IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs December 17, 2024

JAMES THEODORE MENARD v. STATE OF TENNESSEE

Appeal from the Criminal Court for Knox County
No. 124347 Steven Wayne Sword, Judge

No. E2024-00572-CCA-R3-PC

A Knox County jury convicted the Petitioner, James Theodore Menard, of one count of rape of a child, one count of exhibition of pictures depicting sexual conduct harmful to a minor, and two counts of aggravated sexual battery. The trial court imposed an effective sentence of forty-two years in the Tennessee Department of Correction. On appeal, this court affirmed the trial court, and our supreme court denied review. *State v. Menard*, No. E2021-00164-CCA-R3-CD, 2022 WL 1498767, at *1 (Tenn. Crim. App. May. 12, 2022), *perm. app. denied* (Tenn. Sept. 9, 2022). The Petitioner filed for post-conviction relief, alleging ineffective assistance of counsel. After a hearing, the post-conviction court denied relief. On appeal, the Petitioner maintains that his attorney was ineffective for failing to disclose a plea offer and failing to review discovery. After review, we affirm the post-conviction court's judgment.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which J. ROSS DYER, J., and D. KELLY THOMAS, JR., S.J., joined.

Amber Spelman, Knoxville, Tennessee, for the appellant, James Theodore Menard.

Jonathan Skrmetti, Attorney General and Reporter; Ronald L. Coleman, Senior Assistant Attorney General; Charme P. Allen, District Attorney General; and Heather N. Good, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION
I. Facts

At the Petitioner's trial, the State presented evidence that the Defendant had sexually abused his girlfriend's seven-year-old daughter for over a year. After hearing the evidence at trial, a Knox County jury convicted the Petitioner of one count of rape of a child, one

count of exhibition of pictures depicting sexual conduct harmful to a minor, and two counts of aggravated sexual battery. The trial court ordered an effective forty-two-year sentence in confinement. On appeal, this court affirmed the trial court's judgments. *Menard*, 2022 WL 1498767, at *1.

The Petitioner filed a timely petition seeking post-conviction relief based upon ineffective assistance of counsel. As relevant to this appeal, the Petitioner alleged that his attorney ("Counsel") failed to convey a settlement offer from the State and failed to review the State's discovery with him. The trial court held a hearing on the petition, and the parties presented the following evidence:

The Petitioner testified that Counsel met with him only three times during his 329 day "lock[ ] up." About discovery, Counsel told the Petitioner that there was not any physical evidence. According to the Petitioner, he and Counsel never spoke about his "case [or] the evidence." The Petitioner was unaware of Counsel's past experience with cases involving sexual assault or rape. When the Petitioner asked about the defense strategy at trial, Counsel responded, "I'm not your lackey."

The Petitioner denied that he was allowed input in the trial plan for the defense. He did, however, provide Counsel with the names of eight potential witnesses. The Petitioner denied that Counsel reviewed discovery with him and reiterated that Counsel never discussed the charges or a defense strategy with him. The Petitioner recalled that Counsel mentioned a "Child Help interview" that he planned to provide to the Petitioner, but Counsel never did so.

The Petitioner testified that he never viewed the video recording of the victim's interview or the recording of his interview with the police detective. The Petitioner stated that the first time the Petitioner saw that video was at trial. Further, he said that Counsel never conveyed any plea offers to the Petitioner.

On cross-examination, the Petitioner explained that he had not previously raised his complaint that Counsel failed to convey the State's offer to him because he believed it was an issue to be raised as an ineffective assistance of counsel claim. The Petitioner confirmed that he provided Counsel with contact information for each of the eight witnesses. The Petitioner named Crystal Moore, Crystal Strange, Zachary Spurlock, Charlie Ford, Vickie Ford, Samantha Ford, and Leslie Brown, as seven of the witnesses about whom he had provided information to Counsel. He stated that these witnesses had all heard the victim state that she was "lying to get attention." The Petitioner agreed that, at trial, the State and Counsel stipulated to the fact that the victim had previously accused the Petitioner of sexual contact and then recanted.

Counsel testified that he represented the Petitioner at trial. He worked at the Public Defender's officer for thirty years and, at the time of the hearing, was retired. In preparation for the Defendant's case, he requested discovery from the State. He recalled that there was not much discovery as the case "essentially boiled down to the statements of the alleged victim." There were two video recordings of the police interview of the Petitioner and a forensic interview with the victim. He reviewed the discovery with the Petitioner during their meetings but did not show him the forensic interview. He could not recall whether he had reviewed the police interview with the Petitioner.

Counsel testified that he discussed the trial strategy with the Petitioner on several occasions. Counsel confirmed that he received plea offers from the State; however, the Petitioner "made it clear" that he would not plead guilty. The first offer from the State was the minimum sentence for child rape. The State made a second offer in October, shortly before trial. This offer was twelve years for a guilty plea to aggravated sexual battery. Counsel believed this to be "a pretty good result" because the State agreed that the Petitioner could enter a best interest plea pursuant to the second offer. He discussed it with the Petitioner, and the Petitioner asked for time to think it over. Counsel returned the next day and they discussed the offer again. Ultimately, the Petitioner rejected the second offer. Counsel made counteroffers on the Petitioner's behalf but was unable to resolve the case.

Counsel testified that he could not recall how many times he met with the Petitioner, but he was certain it was more than three times.

On cross-examination, Counsel testified that he had tried more than twenty cases involving child rape allegations and that, in many of those cases, there was no physical evidence. Counsel confirmed that the prosecutor had to request permission from the District Attorney to allow the Petitioner to enter a best interest plea as part of the second settlement offer.

Counsel agreed that the case was continued from September 27 to October 11, 2019, to extend the plea deadline. On October 11, Counsel returned to court to confirm the November 18, 2019 trial date because the Petitioner had rejected the State's second offer.

Post-conviction counsel re-called the Petitioner, and the Petitioner reiterated that Counsel never conveyed an offer of settlement from the State. He stated that he would have "jumped on" an offer to serve a twelve-year sentence pursuant to a best interest plea. He had no recollection of a settlement offer being discussed at either the September or October hearings in his case.

In a subsequent written order, the post-conviction court denied relief. It is from this judgment that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner maintains that his attorney was ineffective for failing to disclose a plea offer and failing to review the discovery. The State maintains that the Petitioner failed to show that Counsel was deficient or that he was prejudiced by any alleged deficiency. We agree with the State.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

> First, the [petitioner] 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 [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction [ ] resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984); *see also State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In post-conviction proceedings, the petitioner has the burden of proving the allegations of fact by clear and convincing evidence. T.C.A. § 40-30-110(f). In order for evidence to be clear and convincing, it must eliminate any "serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *State v. Sexton*, 368 S.W.3d 371, 404 (Tenn. 2012). An ineffective assistance of counsel claim is a mixed question of law and fact. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). A post-conviction court's findings of fact are reviewed de novo with a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001) (citing T.R.A.P. 13(d)). A post-conviction court's conclusions of law are reviewed under a pure de novo standard with no presumption of correctness. *Id.* Questions concerning the credibility of witnesses and the weight and value of their testimony are within the trial court's province. *Henley v. State*, 960 S.W.2d 572, 579 (Tenn.1997).

Ineffective assistance of counsel claims require this Court to determine whether the advice given or services rendered by the attorney are within the range of competence

demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, "a petitioner must show that counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, considering all relevant circumstances. *Strickland*, 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court should avoid the "distorting effects of hindsight" and "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 689-90. In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). "'The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation.'" *House*, 44 S.W.3d at 515 (quoting *Goad*, 938 S.W.2d at 369).

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the Strickland test by demonstrating "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; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

A. Failure to Disclose Plea Offers

The Petitioner argues that Counsel was ineffective in failing to disclose plea offers made by the State. In the written order denying relief, the post-conviction court made the following findings:

> Attorneys have a duty to promptly communicate and explain any plea offers extended by the prosecution. *Nesbit v. State*, 452 S.W.3d 779, 800 (Tenn. 2014). Trial counsel must provide the defendant "with competent and fully informed advice, including an analysis of the risks that the [defendant] would face in proceeding to trial." *Nesbit*, 452 S.W.3d at 800 (quoting *Burt v. Titlow*, 571 U.S. 12, 25 (2013). An evaluation of counsel's performance in advising a defendant whether to accept or reject a plea offer "depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." *McMann v. Richardson*, 397 U.S. 759, 771 (1970).
>
> The question in this case is not the advice given on the plea offer, but whether or not the offer was ever presented to the Petitioner. As stated above in the findings of fact, the court finds [Counsel] credible in his testimony that he discussed multiple plea offers with the Petitioner. He recalled significant details about their discussions, particularly that he was able to go all the way to the elected DA to get the State to agree to allowing the Petitioner to enter a best interests plea. The court does not find the Petitioner credible when he states he was not presented any plea offer. Therefore, the court finds that the Petitioner has failed to establish that [Counsel] was deficient in this area.

The evidence does not preponderate against the trial court's findings. The Petitioner testified that Counsel never conveyed any offers to him; however, the hearing dates that reflect a continuance for further plea negotiations stand in contradiction. Counsel testified that he worked with the prosecutor on two settlement offers. As to the first settlement offer, the Petitioner made clear he would not enter a guilty plea to the charges. On the second offer, Counsel worked with the State to get the District Attorney's approval for an agreement that allowed the Petitioner to enter a best interest plea to a reduced sentence of twelve years. Counsel testified that, after some consideration, the Petitioner declined the second offer, and the record of the hearing dates support Counsel's testimony of the events. The post-conviction court found Counsel credible. Questions concerning credibility are within the sound discretion of the post-conviction court. *Henley*, 960 S.W.2d at 579. Accordingly, we conclude that the Petitioner has failed to show that Counsel was deficient in this respect. The Petitioner is not entitled to relief as to this issue.

B. Discovery

The Petitioner also asserts that Counsel failed to review the State's discovery with him. About this issue, the post-conviction court found:

> [Counsel] testified that there was not much discovery provided other than the forensic interview and the Petitioner's statement. He could not remember if he showed the video of the forensic interview to [the Petitioner] but he did discuss the discovery with him. [The Petitioner] testified that he didn't see any discovery. In the absence of proof to the contrary, the court will assume that [Counsel] did not go over the forensic interview prior to trial. For the sake of argument, the court will deem this deficient performance. The court will examine the prejudice prong.
>
> The court finds that [the Petitioner] had failed to show how [Counsel]'s failure to show the forensic interview to him pretrial may have caused him prejudice. [Counsel] certainly discussed the forensic interview with [the Petitioner]. The inconsistencies and recantations were central to the defense. It is reasonable to assume that [the Petitioner] was aware of what he said to the police. There is no evidence to support a finding that the defense would have been different or the result of the trial would have been different had [Counsel] shown the video of the forensic interview to [the Petitioner]. Therefore, the court finds that the Petitioner has failed to establish the prejudice prong of ineffective assistance of counsel.

The evidence does not preponderate against the post-conviction court's findings. Even assuming deficient performance as to Counsel's failure to show the Petitioner the video, the Petitioner knew that the victim's recantations were a focus of the defense strategy at trial. The Petitioner also testified that he was aware of the victim's recantations as it related to the stipulation at trial. Moreover, the Petitioner offered no proof at the post-conviction hearing regarding the prejudice prong and how his viewing the video would have affected the outcome at trial. Accordingly, we conclude that the Petitioner failed to establish prejudice. The Petitioner is not entitled to relief as to this issue.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we affirm the post-conviction court's judgment.

ROBERT W. WEDEMEYER, JUDGE