

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs at Jackson September 1, 2015

JAMES MITCHELL SMITH v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Rutherford County
No. F71484 David M. Bragg, Judge**

No. M2014-02558-CCA-R3-PC – Filed October 5, 2015

Petitioner, James Mitchell Smith, is seeking post-conviction relief from his convictions for driving under the influence (“DUI”), driving on a suspended or canceled license, reckless endangerment, and two counts of leaving the scene of an accident. The post-conviction court denied relief, and petitioner now appeals, arguing that he received ineffective assistance of counsel at trial. Following 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

ROGER A. PAGE, J., delivered the opinion of the Court, in which JAMES CURWOOD WITT, JR., and TIMOTHY L. EASTER, JJ., joined.

Thomas Earl Parkerson, Murfreesboro, Tennessee, for the Appellant, James Mitchell Smith.

Herbert H. Slatery III, Attorney General and Reporter; Ahmed A. Safeullah, Assistant Attorney General; Jennings Hutson Jones, District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts from Trial

Petitioner was involved in an automobile accident on November 9, 2011. *See State v. James M. Smith*, No. M2013-00733-CCA-R3-CD, 2014 WL 766845, at *1

(Tenn. Crim. App. Feb. 25, 2014). As a result, petitioner was indicted for DUI ninth offense, DUI ninth offense with a blood alcohol level over .08, driving on a revoked license, two counts of leaving the scene of an accident involving a personal injury, and felony reckless endangerment. After his October 2012 trial, he was convicted as charged and sentenced to ten years as a Range III, persistent offender. *See James M. Smith*, 2014 WL 766845, at *1, *4. The trial court ordered him to serve the first six years in confinement with the balance suspended to supervised probation. *Id.* at *4. This court provided the following summary of the trial testimony in its opinion disposing of petitioner's direct appeal:

At [petitioner's] trial, the parties presented the following evidence: Paul Hulme testified that on November 9, 2011, he was stopped in his car at a red light at the intersection of Murfreesboro Road and Florence Road waiting for the light to turn green. Hulme said that [petitioner] was driving a vehicle that hit the back end of his car while he was stopped. Hulme did not hear screeching brakes or tires on the road before the impact.

After the impact, [petitioner] approached Hulme's window and apologized. He said, "I'm sorry I hit you, I couldn't stop." [Petitioner] then asked Hulme if he had been drinking, and Hulme replied, "no." [Petitioner] made no reference to someone else driving. Hulme said that he was taken from the scene to the hospital for treatment.

During cross-examination, Hulme said that the evening of the incident he was driving a full-sized, yellow van. He said that the van had a metal divider that prevented him from seeing out of his rearview mirror. Hulme said that, after the impact, he did not see [petitioner] exit the vehicle but that [petitioner] approached him on the driver's side of the van. He conceded that he would not have seen if there were multiple people exiting [petitioner's] vehicle. Hulme said that it was dark at the time of the incident. Hulme said that there was "no chance" that [petitioner] said "I'm sorry we hit you."

Hulme said that, when [petitioner] apologized, Hulme told him that it was okay and that he was not hurt badly. Hulme said [petitioner] then asked him if he had been drinking, to which Hulme responded "no." A nurse then approached and asked Hulme if he was okay, if his neck or chest hurt, and then informed him an ambulance was en route to the scene. Hulme said that he did not speak with officers at the scene because they arrived after the ambulance.

James Wyatt, a Sergeant with the Murfreesboro Police Department, testified that he responded to a car accident involving an allegedly intoxicated driver. When he arrived at the scene, he learned that one of the drivers had left the scene of the accident, and the sergeant was directed toward [petitioner]. Sergeant Wyatt saw [petitioner] in a red and gray shirt across the street. The sergeant started to approach [petitioner], and [petitioner] began walking away from him. [Petitioner] walked up the hill, got on the railroad tracks, and walked thirty to forty yards down the railroad tracks. [Petitioner] then walked down an embankment on the back side of an establishment called "City Limit Liquor." [Petitioner] went around toward the front of the store. Sergeant Wyatt asked [petitioner] to stop, but he continued walking. As [petitioner] was walking around the building, Sergeant Wyatt again asked him to stop. The sergeant caught up and made contact with [petitioner] at the front door of the liquor store.

Sergeant Wyatt testified that, when he made contact with [petitioner], he asked [petitioner] what he was doing. [Petitioner] responded that he was "going to get another drink before [the officer] took him to jail." The Sergeant obtained [petitioner's] identification and took him back to the scene of the accident. Sergeant Wyatt informed [petitioner] that another officer was coming to conduct field sobriety tasks, and [petitioner] responded that he was not going to perform any field sobriety tasks and that "it wasn't his first rodeo."

During cross-examination, Sergeant Wyatt testified that eight minutes transpired between the time that he received the call about the accident and when he arrived at the accident scene. He agreed that "some things" about which he was unaware could have happened at the accident scene before he got there. The sergeant said that the truck involved in the accident, which was owned by [petitioner], was not moved from the accident scene. The sergeant conceded that [petitioner] was not running and that he did not fall down as he was walking. Sergeant Wyatt agreed that [petitioner] did not attempt to flee when he approached him and did not resist speaking with the sergeant.

Officer Brandon Brown, with the Murfreesboro Police Department, testified that he responded to a call regarding this accident. He made a diagram of the accident scene and created a "crash report." The accident involved four cars, and one of the drivers of the cars left the accident scene. Two other drivers were transported to the emergency room. Officer Brown testified that the "box truck" involved in the accident, and which was the cause of the accident, was registered to [petitioner].

During cross-examination, Officer Brown testified that he did not speak with [petitioner] during his investigation of the accident scene. Officer Brown said that he noted on his report that [petitioner's] truck had "more than \$400" worth of damage. He testified that the damage was to the front of [petitioner's] truck. He conceded that there could have been damage to the rear of the truck that he did not notice.

John Harrison, a Special Agent Forensic Scientist with the Tennessee Bureau of Investigation ("TBI"), testified as an expert in forensic toxicology. He testified that he tested the sample of [petitioner's] blood. The ethyl alcohol level was 0.23 gram percent. Agent Harrison testified that, in his opinion, a person was "impaired" when his or her blood alcohol level reached "the .08 level." [Petitioner's] blood alcohol level, he noted, was three times this amount.

For [petitioner], James Shannon Hodge testified that around the time of this accident he was living with a woman named Ann, her son Jeffery, and a man named "Steve Lance." Mr. Lance, he said, was friends with and worked with [petitioner]. Mr. Hodge testified that Mr. Lance drove [petitioner's] truck and, because [petitioner] did not have a valid license, [petitioner] paid Mr. Lance to drive him in his truck. Mr. Hodge testified that he not seen Mr. Lance since the day of the accident. He said Mr. Lance left without paying the money he owed Mr. Hodge for lodging, and he left many of his belongings.

During cross-examination, Mr. Hodge testified that he never notified authorities that they had wrongly arrested [petitioner] and that Mr. Lance was driving [petitioner's] truck. He conceded that he and the Defendant were friends and that he did not want [petitioner] to go to jail.

During redirect examination, Mr. Hodge testified that he was not present at the accident scene and cannot be sure who was driving. He, however, knew that Mr. Lance had left that morning driving [petitioner's] truck.

During further cross-examination, Mr. Hodge agreed he had been previously convicted of burglary and felony possession of a Schedule II substance.

Tom Anderson testified he had known [petitioner] for between fifteen and eighteen years. Mr. Anderson, who worked on trucks for a living, was familiar with [petitioner's] large work truck. Mr. Anderson said

that [petitioner's] truck was towed to his place of business, after which Mr. Anderson salvaged the parts from it. Before doing so, he inspected the truck for damage, and he recalled that there was damage to the front end, the windshield, and the back cab. During cross-examination, Mr. Anderson testified that he had worked on the truck "a couple of months" before the accident, and he therefore did not know when the damage to the truck that he had noted was incurred.

Id. at *1-4.

II. Post-Conviction Hearing

Petitioner filed his first petition for post-conviction relief on March 12, 2014. The post-conviction court appointed counsel, who filed an amended petition for post-conviction relief. The post-conviction court held an evidentiary hearing on November 17, 2014.

Petitioner called trial counsel as his first witness. Trial counsel testified that he was appointed to represent petitioner sometime after petitioner's arraignment but before a July 6, 2012 discussion date. Trial counsel stated that he first met with petitioner on July 25, 2012, which was petitioner's original plea date. The State made a plea offer at that point, and trial counsel had the opportunity to review the State's file. Petitioner's next plea date was in late August. Because trial counsel was unable to attend, he sent his law partner in his stead. Petitioner's case was set for trial at that point. Trial counsel said that from the beginning, petitioner wanted to proceed to trial based on his belief that the State would be unable to prove that petitioner was driving the evening of the accident. Trial counsel recalled that he received discovery from the State on September 6, 2012, and that he reviewed the discovery with petitioner around September 10. He stated that sometime between petitioner's August plea date and their reviewing of the discovery materials, petitioner sent him a letter expressing concern about the pretrial motion date. Trial counsel emphasized that petitioner did not express a desire to reset the trial date to a later time.

Trial counsel testified that part of his trial strategy was to impeach Sergeant Wyatt's testimony with statements he made during the preliminary hearing. To that end, trial counsel had reviewed an audio recording of petitioner's preliminary hearing. He said that he did not have a transcript of the preliminary hearing. Trial counsel stated that he believed he accomplished his goal of impeachment through his cross-examination of Sergeant Wyatt but further stated that Sergeant Wyatt's testimony was not material to whether petitioner was driving the automobile that evening.

Trial counsel testified extensively about his strategy regarding Steve Lance, the man petitioner claimed was driving petitioner's vehicle the evening of the accident. He said that he and petitioner discussed whether to call Mr. Lance as a witness and ultimately decided that Mr. Lance's absence would be better suited to their trial strategy. Trial counsel explained that they "wanted there to be this mystery driver, kind of an empty chair, that [they] could point at." He further explained that Mr. Lance's testimony would not be beneficial because he was unlikely to claim that he was actually driving, which would have led to his being charged in the case. Trial counsel also stated that it would have been difficult to locate Mr. Lance. The only information trial counsel had regarding Mr. Lance's whereabouts was that Mr. Lance's surfing friends in Florida might know where to find him. Trial counsel said that instead of calling Mr. Lance, they called Mr. Lance's roommate, who testified that he had seen Mr. Lance driving for petitioner and that Mr. Lance disappeared after the accident. Trial counsel asserted that he and petitioner agreed on the trial strategy.

Trial counsel testified that he met with petitioner at his office on October 5 to review the case before trial. He said that the day before this meeting, the State had disclosed a DUI video to the defense. Petitioner asked whether there was anything they could do to delay the trial because of the late-disclosed video. Petitioner also told trial counsel that a delay would be beneficial to him because he had been recently released from incarceration. Trial counsel stated that he filed a motion to continue on October 8, just before petitioner's October 10 trial. Trial counsel said that the basis for the motion to continue was the late-disclosed video but that he also mentioned that they had not yet found Mr. Lance. Trial counsel explained that he wanted to "buy [petitioner] some more time," not actually find Mr. Lance and have him testify.

Trial counsel testified that he did not recall filing a motion for discovery in this case. Instead, his assistant called the State to ask for the discovery materials. Trial counsel said that the State offered a plea agreement wherein petitioner would serve four years at thirty-five percent. He agreed that the State's offer sheet generally stated whether a DUI video was available for review. Petitioner's offer sheet did not mention a video. Trial counsel said that he did not know whether a formal motion for discovery would have resulted in receiving discovery materials sooner than September but that it might have. Trial counsel agreed that petitioner had sent him many letters. One letter was admitted as an exhibit, and in it, petitioner wrote, "Ask for more time since we just received discovery." Trial counsel testified that the State's offer was available until the trial actually started. He said that he had petitioner sign a letter on October 5 stating that petitioner had considered the offer and had decided to proceed to trial. The letter was admitted as an exhibit to the post-conviction hearing. Trial counsel admitted that petitioner sent him a letter after counsel's partner represented him at a plea date. Petitioner's letter expressed concern about choosing to proceed to trial without having

seen the State's case. Trial counsel said that petitioner became more confident about his decision to go to trial after counsel reviewed discovery with him.

On cross-examination, trial counsel testified that he reviewed discovery with petitioner on September 10 and again on October 5. He recalled making a copy of the discovery for petitioner. He also stated that they reviewed the video together on October 5. Trial counsel met with petitioner again on October 9 to review the case and prepare for trial. Trial counsel testified that he and petitioner together wrote the October 5 letter signed by petitioner regarding his decision to proceed to trial. Trial counsel agreed that petitioner sent him a letter following his trial in which he expressed his appreciation for trial counsel's work.

Petitioner testified that his records showed that trial counsel was appointed to represent him on June 19, 2012. Petitioner said that there was a discussion date set for July 6 but that he was not brought to court for that proceeding. He first met trial counsel on July 25 for his first plea date. At that time, trial counsel informed him that the State was offering petitioner a plea agreement for a four-year sentence. However, trial counsel asked for a continuance at that time because they had not received discovery yet. Petitioner said that his next plea date was August 24. Trial counsel's partner represented him at that proceeding. Petitioner said that on August 24, the judge told him that he either had to plead guilty or set a trial date. Petitioner testified that he asked trial counsel to investigate felony arrests in petitioner's criminal history from Florida that petitioner claimed were inaccurate. He further testified that the arrests were still in his criminal history at the time of sentencing and that he believed this proved trial counsel did not follow his directive regarding those arrests. Petitioner stated that he asked trial counsel to call Steve Lance to testify on his behalf. Petitioner said that his concerns about trial counsel's representation included the fact that nothing was done to prepare for his case prior to the August 24 plea date, that counsel did not adequately cross-examine Sergeant Wyatt, that twenty-eight days of preparation was insufficient for a felony jury trial, and that five meetings between trial counsel and petitioner totaling three hours and twenty minutes was insufficient preparation. Petitioner agreed that he entered a sentencing agreement after the trial.

The post-conviction court took the matter under advisement and later issued a written order denying post-conviction relief. In the order, the post-conviction court stated that petitioner showed "no basis to demonstrate that the defense that [trial counsel] presented was unreasonable."

III. Analysis

Petitioner argues on appeal that trial counsel provided ineffective assistance of counsel when he "failed to properly prepare for the trial and communicate with his

client.” He points to the limited time that trial counsel spent with him prior to trial, perceived failures of trial counsel to follow petitioner’s directives, and trial counsel’s absence at a plea date as evidence that trial counsel did not adequately prepare for trial. The State responds that petitioner has failed to show that trial counsel’s representation was deficient. We agree with the State.

To obtain relief in a post-conviction proceeding, a petitioner must demonstrate that his or her “conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. § 40-30-103. A post-conviction petitioner bears the burden of proving his or her factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). “Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.” *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010) (quoting *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009)).

Appellate courts do not reassess the post-conviction court’s determination of the credibility of witnesses. *Dellinger v. State*, 279 S.W.3d 282, 292 (Tenn. 2009) (citing *R.D.S. v. State*, 245 S.W.3d 356, 362 (Tenn. 2008)). Assessing the credibility of witnesses is a matter entrusted to the post-conviction judge as the trier of fact. *R.D.S.*, 245 S.W.3d at 362 (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). The post-conviction court’s findings of fact are conclusive on appeal unless the preponderance of the evidence is otherwise. *Berry v. State*, 366 S.W.3d 160, 169 (Tenn. Crim. App. 2011) (citing *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)). However, conclusions of law receive no presumption of correctness on appeal. *Id.* (citing *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001)). As a mixed question of law and fact, this court’s review of petitioner’s ineffective assistance of counsel claims is de novo with no presumption of correctness. *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011) (citations omitted).

The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and article I, section 9 of the Tennessee Constitution require that a criminal defendant receive effective assistance of counsel. *Cauthern v. State*, 145 S.W.3d 571, 598 (Tenn. Crim. App. 2004) (citing *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975)). When a petitioner claims that he received ineffective assistance of counsel, he must demonstrate both that his lawyer’s performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Finch v. State*, 226 S.W.3d 307, 315 (Tenn. 2007) (citation omitted). It follows that if this court holds that either prong is not met, we are not compelled to consider the other prong. *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004).

To prove that counsel's performance was deficient, petitioner must establish that his attorney's conduct fell below an objective standard of "reasonableness under prevailing professional norms." *Finch*, 226 S.W.3d at 315 (quoting *Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006)). As our supreme court held:

"[T]he assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. . . . Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations."

Id. at 315-16 (quoting *Baxter*, 523 S.W.2d at 934-35). On appellate review of trial counsel's performance, this court "must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from the perspective of counsel at that time." *Howell v. State*, 185 S.W.3d 319, 326 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 689).

To prove that petitioner suffered prejudice as a result of counsel's deficient performance, he "must establish a reasonable probability that but for counsel's errors the result of the proceeding would have been different." *Vaughn*, 202 S.W.3d at 116 (citing *Strickland*, 466 U.S. at 694). "A 'reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). As such, petitioner must establish that his attorney's deficient performance was of such magnitude that he was deprived of a fair trial and that the reliability of the outcome was called into question. *Finch*, 226 S.W.3d at 316 (citing *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999)).

In this case, trial counsel met with petitioner several times and thoroughly reviewed the available discovery with him. There is no indication in the record that trial counsel's *only* preparation was the time he spent with petitioner. There is also no indication that petitioner's decision on August 24 to proceed to trial would have been different had trial counsel attended the court proceeding himself rather than sending his law partner. Petitioner claims that he wanted trial counsel to call Steve Lance as a witness, but as trial counsel painstakingly explained, his strategy required that Steve Lance not be present at trial. This court gives deference to matters of trial strategy as long as the strategy is based on informed and adequate representation. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982).

Petitioner also points to trial counsel's cross-examination of Sergeant Wyatt as evidence of trial counsel's ineffectiveness. However, trial counsel's testimony showed that he prepared for Sergeant Wyatt's cross-examination by reviewing the recording of petitioner's preliminary hearing and then impeached Sergeant Wyatt with his inconsistencies despite not being able to play a recording of the hearing at trial.

Finally, petitioner claims that trial counsel's lack of preparedness was evidenced by his failure to procure discovery in a more timely manner. Trial counsel stated that he requested discovery from the State via a telephone call and received discovery more than a month prior to trial. It is clear from trial counsel's testimony that nothing in the discovery changed petitioner's mind about proceeding to trial because petitioner believed the State could not prove he was driving. Petitioner has not shown that trial counsel's performance fell below an objective standard of reasonableness.

Moreover, for petitioner to show that he was prejudiced by trial counsel's failure to call Mr. Lance as a witness, petitioner needed to have secured Mr. Lance's testimony at the post-conviction hearing. "To succeed on a claim of ineffective assistance of counsel for failure to call a witness at trial, a post-conviction petitioner should present that witness at the post-conviction hearing." *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008) (citing *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990)). "As a general rule, this is the only way the petitioner can establish that . . . the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner." *Id.* (quoting *Black*, 794 S.W.2d at 757). Petitioner is not entitled to post-conviction relief in this matter.

CONCLUSION

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

ROGER A. PAGE, JUDGE