

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 27, 2018 Session

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WILLIAM CASEY v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Sullivan County
No. C65101 James F. Goodwin, Judge**

No. E2017-01265-CCA-R3-PC

The Petitioner, William Casey, appeals the post-conviction court’s denial of his petition for post-conviction relief in which he challenged his convictions for first degree criminal sexual conduct and two counts of aggravated rape for offenses that occurred in 1979 and 1980. The Petitioner raised numerous issues in his petition, alleging errors at trial, prosecutorial misconduct, and ineffective assistance of counsel at trial and on appeal. The post-conviction court entered a preliminary order dismissing all of the Petitioner’s claims of errors at trial, prosecutorial misconduct, and ineffective assistance of appellate counsel and the majority of his claims of ineffective assistance of trial counsel. Following an evidentiary hearing on the Petitioner’s remaining claims, the post-conviction court entered an order denying the Petitioner relief. On appeal, the Petitioner contends that the post-conviction court erred in dismissing the majority of his claims before the evidentiary hearing and in finding that the Petitioner failed to establish during the evidentiary hearing that he is entitled to relief as to his remaining claims. We conclude that the post-conviction court properly dismissed the Petitioner’s claims of errors during the trial and prosecutorial misconduct and properly denied the Petitioner relief as to his claims presented during an evidentiary hearing. We also conclude the post-conviction court erred in dismissing the Petitioner’s claims of ineffective assistance of counsel at trial and on appeal without conducting an evidentiary hearing. Accordingly, the post-conviction court’s judgment is affirmed in part and reversed in part, and we remand the case to the post-conviction court for an evidentiary hearing on the issues of ineffective assistance of counsel at trial and on appeal that were dismissed by the court in its preliminary order and properly preserved by the Petitioner on appeal.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed in Part; Reversed in Part; and Remanded

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR. and J. ROSS DYER, JJ., joined.

Francis X. Santore, Jr., Greeneville, Tennessee, for the appellant, William Casey.

Herbert H. Slatery III, Attorney General and Reporter; Courtney N. Orr, Assistant Attorney General; Barry Staubus, District Attorney General; and Julie Canter, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

The 2011 convictions in this case stem from the conduct of the Petitioner against the victim in 1979 and 1980 while the then-juvenile victim was attending a school associated with the church where the Petitioner was the head priest. The evidence presented at trial established that the Petitioner engaged in sexual acts with the victim on three separate occasions when the victim was thirteen and fourteen years old. The victim testified that two of the episodes occurred in the Petitioner's private quarters in the basement of the rectory and that the third episode occurred at the home of the victim's mother. The victim first disclosed the abuse to family members in 1999, 2001, and 2009. The victim disclosed the abuse to Ann Brentwood, who worked for Survivors Network of Those Abused by Priests ("SNAP"), in June 2009, and to the McDowell County Sheriff's Department in North Carolina in September 2009. Father David Boettner, Bishop Stika, and Deacon Sean Smith met with the Petitioner and read the victim's allegations to the Petitioner. The Petitioner stated that there was credibility to the victim's account but that he did not agree with all of the details. When Deacon Smith asked the Petitioner whether he had oral sex and anal sex with the victim, the Petitioner replied, "Unfortunately[,] I'm guilty." The evidence presented at trial is set out in more detail in this court's opinion on direct appeal. *See State v. William Casey*, No. E2012-01451-CCA-R3-CD, 2014 WL 325148, *1, 10-12 (Tenn. Crim. App. Jan. 28, 2014), *perm. app. denied* (Tenn. June 20, 2014) (not for citation).

The jury convicted the Petitioner of first degree criminal sexual conduct and two counts of aggravated rape, and the trial court imposed an effective sentence of no less than thirty-five years but no more than forty years. The Petitioner filed a motion for new trial, which the trial court denied. The Petitioner then appealed his convictions to this court.

The Petitioner argued on direct appeal that (1) the evidence was insufficient to support his convictions; (2) the trial court erred in failing to grant his motion to dismiss his indictment on due process grounds due to "pre-accusatorial" delay; (3) the trial court erred in refusing to reopen the hearing on his motion to dismiss to allow for additional

cross-examination of the victim after the Petitioner received additional statements that the victim had given to the police; (4) the trial court erred in admitting and considering at the hearing on the motion to dismiss the Petitioner's North Carolina conviction, a telephone call to the Petitioner on September 10, 2009, and a confession heard by Father Boettner; (5) the trial court erred in failing to give a special jury instruction relating to the definition of "coercion" and a special jury instruction that the victim's testimony must be corroborated; (6) the trial court improperly commented on the Petitioner's right against self-incrimination; (7) and the prosecutor improperly commented on the Petitioner's right to remain silent during closing argument and improperly vouched for the credibility of the State's witnesses. *See id.* at *13-25. This court affirmed the Petitioner's convictions on direct appeal. *See id.* at *1.

The Petitioner, through counsel, filed a petition for post-conviction relief in which he raised eighty-one claims, including seventeen claims of errors at the trial level, eight claims of prosecutorial misconduct, sixteen claims of ineffective assistance of counsel at trial, and forty claims of ineffective assistance of counsel on appeal. The post-conviction court entered a preliminary order dismissing all of the Petitioner's claims except for nine claims of ineffective assistance of counsel at trial.

Prior to the beginning of the evidentiary hearing, post-conviction counsel agreed that the Petitioner was proceeding on three grounds of ineffective assistance of trial counsel: (1) failure to investigate and compare the victim's claims as to the dates in which the abuse began to the church where the Petitioner was posted during that time period; (2) failure to call witnesses, such as church members, to rebut the victim's claims regarding his status as an altar boy and the layout of the rectory; and (3) failure to investigate whether records documented the Petitioner's whereabouts during the time period in which the crimes were committed to develop defenses, including an alibi defense.

During the evidentiary hearing, the Petitioner presented the testimony of three witnesses regarding their relationship with the Petitioner during the time period in which the abuse against the victim occurred and that they never witnessed the Petitioner engaging in inappropriate behavior. Post-conviction counsel also sought to introduce the Petitioner's daily calendars for the time periods during which the abuse occurred. The post-conviction court allowed the Petitioner to enter the daily calendars as an exhibit for identification purposes only and denied the Petitioner's request to enter them into evidence. The post-conviction court entered an order denying the Petitioner's claims of ineffective assistance of trial counsel presented during the evidentiary hearing.

ANALYSIS

The Petitioner contends that the post-conviction court erred in dismissing the majority of his claims prior to the evidentiary hearing. He also contends that the post-conviction court erred in denying his claim following an evidentiary hearing that trial counsel was ineffective in failing to utilize the Petitioner's daily calendars to establish a partial alibi.

I. Waiver

Although the Petitioner asserts that the post-conviction court erred in dismissing seventy-two of his eighty-one claims prior to the evidentiary hearing, the Petitioner did not address the post-conviction court's rulings on each of the seventy-two claims in his appellate brief. Rather, the Petitioner states in his brief that he chose instead to focus upon what he believed to be "glaring examples of the errors" committed by the post-conviction court. He further states that he is relying upon his post-conviction petition as to the remaining claims that he did not specifically address in his brief. The State responds that the Petitioner has waived any claims of improper dismissal that were not specifically included in his appellate brief. We agree with the State.

The Petitioner explains that he did not address the post-conviction court's dismissal of each of the seventy-two claims in his brief because "to re-cite and, in essence, 'cut and paste,' his post-conviction petition in this brief would violate the letter and the spirit of [Tennessee Rule of Appellate Procedure] 27(i), which restricts the length of arguments in briefs to twenty-five (25) pages." We disagree that a proper argument on all the issues would result in the Petitioner's counsel cutting and pasting the post-conviction petition into the appellate brief; instead, the Petitioner is required to address the post-conviction court's findings as to each claim and include support for his contention that the findings were incorrect. *See* Tenn. R. App. P. 27(a)(7) (requiring that an appellate brief include "[a]n argument ... setting forth ... the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record ... relied on"). Furthermore, the argument portion of a principal brief is limited to fifty pages and not twenty-five pages. *See* Tenn. R. App. P. 27(i). While a party may request permission from this court to exceed the fifty-page limitation, the Petitioner made no effort to do so. Rule 10 of the Rules of the Court of Criminal Appeals clearly provides that "[i]ssues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." Tenn. Ct. Crim. App. R. 10(b). Accordingly, we will only address the post-conviction court's dismissal of those claims that the Petitioner properly addressed in his brief, and the issue of the post-conviction court's dismissal of the remaining claims is waived.

II. Colorable Claims

A petition for post-conviction relief “must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.” T.C.A. § 40-30-106(d). Bare allegations that a constitutional right has been violated and mere conclusions of law will not be sufficient to warrant further proceedings. *Id.* The petitioner’s “[f]ailure to state a factual basis for the grounds alleged shall result in immediate dismissal of the petition.” *Id.* If the facts alleged in the petition, taken as true, fail to show that the petitioner is entitled to relief or fail to show that the claims for relief have not been waived or previously determined, the post-conviction court shall dismiss the petition. T.C.A. § 40-30-106(f). A ground for relief is deemed waived if “the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented” unless (1) the claim is based on a constitutional right that was not recognized as existing at the time of the trial and is to be applied retroactively or (2) the failure to present the claim was the result of state action that violates the federal or state constitution. T.C.A. § 40-30-106(g). “A ground for relief is previously determined if a court of competent jurisdiction has ruled on the merits after a full and fair hearing.” T.C.A. § 40-30-106(h).

In determining whether a petition for post-conviction relief should be dismissed without a hearing, the post-conviction court should review the petition to determine whether the petition asserts a colorable claim. *Burnett v. State*, 92 S.W.3d 403, 406 (Tenn. 2002). A colorable claim is defined as “a claim that, if taken as true, in the light most favorable to the petitioner, would entitle [the] petitioner to relief under the Post-Conviction Procedure Act.” *Id.* (quoting Tenn. Sup. Ct. R. 28, § 2(H)). “[I]f the facts alleged, taken as true, fail to show that the petitioner is entitled to relief, or in other words, fail to state a colorable claim, the petition shall be dismissed.” *Id.* The post-conviction court’s dismissal of a post-conviction petition is an issue of law; therefore, this court reviews the issue de novo. *See Arnold v. State*, 143 S.W.3d 784, 786 (Tenn. 2004); *Jerome Lionel Price v. State*, No. M2010-01633-CCA-R3-PC, 2011 WL 2671821, at *3 (Tenn. Crim. App. July 7, 2011).

The Petitioner contends that the post-conviction court erred in dismissing multiple stand-alone claims of trial errors that he maintained violated his due process and equal protection rights. On appeal, the Petitioner specifically argues against the post-conviction court’s dismissal of the following stand-alone claims: (1) the victim was unable to pinpoint the days and times in which the abuse occurred; (2) the Petitioner’s North Carolina conviction was improperly admitted; (3) the trial court failed to instruct the jury regarding the definition of a “position of custodial or official authority over the victim”; (4) the prosecution was stale and the continuance of the prosecution constituted

cruel and unusual punishment; (5) the trial court improperly admitted testimony by a priest and a deacon regarding the Petitioner's statements; (6) the State failed to provide a particular date for each offense; and (7) the trial court committed plain error in allowing the victim to testify to acts in addition to those charged in the indictment. The Petitioner raised, and this court rejected, arguments on direct appeal regarding the admission of the Petitioner's North Carolina conviction during the hearing on the motion to dismiss, the staleness of the prosecution, and the admission of the Petitioner's statements to a priest and a deacon. *See William Casey*, 2014 WL 325148, at *14-17, 19. Thus, these claims have been previously determined. *See* T.C.A. § 40-30-106(h). The Petitioner has waived the remaining stand-alone claims due to his failure to raise them on direct appeal. *See* T.C.A. § 40-30-106(g). Accordingly, the post-conviction court properly dismissed the stand-alone claims.

The Petitioner maintains that the post-conviction court erred in dismissing multiple claims of prosecutorial misconduct, including (1) the State improperly modified the bill of particulars on multiple occasions in order to fit the crimes into a particular time period in an effort to bypass the applicable statute of limitations; (2) the State failed to provide the Petitioner and trial counsel prior to the hearing on the motion to dismiss with tape recordings of conversations between the victim and the Petitioner and the conversations between the victim, a detective, and Ms. Greenwood; (3) the prosecutor improperly questioned the victim about his conclusions that the Petitioner had authority over him and asked leading questions of the victim about the Petitioner being a "father figure" and "God on Earth"; (4) the prosecutor asked improper leading questions to Diocesan officials about the Petitioner's "non-answer" when he was questioned by the officials; and (5) the prosecutor's statements in closing argument alluding to the Petitioner's authority over the victim were improper. On direct appeal, the Petitioner raised an issue regarding the State's failure to provide the tape recorded conversations to the defense prior to the hearing on the motion to dismiss, and this court rejected the Petitioner's claims. *See William Casey*, 2014 WL 325148, at *17-18. The Petitioner has waived the remaining claims of prosecutorial misconduct because he could have raised them on direct appeal and failed to do so. *See* T.C.A. § 40-30-106(g). The post-conviction court properly dismissed these claims.

The Petitioner asserts that the post-conviction court erred in dismissing his grounds of ineffective assistance of trial counsel in which he challenged trial counsel's failure to (1) seek to exclude the Petitioner's North Carolina conviction pursuant to Tennessee Rule of Evidence 404; (2) request a jury instruction as to what constitutes being in a position of custodial or official authority; (3) move for a change of venue until the middle of jury selection; and (4) object to the State's actions in eliciting testimony from the victim regarding other sexual acts by the Petitioner and then electing the sexual act upon which to rely. The Petitioner also contends that the post-conviction court erred

in dismissing his grounds of ineffective assistance of appellate counsel in which he challenged counsel's failure to raise issues on direct appeal regarding: (1) the trial court's denial of the Petitioner's motion to exclude the Diocesan officials' testimony at trial and Ms. Sue Frasier-Bear's testimony at the hearing on the motion to dismiss; (2) the trial court's failure to exclude the testimony of Ms. Frasier-Bear and the Diocesan officials and the victim's written recollection of the incidents as hearsay; (3) the trial court's failure to rule on the Petitioner's motion under Tennessee Rule of Evidence 609 prior to the State's presentation of the evidence; (4) the trial court's utilization of a jury panel that had been exposed to pretrial publicity; (5) the trial court's denial of the Petitioner's motion for a change of venue; (6) the trial court's admission of evidence of the victim's circumstances at the time of trial that was designed to create undue sympathy for the victim; (7) the trial court's admission of the victim's testimony of hearsay statements from his mother and the victim's opinion as to whether the Petitioner was an "authority figure"; (8) the trial court's admission of the victim's testimony regarding the response of his mother, his former wife, and another person to the victim's statements regarding the Petitioner; (9) the trial court's admission of the certified transcript of a conversation between the victim and the Petitioner in lieu of playing the actual audio recording; (10) the State's numerous amendments to the bill of particulars; (11) the trial court's failure to instruct the jury on the applicable statute of limitations; (12) the trial court's admission of evidence of death threats received by the victim; (13) the trial court's allowing a witness to remain in the courtroom during a hearing regarding the admission of the witness's testimony; (14) the trial court's admission of evidence of the Petitioner's silence in response to questioning by a Diocesan official; (15) the State's statements during closing arguments that the presumption of innocence had been lifted; (16) the trial court's admission of evidence of trips that the victim and the Petitioner took together; and (17) issues of plain error.

As noted by the State, the Petitioner failed to raise as a ground for relief in his post-conviction petition that appellate counsel was ineffective in not raising an issue challenging the trial court's admission of the certified transcript of a conversation between the victim and the Petitioner in lieu of playing the actual audio recording. Therefore, this ground for relief is waived. *See Charles Williams v. State*, No. W2012-00635-CCA-MR3-PC, 2013 WL 5488595, at *7 (Tenn. Crim. App. Sept. 30, 2013), *perm. app. denied* (Tenn. Feb. 11, 2014).

The State concedes that the post-conviction court erred in dismissing the remaining grounds of ineffective assistance of counsel that were raised by the Petitioner in this appeal. Accordingly, we reverse the post-conviction court's dismissal of the Petitioner's four grounds of ineffective assistance of trial counsel and seventeen grounds of ineffective assistance of appellate counsel that the Petitioner properly raised in his brief.

III. Ineffective Assistance of Counsel

The Petitioner asserts that the post-conviction court erred in denying relief on one of the grounds of ineffective assistance which were presented at the post-conviction hearing. He contends that trial counsel was ineffective in failing to utilize the Petitioner's daily calendars to establish a partial alibi. The Post-Conviction Procedure Act provides relief when a 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. The petitioner bears the burden of proving the allegations of fact in the petition by clear and convincing evidence. T.C.A. § 40-30-110(f); *Ward v. State*, 315 S.W.3d 461, 465 (Tenn. 2010). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009) (quoting *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998)). The findings of fact made by a post-conviction court are conclusive on appeal unless the evidence preponderates against them. *Ward*, 315 S.W.3d at 465. This court may not substitute its own inferences for those drawn by the post-conviction court, and questions concerning the credibility of witnesses, the weight and value of the evidence, and the factual issues raised by the evidence are to be resolved by the post-conviction court. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001). Mixed questions of fact and law are reviewed de novo, with a presumption of correctness applied to the factual findings. *Ward*, 315 S.W.3d at 465. A claim of ineffective assistance of counsel raises a mixed question of law and fact. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). The trial court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *Id.*

Under the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution, the accused is guaranteed the right to effective assistance of counsel. *Moore v. State*, 485 S.W.3d 411, 418 (Tenn. 2016). To prevail on a claim that he was denied his constitutional right to effective assistance of counsel, a petitioner must prove both that counsel's performance was deficient and that the deficient performance caused prejudice to the defense. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). A claim may be denied for failure to establish either deficiency or prejudice, and the reviewing court need not address both components if a petitioner has failed to establish one. *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996).

"Establishing deficient performance requires showing 'that counsel's representation fell below an objective standard of reasonableness,' which standard is measured by 'professional norms' prevailing at the time of the representation." *Garcia v. State*, 425 S.W.3d 248, 256-57 (Tenn. 2013) (quoting *Strickland*, 466 U.S. at 688). So long as counsel's representation was "within the range of competence demanded of

attorneys in criminal cases,” counsel will not be deemed to have performed deficiently. *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011) (quoting *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). Deficient performance requires a showing of errors so serious that “counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment.” *Id.* (quoting *Strickland*, 466 U.S. at 687). In determining prejudice, the reviewing court must decide if there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Calvert v. State*, 342 S.W.3d 477, 486 (Tenn. 2011) (quoting *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).

Although the Petitioner claims that trial counsel was deficient in failing to utilize the Petitioner’s daily calendars to establish a partial alibi, neither the Petitioner nor trial counsel testified at the post-conviction hearing. Moreover, while the Petitioner entered the daily calendars for identification purposes, the post-conviction court denied his request to enter the daily calendars into evidence, a finding that the Petitioner does not challenge on appeal. Therefore, the Petitioner failed to present clear and convincing evidence establishing any deficiency by trial counsel or any prejudice.

CONCLUSION

We reverse the post-conviction court’s dismissal of the Petitioner’s grounds for ineffective assistance of counsel that the Petitioner specifically challenged on appeal. We remand the case to the trial court for an evidentiary hearing on those specific grounds. We otherwise affirm the post-conviction court’s judgment.

JOHN EVERETT WILLIAMS, JUDGE