

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 3, 2019

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Clerk of the
Appellate Courts

VERNON WALTON v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Shelby County
No. 14-01185 J. Robert Carter, Jr., Judge**

No. W2019-00379-CCA-R3-PC

The Petitioner, Vernon Walton, appeals from the Shelby County Criminal Court's denial of his petition for post-conviction relief from his December 5, 2016 guilty plea conviction of attempted first degree murder, for which he is serving a sixteen-year sentence. He contends that the post-conviction court erred in denying relief based upon his claims of ineffective assistance of counsel and entry of an involuntary guilty plea. We affirm the judgment of the post-conviction court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and J. ROSS DYER, JJ., joined.

Bob Huddleston, Memphis, Tennessee, for the Appellant, Vernon Walton.

Herbert H. Slatery III, Attorney General and Reporter; Jonathan H. Wardle, Assistant Attorney General; Amy P. Weirich, District Attorney General; Jamal Blanchard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Petitioner was indicted for attempted first degree murder, employing a firearm during the commission of a dangerous felony, two counts of aggravated assault, and reckless endangerment. He was represented initially by retained counsel, who will be referred to as original trial counsel. He was later given appointed counsel, who will be referred to as trial counsel. The transcript of the guilty plea hearing reflects that the Defendant, who was armed, engaged in a vehicular chase of Monique Smith and attempted to run her off the road. She sought help from an armed security guard at a football stadium. The Petitioner approached her car and shot her nine times. He pointed his weapon at the security guard and fled. The victim spent about one month in a hospital

and was still undergoing medical treatment and had two projectiles lodged in her body at the time of the guilty plea hearing.

The Defendant entered into his guilty plea agreement on the day of the trial. The trial court advised him of his rights. The Petitioner acknowledged the rights and stated he wanted to waive them and plead guilty. The court advised him of the sentencing range for the charged offenses, and the Defendant acknowledged his understanding of the plea agreement and accompanying sixteen-year sentence as a Range I offender with 85% release eligibility. The Defendant stated that no one had threatened or forced him to enter into the plea agreement, that he had discussed the guilty plea with trial counsel, and that he was personally making the decision to plead guilty. He acknowledged that he had spoken with his father about the case, as well. He said he was taking his medication as prescribed and agreed he understood the proceedings. He said, “[Trial counsel] was saying something about a post-conviction, I don’t know what that is.” The court advised the Petitioner of the opportunity to seek post-conviction relief within one year of the judgment’s becoming final if constitutional deficiencies existed with regard to his case, such as “whether the plea was done inappropriate[ly] or a new law comes out and changes something or whether you have a complaint about the representation of one of your lawyers[.]” The Petitioner acknowledged, “Okay,” and stated he did not have any further questions. He agreed that he had advised counsel of everything he knew about the case and that counsel had done “everything [the Petitioner had] asked him to within reason.”

The trial court found that the Petitioner was entering his plea freely and voluntarily and that he had waived his rights intelligently, knowingly, and without threats or coercion. The court accepted the Petitioner’s guilty plea for attempted first degree murder, dismissed the remaining charges, and imposed the agreed-upon sentence.

Thereafter, the Petitioner filed a pro se post-conviction petition alleging that his guilty plea had not been freely, intelligently, and voluntarily entered due to his mental incompetency at the time of the guilty plea. Post-conviction counsel was appointed and filed an amended petition which alleged fifteen factual bases of ineffective assistance of original trial counsel and trial counsel and also alleged that the Petitioner’s guilty plea had been involuntary. Thirteen of the ineffective assistance of counsel claims related to his attorneys’ alleged failures to investigate issues and obtain evidence related to the Petitioner’s mental health and to communicate with the Petitioner about the effects of his prescribed medication on his actions on the day of the crime and lack of memory of the relevant events. The remaining two factual bases related to trial counsel’s alleged failure to involve the Petitioner and his family meaningfully in the preparation of the defense and to trial counsel’s alleged failure to communicate with the Petitioner regarding the risks and benefits of pleading guilty as compared with proceeding to a trial.

At the hearing, post-conviction counsel advised the post-conviction court that he had spoken with the Petitioner that day about the need for psychiatric expert testimony in order to demonstrate prejudice. Counsel said he had spoken to the Petitioner's mother "a few times prior to this" about the issue but that she had stated she was unable to provide funds for an expert. Counsel stated that the Petitioner thought he might be able to raise the funds for an expert within six weeks. The court noted that the case had been pending for one year and said that it would not delay the hearing but that it would take the matter under advisement and allow the Petitioner the opportunity to present additional evidence at a later date.

Trial counsel testified that he was appointed to represent the Petitioner "quite sometime" after the Petitioner had been indicted. Counsel said he was unsuccessful in reaching original trial counsel, despite several attempts. He said he had the discovery information and that he saw information about at least one psychiatric evaluation, which he agreed had been obtained by original trial counsel. He agreed that he attempted to get the Petitioner's medical records from the Veterans Administration (VA) but that the VA never provided the records. He thought he spoke with one of the Petitioner's VA doctors but did not know if he requested the records in writing. He agreed he filed a motion for funding for a private investigator. Counsel said that once he realized that the Petitioner had already undergone a mental evaluation, he focused on an investigation of the Petitioner's guilt or innocence and to see if there was a way to negotiate a better plea offer. Counsel said he thought the Petitioner's family had been misled prior to his representation about the viability of a mental health defense. In counsel's opinion, a defense based upon the Petitioner's mental health was not "going to save the day" after the Petitioner had been found competent for trial. Counsel noted that he had reviewed the findings of an original mental health evaluation and a reevaluation. He said the reevaluation found that the Petitioner was competent to stand trial and that the Petitioner did not qualify for a diminished capacity defense.

Trial counsel testified that the Petitioner and his family mentioned many times that the Petitioner suffered from Post-Traumatic Stress Disorder (PTSD) and that they would like to have a private psychiatric evaluation performed. Counsel said he contacted at least two psychiatrists and determined that their fees were approximately \$2500 down payment and \$200 per hour. Counsel said he provided this information to the Petitioner's parents and that "there was no follow through on it," which he thought had been due to financial reasons. Counsel said he spoke to one of the mental health experts about the Petitioner's mental health issues.

Trial counsel did not think he requested funds for a psychiatric expert. He thought such a request would have been denied. He could not recall whether original trial counsel had made such a request. He agreed he did not learn the contents of the Petitioner's VA

medical records and said he had hoped they would show that the Petitioner suffered from PTSD. The Petitioner's VA medical records were received as an exhibit.

Trial counsel testified that he visited the Petitioner "numerous times" before the guilty plea. He estimated they met twelve to twenty times. He agreed the Petitioner told him that the Petitioner had been taking Ambien at the time of the offense. Counsel agreed he researched the drug's side effects. A document listing the side effects was received as an exhibit.

Trial counsel testified that he had the case for about six months before it was resolved with the plea agreement. In his opinion, the Petitioner was better served by accepting the sixteen-year offer than by going to trial. In counsel's opinion, the Petitioner would be found guilty at a trial and would receive a sentence of at least thirty-two years. He noted the multiple gunshot wounds sustained by the victim and said she had been fortunate to have survived. He noted that the other charges were dismissed pursuant to the plea agreement, one of which was a firearm charge that required 100% service of a sentence.

When asked if would seek a psychiatric expert if he "had to do this all over again." trial counsel testified, "Possibly," but he noted that the psychiatric professionals with whom he had spoken said that even if the Petitioner presented evidence of PTSD, it would not mitigate the fact that the Petitioner had, in their opinion, been capable of forming the mens rea for the crime. Thus, counsel concluded that any evidence a psychiatric expert might offer would not have made a difference at a trial. He did not recall asking the psychiatrists with whom he spoke about any drug interactions between Ambien and an SSRI antidepressant.

Trial counsel testified that he had been aware of the Petitioner's mental health diagnoses and said he would never have a client enter a guilty plea if counsel thought the client did not know what he was doing. Counsel said he knew of the medications the Petitioner took because the Petitioner and he had discussed them.

Trial counsel testified that the Petitioner had been pleasant in their dealings and that the Petitioner's family, though upset at times about the Petitioner's predicament, had been "respectful and relatively easy to deal with." He said he met with the Petitioner's family in his office and in the courtroom. He agreed that, after the case was over, he assisted the Petitioner's family in recovering \$5,000 that had been seized from the Petitioner when he was arrested.

The Petitioner testified that he was diagnosed with PTSD shortly after he entered the military in 2006. He said he also had been diagnosed at a VA hospital around 2008 with antisocial personality disorder, bipolar disorder with schizophrenic type one, anxiety

disorder, major depressive disorder, and insomnia. He said he sought counseling at the VA hospital, where he also worked, to help with the symptoms of his conditions. He said he saw a psychologist every sixty to ninety days and took Paxil, Citalopram, and Ambien. He said he had been advised of the side effects by a VA pharmacist. When asked if he took his medications as prescribed, he said, "For the most part, yes."

Regarding the day of the offense, the Petitioner testified that he had a "shot or two" of Disarrano or Crown Royal with his father and had taken his medication for PTSD, depression, and anxiety. He recalled taking Paxil. He said he took Ambien around 5:00 p.m. because he had not slept for three to four days and was going to spend the night at his father's house.

The Petitioner testified that he understood the meaning of his guilty plea at the time he submitted it. He said he did not think his plea was voluntary because he did not feel like he had a choice. He disputed that trial counsel advised him that he would receive a sentence in the range of thirty years if he went to trial and said counsel told him he would have to serve "50 something years" if he did not accept the plea offer. He said that his "back [was] against the wall" and that counsel told him he was "not going to win." The Petitioner said he did not want sixteen years or fifty years but that counsel kept saying the Petitioner would not win. The Petitioner said that counsel kept saying he could not defend the Petitioner and that they did not review witnesses or strategy. The Petitioner disagreed that he met with counsel twelve to twenty times and said they met about four to eight times.

The Petitioner testified that, in his opinion, trial counsel did not investigate the case. The Petitioner said counsel did not obtain the VA records and never asked the Petitioner to sign a release in order for counsel to obtain them.

The Petitioner testified that he would have preferred a trial "because I would have known my appeal rights" and that he had not known he waived the right to an appeal by pleading guilty. He acknowledged, however, that the trial judge had advised him during the plea hearing of the waiver of appeal but said he had been "dazed out" because he was about to go to the penitentiary. He agreed that he had been properly medicated at the plea hearing but said the medications had side effects.

The Petitioner agreed that his original trial counsel had obtained a mental evaluation and that the conclusion had been that no evidence existed to support a diminished capacity defense. He said the results showed, however, that he was mentally ill and needed to continue treatment. He said he had told the doctors who conducted the mental evaluation, his original trial counsel, and trial counsel about the alcohol and medications he had ingested on the day of the crime.

The post-conviction court observed that the Petitioner previously had been represented by original trial counsel for over two years and that the court had authorized funds “for a variety of evaluations and things” at original trial counsel’s request. The court stated that it would allow the Petitioner time to obtain an expert and that it would defer its ruling until January 4, 2019. The hearing occurred on November 15, 2018.

No additional evidence was submitted by the Petitioner. In its February 1, 2019 order denying relief, the post-conviction court found, based upon its file, that the Petitioner’s previous trial counsel had obtained a continuance in order for him to obtain the Petitioner’s VA medical records and to provide them to West Tennessee Forensic Services, the entity responsible for the mental health evaluation. The court found that letters from West Tennessee Forensic Services reflected that the evaluators had reviewed the Petitioner’s VA records.

The post-conviction court found that trial counsel had investigated the matter and determined that a mental health defense was not viable. Therefore, counsel had obtained funding for a private investigator in order to have information necessary to obtain the best possible resolution for the Petitioner. The court found that the Petitioner had failed to offer expert evidence to support his claim that a viable defense existed relative to his mental health or prescription medication usage. The court found that the Petitioner failed to show any evidence which could have been used to obtain a more favorable outcome in the conviction proceedings. The court also found that the Petitioner’s claim that he had “no choice” but to accept the plea offer and plead guilty was unsupported by the evidence. The court found that the Petitioner made the choice to accept the offer and plead guilty in order to avoid the possibility of a significantly longer sentence if he were found guilty at a trial. The court concluded that the Petitioner’s guilty plea had been knowingly and voluntarily entered. Thus, the court denied post-conviction relief.

Post-conviction relief is available “when the 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.” T.C.A. § 40-30-103 (2018). A petitioner has the burden of proving his factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f) (2018).

A post-conviction court’s findings of fact are binding on appeal, and this court must defer to them “unless the evidence in the record preponderates against those findings.” *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *see Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court’s application of law to its factual findings is subject to a de novo standard of review without a presumption of correctness. *Fields*, 40 S.W.3d at 457-58.

I

Ineffective Assistance of Counsel

The Petitioner contends that original trial counsel and trial counsel provided ineffective assistance of counsel in the conviction proceedings. The State counters that the post-conviction court properly denied relief. We agree with the State.

To establish a post-conviction claim of the ineffective assistance of counsel in violation of the Sixth Amendment, a petitioner has the burden of proving that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see *Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). The Tennessee Supreme Court has applied the *Strickland* standard to an accused's right to counsel under article I, section 9 of the Tennessee Constitution. See *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner must satisfy both prongs of the *Strickland* test in order to prevail in an ineffective assistance of counsel claim. *Henley*, 960 S.W.2d at 580. “[F]ailure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.” *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). To establish the performance prong, a petitioner must show that “the advice given, or the services rendered . . . are [not] within the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); see *Strickland*, 466 U.S. at 690. The post-conviction court must determine if these acts or omissions, viewed in light of all of the circumstances, fell “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. A petitioner “is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision.” *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); see *Pylant v. State*, 263 S.W.3d 854, 874 (Tenn. 2008). This deference, however, only applies “if the choices are informed . . . based upon adequate preparation.” *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). To establish the prejudice prong, a 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.” *Strickland*, 466 U.S. at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

The Petitioner contends that his original trial counsel provided ineffective assistance of counsel by failing to file a notice of the intent to rely upon a mental health defense, failing to obtain funding for a defense psychiatric evaluation, and “failing to petition the court to request a recommendation of West Tennessee Forensic Services to determine if in-patient evaluation was needed.” Although these allegations were raised in the amended petition, the Petitioner did not present evidence at the hearing relative to the

performance of his original trial counsel. Original trial counsel did not testify at the hearing, and the Petitioner's testimony focused on his complaints relative to successor counsel's performance. Because the Petitioner failed to pursue these allegations by offering evidence to support them at the hearing, the post-conviction court had no obligation to address them in its order, other than by denying post-conviction relief. *See Black v. State*, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). In the absence of proof to support the allegations, the post-conviction court did not err in denying relief based upon ineffective assistance of counsel allegations related to original trial counsel.

The Petitioner contends, as well, that trial counsel provided ineffective assistance of counsel in several respects related to counsel's not obtaining a defense psychiatric expert and not advancing a defense based upon the Petitioner's mental health and prescription medication usage. The record reflects that counsel determined, at the outset of his representation, that the Petitioner had undergone at least one psychiatric evaluation, which did not support reliance upon a mental health defense. Counsel testified that the Petitioner and his family seemed to have confidence in a mental health defense, despite the lack of evidence to support such a defense. Counsel said he investigated the fees for a defense psychiatric expert and provided the information to the Petitioner and his family, but they did not provide the necessary funds. Counsel said he did not seek funds from the trial court because he did not think funding would be approved. Instead, counsel obtained court funding for an investigator in order to have the information necessary for obtaining the most favorable outcome for the Petitioner. At the hearing, the Petitioner did not offer expert psychiatric testimony to show that a mental health defense would have been a viable option at a trial or that his prescription medication usage on the day of the offense had any effect on his ability to form the mens rea for the crime. *See id.* The record supports the post-conviction court's determination that the Petitioner failed to establish deficient performance and prejudice relative counsel's informed decision not to pursue a mental health defense. Thus, the court did not err in denying relief on the Petitioner's ineffective assistance of counsel claims relative to trial counsel.

II

Involuntary Guilty Plea

The Petitioner contends that his guilty plea was not knowingly and voluntarily entered because he did not understand the nature and consequences of the plea and because he received the ineffective assistance of counsel, which left him with no meaningful alternative but to plead guilty in order to avoid a lengthy sentence. The State responds that the post-conviction court properly denied this claim. We agree with the State.

The Supreme Court has concluded that a guilty plea must represent a “voluntary and intelligent choice among the alternative courses of action open to the defendant.” *North Carolina v. Alford*, 400 U.S. 25, 31 (1970). A trial court must examine in detail “the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence.” *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969); see *Blankenship v. State*, 858 S.W.2d 897, 904 (Tenn. 1993). Appellate courts examine the totality of circumstances when determining whether a guilty plea was voluntarily and knowingly entered. *State v. Turner*, 919 S.W.2d 346, 353 (Tenn. Crim. App. 1995). A guilty plea is not voluntary if it is the result of “[i]gnorance, incomprehension, coercion, terror, inducements, [or] subtle or blatant threats.” *Boykin*, 395 U.S. at 242-43; see *Blankenship*, 858 S.W.2d at 904. A petitioner’s representations and statements under oath that his guilty plea is knowing and voluntary create “a formidable barrier in any subsequent collateral proceedings [because] [s]olemn declarations . . . carry a strong presumption of verity.” *Blackledge v. Allison*, 431 U.S. 63, 74 (1977).

The Petitioner argues that his plea was involuntary because (1) his mental health impaired his ability to understand the consequences of the guilty plea, (2) he was coerced by undue pressure from trial counsel to plead guilty, and (3) his plea was involuntary because he received the ineffective assistance of counsel. The record of the guilty plea hearing reflects that the trial court advised the Petitioner of his rights related to a trial and of the fact that the Petitioner would waive these rights if he pleaded guilty. The Petitioner acknowledged that he was pleading guilty of his own accord, that trial counsel had consulted with him, that the decision to plead guilty belonged to the Petitioner, and that the Petitioner was not coerced into the guilty plea. The Petitioner stated that he understood his guilty plea and its consequences and that he was taking his medication as prescribed. He was afforded the opportunity to ask questions and asked a question about the nature of post-conviction proceedings, which the court answered.

At the post-conviction hearing, the Petitioner said that he understood the guilty plea at the time he entered it but that he felt like he had no option but to plead guilty because trial counsel advised him he would face the possibility of a much longer sentence if he went to trial than if he accepted the sixteen-year plea offer. The post-conviction court rejected the Petitioner’s claim that he had no choice and found, instead, that the Petitioner knowingly chose to plead guilty in order to minimize the sentence he would have to serve. The record supports the court’s determination. The Petitioner was faced with overwhelming evidence of his guilt of several charges, which carried the possibility of a significant prison sentence. Counsel advised the Petitioner of the likelihood of conviction and a lengthy sentence. No mental health defense could be supported based upon the findings of the court-ordered psychiatric evaluation, and no funds were available for a defense psychiatric evaluation. The Petitioner elected, given the circumstances in which he found himself, to plead guilty and receive a sixteen-year

sentence for attempted first degree murder and dismissal of the additional charges. The Petitioner is not entitled to relief on this basis.

In consideration of the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

ROBERT H. MONTGOMERY, JR., JUDGE