

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs August 2, 2022

FILED 08/16/2022 Clerk of the Appellate Courts
--

ERIC DATES v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 09-07729 Lee V. Coffee, Judge

No. W2021-01464-CCA-R3-PC

The Petitioner, Eric Dates, sought post-conviction relief from his conviction of driving under the influence (“DUI”), for which he received a sentence of eleven months, twenty-nine days on probation with service of forty-eight hours in confinement. Relevant to this appeal, he alleged that trial counsel was ineffective in his advice concerning a plea offer the Petitioner rejected prior to his trial. Following a hearing, the post-conviction court denied the petition, and the Petitioner appeals. After review, we affirm the judgment of the post-conviction court.

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

JOHN EVERETT WILLIAMS, P.J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and TIMOTHY L. EASTER, JJ., joined.

Joseph A. McClusky (on appeal), Memphis, Tennessee, and Josie Holland (at hearing), Memphis, Tennessee, for the appellant, Eric Dates.

Herbert H. Slatery III, Attorney General and Reporter; Katherine C. Redding, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Meagan Fowler, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL AND PROCEDURAL HISTORY

The Petitioner was charged with DUI, reckless driving, and possession of a handgun while under the influence after law enforcement pulled him over and discovered

that he was intoxicated and possessed a handgun. *State v. Eric Dates*, No. W2012-01030-CCA-R3-CD, 2013 WL 12181752, at *1-2 (Tenn. Crim. App. Sept. 6, 2013), *perm. app. denied* (Tenn. Jan. 14, 2014). The Petitioner refused to comply with field sobriety testing, and he was arrested. *Id.* at *5. The jury convicted the Petitioner of DUI but acquitted him of reckless driving and possession of a handgun while under the influence. *Id.* at *9. The trial court found that the Petitioner violated the implied consent law. *Id.* The Petitioner was sentenced to eleven months, twenty-nine days on probation with service of forty-eight hours in confinement. *Id.* On appeal, the Petitioner challenged the stop of his vehicle and the sufficiency of the evidence, and a panel of this court affirmed the Petitioner's convictions. *Id.* at *11.

Post-Conviction Proceedings

On January 13, 2015, the Petitioner filed a petition for post-conviction relief by counsel, alleging among other claims not maintained on appeal that trial counsel was ineffective in advising the Petitioner regarding the State's pretrial plea offer. The post-conviction court dismissed the petition on the ground that the Petitioner's sentence had expired and that he was barred from seeking post-conviction relief as a result. On appeal, this court reversed the post-conviction court's decision because the collateral consequences of the Petitioner's misdemeanor conviction continued to impose a restraint on his liberty such that post-conviction proceedings were available to him. *Eric Dates v. State*, No. W2015-02230-CCA-R3-PC, 2017 WL 347797, at *3 (Tenn. Crim. App. Jan. 24, 2017), *no perm. app. filed*. We remanded for the post-conviction court to conduct an evidentiary hearing on the merits of the Petitioner's claims. *Id.* On remand, the post-conviction court held a hearing at which the Petitioner testified. Trial counsel did not testify at the hearing.

The Petitioner testified that he spent twenty years working as a police officer but was involuntarily separated from his employment when he paid a \$50 fine to settle an open container charge. He did not recall if he was initially charged with DUI in that matter. He started working in private security but was trying to rejoin the Memphis Police Department. He retained trial counsel to represent him shortly after he was arrested, when his case was pending in general sessions court. The Petitioner stated that trial counsel relayed an offer from the State for him to plead guilty to "refusing to submit," but he agreed the offer could have also required him to plead guilty to reckless driving. He stated that pursuant to the agreement, the State would have dismissed his DUI charge. The Petitioner testified that he did not know whether to accept the State's offer, so he sought advice from trial counsel. In response, trial counsel said that "it was up to [him]" but believed that "they don't have anything as far as proof." At the time, the Petitioner agreed with trial counsel's assessment of the evidence. The Petitioner said that "at some point . . . we didn't take that plea deal." The Petitioner also called the attorney

for the Memphis Police Association union for advice because he was trying to rejoin the police department. He relayed the State's offer to the union attorney, and she advised him that "it wouldn't be a good idea . . . to take any type of plea relating to anything of that sort." The Petitioner testified that his understanding was that a DUI conviction or refusal to submit would prevent him from rejoining the police force. He stated that "at that time, [he] was putting everything on . . . the Union attorney . . . [b]ut at the end of the day . . . it was [his] responsibility, [his] call." He clarified that he relied on trial counsel's advice primarily and the union attorney's advice secondarily. The Petitioner agreed that his primary motive in rejecting the plea agreement was that he hoped to rejoin the police force. After rejecting the State's offer, the Petitioner proceeded to trial.

The post-conviction court found that trial counsel's performance was not deficient because he negotiated a settlement with the State in which the Petitioner would enter a guilty plea to refusal to submit to a breath test in exchange for the dismissal of the remaining charges. The court credited the Petitioner's testimony that he rejected the State's offer in reliance on the union attorney's advice to preserve his ability to rejoin the police department. The court found that the Petitioner failed to show prejudice because he tactically decided to reject the plea and had not shown that the result of the proceeding would have been different had his attorney "done something different." The court found that the Petitioner was no longer satisfied with the choice he made when he rejected the guilty plea as a result of the trial and that his testimony was "inconsistent and contradictory with his testimony at trial setting hearings." As a result, the court concluded that the Petitioner failed to prove he received ineffective assistance of counsel, and it dismissed his petition. The Petitioner appeals.

ANALYSIS

The Petitioner asserts on appeal that he received ineffective assistance of counsel when trial counsel assessed the proof incorrectly and failed to investigate whether the terms of the plea offer would actually have had an adverse effect on his chances of his rejoining the police force. He argues that "it is likely that the plea bargain would not have harmed [the Petitioner] as he was led to believe by counsel."

A petitioner may request post-conviction relief by asserting grounds alleging that his conviction or sentence is void or voidable because it abridged his constitutional rights provided by the Tennessee or the United States Constitutions. T.C.A. § 40-30-103. To obtain post-conviction relief, a petitioner must prove the allegations of fact made in the petition by clear and convincing evidence. T.C.A. § 40-30-110(f). On appeal, the post-conviction court's findings of fact are conclusive unless the evidence preponderates against them. *Ward v. State*, 315 S.W.3d 461, 465 (Tenn. 2010). "[Q]uestions concerning the credibility of witnesses, the weight and value to be given their testimony,

and the factual issues raised by the evidence are to be resolved by the trial judge.” *Fields v. State*, 40 S.W.3d 450, 456 (Tenn. 2001) (citing *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997)). Additionally, appellate courts may not “substitute their own inferences for those drawn by the trial court.” *Id.* (citing *Henley*, 960 S.W.2d at 579). This court reviews “a post-conviction court’s conclusions of law, decisions involving mixed questions of law and fact, and its application of law to its factual findings de novo without a presumption of correctness.” *Whitehead v. State*, 402 S.W.3d 615, 621 (Tenn. 2013) (citations omitted).

A criminal defendant has a right to the assistance of counsel under the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). The right to assistance of counsel inherently guarantees that counsel’s assistance is “effective.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Dellinger v. State*, 279 S.W.3d 282, 293 (Tenn. 2009). To prove that counsel was ineffective, a petitioner must show that (1) counsel performed deficiently and (2) such deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Because a petitioner must establish both deficiency and prejudice to prove ineffective assistance of counsel, a court need not address both prongs where the petitioner has failed to establish one of them. *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 697).

To establish deficient performance, a petitioner must show that “counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688. This standard requires a petitioner to demonstrate that the “services rendered or the advice given” were “below ‘the range of competence demanded of attorneys in criminal cases.’” *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009) (quoting *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). Counsel must have made errors so serious that counsel was not functioning as the “‘counsel’” guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. Measuring counsel’s performance requires giving deference to counsel’s decisions, and courts must apply a “strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Id.* at 689. Accordingly, this court has held that 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 made during the course of the proceedings.” *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). The reviewing 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 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 v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (quoting *Goad*, 938 S.W.2d at 369).

During plea negotiations, trial counsel has a duty to promptly communicate and explain plea offers extended by the prosecution. *Nesbit v. State*, 452 S.W.3d 779, 800 (Tenn. 2014). In doing so, 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.” *Id.* (quoting *Burt v. Titlow*, 571 U.S. 12, 25 (2013) (Sotomayor, J., concurring)). Whether counsel’s advice in this regard was competent “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). “As other appellate courts have recognized, ‘a defense attorney’s simple misjudgment as to the strength of the prosecution’s case, the chances of acquittal, or the sentence a defendant is likely to receive upon conviction, among other matters involving the exercise of counsel’s judgment, will not, without more, give rise to a claim of ineffective assistance of counsel.’” *Roy Smith v. State*, No. M2017-00321-CCA-R3-PC, 2018 WL 3803081, at *4 (Tenn. Crim. App. Aug. 9, 2018) (quoting *Commonwealth v. Mahar*, 809 N.E.2d 989, 994 (Mass. 2004)). “[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.” *Felts v. State*, 354 S.W.3d 266, 277 (Tenn. 2011) (quoting *Strickland*, 466 U.S. at 690-91).

To demonstrate that counsel’s deficient performance prejudiced the defense, a petitioner must prove “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Dellinger*, 279 S.W.3d at 293 (quoting *Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. “In the context of pleas[,] a defendant must show the outcome of the plea process would have been different with competent advice.” *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). “Even if the trial itself is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more severe sentence.” *Id.* at 166. The Tennessee Supreme Court has adopted the following test for determining prejudice in this context:

[A] defendant claiming that trial counsel’s performance was deficient in the plea negotiations process has the burden to show by a reasonable probability that, but for counsel’s deficient representation, (1)

the defendant would have accepted the plea, (2) the prosecution would not have withdrawn the offer, and (3) the trial court would have accepted the terms of the offer, such that the penalty under its terms would have been less severe than the penalty actually imposed.

Nesbit, 452 S.W.3d at 800-01 (citing *Lafler*, 566 U.S. at 164).

The Petitioner maintains that trial counsel should have investigated his ability to rejoin the police department prior to him rejecting the plea agreement. He asserts that his decision to reject the plea agreement was premised on the understanding that the plea agreement would adversely affect his chances of rejoining the police but that “it is likely that the plea bargain would not have harmed” him. He also asserts that trial counsel misadvised him of the strength of the State’s case against him.

The post-conviction court found that the Petitioner wanted to rejoin the police department and that he rejected the plea offer negotiated by trial counsel in reliance on the union attorney’s advice “that it would not be a good idea to take any guilty plea.” The court found that the Petitioner was no longer satisfied with the choice he made. Although the Petitioner asserts on appeal that he was prejudiced by counsel’s performance, he provided no evidence to support that argument at the evidentiary hearing. Specifically, the record is silent as to whether the Petitioner would have accepted the plea. *See Nesbit*, 452 S.W.3d at 800-01.

As we previously stated, “[i]n the context of a petitioner who seeks to reinstate . . . a plea offer, the petitioner must show that there is a reasonable probability that he or she would have accepted the plea had it been properly communicated to him or her.” *State v. Garrison*, 40 S.W.3d 426, 431 (Tenn. 2000). The Petitioner did not testify at the evidentiary hearing that he would have accepted a plea deal had trial counsel adequately advised him. *See Mario Green v. State*, No. W2012-01099-CCA-R3-PC, 2013 WL 3324989, at *6 (Tenn. Crim. App. June 26, 2013) (concluding that the petitioner failed to present clear and convincing evidence that he would have pleaded guilty where he “did not testify that he would have accepted a plea deal at his evidentiary hearing.”). Additionally, the Petitioner did not introduce any proof regarding what trial counsel would have found with further investigation and how the plea would have affected his chances of rejoining the police department. Therefore, the Petitioner has not established prejudice and is not entitled to relief.

CONCLUSION

Based on the foregoing reasons, we affirm the judgment of the post-conviction court.

JOHN EVERETT WILLIAMS, PRESIDING JUDGE