

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs May 1, 2018

FILED

07/02/2018

Clerk of the
Appellate Courts

DAVID CODY WATKINS v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Weakley County
No. CC-17-CR-60 Jeff Parham, Judge**

No. W2017-02117-CCA-R3-PC

The petitioner, David Cody Watkins, appeals the denial of his post-conviction petition, arguing he received ineffective assistance of counsel at trial. Following our review, we affirm the denial of the petition.

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

J. ROSS DYER, J., delivered the opinion of the court, in which ALAN E. GLENN and TIMOTHY L. EASTER, JJ., joined.

Jason Jackson, Martin, Tennessee, for the appellant, David Cody Watkins.

Herbert H. Slatery III, Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; Tommy A. Thomas, District Attorney General; and Kate Bynum, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Procedural and Factual Background

On October 24, 2016, the petitioner pled guilty to aggravated arson for which he received a sentence of fifteen years to be served at 100 percent.¹ The petitioner filed a *pro se* petition for post-conviction relief. After the appointment of counsel, the petitioner filed an amended petition on April 21, 2017, alleging ineffective assistance of counsel.

¹ The record on appeal does not contain the transcript of the guilty plea hearing or other documents and/or transcripts which are at issue in the instant matter such as the motion to suppress, the transcript of the suppression hearing, or the order denying the motion to suppress.

The following proof was introduced during the post-conviction hearing: Trial counsel testified he has practiced law for twenty-nine years and worked for the public defender's office for the past fifteen years. While the petitioner appeared nervous about the trial process, trial counsel did not believe this impacted the petitioner's ability to understand the proceedings, noting he discussed the case with the petitioner numerous times. Trial counsel confirmed he explained the applicable sentencing ranges for aggravated arson, including the fact that any sentence imposed would be served at 100 percent. He then followed up on their conversation by sending the petitioner a letter which outlined the sentencing range and the requirement of mandatory service. A portion of trial counsel's letter to the petitioner was entered as an exhibit during the post-conviction hearing.

Trial counsel's letter also informed the petitioner that the State had offered a plea deal of fifteen years at 100 percent. Trial counsel testified that he made several counter-offers concerning lesser offenses and shorter sentences which the State rejected. Each counter-offer and the subsequent rejection by the State was discussed with the petitioner.

Trial counsel testified that he filed a motion to suppress the petitioner's statement, claiming law enforcement made promises of leniency in order to secure a confession. During the suppression hearing, trial counsel questioned Investigator Marty Plunk about any promises he made the petitioner in exchange for his confession, such as claiming Investigator Plunk would "go to bat for [the petitioner]" and that the district attorney would be lenient if the petitioner confessed. In response to questioning by trial counsel, Investigator Plunk stated he explained to the petitioner he was only the fact-finder and the district attorney's office made "the decision whether to indict or even charge [the petitioner]."

On cross-examination, trial counsel again noted he discussed the full-range of potential punishments with the petitioner. He also testified he met with the petitioner on several occasions, and during those meetings, they discussed the State's plea offer, their counter offers, the mandatory 100 percent service for aggravated arson, and the fact that the petitioner could not receive more than a fifteen percent reduction on his sentence.

Trial counsel testified that on the day of the plea, he was in court expecting to set the petitioner's case for trial. However, the petitioner decided to take the State's plea offer. During the plea hearing, the trial court asked the petitioner if he understood his sentence carried a requirement of 100 percent mandatory service, and the petitioner informed the trial court that he understood. Furthermore, trial counsel noted the petitioner asked no questions of the trial court and never wavered from his decision to plead guilty.

The petitioner was the next witness called during the post-conviction hearing. Initially, the petitioner testified he was “very nervous and very scared” about the process and believed that affected his ability to understand what was going on and affected his judgment. While the petitioner remembered the judge asking him questions during the plea hearing, he did not remember each question. The petitioner stated he was unaware that his sentence would be served at 100 percent until the day he signed the plea. Until he was made aware of that fact, he believed the trial court would take into account his lack of a criminal history and would sentence him to a term less than fifteen years.

Concerning his confession, the petitioner testified that Investigator Plunk told him that he had “influenced the [district attorney] 98% of the time,” and the petitioner believed that to mean Investigator Plunk had influence and would talk to the district attorney on the petitioner’s behalf. The petitioner noted trial counsel never questioned Investigator Plunk about this specific promise, but acknowledged trial counsel questioned another officer, Paul Hutcherson, about it. The petitioner also admitted trial counsel asked Investigator Plunk general questions about promises and statements he made to the petitioner.

Next, the petitioner testified he mentioned Nathan Johnson as a potential witness to trial counsel “a couple of times.” While he could not remember the substance of their conversations, the petitioner testified “I did want [trial counsel] to talk to [Mr. Johnson] at least one time, get his side of the story.”

On cross-examination, the petitioner acknowledged trial counsel met with him in jail and on court dates. The petitioner also acknowledged trial counsel sent him a letter explaining that aggravated arson carried a fifteen-year minimum with a 100 percent mandatory service. Thus, he was given notice that he was facing 100 percent mandatory service prior to the plea hearing. He confirmed that trial counsel made him aware of the State’s offer of fifteen years at 100 percent.

The petitioner admitted he was provided with, read, signed, and understood the plea form. He acknowledged the form advised him of his right not to plead guilty, that he would be waiving his right to appeal, and that he was accepting a fifteen-year sentence to be served at 100 percent. The petitioner confirmed he knew he could not receive more than fifteen percent reduction for sentence credits. The petitioner testified he never told trial counsel he did not understand what was happening or that he had changed his mind. Finally, he told the trial judge he was satisfied with trial counsel.

On September 25, 2017, the post-conviction court entered a written order finding the petitioner failed to meet his burden of proof and denying the petition for post-conviction relief. This timely appeal followed.

Analysis

On appeal, the petitioner contends the post-conviction court erred in denying his petition. Specifically, he argues trial counsel was ineffective for failing to fully explain the sentencing guidelines and the effects and consequences of his guilty plea, for failing to contact and interview potentially beneficial witnesses, and for failing to question Investigator Plunk during the suppression hearing concerning promises of leniency made in exchange for the petitioner's confession. The State contends trial counsel provided the petitioner with a detailed outline of the consequences of his guilty plea, including potential sentences, and sufficiently questioned Investigator Plunk concerning the circumstances surrounding the petitioner's confession. Additionally, the State notes the petitioner failed to call any of his alleged potential witnesses during the post-conviction hearing and, therefore, has waived that claim. Upon our review, we agree with the State.

The petitioner bears the burden of proving his post-conviction factual allegations by clear and convincing evidence. *See* Tenn. Code Ann. § 40-30-110(f). The findings of fact established at a post-conviction evidentiary hearing are conclusive on appeal unless the evidence preponderates against them. *See Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996). This Court will not reweigh or reevaluate evidence of purely factual issues. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997). However, appellate review of a trial court's application of the law to the facts 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 presents mixed questions of fact and law. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Thus, this Court reviews the petitioner's post-conviction allegations *de novo*, affording a presumption of correctness only to the post-conviction court's findings of fact. *See id.*; *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceedings. *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 the standard for determining ineffective assistance of counsel applied in federal cases is also applied 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. In order for a post-conviction petitioner to succeed, both prongs of the *Strickland* test must be satisfied. *Id.* Thus, courts are not required to even “address both components of the inquiry if the defendant makes an insufficient showing on one.” *Id.*; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (stating that “a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim”).

A petitioner proves a deficiency by showing “counsel’s acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms.” *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the *Strickland* test is satisfied when the petitioner shows there is a reasonable probability, or “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. However, “[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)).

A guilty plea must be knowingly, voluntarily, and intelligently entered in order to be valid. *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010). The court must determine whether the guilty plea evidences a voluntary and informed decision to pursue a guilty plea in light of the alternative options available to the defendant. *Id.* In the context of a post-conviction challenge to a guilty plea, both prongs of the *Strickland* test must be met. *Garcia v. State*, 425 S.W.3d 248, 256 (Tenn. 2013). Thus, to successfully challenge his guilty plea, the petitioner must show counsel’s performance was deficient, and he “must establish a reasonable probability that, but for the errors of his counsel, he would not have entered the plea.” *Adkins v. State*, 911 S.W.2d 334, 349 (Tenn. Crim. App. 1994) (citing *Hill v. Lockhart*, 474 U.S. 52, 59 (1985)); *Garcia*, 425 S.W.3d at 257.

Initially, the petitioner argues trial counsel failed to inform him of the consequences of pleading guilty. More specifically, the petitioner contends trial counsel never discussed the applicable sentencing guidelines with him until “immediately before” he entered his guilty plea and he was not made aware of the fact that his fifteen year sentence carried with it a mandatory service of 100 percent with no more than fifteen percent reduction for sentence credits. However, as noted by the State and found by the

post-conviction court, the petitioner admitted trial counsel advised him in a letter after the preliminary hearing and prior to indictment that aggravated arson carried a minimum sentence of fifteen years with 100 percent mandatory service. The petitioner also admitted the trial court questioned him during the plea hearing about his sentence, and the petitioner informed the trial court that he understood he was accepting a sentence of fifteen years at 100 percent with no more than fifteen percent reduction for sentencing credits of any type. The petitioner's testimony was corroborated by trial counsel. Additionally, trial counsel testified he advised the petitioner the judge would not lower his sentence. Finally, while the transcript of the guilty plea hearing is not part of the record on appeal, the post-conviction court noted it reviewed the transcript and found it corroborated the testimony that the petitioner knew and understood the sentence he was accepting. Based on the record before this Court, the petitioner has failed meet his burden of proof and, therefore, is not entitled to relief on this issue.

The petitioner next contends counsel was ineffective for failing to interview Nathan Johnson. The petitioner, however, failed to present Mr. Johnson as a witness during the post-conviction hearing. When a petitioner contends trial counsel failed to discover, interview, or present witnesses in support of his defense, the petitioner must call those witnesses to testify at an evidentiary hearing. *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). This is the only way the petitioner can establish that:

(a) a material witness existed and the witness could have been discovered but for counsel's neglect in his investigation of the case, (b) a known witness was not interviewed, (c) the failure to discover or interview a witness inured to his prejudice, or (d) 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 [p]etitioner.

Id. Even if a petitioner is able to show counsel was deficient in the investigation of the facts or the calling of a known witness, the petitioner is not entitled to post-conviction relief unless he produces a material witness at his post-conviction evidentiary hearing who "could have been found by a reasonable investigation" and "would have testified favorably in support of his defense if called." *Id.* at 758. Because the petitioner failed to do so, he cannot establish the prejudice requirement of the two-prong *Strickland* test. *Id.* Thus, the petitioner is not entitled to relief on this issue.

Finally, the petitioner argues trial counsel was ineffective because he failed to question Investigator Plunk regarding a promise he made to the petitioner regarding leniency and his willingness to influence the district attorney if the petitioner confessed. Initially, we note the petitioner failed to include a transcript of the suppression hearing with the record. It is the petitioner's responsibility to prepare an adequate record for this

Court to address the issues. *State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993). Therefore, this issue is waived. *Id.*

Notwithstanding the waiver, it is clear from the record on appeal that the witnesses reviewed and were questioned about the suppression hearing transcript and the post-conviction court reviewed the transcript in ruling on the case. During the post-conviction hearing, trial counsel testified he questioned Investigator Plunk at the suppression hearing regarding promises he allegedly made to the petitioner. According to trial counsel, Investigator Plunk testified he explained to the petitioner that his only role was to act as a factfinder, and the district attorney's office would determine whether or not to charge him. The post-conviction court found the suppression hearing transcript supported trial counsel's testimony, and this Court will not reweigh the credibility determinations of the post-conviction court. *Henley*, 960 S.W.2d at 579. Therefore, the petitioner has failed to establish that trial counsel's performance was deficient in this regard, or that his defense was prejudiced and is, thus, not entitled to relief.

Conclusion

Based upon the foregoing authorities and reasoning, the judgment of the post-conviction court is affirmed.

J. ROSS DYER, JUDGE