

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs December 5, 2017

RODNEY SMITH v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County

No. 14-03151

James M. Lammey, Judge

No. W2017-00406-CCA-R3-PC

The petitioner, Rodney Smith, appeals the denial of post-conviction relief from his Shelby County Criminal Court convictions for attempted especially aggravated robbery, aggravated burglary, employment of a firearm during the commission of a dangerous felony, convicted felon in possession of a handgun, and convicted felon in possession of a firearm. On appeal, the petitioner alleges he received ineffective assistance of counsel due to trial counsel's failure to call a material witness at trial. Discerning no error, we affirm the judgment of the post-conviction court.

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

J. ROSS DYER, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and ALAN E. GLENN, JJ., joined.

Andrew S. Deshazo, Memphis, Tennessee, for the appellant, Rodney Smith.

Herbert H. Slatery III, Attorney General and Reporter; David H. Findley, Assistant Attorney General; Amy Weirich, District Attorney General; and Glen Baity, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

A Shelby County grand jury indicted the petitioner for one count of especially aggravated robbery of victim Derrick Cornell, one count of aggravated burglary of Mr. Cornell, one count of assaulting victim Shaneka Carruthers, one count of employment of a firearm during the commission of a dangerous felony against Mr. Cornell, one count of convicted felon in possession of a handgun as a result of a prior rape conviction, and one count of convicted felon in possession of a handgun as a result of a prior felony drug

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conviction. The grand jury indicted codefendant Lorenzo Horne for one count of facilitation of especially aggravated robbery and one count of accessory after the fact. The petitioner and Mr. Horne were tried separately.

A. Trial and Sentencing

At the petitioner's trial, the jury heard testimony that Mr. Morris Mitchell, who was not called as a witness, was an ordained minister that owned a house located at 3055 North Trezevant from which he sold drugs and operated a prostitution ring. The petitioner and Mr. Mitchell had known one another a long time, and the petitioner frequented Mr. Mitchell's house for the purpose of smoking marijuana. The evening of November 9, 2013, Mr. Mitchell called the petitioner and asked him to come over and bring a scale to weigh narcotics. According to the petitioner, who testified at trial, when he arrived at the house, Mr. Mitchell met him at the car. Mr. Mitchell, the petitioner, and Mr. Horne, who was already present at the house, walked to the side of the house and entered a room that Mr. Mitchell unlocked from the outside. Once inside the room, the petitioner put the scale on the table. He heard angry voices coming from a back room. Mr. Cornell then charged into the room naked and hit the petitioner in the head with a gun. The two fought, and the petitioner was shot. Ms. Carruthers, who was only partially clothed, entered the room while the men were fighting.

The petitioner denied robbing anyone that evening. The petitioner described the house as "a dope house" and testified that Mr. Mitchell "pimps girls" out of it. For these reasons, Mr. Mitchell does not allow anyone in the backroom of the house.

Ms. Carruthers also testified at the petitioner's trial. She admitted to being a prostitute and indicated she and other women brought men back to a room in Mr. Mitchell's house, had sex with them in exchange for money, and gave Mr. Mitchell a portion of the money earned "as a result of doing business" in his house. The evening in question, Ms. Carruthers brought Mr. Cornell to Mr. Mitchell's house. Mr. Cornell paid Ms. Carruthers for sex. Ms. Carruthers gave Mr. Mitchell a portion of the money received from Mr. Cornell and bought narcotics from Mr. Mitchell. Ms. Carruthers then brought Mr. Cornell to the back room in Mr. Mitchell's house.

While in the back room with Mr. Cornell, Ms. Carruthers heard a knock on the door and thought it was Mr. Mitchell. Both Ms. Carruthers and Mr. Cornell were naked. Mr. Cornell opened the door, and the petitioner hit him in the head with a gun.

Mr. Horne also testified at trial but offered a slightly different version of events. Mr. Horne confirmed the petitioner, Mr. Mitchell, Ms. Carruthers, Mr. Cornell, and a couple others were present in Mr. Mitchell's home the night of the robbery. The

petitioner was smoking marijuana, and Mr. Horne was smoking crack cocaine. Mr. Mitchell left the house, and the petitioner pulled out a gun and indicated he was going to rob Mr. Cornell, who was in the back room with Ms. Carruthers. Mr. Horne told him not to do it, but the petitioner left the room and walked to the side of the house. Mr. Horne then heard gun shots, and the petitioner asked Mr. Horne for help because Mr. Cornell was “fixin’ to kill” him. Mr. Horne tried to kick in the door, but it did not open. Mr. Horne then left in a truck, found Mr. Mitchell, and brought him back to the house. Mr. Mitchell opened the door to the back room, and the petitioner exited. The petitioner had been shot in the left knee, so Mr. Horne drove the petitioner to the petitioner’s mother’s house, and she drove both men to the hospital. The police detained Mr. Horne while he was standing outside the hospital.

After hearing testimony from multiple witnesses, the jury found the petitioner guilty of attempted especially aggravated robbery, aggravated burglary, employment of a firearm during the commission of a dangerous felony, convicted felon in possession of a handgun, and convicted felon in possession of a firearm. The jury found the petitioner not guilty of assault on Ms. Carruthers. The trial court merged the convictions for possession of a handgun and possession of a firearm. The petitioner then waived his right to file a motion for a new trial and a direct appeal in exchange for an effective sentence of twenty-three years to be served at thirty-five percent. Following a hearing, the trial court found the petitioner freely and voluntarily entered into this agreement.

B. Post-Conviction Hearing

After entering into the plea agreement, the petitioner filed a *pro se* petition for post-conviction relief. The post-conviction court appointed counsel, and the petitioner subsequently filed an amended petition for post-conviction relief alleging, in part, that trial counsel failed to secure the trial testimony of Mr. Mitchell, a material witness, who would have testified he owned the home the petitioner was convicted of burglarizing, and the petitioner was an invited guest in his home the day of the burglary. The remaining allegations are not relevant to this appeal.

During the post-conviction hearing, the petitioner testified that he has known Mr. Mitchell for thirty-five years, and Mr. Mitchell invited him to his house the day of the attempted burglary. Once the petitioner arrived, he called Mr. Mitchell from his car to let him know he was outside. Mr. Mitchell let the petitioner in his house, and the two discussed business. Mr. Mitchell then left to go to the store, and the petitioner stayed at the house.

The petitioner admitted Mr. Cornell gave a statement to the police indicating he rented a room from Mr. Mitchell. At trial, however, Mr. Cornell testified he resided

someplace else but was present in a room in the back of Mr. Mitchell's house with Ms. Carruthers on November 9, 2013, when the petitioner knocked on the door. The victim opened the door wearing only his socks, the petitioner pulled out a gun, and the men got into an altercation. The petitioner admitted that the testimony of Mr. Horne and Ms. Carruthers placed him at the crime scene. The petitioner also admitted the jury heard testimony at trial that the gun recovered from the scene did not have his fingerprints on it.

According to the petitioner, Mr. Mitchell was a family friend. Following the petitioner's arrest, his family members tried to contact Mr. Mitchell but were unable to do so. Eventually, Mr. Mitchell learned the petitioner had been arrested following the altercation at his house and went to the petitioner's mother's house to discuss the situation.

The petitioner claims he told trial counsel about Mr. Mitchell and that he wanted him to testify at trial to dispute the burglary charge. Despite the petitioner's request, trial counsel did not attempt to contact Mr. Mitchell, never subpoenaed Mr. Mitchell to trial, and did not call Mr. Mitchell as a witness at trial. When the petitioner asked trial counsel why he did not attempt to contact Mr. Mitchell, trial counsel responded, "I don't like him."

Mr. Mitchell also testified at the post-conviction hearing. According to Mr. Mitchell, he and another individual own the property at issue. There are four houses on the premises that are used as a ministry. Mr. Mitchell invited the petitioner to one of the houses on November 9, 2013, to discuss "some quiet things." The petitioner arrived at 6:30 p.m. and was alone. The two went into the front room of the house to talk. Mr. Mitchell did not give the petitioner permission to enter any other areas of the house.

Mr. Horne arrived at the house about twenty minutes later and entered the front room. Mr. Cornell, Ms. Carruthers, and two others arrived approximately thirty minutes later. Mr. Cornell and Ms. Carruthers went into a back room that Mr. Mitchell uses for counseling purposes. The room can only be accessed through a door facing the outside of the house. Mr. Mitchell denied knowing what Mr. Cornell and Ms. Carruthers were doing in the room.

Mr. Mitchell and the petitioner were in the front room for about an hour before Mr. Mitchell left for the store. When he returned approximately thirty minutes later, Mr. Mitchell could hear the victim screaming in the back room. The victim refused to open the door. When the police arrived, they instructed Mr. Mitchell to kick in the door. Mr. Mitchell did as instructed and found the victim inside the room and naked. The room was covered in blood. The police attempted to get a statement from Mr. Mitchell that

evening, but he told them he had been at the store and had no knowledge of what happened while he was gone. The police never questioned Mr. Mitchell again.

Mr. Mitchell testified that following the petitioner's arrest, he went to an attorney's office with the petitioner's mother. He told the attorney he did not have any knowledge of what transpired at the house after he left. He could not remember the attorney's name and did not remember whether he ever spoke with trial counsel. Mr. Mitchell did not know about the trial setting, but he went to the sentencing hearing with the petitioner's mother.

Mr. Mitchell would have attended the trial had the family asked him to be present. A subpoena would have been unnecessary. However, he could not have testified as to the events that transpired while he was at the store.

Trial counsel testified last. Trial counsel has been licensed and practicing law since 1974 and has had a criminal defense practice in Tennessee since 1984. Trial counsel tries approximately one jury trial per month and has represented criminal defendants in everything from DUI to capital murder cases. He was hired by the petitioner's mother to represent the petitioner on the charges of especially aggravated robbery, aggravated burglary, aggravated assault, and employing a firearm felony.

Trial counsel spoke with the petitioner's family members regarding Mr. Mitchell, but they never established anything useful Mr. Mitchell would add to the petitioner's defense. Trial counsel asked the petitioner's family members to bring Mr. Mitchell to the office so he could speak with him regarding the events that transpired at his house, but no one could get into contact with him. Trial counsel does not remember whether he ever spoke with Mr. Mitchell

Trial counsel and the petitioner also discussed Mr. Mitchell. Trial counsel testified:

[The petitioner] told me that Mr. Mitchell owned the house where he was; that it was a dope house and a prostitute house; and that's where people gathered all the time and that's what was going on that night. They were doing drugs, and he went in there to buy drugs, got into it with somebody in the house, and all kinds of things were going on at that location at that time.

Based on his conversations with the petitioner and his family members, trial counsel decided not to call Mr. Mitchell as a witness at trial. Even though the property belonged to him, when reviewing discovery, trial counsel saw that Mr. Mitchell had been

interviewed by the police and was not present when the incident took place. All actions that resulted in criminal charges against the petitioner occurred in Mr. Mitchell's absence.

Trial counsel indicated the petitioner testified at trial and was able to explain his version of the events. When doing so, the petitioner was articulate, animated, and able to speak directly to the jury. The jury's decision was based on its assessment of the credibility of the witnesses. Trial counsel testified that the petitioner had his day in court and "[t]o this day, I can think of nothing that we should have done or could have done that was not done in [the petitioner's] case."

After considering the above testimony, the post-conviction court found the petitioner failed to carry his burden of proving either deficient performance or prejudice and, therefore, failed to prove ineffective assistance of counsel. In its written order denying the petition for post-conviction relief, the post-conviction court incorporated these oral findings of fact made at the conclusion of the hearing:

And I'm convinced that [trial counsel] knew exactly [what] he was doing; he did the best that he could. I don't see, in any respect, where he's deficient[.] . . . You know, the two-prong thing – you have to show he was deficient and then that it – that [the petitioner] was prejudiced by this. I don't see where he was prejudiced at all – not a bit. I think putting Mr. Mitchell on – first of all, I don't think Mr. Mitchell was going to come in here and admit that this was a house where they do bad things – being a preacher and all that, so I mean, everyone on the jury knew what they were doing back there. . . . [I]f you intimate that the preacher knew about it, that's going to put egg all over his face. . . . But, coincidentally, he was gone at the time of the whole event. No one is going to help [the petitioner]. His testimony today would have hurt Mr. Smith much worse because he, being a preacher – being the owner of the house – confirmed that they were all together when they left and said, "We're going back here in this back room," and he said, "well, yeah, [the petitioner] was there." That shows [the petitioner] knew that they were back there.

This timely appeal followed.

Analysis

On appeal, the petitioner asserts the post-conviction court erred in denying his petition for post-conviction relief, alleging the failure to call Mr. Mitchell as a witness at trial amounted to both deficient performance and was prejudicial to his case, as Mr. Mitchell would have testified that he owned the property, and the petitioner had his

permission to be present the night in question. The State contends the petitioner did not show deficient performance or prejudice where trial counsel testified the family could not locate Mr. Mitchell, trial counsel did not think Mr. Mitchell's testimony would be useful, Mr. Mitchell testified the petitioner did not have permission to enter the back room of the house, and Mr. Mitchell admitted he was not home at the time of the events leading to the petitioner's arrest. We agree with the State.

To obtain relief in a post-conviction proceeding, a petitioner must demonstrate that his or her "conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103. The post-conviction petitioner bears the burden of proving his allegations of fact by clear and convincing evidence. *See* Tenn. Code Ann. § 40-30-110(f). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010) (quoting *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009)).

Appellate courts do not reassess the trial court's determination of the credibility of witnesses. *Dellinger v. State*, 279 S.W.3d 282, 292 (Tenn. 2009) (citing *R.D.S. v. State*, 245 S.W.3d 356, 362 (Tenn. 2008)). Assessing the credibility of witnesses is a matter entrusted to the trial judge as the trier of fact. *R.D.S.*, 245 S.W.3d at 362 (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. *See Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case 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, which presents mixed questions of fact and law, is reviewed de novo, with a presumption of correctness given only to the post-conviction court's findings of fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001); *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and article I, section 9 of the Tennessee Constitution both require that criminal defendants receive effective assistance of counsel. *Cauthern v. State*, 145 S.W.3d 571, 598 (Tenn. Crim. App. 2004) (citation omitted). When a petitioner claims he received ineffective assistance of counsel, he has the burden of showing both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. *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 same standard for determining ineffective assistance of counsel applied in federal cases also applies 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.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). With regard to the standard, our supreme court has held:

[T]he assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations.

Finch v. State, 226 S.W.3d 307, 315-16 (Tenn. 2007) (quoting *Baxter*, 523 S.W.2d at 934-35).

When reviewing trial counsel's performance, this Court "must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from the perspective of counsel at that time." *Howell v. State*, 185 S.W.3d 319, 326 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 689). The fact that a trial strategy or tactic failed or was detrimental to the defense does not, alone, support a claim for ineffective assistance of counsel. *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). Deference is given to sound tactical decisions made after adequate preparation for the case. *Id.*

To satisfy the prejudice prong of the test, the petitioner “must establish a reasonable probability that but for counsel’s errors the result of the proceeding would have been different.” *Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006) (citing *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). In order to prevail, the deficient performance must have been of such magnitude that the petitioner was deprived of a fair trial and that the reliability of the outcome was called into question. *Finch*, 226 S.W.3d at 316.

Courts need not approach the *Strickland* test in a specific order or even “address both components of the inquiry if the defendant makes an insufficient showing on one.” 466 U.S. at 697; *see also Goad*, 938 S.W.2d at 370 (stating that “failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim”).

Here, the petitioner has failed to prove either prong of the *Strickland* test. Trial counsel made a strategic decision not to call Mr. Mitchell as a witness at trial, and we give deference to the tactical decisions of counsel made after adequate trial preparation. The petitioner did not present any evidence at the post-conviction hearing that trial counsel was not adequately prepared for trial. To the contrary, trial counsel spoke with both the petitioner and the petitioner’s mother regarding Mr. Mitchell. Trial counsel asked the petitioner’s mother to bring Mr. Mitchell to his office so they could speak, and she could not locate Mr. Mitchell. It is unclear as to whether Mr. Mitchell and trial counsel ever met to discuss Mr. Mitchell’s potential testimony, but based on the information contained in the police report and relayed to trial counsel by the petitioner, trial counsel determined Mr. Mitchell’s testimony would not be useful to the petitioner’s case. The petitioner has not shown trial counsel’s decision not to call Mr. Mitchell as a witness at trial amounted to deficient performance.

The petitioner has further failed to prove the alleged deficient performance prejudiced the defense of his case. Based on his testimony at the post-conviction hearing, Mr. Mitchell was not present during the altercation leading to the petitioner’s arrest. He would have testified, however, that the petitioner was present in the home with Ms. Carruthers, Mr. Cornell, and the others at the time he left for the store. Further, while he owned the house and invited the petitioner over that evening, he did not give him permission to enter the back room of the house, which could only be accessed via a separate entrance on the outside of the house. Therefore, the petitioner has not shown the result of his trial would have been different if trial counsel had called Mr. Mitchell to testify. The petitioner is not entitled to relief on this issue.

CONCLUSION

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

J. ROSS DYER, JUDGE