IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 18, 2018

KENNETH SPENCER v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 09-00769 Paula L. Skahan, Judge

No. W2018-00545-CCA-R3-PC

The Petitioner, Kenneth Spencer, appeals the denial of his petition for post-conviction relief, arguing that the post-conviction court erred in finding that he received effective assistance of counsel. Following our review, we affirm the judgment of the post-conviction court.

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 NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

J. Shae Atkinson, Memphis, Tennessee (on appeal) and Seth Seagraves, Memphis, Tennessee (at hearing), for the appellant, Kenneth Spencer.

Herbert H. Slatery III, Attorney General and Reporter; Robert W. Wilson, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Charles Summers and Leslie Byrd, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

FACTS

In 2010, the Petitioner was convicted by a Shelby County Criminal Court jury of the first degree premeditated murder of a man who was killed inside his home by a stray bullet the Petitioner fired toward two vehicles under the belief that a man named Arsenio Delk was inside one of the vehicles. State v. Kenneth Spencer, No. W2010-02455-CCA-R3-CD, 2011 WL 6147012, at *1 (Tenn. Crim. App. Dec. 8, 2011). On appeal, this court concluded that the evidence was sufficient to sustain the conviction, but the trial court

committed reversible error in its jury instructions on premeditation. We therefore reversed the conviction and remanded for a new trial. Id.

At the conclusion of his second trial, the Petitioner was again convicted of the first degree premeditated murder of the victim. Among the witnesses who testified at both trials was Patrick Jefferson, the driver of the vehicle in which the Petitioner rode to the victim's and Mr. Delk's neighborhood as he hunted for Mr. Delk. On direct appeal, this court concluded that the court erred by admitting into evidence weapons that were unrelated to the victim's death but that the error was harmless given the overwhelming evidence of the Petitioner's guilt:

> In the case at hand, we conclude that the evidence was overwhelming so that the error was harmless. There was ample evidence presented that [the Petitioner] and Delk were engaged in an altercation a week before the death of the victim. [The Petitioner] shot Delk in the arm during the altercation. On the night in question, multiple witnesses stated they saw a car matching the description of Jefferson's car. Jefferson admitted that he drove [the Petitioner] and Morris through the neighborhood on the night in question. Jefferson testified that [the Petitioner] and Morris were directing him to Delk's house which was in the same neighborhood as the victim's house. Jefferson stated that he told [the Petitioner] not to do anything stupid because Jefferson had a feeling that something bad would happen. Finally, [the Petitioner] admitted to officers during an interview that he went to the neighborhood that night to shoot Delk and that he indeed fired the gun. This evidence when taken as a whole is overwhelming proof of [the Petitioner's] guilt. We conclude that the admission of the weapons and ammunition, while error, did not contribute to the jury's verdict in the face of the overwhelming evidence of guilt.

State v. Kenneth Spencer, No. W2012-02720-CCA-R3-CD, 2014 WL 1410317, at *6 (Tenn. Crim. App. Apr. 10, 2014), perm. app. denied (Tenn. Aug. 27, 2014).

We, therefore, affirmed the conviction, and our supreme court subsequently denied the Petitioner's application for permission to appeal. Id. at *1.

On May 5, 2015, the Petitioner filed a pro se petition for post-conviction relief in which he raised a number of claims, including ineffective assistance of counsel. Following the appointment of post-conviction counsel, he filed an amended petition in which he alleged that his trial counsel was ineffective for failing to present to the

Petitioner or otherwise pursue an offer of 20 years to settle the case and for failing to request an accomplice jury instruction regarding witness Patrick Jefferson.

At the September 8, 2017 evidentiary hearing, the Petitioner testified that he had the same trial counsel for both trials, although he was unhappy with him after the first trial and tried unsuccessfully to obtain a "paid attorney" for his second trial. He estimated that trial counsel met with him a total of fifteen times during the course of his entire representation covering both trials. He said he and trial counsel did not get along well, especially after the first trial, and he did not trust him to handle the second trial.

The Petitioner agreed that one of his complaints about trial counsel was his failure to request an accomplice jury instruction with respect to Mr. Jefferson, who was present on the night of the shooting and knew what was happening. He denied, however, that any of them were "looking for" Mr. Delk that night. He said that trial counsel came to him with one offer for 25 years, in which he was interested, but his parents talked him out of accepting. He stated that he would have accepted an offer involving less time, but trial counsel never brought him any other offers. However, he later found in his discovery packet a document indicating that trial counsel and the prosecutor had discussed a 20 year offer. According to the Petitioner, trial counsel never communicated that 20 year offer to him.

On cross-examination, the Petitioner acknowledged there was a note on the document in which trial counsel indicated the Petitioner was not interested in the offer. He further acknowledged that other notations indicated that the prosecutor would discuss the offer with the victim's family if the Petitioner expressed interest, but it was not an "official offer." The Petitioner said he understood that it had not been an official offer but reiterated that counsel never brought the offer to him "at all."

Trial counsel testified that that he had been with the Shelby County Public Defender's Office since 1998 and in that capacity represented the Petitioner at both his murder trials. He said he had documented 32 jail visits he made with the Petitioner during the course of his representation. In addition, he met with him during numerous court report settings, for at least triple the 15 meetings that the Petitioner claimed in his testimony. During those meetings, he discussed with the Petitioner at length the elements of the charged offense and lesser-included offenses and possible defenses.

Trial counsel testified that as he was preparing the motion to suppress the Petitioner's statement, he had a "loose conversation" with the lead prosecutor of the first trial about the possibility of a settlement. The case had originally been bound over to the criminal court as a reckless homicide because the testimony presented at the preliminary hearing contained only a synopsis of the episode rather than the "back story" in support

of premeditation, and he attempted to use that fact as a negotiating tool. At the time of the evidentiary hearing, the prosecutor was the Shelby County District Attorney, but at the time of the first trial she was the leader of the gang unit.

Trial counsel testified that the prosecutor told him if he "signed for twenty" she would "take it to the family." She made it clear, however, that it was not an official offer and that she not only had to obtain the approval of the family but also had to "go up the chain of command and get it approved" in her office. Trial counsel said that he visited the Petitioner a short time later, who told him that he was "not interested at all" in the offer and did not want to plead to second degree murder "of any kind." Based on the conversations he had with the Petitioner about transferred intent, the Petitioner appeared to be in denial about his role in the victim's death and did not believe he was guilty of second degree murder. The Petitioner, instead, wanted an offer on criminally negligent homicide, reckless homicide, or possibly voluntary manslaughter. The Petitioner sent trial counsel several letters to that effect during the course of counsel's representation in the first trial, "indicating . . . that [the Petitioner] would only plead to two to four years of either criminally negligent or reckless homicide."

Trial counsel testified that there was only a "very short window" during which the informal 20-year offer was a possibility. Afterwards, he was never even approached with a second degree murder offer. By the time the case was remanded for retrial, the lead prosecutor had moved up to Deputy District Attorney. When trial counsel broached the subject of a possible second degree murder plea with the new prosecutors assigned to the case, the "door shut in [his] face as far as any offer was concerned." Trial counsel said that the district attorney's office knew after the first trial that it had a strong case, and it was made clear to him that an offer would never emerge.

Trial counsel testified that it was questionable whether or not Mr. Jefferson was an accomplice. Regardless, in counsel's opinion, he was a very weak witness for the State and requesting an accomplice jury instruction would have only served to bolster his testimony, in that the Petitioner's videotaped statement corroborated Mr. Jefferson's account of what transpired. In short, counsel believed that an accomplice instruction would have been "more harmful" than beneficial to the Petitioner's case. On cross-examination, trial counsel testified that when the case was remanded, he asked not only the new prosecutors but also the original lead prosecutor herself about the possibility of a deal. He said she told him emphatically that there would be no deals in the case.

On March 14, 2018, the post-conviction court entered an order denying the petition, finding that the Petitioner failed to meet his burden of demonstrating that his counsel was deficient in his performance or that any alleged deficiency prejudiced the

outcome of his case. Thereafter, the Petitioner filed a timely notice of appeal to this court.

ANALYSIS

The post-conviction petitioner bears the burden of proving his factual allegations by clear and convincing evidence. See Tenn. Code Ann. § 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 Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). However, review of a trial 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 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)).

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." Id. 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.").

The Petitioner argues on appeal that trial counsel was ineffective for not pursing and communicating the 20-year informal offer to the Petitioner and for not requesting an accomplice jury instruction in order to argue an accomplice theory at trial. The Petitioner asserts that there would have been "nothing harmful from arguing an accomplice theory other than the prejudice to [the Petitioner] from not doing so."

In its detailed written order denying the petition, the post-conviction court noted, among other things, the Petitioner's own admission that the 20-year offer was not an official offer and trial counsel's testimony that the Petitioner was uninterested when he met with him about the unofficial offer. The court also accredited the testimony of trial counsel that the Petitioner was completely uninterested in any kind of plea that involved second degree murder, and the State was uninterested after the first trial in even attempting to negotiate a settlement of the case. The court further found that counsel's decision not to request an accomplice jury instruction with respect to Mr. Jefferson's testimony was a matter of sound trial strategy.

The record fully supports the findings and conclusions of the post-conviction court. Trial counsel's testimony, which was accredited by the post-conviction court, was that he communicated the unofficial offer to the Petitioner, who was uninterested in a settlement that involved a plea to second degree murder. According to trial counsel, the only kind of plea in which the Petitioner was interested was one involving a two to four-year sentence for either criminally negligent or reckless homicide, and he sent counsel multiple letters to that effect. Trial counsel also provided a reasonable explanation for not requesting an accomplice jury instruction with respect to Mr. Jefferson, testifying that he believed such an instruction would have only served to bolster Mr. Jefferson's weak testimony and hurt their defense by underscoring the Petitioner's own damaging statement, which corroborated Mr. Jefferson's account. The Petitioner has not shown that counsel's failure to request the accomplice jury instruction was not part of a sound trial strategy or that counsel failed to present or pursue any offers to the Petitioner. Accordingly, we affirm the denial of the petition for post-conviction relief.

CONCLUSION

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

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ALAN E. GLENN, JUDGE