

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs January 22, 2015

DOUGLAS WAYNE YOUNG v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Sullivan County
No. C61,340 Robert H. Montgomery, Jr., Judge**

No. E2014-00968-CCA-R3-PC – Filed May 28, 2015

The petitioner, Douglas Wayne Young, appeals the denial of post-conviction relief from his 2009 Sullivan County Criminal Court jury convictions of aggravated burglary, aggravated assault, especially aggravated kidnapping, and four counts of aggravated rape, claiming that the post-conviction court abused its discretion by denying his motion for a continuance and that he was denied the effective assistance of counsel at trial. Discerning no error, we affirm.

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

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which D. KELLY THOMAS, JR., and NORMA MCGEE OGLE, JJ., joined.

Kenneth E. Hill, Kingsport, Tennessee, for the appellant, Douglas Wayne Young.

Herbert H. Slatery III, Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Barry P. Staubus, District Attorney General; and Teresa Nelson, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

A Sullivan County Criminal Court jury convicted the petitioner of one count each of aggravated burglary, aggravated assault, and especially aggravated kidnapping, and four counts of aggravated rape. The trial court imposed a total effective sentence of 50 years' incarceration, and this court affirmed the judgments on direct appeal. *See State v. Douglas Wayne Young*, No. E2010-00027-CCA-R3-CD, slip op. at 1 (Tenn. Crim. App., Knoxville, May 23, 2011), *perm. app. denied* (Tenn., Sept. 21, 2011).

The *Douglas Wayne Young* case “relates to the [petitioner’s] breaking into his estranged wife’s home, forcing her to have intercourse with him, and forcing her to

accompany him as he traveled between Tennessee, Georgia, and North Carolina.” *Id.*, slip op. at 1-2. The victim, who resided in Bristol, Tennessee, testified that she returned home from work on the afternoon of January 4, 2008, to find the petitioner holding a gun on her. *Id.*, slip op. at 5. The petitioner punched her in the nose and then forced her into a bedroom at gunpoint. *Id.* The petitioner “ripped her pants off, continued hitting her,” and “penetrated her vaginally, orally, and anally without her consent.” *Id.* “[A]s a result of the attack, she suffered a broken nose, two black eyes, a bruised face, and an injured mouth.” *Id.*

After forcing the victim to get dressed and clean the blood from her injuries, the petitioner forced the victim at gunpoint into his vehicle. *Id.*, slip op. at 5-6. The petitioner raped the victim in the vehicle twice at gunpoint while stopped along the road. *Id.*, slip op. at 6. On January 5, the petitioner drove to Cherokee, North Carolina, and he instructed the victim to check into the Drama Inn using a false name and license plate information. *Id.* While waiting to check into the motel, the petitioner stood beside her, “showed her eight bullets in the gun and said, ‘If you do anything, the first 4 are for you.’” *Id.*

Over the next five days, the petitioner continued to force the victim to have sexual intercourse with him, and he kept her physically restrained or held her at gunpoint at all times. *Id.*, slip op. at 6-7. On January 11, the petitioner was captured by law enforcement officers as he and the victim were leaving a restaurant in Georgia. *Id.*, slip op. at 7-8.

The petitioner testified at trial and denied all accusations against him, claiming that the victim went with him willingly on January 4 and that all sexual intercourse was consensual. *Id.*, slip op. at 13-16. The petitioner stated that the victim’s facial injuries were the result of his “accidentally hit[ting] her on the bridge of her nose with his head” when they were inexplicably struggling over a handgun at the victim’s house on January 4. *Id.*, slip op. at 13-14.

On September 5, 2012, the petitioner filed, pro se, a timely petition for post-conviction relief. Following the appointment of counsel, the post-conviction court held an evidentiary hearing on April 30, 2014. Before the hearing began, the petitioner’s post-conviction counsel moved for a continuance on the basis that the prosecutor had just provided him with the notes of trial counsel’s private investigator and that the notes included the identity of a previously-unknown motel clerk at the Drama Inn who was working on the day the petitioner and the victim checked in. Post-conviction counsel stated that, according to the notes, the clerk reported that the victim “looked fine when they checked in but later on another date that’s when [the victim] appeared to have been

beaten up.” Post-conviction counsel stated that the clerk “might be a material witness” and that he needed time to speak with her.

The prosecutor responded that the clerk’s potential testimony – that the victim appeared to have beaten – would have been inculpatory and that therefore her testimony would be irrelevant in assisting the petitioner’s case. The post-conviction court determined that a continuance would be unnecessary at that time, explaining that post-conviction counsel could question trial counsel about his decision not to call the motel clerk as a witness at trial. The post-conviction court continued, explaining as follows:

I mean we can start the hearing today and I want to try to get as much testimony on today as I can whether it comes from your client or from [trial counsel] or whoever else we may be talking about and if you feel like that you need an additional 30 days to talk to that witness and see whether that witness is somebody that you would want to call for this court to hear with regard to the issue of whether or not [trial counsel] was ineffective in his representation of the [petitioner] and you want them to testify in front of me then we can do that but I just don’t see putting this off today for that reason.

The petitioner testified that trial counsel met with him shortly after being appointed to his case. The petitioner expressed to trial counsel the urgent need to collect an electronic mail message that the victim had sent to the petitioner, and trial counsel had explained to the petitioner that he had been unable to retrieve the message because the petitioner’s electronic mail account had been closed. The petitioner also informed trial counsel of the need to collect video surveillance footage from two Walmart stores he had visited during early January 2008. The petitioner stated that trial counsel was able to review the footage from one of the Walmart stores but that the footage from the other store had been deleted.

With respect to witness testimony, the petitioner stated that trial counsel failed to interview or call as a witness, among others, the woman who owned the Drama Inn. According to the petitioner, this woman, later identified as Laverne Conley, had several friendly interactions with the victim. The petitioner also testified that he had asked trial counsel to interview some women he had met on a dating website in order to establish that he “wasn’t so obsessed” with the victim.

Trial counsel testified that, at the time he was appointed to represent the petitioner in October 2008, approximately 75 to 80 percent of his practice was devoted to

criminal defense work. The petitioner's previous trial attorney provided all of his files to trial counsel, and trial counsel reviewed all documents contained in the petitioner's court file as well. Trial counsel hired a private investigator who provided trial counsel with detailed reports of his findings. Trial counsel accompanied the private investigator to Cherokee, North Carolina, on a follow-up visit so that trial counsel could question some witnesses himself.

Trial counsel had open communications with the petitioner's family, and trial counsel reviewed the voluminous discovery with the petitioner. Trial counsel agreed that the petitioner was adamant in his desire to go to trial and that he had no interest in accepting a plea. Trial counsel did approach the State to discern if any plea offer would be extended, and the State assured him that "there would be no plea offers in this case."

With respect to trial strategy, trial counsel stated that "the only possible strategy we had was . . . to try to convince the jury that the victim had gone with [the petitioner] voluntarily and was there consensually and we talked about the problems with convincing a jury of that."

Trial counsel testified that he made several attempts to locate an electronic mail message the petitioner had received from the victim, but, despite his efforts, he was unsuccessful. Trial counsel's private investigator attempted to review the video surveillance footage from a Walmart in Clayton, Georgia, but the investigator learned that the video footage was only retained for 90 days and was therefore no longer available.

Regarding the testimony of Laverne Conley, trial counsel testified that the private investigator located and interviewed Ms. Conley. Based on that interview, trial counsel learned that Ms. Conley would testify "that at one point [the victim] appeared as though she had been beaten and then additionally that any time [the victim] left the room that they could see [the petitioner] watching [the victim]." Trial counsel made the decision not to call Ms. Conley as a witness at trial because

one of the biggest problems we had with the case was the physical injuries that [the victim] presented with when [the petitioner] was apprehended in Clayton, Georgia and I felt like [Ms. Conley's] testimony there would have played into that and strengthened in the jury's mind the issue about the injuries.

Because, trial counsel explained, Ms. Conley initially believed that the victim "looked fine" when she and the petitioner checked into the motel, which directly contradicted

both the victim's and the petitioner's statements that the victim's nose was already broken, "the risk [of calling Ms. Conley as a witness] outweighed the possible good she could have done." Moreover, Ms. Conley failed to confirm that she had conversations with the victim outside the presence of the petitioner, which further undercut the petitioner's claims.

The private investigator also interviewed two women with whom the petitioner had allegedly had some romantic involvement, but trial counsel determined that their testimony would not be favorable to the defense because, in part, they would have confirmed the petitioner's obsession with the victim.

At the close of all proof, the petitioner renewed his motion for a continuance. The post-conviction court denied the motion, finding as follows:

I think that the real issue . . . is that it's not a situation where it's a witness that was discovered after the trial and/or a witness that was never – that was known to the defense attorney but was never interviewed by the defense attorney or somebody on his – in working with him prior to trial. This is a little bit of a different situation and so I have to make my decision not on what this person might testify to today but what [trial counsel] knew prior to trial before making the decision to call them so I think I'm going to deny your request[.]

The post-conviction court made extensive findings of fact and conclusions of law in its May 8, 2014 order denying post-conviction relief, finding that trial counsel "provided exceptional representation in a very serious case." The post-conviction court continued as follows:

[Trial counsel] reviewed discovery, hired an investigator, met with witnesses, reviewed evidence, met with [p]etitioner on numerous occasions, developed a trial strategy, attempted to locate helpful evidence, and even traveled to Cherokee, NC, to assess the scene where [p]etitioner was arrested with the victim. [Trial counsel] elected, as part of his trial strategy, not to call certain witnesses that in his opinion would not have been helpful to the defense, but made the decision with the [p]etitioner to call the [p]etitioner in order to explain to the jury that victim being with the [p]etitioner in Cherokee was consensual.

The Court further finds that none of the evidence presented shows that [trial counsel's] performance in his representation of [p]etitioner fell below an objective standard of reasonableness. The Court finds that the [p]etitioner has failed to show by clear and convincing evidence that [trial counsel's] performance as [p]etitioner's attorney was deficient.

In this appeal, the petitioner contends that the post-conviction court abused its discretion by denying his motion for a continuance and that trial counsel was ineffective for failing to call Ms. Conley as a witness at trial. The State counters that the post-conviction court properly exercised its discretion in denying the motion and properly denied post-conviction relief. We address each claim in turn.

I. Denial of Motion to Continue

The petitioner argues that the trial court abused its discretion by denying his motion for a continuance to permit the petitioner time in which to confer with Ms. Conley. We disagree.

“[T]he granting or denying of a continuance is a matter which address itself to the sound discretion of the trial judge.” *Moorehead v. State*, 409 S.W.2d 357, 358 (Tenn. 1966) (citing *Bass v. State*, 231 S.W.2d 707 (Tenn. 1950)). An abuse of discretion is demonstrated by showing that the failure to grant a continuance denied the defendant a fair trial or that it could be reasonably concluded that a different result would have followed had the continuance been granted. *State v. Hines*, 919 S.W.2d 573, 579 (Tenn. 1995) (citing *State v. Wooden*, 658 S.W.2d 553, 558 (Tenn. Crim. App. 1983)). “The burden rests upon the party seeking the continuance to show how the court’s action was prejudicial. The only test is whether the defendant has been deprived of his rights and an injustice done.” *State v. Goodman*, 643 S.W.2d 375, 378 (Tenn. Crim. App. 1982) (citing *Baxter v. State*, 503 S.W.2d 226, 228 (Tenn. Crim. App. 1973)).

In the instant case, post-conviction counsel moved to continue the post-conviction hearing on the grounds that he had just learned the identity of Ms. Conley and that he needed time to speak with her because he believed her testimony might be material to post-conviction matters. After hearing the testimony of both the petitioner and trial counsel, the post-conviction court denied the motion to continue, finding, in effect, that trial counsel made a tactical decision not to call Ms. Conley and that a continuance to hear testimony from Ms. Conley would be unnecessary given the statements she had previously made to the private investigator.

We find no abuse of discretion in the post-conviction court's decision to deny the motion to continue. A post-conviction hearing "shall not be continued except by order of the court finding that unforeseeable circumstances render a continuance a manifest necessity." Tenn. Sup. Ct. R. 28, § 8(B). The petitioner has failed to show the "manifest necessity" of a continuance given that the substance of Ms. Conley's potential testimony was available through the private investigator's notes, and, as such, the post-conviction court did not abuse its discretion in denying the petitioner's motion to continue.

II. Ineffective Assistance of Counsel

The petitioner contends that trial counsel was ineffective by failing to call Ms. Conley as a witness. Specifically, the petitioner argues that Ms. Conley's testimony was material because Ms. Conley told the private investigator that the victim "looked fine" when checking into the Drama Inn on January 5 and that this testimony would have rebutted the victim's trial testimony that the petitioner had caused her facial injuries in Bristol on January 4. This, in turn, would have cast doubt on the victim's assertions that the petitioner had raped and kidnapped her.

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 (2006). 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).

To establish entitlement to post-conviction relief via a claim of ineffective assistance of counsel, the post-conviction petitioner must affirmatively establish first 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 second that his 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." *Id.* at 694.

Should the petitioner fail to establish either deficient performance or prejudice, he is not entitled to relief. *Strickland*, 466 U.S. 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 reviewing a claim of ineffective assistance of counsel, 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).

Claims of ineffective assistance of counsel are mixed questions of law and fact. *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010); *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). When reviewing the application of law to the post-conviction court’s factual findings, our review is de novo, and the post-conviction court’s conclusions of law are given no presumption of correctness. *Fields*, 40 S.W.3d at 457-58; *see also State v. England*, 19 S.W.3d 762, 766 (Tenn. 2000).

In our view, the record unquestionably supports the post-conviction court’s denial of relief. The petitioner’s assertion that Ms. Conley’s testimony would have rebutted that of the victim’s fails to take into consideration that the witness’s testimony would have contradicted the petitioner’s own testimony as well. In his testimony at trial, the petitioner explained that the victim’s facial injuries resulted from his “accidentally hit[ting] her on the bridge of her nose with his head” while he and the victim were struggling over a handgun at the victim’s house on January 4. *Douglas Wayne Young*, No. E2010-00027-CCA-R3-CD, slip op. at 13-14. At the post-conviction hearing, trial counsel explained that Ms. Conley’s testimony was too much of a risk and would likely “outweigh[] the possible good she could have done.” Additionally, trial counsel testified that Ms. Conley failed to confirm that she had conversations with the victim outside the presence of the petitioner, which again directly contradicted the petitioner’s claims. Given these concerns, trial counsel decided against calling Ms. Conley as a witness, and we will not second-guess this reasonable trial strategy. *See Adkins*, 911 S.W.2d at 347. The petitioner has failed to demonstrate that trial counsel’s failure to call Ms. Conley as a witness inured to his prejudice.

Conclusion

We find no abuse of discretion in the post-conviction court's denial of the petitioner's motion to continue, and that the petitioner failed to establish that he was denied the effective assistance of counsel at trial. Accordingly, the judgment of the post-conviction court is affirmed.

JAMES CURWOOD WITT, JR., JUDGE