IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs July 9, 2019

JAVONTE THOMAS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 14-03018 J. Robert Carter, Jr., Judge

No. W2018-02171-CCA-R3-PC

The petitioner, Javonte Thomas, appeals the denial of his petition for post-conviction relief, which petition challenged his conviction of first degree premeditated murder, alleging that he was deprived of the effective assistance of counsel. Discerning no error, we affirm the denial of post-conviction relief.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER, and J. ROSS DYER, JJ., joined.

Jason D. Ballenger, Memphis, Tennessee, for the appellant, Javonte Thomas.

Herbert H. Slatery III, Attorney General and Reporter; Katharine K. Decker, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case arose from an incident in which the petitioner shot and killed Quintin Fifer, the victim. *State v. Javonte Thomas*, No. W2015-01473-CCA-R3-CD, slip op. at 1 (Tenn. Crim. App., Jackson, Aug. 16, 2016). This court summarized the evidence on direct appeal:

> [T]he [petitioner], whose brother had apparently been shot by the victim during an earlier altercation, was riding in a car with his brother and Mr. [Darius] Love when Mr. Love and his brother spotted the victim[,] and Mr. Love saw the opportunity of exacting revenge by killing the victim. . . . [T]he [petitioner], armed with a borrowed weapon, got out of

> the vehicle when Mr. Love pulled over at the service station, followed the victim's vehicle, approached the driver's side door, and fired multiple shots at the defenseless victim before fleeing the scene and later returning the weapon to the person from whom it was borrowed.

Id., slip op. at 11-12. The jury convicted the petitioner of first degree premeditated murder, and the trial court imposed a sentence of life imprisonment. *See id.*, slip op. at 7. This court affirmed the petitioner's conviction on direct appeal, *see id.*, slip op. at 12, and our supreme court denied permission to appeal, *see State v. Javonte Thomas*, No. W2015-01473-SC-R11-CD (Tenn. Dec. 15, 2016).

The petitioner filed a timely, pro se petition for post-conviction relief that has not been included in the record on appeal. After the appointment of counsel, the petitioner filed an amended petition, alleging the ineffective assistance of the petitioner's trial counsel by counsel's failing to procure an expert witness to testify as to the petitioner's mental capacity in support of his motion to suppress a statement he made to police officers and by failing to adequately negotiate a plea agreement.

At the September 20, 2018 evidentiary hearing, trial counsel testified that "there really weren't negotiations" with the State regarding a plea deal, explaining that this "was a no-deals case and the State never really came with an offer on that." He stated that he discussed a potential plea agreement with the State "a couple of times," but the State was not willing to enter into a plea agreement in this case. Trial counsel stated that it was his usual practice to ask defendants what kind of plea deal they may be willing to accept, but he could not specifically recall whether he had had such a conversation with the petitioner. Counsel said that he attempted to use the fact that the petitioner's brother, Jeremy Thomas, had previously been shot by the victim as a basis to negotiate a plea offer, but the State considered the brother's shooting as "motive for first degree [murder] rather than anything else."

Trial counsel stated that his defense strategy was to argue that Mr. Thomas and Mr. Love provoked the petitioner into killing the victim and that the petitioner's actions rose only to the level of voluntary manslaughter. Counsel conceded that he "didn't really have a whole lot of facts to support" that theory but stated that he argued that the petitioner's "lower IQ" made him particularly "susceptible to pressure by his older brother and his older brother's friend" and that the petitioner was "trying to impress them, trying to look good, he was easily kind of whipped into a frenzy by them." Counsel stated that he did not present a theory of diminished capacity; rather, he argued the petitioner's mental capacity as a factor in the theory of provocation. He noted one

difficulty with this case arose from his not being able to call Mr. Love, a co-defendant, as a witness and not being able to locate Mr. Thomas. Counsel stated that he met with Mr. Thomas "once or twice," but then Mr. Thomas "completely disappeared, [and] would no longer cooperate." He clarified that Mr. Thomas was not charged in connection with this case.

Trial counsel recalled moving to suppress the petitioner's statement made to police officers, in which motion counsel argued that, based on the petitioner's being in special education classes in high school, "he wasn't of a high enough mental capacity to know what he was doing" when he made the statement. Counsel acknowledged that he did not have the petitioner mentally evaluated, explaining, "[The petitioner] never struck me as having a difficult time understanding what was happening or anything like that. . . . [I]t never struck me that his IQ was so low or anything like that that we needed to get a mental evaluation so I never did that." He stated that the petitioner's family could not afford the services of an expert witness to testify to the petitioner's mental capacity and that the petitioner's being in special education classes in school would not have been a sufficient basis on which to ask for funding to hire an expert. At trial, counsel asserted the petitioner's diminished capacity in the context of his not being able to withstand the provocation by Mr. Thomas and Mr. Love. He stated that, in talking to the petitioner's family and reviewing his school records, "it didn't really appear that an expert would have been of any value."

During cross-examination, trial counsel testified that he had experience with cases in which mental capacity was an issue, and he was familiar with obtaining mental health evaluations for clients. He stated that he "had kind of developed an awareness of what it took" for a client to be deemed incompetent. In the present case, he relied on the petitioner's history of special education classes and "just worked with what [he] had" in attacking the State's case. Counsel acknowledged that the petitioner's school records did not reveal an intellectual disability or mental health diagnosis. He also acknowledged that the police officer who took the petitioner's statement testified at the suppression hearing that he believed that the petitioner was competent when he made the statement. Counsel recalled that the petitioner's limited mental competency was argued to the jury at trial and that this court addressed the issue on direct appeal. Counsel stated that he did not believe that he could have met his burden to obtain funding from the court for a mental health expert. He reiterated that he presented the victim's shooting Mr. Thomas as the motive for the petitioner's shooting the victim and that he argued for voluntary manslaughter on that basis.

On redirect examination, trial counsel stated that he was not aware of the petitioner's undergoing any mental evaluation prior to this case. He also stated that the petitioner's family did not raise any concerns as to the petitioner's mental competency.

Upon questioning by the court, trial counsel acknowledged that there were video recordings of the petitioner's shooting the victim, and he recalled one witness at trial describing the defendant as "stalking" the victim on the video.

During the second redirect examination, trial counsel explained that he did not argue that the petitioner's mental capacity negated the element of premeditation but rather that, because of his "lower mindset," Mr. Thomas' pushing the petitioner to commit the offense was "significant provocation." He stated that he focused on arguing provocation because, with the video evidence of the shooting, "there was not a whole lot to argue [against] premeditation."

On re-cross-examination, counsel reiterated that Mr. Thomas could not be located as a witness. He stated that he "tried everything [h]e could to get him" as a witness because he believed that his testimony could be critical to the petitioner's defense, but neither he nor the petitioner's family could locate him, and they had no information as to his whereabouts.

The petitioner testified that he graduated from high school, where he had been enrolled in special education classes. He explained that the school required him to take the special education classes because he did not have "the high level intelligence as everyone else." He stated that he could not read or write very well. The petitioner testified that he had not been evaluated by a mental health professional while in school and that he had never taken an IQ test or been diagnosed with a mental health problem. He explained that he did not request a mental evaluation in this case because he assumed that it would be done, and he did not know that he needed to request it. The petitioner pointed out that, when he made the statement to police, he told the officer that he "wasn't in the right state of mind" because he had been in special education classes and "[d]idn't know how to read very well."

The petitioner stated that, although he had talked with trial counsel in preparation for trial, counsel "barely came to see [him]." He denied trial counsel's discussing a trial strategy with him, but he acknowledged discussing a plea agreement. Trial counsel came to visit him in December before his scheduled January trial and told him that "he had got with the prosecutor and the judge and they were offering [him] 25 years" for a plea of guilty to second degree murder. He stated that counsel had given him a piece of paper with the plea offer, and he told counsel that he needed to think about it.

The next day, counsel returned, and the petitioner signed the agreement, but the plea agreement was never filed with the court, and the petitioner did not receive a plea submission hearing. He stated that trial counsel never explained to him why his plea was not entered.

On cross-examination, the petitioner clarified that, in his conversation with trial counsel about a plea offer, counsel had asked him whether he would be willing to take such a deal if he could get the State to agree. The paper that he signed was to show his intent to accept such an offer. The petitioner recalled that, when giving his statement to police, he was asked to read a statement back to the officer, and he had difficulty with the word "coercion" but that he was able to understand the meaning after the officer explained it to him.

Upon questioning by the court, the petitioner testified that he was not taking any medication. He acknowledged having reviewed the videos of the crime with trial counsel before trial.

In its written order denying post-conviction relief, the post-conviction court found that "[t]rial counsel was aware of the facts of the case and prepared a defensive strategy." The court concluded that the proof against the petitioner was overwhelming and that "[t]here [wa]s nothing to support any sort of mental defense, diminished capacity or lack of competence."

In this appeal, the petitioner argues that the post-conviction court erred by denying post-conviction relief, asserting that he was deprived of the effective assistance of counsel by trial counsel's failing to secure a mental health expert and failing to adequately negotiate a plea deal.

We view the petitioner's claim with a few well-settled principles in mind. Post-conviction relief is available only "when the conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. A post-conviction petitioner bears the burden of proving his or her factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f). On appeal, the appellate court accords to the post-conviction court's findings of fact the weight of a jury verdict, and these findings are conclusive on appeal unless the evidence preponderates against them. *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). By contrast, the post-conviction court's conclusions of law receive no deference or presumption of correctness on appeal. *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001).

Before a petitioner will be granted post-conviction relief based upon a claim of ineffective assistance of counsel, the record must affirmatively establish, via facts clearly and convincingly established by the petitioner, that "the advice given, or the services rendered by the attorney, are [not] within the range of competence demanded of attorneys in criminal cases," *see Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975), and that counsel's deficient performance "actually had an adverse effect on the defense," *Strickland v. Washington*, 466 U.S. 668, 693 (1984). In other words, the petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Should the petitioner fail to establish either deficient performance or prejudice, he is not entitled to relief. *Id.* at 697; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Indeed, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697.

When considering a claim of ineffective assistance of counsel, a reviewing court "begins with the strong presumption that counsel provided adequate assistance and used reasonable professional judgment to make all significant decisions," *Kendrick v. State*, 454 S.W.3d 450, 458 (Tenn. 2015) (citation omitted), and "[t]he petitioner bears the burden of overcoming this presumption," *id.* (citations omitted). We will not grant the petitioner the benefit of hindsight, second-guess a reasonably based trial strategy, or provide relief on the basis of a sound, but unsuccessful, tactical decision made during the course of the proceedings. *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). Such deference to the tactical decisions of counsel, however, applies only if the choices are made after adequate preparation for the case. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

Here, the petitioner first asserts that trial counsel should have sought the services of a mental health expert to evaluate and testify to the petitioner's mental capacity. The petitioner contends that the testimony of a mental health expert would have bolstered his argument that he lacked the capacity to knowingly and intelligently waive his constitutional rights. Relatedly, the petitioner asserts that an expert's testimony would also "have greatly bolstered, if not confirmed" the defense theory of provocation. The State contends that the post-conviction court did not err by denying relief on this matter.

To support a claim of ineffective assistance of counsel premised on counsel's failure to call certain witnesses, "these witnesses should be presented by the petitioner at the evidentiary hearing." *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.* At the evidentiary hearing, the only evidence of the petitioner's alleged mental deficiency was his testimony that he was assigned to special education classes in high school and that he had difficulty reading and writing. This court has already considered the petitioner's mental capacity in light of his attending special education classes and concluded that he knowingly and voluntarily waived his rights. *See Javonte Thomas*, slip op. at 9-10. Because the petitioner failed to show what additional information a mental evaluation by an expert would have revealed, he has failed to establish that he was prejudiced by trial counsel's failure to seek the services of a mental health expert. In consequence, we need not determine whether counsel performed deficiently on this matter. *See Strickland*, 466 U.S. at 697.

Next, the petitioner argues that trial counsel failed to sufficiently negotiate a plea agreement with the State. The petitioner testified that counsel discussed with him a potential plea agreement to offer the State. Counsel's testimony established that he talked with the prosecutor about a plea deal, but the State was unwilling to entertain any offer. The State is under no obligation to enter into plea negotiations, *see State v. Head*, 971 S.W.2d 49, 50 (Tenn. Crim. App. 1997) (citations omitted), and counsel cannot be faulted for the State's unwillingness to engage in such negotiations, *see Shanda Alene Wright v. State*, No. M2010-00613-CCA-R3-PC, slip op. at 6 (Tenn. Crim. App., Nashville, Apr. 8, 2011) (citing *Head*, 971 S.W.2d at 50). Because the petitioner has failed to show that the State would have offered a plea deal had counsel made additional efforts, this claim also fails.

Accordingly, the judgment of the post-conviction court is affirmed.

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JAMES CURWOOD WITT, JR., JUDGE