IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs November 7, 2017

DANNIE WEAVER v. STATE OF TENNESSEE

Appeal from the Circuit Court for Henderson County
No. 15035-3 Kyle Atkins, Judge

No. W2017-00172-CCA-R3-PC

Dannie Weaver, the Petitioner, entered a best interest plea to driving under the influence, possession of a Schedule VI controlled substance with prior convictions,[1] possession of a Schedule II drug, possession of drug paraphernalia, and a violation of the seat belt law. The Petitioner received a total effective sentence of four years with thirty-five percent release eligibility, which was suspended to probation following the service of thirty-five days in jail. The Petitioner filed a petition for post-conviction relief and alleged that trial counsel's performance was deficient and that, absent the deficient performance, the Petitioner would have proceeded to trial. The Petitioner also alleged that his best interest plea was involuntary and unknowing. The post-conviction court denied relief and the Petitioner appealed. After a thorough review of the facts and applicable case law, we affirm.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Samuel W. Hinson, Lexington, Tennessee, for the appellant, Dannie Weaver.

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[1] The Petitioner's plea agreement form lists this conviction as possession of a Schedule IV controlled substance with prior convictions. The Petitioner's judgment forms are not in the record on appeal. At the guilty plea submission hearing, the prosecutor noted that the plea agreement form incorrectly listed the controlled substance as Schedule IV instead of Schedule VI, and the trial court stated that the Petitioner was charged with possessing a Schedule VI controlled substance.

Herbert H. Slatery III, Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; Jody Pickens, District Attorney General; and Matthew Floyd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual and Procedural Background

Best Interest Plea Submission Hearing

At the plea submission hearing, the Petitioner testified that trial counsel had discussed the plea agreement and the positive and negative aspects of his case with him. The Petitioner stated that trial counsel advised him that entering a best interest plea was his most favorable option. The trial court noted that, in count three of the indictment, the Petitioner was charged with possession of a Schedule VI controlled substance with prior convictions, a Class D felony, and that the Petitioner could receive a sentence of two to four years for this conviction. The Petitioner affirmed that he had the right to proceed to trial, to assistance of counsel, to confront and cross-examine witnesses, to present witnesses, to testify or not testify at trial, and to appeal. He stated that he understood that he was giving up these rights. He testified that he was not under the influence of any drugs or alcohol and that he had no physical or mental impairments other than his previous heart attack. He stated that he was not "thinking too straight[,]" but he stated that his heart condition did not prevent him from understanding his plea agreement. The Petitioner agreed that he understood the charges that he was pleading to and the accompanying sentencing ranges. He confirmed that he understood that, by a best interest plea, the State could use his convictions to enhance a future sentence. The Petitioner confirmed that he was entering his plea freely and voluntarily and that no one had forced or pressured him to enter his best interest plea. The Petitioner asked the trial court to allow him to serve his sentence on weekends because he was "trying to go to school." The Petitioner also testified that he was satisfied with trial counsel's representation and that he had no questions about his best interest plea.

The State offered the following recitation of facts as a basis for the Petitioner's plea:

> [T]he State would show at trial that on March 5th, 2014, [the Petitioner] was stopped for a seat belt violation by Trooper Edwards. . . . Trooper Edwards noticed a very strong odor of marijuana coming from the vehicle. [The Petitioner] admitted that he was smoking marijuana prior to driving and stated that he should not be driving. Trooper Edwards performed field

> sobriety tests and [the Petitioner] performed them unsatisfactor[ily]. A search of the vehicle also contained a green leafy substance inside a red and blue glass pipe with marijuana residue in it. There was also a clear plastic container in a toolbox in his vehicle that contained a green leafy substance that turned out to be marijuana. [The Petitioner] also had in his possession a prescription pill bottle labeled Tramadol. And inside was one and a half white pills and [the Petitioner] stated that they were methadone. [The Petitioner] also . . . was not wearing his seat belt on the stop.

The Petitioner confirmed that the State's recitation of facts was "substantially correct[.]" The trial court accepted the Petitioner's best interest plea.

Post-Conviction Proceedings

The Petitioner filed a timely pro se post-conviction petition on December 22, 2015. The post-conviction court appointed counsel to represent the Petitioner, who filed an amended petition. The Petitioner argued that he received ineffective assistance of counsel and that his best interest plea was entered unknowingly and involuntarily.

At the post-conviction hearing, trial counsel testified that he represented the Petitioner in the underlying case. He stated that he met with the Petitioner "probably seven or eight times" to discuss the case. On three occasions, trial counsel and the Petitioner watched the video of the Petitioner's traffic stop. Trial counsel stated that he filed a motion to suppress evidence against the Petitioner relating to the Petitioner's traffic stop. However, trial counsel testified that "[b]ased on the hearing and what was said on the video, the officer testified accurately as to what was actually described on the scene and described on the video."[2] After the trial court denied the Petitioner's motion to suppress on May 22, 2015, the Petitioner was taken into custody because the Petitioner was unable to provide a urine sample. The trial court revoked his bond. The next day, the Petitioner went to Jackson-Madison County General Hospital due to his heart condition. Trial counsel met with the Petitioner at the hospital. The Petitioner was later released to go home, but he later returned to the hospital and was then returned to custody.

On June 4, 2015, the date of the plea submission hearing, trial counsel discussed the plea agreement with the Petitioner prior to the hearing. Trial counsel stated that the Petitioner's behavior and understanding appeared to be the same as when they had met on previous occasions. Trial counsel identified the Petitioner's plea agreement and

[2] The transcript of the suppression hearing reflects that the trial court admitted this video into evidence at the hearing.

confirmed that the agreement stated the Petitioner pled guilty to possession of a Schedule IV controlled substance as to count two instead of a Schedule VI controlled substance. On cross-examination, trial counsel agreed that the plea agreement form essentially contained a clerical error. He stated that the Petitioner "never wanted to plead guilty" and that he and the Petitioner "talked about it and [they] managed to get the [State] to agree to a best interest plea." After the motion to suppress hearing, the Petitioner and trial counsel discussed "whether or not to proceed to trial and [they] talked about what the possibility and outcomes would be if [the Petitioner] w[e]nt to trial and if he prevailed or if he won and so forth." He testified that it was normally his practice to advise his clients that, if their plea was not voluntary or if they had questions about the plea, the trial court would not accept the plea. Trial counsel stated that the Petitioner did not file a direct appeal.

The Petitioner testified that trial counsel represented him in the underlying criminal case. He stated that he met with trial counsel several times and that trial counsel explained his charges and the trial process to him. The Petitioner did not recall that the video of his traffic stop was played at the suppression hearing. He explained that he was incarcerated after the hearing because he was unable to provide a urine sample. The Petitioner testified that on May 27, 2015, he had a heart attack and died[,] but "God let [him] come back." He explained that he was admitted to the hospital three times between his suppression hearing and his plea submission hearing. On June 3, 2015, he was admitted to the hospital for chest pains and stayed in the hospital overnight but was unable to sleep. The Petitioner stated that he was prescribed Gabapentin and morphine while hospitalized. On June 4, 2015, the Petitioner returned to the county jail and later entered his best interest plea. He stated that he could "barely remember" meeting with trial counsel prior to his plea submission hearing but he remembered that trial counsel discussed the plea agreement with him. During the plea submission hearing, the Petitioner was "somewhat" in pain. He stated that he was "pretty sure" that the medication he took while he was hospitalized affected his ability to understand the ramifications of his plea. He explained that he would not have pled guilty if he had been in the "right state of mind[.]" The Petitioner testified that he "woke up later in the . . . holding cell and it's like [he] had a dream"; he found his plea agreement under his mattress and noticed that the plea agreement stated that he pled guilty to possession of a Schedule IV substance in count two instead of a Schedule VI substance. The Petitioner stated that trial counsel refused to speak with him after his plea submission hearing.

On cross-examination, the Petitioner testified that he did not recall whether the trial court asked him during his best interest plea if he was under the influence of drugs or alcohol. The Petitioner could also not recall informing the trial court of his heart attack. The Petitioner did not provide any evidence of his hospital admissions or the medications that he was given during his admissions prior to his plea submission.

The post-conviction court credited trial counsel's testimony and found that trial counsel met with the Petitioner on at least eight occasions and that the trial court discussed the plea agreement with the Petitioner "exhaustively" at the guilty plea submission hearing. The post-conviction court found that, when the Petitioner indicated that he thought that the plea was not in his best interest, the trial court offered to set his case for trial, and the Petitioner declined. The post-conviction court found that the Petitioner did not appear to be intoxicated and was responsive to questioning during the plea submission hearing. The post-conviction court also noted that the Petitioner requested to serve his sentence on weekends and concluded that trial counsel's representation at the Petitioner's plea submission hearing was not deficient and did not prejudice the Petitioner. The post-conviction court denied relief. The Petitioner now timely appeals the post-conviction court's decision.

II. Analysis

Standard of Review

In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Post-conviction relief cases often present mixed questions of law and fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Appellate courts are bound by the post-conviction court's factual findings unless the evidence preponderates against such findings. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). When reviewing the post-conviction court's factual findings, this court does not reweigh the evidence or substitute its own inferences for those drawn by the post-conviction court. *Id.*; *Fields*, 40 S.W.3d at 456 (citing *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). Additionally, "questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the [post-conviction court]." *Fields*, 40 S.W.3d at 456 (citing *Henley*, 960 S.W.2d at 579); *see also Kendrick*, 454 S.W.3d at 457. The post-conviction court's conclusions of law and application of the law to factual findings are reviewed de novo with no presumption of correctness. *Kendrick*, 454 S.W.3d at 457.

Ineffective Assistance of Counsel

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. *See* U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687

(1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven in order for the court to grant post-conviction relief. *Strickland*, 466 U.S. at 687; *Henley*, 960 S.W.2d at 580; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Accordingly, if we determine that either factor is not satisfied, there is no need to consider the other factor. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (citing *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004)). Additionally, review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Henley*, 960 S.W.2d at 579. We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006).

As to the first prong of the *Strickland* analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." *Henley,* 960 S.W.2d at 579 (citing *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)); *see also Goad*, 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate "that 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); *see also Baxter*, 523 S.W.2d at 936.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. *Goad*, 938 S.W.2d at 370. Therefore, under the second prong of the *Strickland* analysis, 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.* (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

The Petitioner asserts that trial counsel's performance was deficient because trial counsel failed to sufficiently explain the plea agreement and failed to correct the plea agreement form, which should have stated that the Petitioner was pleading guilty to possession of a Schedule VI substance, not a Schedule IV substance. The Petitioner contends that he was prejudiced by this deficient performance because he "was forced to enter into a plea that . . . was wrong on its face . . . and that he didn't understand."

However, the Petitioner does not present any evidence establishing that he did not understand any component of his plea agreement. At the plea submission hearing, trial

counsel, whose testimony the post-conviction court credited, testified that he met with the Petitioner on seven or eight occasions to discuss the case. The post-conviction court concluded that trial counsel's representation at the Petitioner's guilty plea submission hearing was not deficient and did not prejudice the Petitioner.

We conclude that the post-conviction court properly denied relief to the Petitioner on this ground. The record reflects that, while trial counsel did not correct a clerical error in the plea agreement form, both trial counsel and the trial court discussed the aspects and ramifications of the plea agreement with the Petitioner. At the plea submission hearing, the trial court correctly stated that, in count three of the indictment, the Petitioner was charged with possession of a Schedule VI controlled substance with prior convictions, a Class D felony, and that the Petitioner could receive a sentence of two to four years for this conviction. Additionally, at the plea submission hearing, the Petitioner testified that he was satisfied with trial counsel's representation. Because the Petitioner did not include his judgment sheets in the record on appeal, we are unable to conclude that the Petitioner was affected by the clerical error in the plea agreement form. The Petitioner is not entitled to relief on this ground.

Unknowing and Involuntary Guilty Plea

The Petitioner also asserts that his best interest plea was unknowing and involuntary because "he did not have enough time to meet with his attorney, . . . he was under the influence of medication that impacted his ability to comprehend the proceedings, and . . . he had little to no sleep the prior night due to the multiple heart attacks and the medication he was taking." As further evidence of his allegation that his guilty plea was unknowing and involuntary, the Petitioner asserts that "he [does not] even remember the guilty plea proceedings."

Whether a guilty plea is intelligent and voluntary is a mixed question of law and fact. *See Jaco v. State*, 120 S.W.3d 828, 830-31 (Tenn. 2003). Therefore, in such cases we review the post-conviction court's findings of fact *de novo* with a presumption of correctness. *Id.* The post-conviction court's findings of law are reviewed purely *de novo*. *Id.*

When reviewing a guilty plea, this court looks to both the federal standard as announced in the landmark case *Boykin v. Alabama*, 395 U.S. 238 (1969), and the state standard as announced in *State v. Mackey*, 553 S.W.2d 337 (Tenn. 1977), *superseded on other grounds by* Tenn. R. Crim. P. 37(b) and Tenn. R. App. P. 3(b). *Don Allen Rodgers v. State*, No. W2011-00632-CCA-R3-PC, 2012 WL 1478764, at *5 (Tenn. Crim. App. Apr. 26, 2012). Under the federal standard, there must be an affirmative showing that the plea was "intelligent and voluntary." *Boykin*, 395 U.S. at 242. Likewise, the Tennessee

Supreme Court has held that "the record of acceptance of a defendant's plea of guilty must affirmatively demonstrate that his decision was both voluntary and knowledgeable, i.e. that he has been made aware of the significant consequences of such a plea . . . ." *Mackey*, 553 S.W.2d at 340. "[A] plea is not 'voluntary' if it is the product of '[i]gnorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats . . . ." *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993) (quoting *Boykin*, 395 U.S. at 242-43).

In order to determine whether a plea is intelligent and voluntary, the trial court must "canvass[] the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence." *Boykin*, 395 U.S. at 244. The trial court looks to several factors before accepting a plea, including:

> [T]he relative intelligence of the defendant; degree of his familiarity with criminal proceedings; whether he was represented by competent counsel and had the opportunity to confer with counsel about the options available to him; the extent of advice from counsel and the court concerning the charges against him; and the reasons for his decision to plead guilty, including a desire to avoid a greater penalty that might result from a jury trial.

Blankenship, 858 S.W.2d at 904; *Howell v. State*, 185 S.W.3d 319, 330-31 (Tenn. 2006). Once the trial court has conducted a proper plea colloquy, it discharges its duty to assess the voluntary and intelligent nature of the plea and creates an adequate record for any subsequent review. *Boykin*, 395 U.S. at 244.

Statements made by a petitioner, his attorney, and the prosecutor during the plea colloquy, as well as any findings made by the trial court in accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings." *Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977). Statements made in open court carry a strong presumption of truth, and to overcome such presumption, a petitioner must present more than "conculsory allegations unsupported by specifics." *Id.* at 74.

At the guilty plea submission hearing, the Petitioner confirmed that he was entering his guilty plea freely and voluntarily and that no one had forced or pressured him to plead guilty. The Petitioner asked the trial court to allow him to serve his sentence on weekends because he was "trying to go to school." The Petitioner also testified that he had no questions about his guilty plea. The trial court discussed the plea agreement with the Petitioner "exhaustively" at the guilty plea submission hearing. When the Petitioner indicated that he thought that the plea was not in his best interest, the trial court offered to set his case for trial, and the Petitioner declined. The post-conviction court found that the

Petitioner did not appear to be intoxicated and was responsive to questioning during the guilty plea submission hearing.

We conclude that the post-conviction court properly denied relief on this ground. The Petitioner testified at his guilty plea submission hearing that he was not under the influence of any substance and that he entered his guilty plea knowingly and voluntarily. The Petitioner has presented no evidence that his hospital stay, medications, or trial counsel's representation caused his guilty plea to be unknowing or involuntary, other than his own general assertions. Additionally, the Petitioner's request to serve his sentence on weekends shows that he was alert and focused on his plea during the hearing. The Petitioner is not entitled to relief on this ground.

III. Conclusion

We conclude that the post-conviction court properly denied relief to the Petitioner, who has not established that he received ineffective assistance of counsel or that his best interest plea was entered unknowingly or involuntarily. For the aforementioned reasons, the judgment of the post-conviction court is affirmed.

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ROBERT L. HOLLOWAY, JR., JUDGE