

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs March 3, 2020

FILED

04/24/2020

Clerk of the
Appellate Courts

TRAVIS TATE v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 13-00846 W. Mark Ward, Judge

No. W2019-01380-CCA-R3-PC

A jury convicted Petitioner, Travis Tate, of second degree murder, attempted voluntary manslaughter, and employing a firearm during the commission of a dangerous felony. Petitioner's convictions were upheld by this Court on direct appeal. *State v. Travis Tate*, No. 2014-02102-CCA-R3-CD, 2016 WL 7664764 (Tenn. Crim. App. May 31, 2016), *no perm. app. filed*. Petitioner timely filed a petition for post-conviction relief. After a hearing, the post-conviction court denied the petition. After reviewing the record, we affirm the judgment of the post-conviction court.

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

TIMOTHY L. EASTER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J. ROSS DYER, JJ., joined.

Bobby Gene Huddleston, Jr., Memphis, Tennessee, for the appellant, Travis Tate.

Herbert H. Slatery III, Attorney General and Reporter; Renee W. Turner, Senior Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

A grand jury indicted Petitioner for one count of first degree murder, one count of attempted first degree murder, and one count of employment of a firearm during the commission of a dangerous felony.

At trial, the following facts were adduced. The deceased victim, Demarcus Smith, owed Petitioner money. The week prior to the shooting, Petitioner sent threatening text messages to Mr. Smith that said, "When I see you and your bitch, I'm going to kill both of you all." Jeremy Fletcher arranged to meet Mr. Smith at a gas station. Upon arrival to the gas station, Mr. Smith did not see Mr. Fletcher but he saw Petitioner. Mr. Smith attempted to avoid the confrontation by driving away from the gas station. Petitioner, in his vehicle, cut Mr. Smith off and blocked Mr. Smith's exit. Petitioner brandished a black handgun. Mr. Smith exited his vehicle, followed shortly by Kevin Miller, who also had a handgun. Mr. Smith asked his girlfriend, Lankea Bell, to give him money. Ms. Bell gave Mr. Smith \$100 from her wallet, and Petitioner "snatched" the money from Mr. Smith. Petitioner then shot Mr. Smith several times, and shot Mr. Miller once. Mr. Smith died at the scene of the shooting.

Witnesses in the area observed Petitioner cut off Mr. Smith and called 9-1-1 before the shooting occurred. Witnesses saw Petitioner fire his gun. Police arrived and saw Petitioner standing over Mr. Smith while holding his gun. Petitioner discarded his weapon and fled the scene. Police apprehended Petitioner a short distance away while he was hiding in a Coca-Cola delivery truck.

Police found two guns at the scene but only one of the weapons had been fired, Petitioner's .45 caliber handgun. The other weapon was a .40 caliber handgun. Phone records show that Mr. Fletcher had conversations with both Petitioner and Mr. Smith just before the incident. Although subpoenaed, Mr. Miller did not appear at the trial. Petitioner chose not to testify.

The jury convicted [Petitioner] of the lesser-included offenses of second degree murder and attempted voluntary manslaughter and also convicted him as charged of employing a firearm during the commission of a dangerous felony. The trial court imposed consecutive sentences of twenty-five years, seven years, and eight years, respectively.

Petitioner filed a timely petition for post-conviction relief alleging ineffective assistance of counsel because; (1) trial counsel failed to meaningfully involve Petitioner in the preparation of the case due to trial counsel's lack of communication with Petitioner; (2) trial counsel fail to advocate for Petitioner according to Petitioner's wishes; (3) trial counsel failed to object to testimony about text messages entered into evidence at trial; and (4) trial counsel made Petitioner feel as though he should not testify about the character and reputation of Mr. Smith and Mr. Miller.

Post-Conviction Hearing

Trial counsel testified that he had been practicing criminal defense law for twenty-four years. He visited Petitioner six or seven times for thirty minutes to an hour each time prior to trial. Trial counsel explained that Petitioner was not pleased that he did not visit with Petitioner more often. Petitioner would become extremely loud and agitated when trial counsel told Petitioner something he did not want to hear.

During trial counsel's visits with Petitioner, they discussed potential defenses, including Petitioner's desire to pursue a self-defense strategy. Given the evidence, the only defense that Petitioner had was self-defense or to present information to the jury so that the jury would convict Petitioner of a lesser-included offense. Trial counsel explained to Petitioner that because Petitioner was a convicted felon in possession of a handgun, the law did not allow a self-defense strategy for Petitioner. Petitioner wanted trial counsel to bring out the fact that the victim had drugs in his car. Trial counsel felt the drugs were irrelevant but raised the issue at trial to appease Petitioner. Trial counsel wanted to argue voluntary manslaughter because there was another gun found at the scene. Trial counsel testified that that Petitioner was, at first, adamant about testifying. Trial counsel had a very difficult time explaining to Petitioner that he could not talk about Mr. Miller's past at trial. Trial counsel asked the trial court to help further explain the law. He felt it necessary because Petitioner would not listen to him. The trial court held a *Momon*¹ hearing and explained to Petitioner that if he started testifying as to the character of Mr. Miller, then it opened the door for the State to bring in Petitioner's character and prior bad acts. Trial counsel believed that it would hurt Petitioner's case if his character became an issue. After the hearing, trial counsel met with Petitioner and explained he could still testify if he chose. Ultimately, Petitioner chose not to testify.

Petitioner sent the deceased victim a text message about a week before the murder saying that Petitioner intended to kill Mr. Smith and Mr. Smith's girlfriend. Testimony at trial indicated that the altercation was about money that Mr. Smith owed Petitioner. Trial counsel explained that he initially objected to testimony regarding the text messages based on hearsay, but then withdrew the objection. He objected because the State no longer had the message itself and was relying on testimony about the message. He admitted that he should have objected on best evidence grounds and lack of authentication.

¹ *Momon v. State*, 18 S.W.3d 152, 162 (Tenn. 1999) (“At any time before conclusion of the proof, defense counsel shall request a hearing, out of the presence of the jury, to inquire of the defendant whether the defendant has made a knowing, voluntary, and intelligent waiver of the right to testify. This hearing shall be placed on the record and shall be in the presence of the trial judge.”).

Trial counsel provided Petitioner with discovery during their second meeting. He gave Petitioner everything but the video because there was no way for Petitioner to view the video in jail. Trial counsel believed that Petitioner viewed the video in the back of the courtroom. Trial counsel did not hire a private investigator because it was not necessary. Trial counsel spoke to the witnesses and knew what their testimony would be. Through cross-examination of other witnesses, trial counsel was successful in showing that Mr. Miller also had a gun during the altercation. Through this additional evidence, and in spite of Petitioner's threats to kill Mr. Smith, trial counsel convinced the jury that this was a case of criminal attempt of voluntary manslaughter against Mr. Miller and second degree murder of Mr. Smith. Petitioner faced a minimum of sixty-one years if he had been convicted as charged and would have received additional time if the sentences were all run consecutively. Petitioner received an effective forty-two-year sentence.

Petitioner was angry with trial counsel because he always felt trial counsel rushed off. He was also unhappy because his fiancée had passed away. Petitioner testified that trial counsel only visited him three times and that he did not respond to Petitioner's phone calls and letters. Petitioner reported trial counsel to the Tennessee Board of Professional Responsibility. Petitioner was upset that trial counsel did not call his brother or father to testify. Petitioner stated that trial counsel should have hired a private investigator. Petitioner also took issue with trial counsel's failure to test the second gun found at the scene for Mr. Smith's fingerprints and failure to investigate the phone records which showed that Petitioner did not call the victims.

On cross-examination, Petitioner acknowledged that there was testimony at trial that Mr. Miller had a gun. Petitioner acknowledged that he had a .45 caliber gun and that all shots fired came from his gun. Petitioner acknowledged that all shell casings found at the scene match his gun. Petitioner was angry after the *Momon* hearing because the judge made him feel uncomfortable. He knew that because he was acting unlawfully, that a self-defense strategy was not available to him. Although he understood that he could not discuss Mr. Miller's or Mr. Smith's prior bad acts at trial, he was still upset that the victims' prior bad acts were not brought up at trial. Petitioner testified that trial counsel should have called Mr. Smith's sister and Demarco Sain, who had sent a text message to Petitioner's brother about information he received from Mr. Miller, to testify at trial.

Petitioner requested additional time to call his brother and father to testify at the post-conviction hearing. Ultimately, neither testified and the post-conviction court denied relief. It is from that denial that Petitioner now appeals.

Analysis

Petitioner argues that he received ineffective assistance of counsel because; (1) trial counsel failed to meaningfully involve Petitioner in the preparation of the case due to trial counsel's lack of communication with Petitioner; (2) trial counsel failed to advocate for Petitioner according to Petitioner's wishes; (3) trial counsel failed to object to testimony about text messages entered into evidence at trial; and (4) trial counsel made Petitioner feel as though he should not testify about the character and reputation of Mr. Smith and Mr. Miller. The State argues that the post-conviction court properly denied relief.

Post-conviction relief is available for any conviction or sentence that 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. In order to prevail in a claim for post-conviction relief, a petitioner must prove his factual allegations by clear and convincing evidence. T.C.A. § 40-30-110(f); *Momon*, 18 S.W.3d at 156. "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998). On appeal, a post-conviction court's findings of fact are conclusive unless the evidence preponderates otherwise. *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006). Accordingly, questions concerning witness credibility, the weight and value to be given to testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction court, and an appellate court may not substitute its own inferences for those drawn by the post-conviction court. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001). However, the post-conviction court's conclusions of law and application of the law to the facts are reviewed under a purely de novo standard, with no presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

Both the Sixth Amendment to the Constitution of the United States and article I, section 9 of the Tennessee Constitution guarantee the right of an accused to the effective assistance of counsel. See *Davidson v. State*, 453 S.W.3d 386, 392-93 (Tenn. 2014). In order to sustain a claim of ineffective assistance of counsel, a petitioner must demonstrate that counsel's representation fell below the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). Under the two prong test established by *Strickland v. Washington*, 466 U.S. 668, 687 (1984), a petitioner must prove that counsel's performance was deficient and that the deficiency prejudiced the defense. 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). Because a petitioner must establish both elements in order to prevail on a claim of ineffective assistance of counsel, "failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." *Henley v. State*, 960 S.W.2d 572, 580 (Tenn. 1997). "Indeed, a court need

not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.” *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 697).

The test for deficient performance is whether counsel’s acts or omissions fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688; *Henley*, 960 S.W.2d at 579. This Court must evaluate the questionable conduct from the attorney’s perspective at the time, *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982), and “should indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance,” *State v. Burns*, 6 S.W.3d 453, 462 (Tenn. 1999).

Even if a petitioner shows that counsel’s representation was deficient, the petitioner must also satisfy the prejudice prong of the *Strickland* test in order to obtain relief. The question is “whether counsel’s deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair.” *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993). A petitioner must show that there is a reasonable probability “sufficient to undermine confidence in the outcome” that, “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Burns*, 6 S.W.3d at 463 (quoting *Strickland*, 466 U.S. at 694).

A. Lack of Communication

Petitioner argues that trial counsel was ineffective by failing to meaningfully involve Petitioner in trial preparation because of lack of communication. The State argues that trial counsel was not ineffective.

During the post-conviction hearing, both Petitioner and trial counsel testified that they had multiple face-to-face meetings and that Petitioner was given his discovery. The post-conviction court found that “Petitioner has not attempted to establish any way in which better communication with his trial counsel or better involvement of Petitioner in trial preparation could have altered the outcome of the case.” The evidence does not preponderate against the post-conviction court’s finding. Because Petitioner failed to put forth any proof with regard to this issue at the hearing, he failed to prove by clear and convincing evidence trial counsel was ineffective. Petitioner is not entitled to relief.

B. Advocate

Petitioner argues that trial counsel was ineffective in failing to advocate according to Petitioner’s wishes. The State argues that trial counsel was not ineffective.

The post-conviction court found that Petitioner does not “specifically [identify] what ‘Petitioner’s wishes’ were that his trial counsel failed to advocate.” Petitioner argues that he and trial counsel discussed “a self-defense argument but that [trial counsel] failed to use any of the argument during trial.” Trial counsel testified that he explained to Petitioner that a self-defense strategy was not available to Petitioner because Petitioner illegally possessed a handgun. Trial counsel testified that, at the behest of Petitioner, he entered information about the drugs that were in Mr. Smith’s car at the time of the murder into evidence. Petitioner further testified that he wanted trial counsel to call other witnesses at trial. However, Petitioner did not call any further witnesses to testify at the post-conviction hearing. “To succeed on a claim of ineffective assistance of counsel for failure to call a witness at trial, a post-conviction petitioner should present that witness at the post-conviction hearing.” *Plyant v. State*, 362 S.W.3d 853, 869 (Tenn. 2008) (internal citations omitted). While Petitioner does not specifically define his “wishes”, it is clear from the record as to what some of his “wishes” were – more than anything, a better outcome. However, Petitioner fails to prove by clear and convincing evidence trial counsel was ineffective. Trial counsel did obtain a much better outcome for Petitioner than what Petitioner was facing before trial. Petitioner is not entitled to relief.

C. Objection

Petitioner argues that trial counsel was ineffective for failing to object to testimony concerning a text message. The State argues that Petitioner has failed to prove that he was prejudiced for the lack of trial counsel’s objection.

At the post-conviction hearing, trial counsel conceded that he should have probably objected to the testimony under the best evidence rule or due to lack of proper authentication. However, the post-conviction court found that “no effort was made during the post-conviction hearing to show that if such an objection had been made it would have resulted in the exclusion of the evidence. In fact, had such an objection been made at trial, there are many ways in which the source of the text message might have been authenticated.” The evidence does not preponderate against the post-conviction courts findings. Petitioner has failed to show that he was prejudiced by trial counsel’s lack of objection. Petitioner is not entitled to relief.

D. Petitioner’s Testimony at Trial

Petitioner argues that trial counsel was ineffective by making Petitioner “feel as though he should not testify about the character and reputation of [Mr.] Smith and [Mr.] Miller.” The State argues that trial counsel was not ineffective.

At the post-conviction hearing, trial counsel testified that he had spoken to Petitioner about testifying in his own defense. He stated that Petitioner would not listen to him, so he asked the trial court to explain the law to Petitioner. During the *Momon* hearing, the trial court thoroughly explained that if Petitioner testified about Mr. Miller's character and prior bad acts, then the State would be allowed to pursue evidence about Petitioner's character and prior bad acts. After the *Momon* hearing, the trial court gave Petitioner thirty minutes to discuss the matter further with trial counsel. Trial counsel explained that Petitioner could still testify if he did not mention the character of Mr. Miller. Ultimately, Petitioner chose not to testify. The post-conviction court found that "Petitioner has failed to establish either deficient performance or prejudice." The evidence does not preponderate against the post-conviction court's findings. Petitioner fails to prove by clear and convincing evidence trial counsel was ineffective. Petitioner is not entitled to relief.

Conclusion

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

TIMOTHY L. EASTER, JUDGE