prevented Petitioner from entering a knowing, intelligent, and voluntary guilty plea. After a review of the entire record and the parties' briefs, we affirm the judgment of the trial 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 D. KELLY THOMAS, JR., JJ., joined.

Michael R. Working, Memphis, Tennessee, for the appellant, Arturo Rivera.

Robert E. Cooper, Jr., Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Susannah Shea, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In his brief, the crux of Petitioner's argument that trial counsel rendered ineffective assistance of counsel is that trial counsel failed to communicate to Petitioner information critical to, and necessary for, entry of a knowing, intelligent, and voluntary guilty plea. Petitioner testified at the post-conviction hearing that: (1) trial counsel never provided a discovery packet and Petitioner never had a chance to review the allegations; (2) trial counsel did not give Petitioner any information about what witnesses had said in interviews; (3) trial counsel never met with Petitioner in jail even though Petitioner was held in lieu of bond for

over a year pending the guilty plea; and (4) trial counsel only spoke with Petitioner at court hearings, usually for no more than five minutes.

Testimony and statements of counsel at the post-conviction hearing indicated that Petitioner's first language is Spanish. He complained that trial counsel, who spoke some Spanish, still could not fully bridge the language barrier, although interpreters were available at all court hearings, including the guilty plea hearing. When asked by post-conviction counsel if trial counsel spoke about interviews with the victim, Petitioner testified, "[Trial counsel] only told me that the witness could not come to the jury trial. . . ." Petitioner admitted that he personally knew the victim, having previously worked with him for seven years. Petitioner also testified at length about how intoxicated he was at the time of the crime, and although he could recall seeing the victim (an employee of the restaurant) at the crowded restaurant where the crime occurred, and remembered being told to go outside if he intended to smoke a cigarette, he had no memory at all of pulling out the handgun and taking the money. Petitioner admitted that "he," an apparent reference to trial counsel, told Petitioner about the "eighty-five percent" service of the 7.2-year sentence.

Trial counsel testified that he had been practicing law approximately fifteen years and that he was "approximately seventy percent bilingual" in English and Spanish. He always had an interpreter present "every time we had court." Trial counsel acknowledged that he spoke to Petitioner about the guilty plea on more than one occasion and that

Well, I spoke to him in both Spanish and English. If I had an interpreter present, I would explain things in Spanish, and then again, in English and the interpreter would, to make sure the conjugations had been just right. . . .
And that [Petitioner] understood everything.

Trial counsel testified that Petitioner was an undocumented alien at the time of the guilty plea. As a result, trial counsel informed Petitioner that the felony conviction would result in deportation. Trial counsel informed Petitioner that a negotiated plea offer to plead guilty to a lesser offense or for less incarceration was not possible. He advised Petitioner that he could refuse to plead guilty and then have a jury trial, and that if he was convicted as charged at trial "he would likely receive worse time if he [Petitioner] lost." Trial counsel testified that Petitioner was not happy about the prospect of deportation, or about the 85 percent service of the imposed sentence, but that Petitioner understood it and he decided to accept it and move forward with entering the negotiated guilty plea.

Contrary to Petitioner's testimony on the subject, trial counsel testified that the victim was going to appear at trial and was going to testify that "he (the victim) was fearful he was being robbed and gave [Petitioner] all the money he had." Trial counsel thoroughly

discussed with Petitioner that Petitioner's intoxication was not a defense to the crime. Trial counsel stated he had "multiple sit downs" with Petitioner to discuss the guilty plea offer. Trial counsel did not have a written record in his file of when he received a "discovery packet" from the state or the date he gave a copy of the discovery packet to Petitioner. Trial counsel did not have a written record of how many times he met with Petitioner at the jail and had no independent recollection of how many times they met at the jail.

Trial counsel testified that he advised Petitioner that his asserted lack of memory of the aggravated robbery was not a defense to the charge. Trial counsel also testified as to his understanding of the facts surrounding the crime, and his understanding did not contradict the facts of the incident as testified to by Petitioner at the post-conviction hearing.

In its order denying post-conviction relief, the trial court implicitly credited the testimony of trial counsel and discredited the testimony of Petitioner. The trial court explicitly stated that Petitioner had failed to prove by clear and convincing evidence that trial counsel rendered ineffective assistance of counsel. In part, the trial court stated,

Petitioner testified that [trial counsel] never met with him for more than five minutes at a time. PC Tr. Pg.33. He also claims [trial counsel] never fully discussed the strength of his case and the likelihood of winning at trial, thereby completely failing to inform Petitioner of the viability of his different legal options. Id. [Trial counsel] testified that he did discuss these things at length with Petitioner and gave Petitioner time to consider whether or not he should accept the plea offer. Id. at 19.

This conflicting testimony hardly constitutes clear and convincing proof that [trial counsel's] representation fell below an objective standard of reasonableness. It is clear that [trial counsel] understood the possible weaknesses in the State's case against his client. He took the time to research defenses to specific intent crimes, and he made sure to find out exactly what the victim's testimony would be before making any movement on the plea offer. Id. at 24, 27. This Court is not convinced that [trial counsel] would perform his due diligence in investigating the legal matters of the case, then utterly neglect to inform his client of his findings.

As to Petitioner's failure to prove prejudice, even if trial counsel's representation had been deficient, the trial court stated,

Petitioner has not convinced this Court that there is a reasonable probability that he would have insisted on going to trial had he known more

about the strengths and weaknesses of his case. Nowhere in his hearing does he even say that he would have so insisted. His counsel for his post-conviction hearing points to the possibility that a trial might result in a different outcome, but that is not the standard for prejudice when contesting a guilty plea. Petitioner must establish by clear and convincing evidence that “there is a reasonable probability that, but for counsel’s errors, *he would not have pleaded guilty and would have insisted on going to trial.*” Hill, 474 U.S. at 59 (emphasis added). Pointing out issues perceived as possible weaknesses in the State’s case does not constitute clear and convincing evidence that learning of those issues would have led to Petitioner’s insistence on going to trial. And without such evidence, Petitioner fails to establish prejudice.

Not mentioned by the trial court in its order, but still significant, is the fact that Petitioner failed at the post-conviction hearing to introduce the transcript of the guilty plea hearing. We assume that if there was any indication in the transcript that Petitioner’s guilty plea was not knowingly, voluntarily, and intelligently entered, and/or that trial counsel had rendered ineffective assistance of counsel, Petitioner would have produced the transcript at the post-conviction hearing.

ANALYSIS

In order to be granted post-conviction relief, a petitioner must prove the factual allegations supporting relief by clear and convincing evidence at an evidentiary hearing. T.C.A. § 40-30-110(f); *Ward v. State*, 315 S.W.3d 461, 465 (Tenn. 2010). The trial court’s factual findings in its ruling in a post-conviction proceeding “are conclusive on appeal unless the evidence preponderates against those findings.” *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Appellate review of legal issues, or of mixed questions of fact and law, such as in a claim of ineffective assistance of counsel, is de novo with no presumption of correctness. *Pylant v. State*, 263 S.W.3d 854, 867-68 (Tenn. 2008). A petitioner must satisfy both prongs of the two-prong test to prove ineffective assistance of counsel which is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Dellinger v. State*, 279 S.W.3d 282, 293 (Tenn. 2009). These prongs are (1) deficient performance of counsel, defined as “counsel’s representation fell below an objective standard of reasonableness,” *Strickland*, 466 U.S. at 687-88, and (2) prejudice to the defendant, defined as “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Dellinger*, 279 S.W.3d at 293. If the petitioner fails to establish either one of the prongs, that is a sufficient basis to deny relief, and the other prong does not need to be addressed. *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004).

As to guilty pleas, the petitioner must establish a reasonable probability that, but for the errors of his counsel, he would not have entered the plea. *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). When determining the knowing and voluntary nature of a guilty plea, the standard is “whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *see also State v. Pettus*, 986 S.W.2d 540, 542 (Tenn. 1999).

In order for a guilty plea to be voluntary, the petitioner must have an understanding of the charges against him and the consequences of pleading guilty, including “the sentence that he will be forced to serve as the result of his guilty plea and conviction.” *Blakenship v. State*, 858 S.W.2d 897, 905 (Tenn. 1993). A petitioner’s solemn declaration in open court that his or her plea is knowing and voluntary creates a formidable barrier in any subsequent collateral proceeding because these declarations “carry strong presumption of verity.” *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S.Ct. 1621, 52 L. Ed. 2d 136 (1977).

In the argument section of his brief, Petitioner argues facts based upon the discredited testimony of Petitioner and upon misplaced interpretations of trial counsel’s testimony. For examples, Petitioner asserts trial counsel *never* met with Petitioner in jail and never spoke with Petitioner about the case outside the courtroom. Petitioner also asserts that trial counsel testified that “[the victim] did not indicate that he was in fear.” Petitioner also asserts in his brief that he had “complete ignorance of the evidence against him.” This contradicts portions of Petitioner’s testimony at the post-conviction hearing where he implicitly acknowledges he remembered much of what happened (the State’s evidence) except he had no memory of pulling out the gun. Again, we must assume that in some fashion Petitioner acknowledged at the guilty plea hearing the essence of the evidence against him when he pled guilty.

The State argues in its brief that based on what is in the record, the trial court correctly determined that Petitioner failed to prove both deficient representation and prejudice by clear and convincing evidence. In light of the applicable legal authority, we agree with the State.

Accordingly, the judgment of the trial court is affirmed.

THOMAS T. WOODALL, JUDGE