

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs November 28, 2017

DUSTIN LUCIO v. STATE OF TENNESSEE

**Appeal from the Circuit Court for Sevier County
No. 15763-II O. Duane Slone, Judge**

No. E2017-00089-CCA-R3-PC

Petitioner, Dustin Lucio, appeals from the denial of his petition for post-conviction relief. Petitioner was convicted by a jury of aggravated rape and sentenced by the trial court to 23 years in confinement to be served at 100 percent release eligibility. Petitioner's conviction and sentence were affirmed on direct appeal. *State v. Dustin Matthew Lucio*, No. E2014-00642-CCA-R3-CD, 2015 WL 1510830 (Tenn. Crim. App. Mar. 31, 2015), *perm. app. denied* (Tenn. Aug. 13, 2015). Petitioner contends that his appellate counsel was ineffective for failing to include in the record on appeal a transcript of the hearing on the State's motion in limine. In that motion, the State sought to exclude from evidence the victim's medical records showing that she received treatment for drug abuse after the offense occurred. Following a hearing, the post-conviction court denied relief. Finding no error, we affirm the judgment of the post-conviction court.

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

THOMAS T. WOODALL, P.J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and J. ROSS DYER, JJ., joined.

Gerald L. Gulley, Jr., Knoxville, Tennessee, for the appellant, Dustin Lucio.

Herbert H. Slatery III, Attorney General and Reporter; Renee Turner, Senior Counsel; James B. Dunn, District Attorney General; and George C. Ioannides, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Procedural and factual background

Prior to Petitioner's trial, the State filed a motion seeking to exclude medical records showing that the victim had been treated for substance abuse after the offense. At

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the hearing on the State's motion, the victim testified that she was raped by Petitioner on February 20, 2009. She testified that she developed a "drug problem" immediately after the incident. The victim acknowledged on cross-examination that she had had a drug problem "[p]robably two years" prior to the incident, but she got better prior to the rape. She denied using drugs at the time of the incident. She testified that she consumed "[p]robably two shots" of alcohol on the night the rape occurred. She testified that she entered a drug rehabilitation program in November 2009, for addiction to "[p]ain killers, narcotics," and was currently still in treatment. She testified that she did not receive treatment for her addiction prior to the current treatment. She testified that she stopped using drugs previously when she "[m]oved to Knoxville." She began using drugs again after the rape.

The trial court granted the State's motion, finding "that the drug treatment was outside of this time period of this incident and for that reason the Court found that that would not be allowed to come into trial." The court made the following findings and conclusions:

The issue straight up is whether or not she can be asked about drug use during the relevant times in this case, and certainly that is material, that if someone is under the influence of drugs during the relevant time, you may ask about that. But we're not going back to when she was a teenager. I'll need some authority as to whether or not the fact that she's in rehabilitation now is relevant or not. I'm going to make that call. You'll need to provide me with some authority that say that is. The question on the use of drugs has to do with a person's cognizant abilities during the time, relevant times which they testified to, not whether or not they have been at some point in time addicted to a drug. So at this point in time you may ask her about her drug use in the time immediately, and I don't mean that day, but in general terms of close in time to the event, and whether or not she was under the influence during the time alleged for using drugs. But unless you show me some authority about later on any drug treatment, I'm going to exclude that.

The testimony at the trial, as relevant to the issue in this appeal, is as follows. The victim testified that on cross-examination she was not "intoxicated drunk" but had "a buzz" on the night of the incident. The victim testified that she had been to two bars with some friends. She returned alone to one of the friend's apartment where her 15-year-old niece, A.K., was babysitting her friend's children. The children were asleep in a bedroom. The 15-year-old niece was intoxicated and vomiting. Petitioner, whom the victim testified she had never seen before, came out of a back bedroom. Another male and a female also came out of the bedroom and left the apartment. Petitioner followed

them outside, and the victim did not think he would return. The victim sat on the couch with her niece. *State v. Dustin Matthew Lucio*, 2015 WL 1510830, at *1.

Petitioner came back inside the apartment and told the victim that his friend had left his cell phone in the bedroom. He asked the victim to call the phone number. The victim called the number and went to the bedroom to listen for the phone. She testified that the lights suddenly went out, and Petitioner pushed her onto the floor. He closed the bedroom door and put his hand over her nose and mouth. She testified that she kicked and screamed and eventually “[g]ave up.” Petitioner told her to move to the bed and remove her pants. Petitioner then raped her vaginally. Petitioner’s phone rang, and he left the bedroom. He told her not to move or he would get a knife from the kitchen and kill her. Petitioner returned to the bedroom and told the victim that he had friends “coming to do the same thing to you.” Petitioner left the bedroom again, and the victim put on her underwear, jumped out of the bedroom window, and ran to the nearby apartment of the man who had raised A.K. The victim told him that she had been raped and that A.K. and the children were still in her friend’s apartment. The victim was not wearing any pants. *Id.* at *2.

The victim denied drinking alcohol with Petitioner. She also denied knowing that Petitioner possessed Roxicodone prior to the rape and denied that he took her phone as collateral for giving her the drug. *Id.*

Petitioner gave a statement to police. In the statement, he claimed he was intoxicated and did not remember what happened with the victim. Petitioner did not admit or deny the victim’s allegations and said he could not remember. *Id.* at *4.

Dr. Kevin Stasney treated the victim in the emergency room at the hospital that she was taken to on the night of the incident. Dr. Stasney testified that he did not draw blood from the victim or order a toxicology report. He testified that the victim did not appear to be under the influence of alcohol and that she was able to answer his questions and follow directions. Samples were collected from the victim for a rape kit. DNA evidence showed that Petitioner’s DNA profile matched the sperm collected in the rape kit. *Id.*

On direct appeal, Petitioner argued that the trial court erred by refusing to allow him to introduce evidence of the victim’s history of drug abuse and use of drugs on the day of the incident to corroborate his version of events. A panel of this court concluded:

Regarding the appellant’s latter claim that he should have been allowed to introduce evidence that the victim later sought treatment for Roxicodone, the State filed a motion on the issue, the trial court held a

hearing, and the trial court granted the motion. However, the appellant failed to include a transcript of the hearing in the appellate record. As this court has repeatedly stated, it is the appellant's duty to prepare a record which conveys a fair, accurate, and complete account of what transpired in the trial court which forms the basis of his appeal. *See* Tenn. R. App. P. 24(b). "In the absence of an adequate record on appeal, this court must presume that the trial court's rulings were supported by sufficient evidence." *State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). Without a transcript of the hearing, which would have included the parties' arguments, the evidence presented, and the trial court's oral findings, we cannot consider the merits of the issue. Furthermore, nothing in the record before us shows that the victim sought treatment for an addiction to the same drug that appellant claimed to have given her on the night in question. Therefore, he is not entitled to relief.

Id. at *9.

At the post-conviction hearing, Petitioner did not offer any testimony. The post-conviction court admitted into evidence portions of the trial record, including a transcript of the hearing on the State's motion. After hearing arguments of counsel for both parties and reviewing the exhibits admitted into evidence, the post-conviction court found that appellate counsel was deficient in failing to timely file a transcript that was material to an argument being made on appeal. The post-conviction court concluded, however, that Petitioner was not prejudiced by counsel's deficiency. At the conclusion of the hearing, the post-conviction court stated as follows:

In reviewing the transcript, the Court observed that [the trial judge] advised defense counsel at the time [of the suppression hearing] that he needed some sort of case authority or some sort of – some additional evidence to support a leap from someone – or to make a connection for the trier of fact between prior substance abuse and going into addiction treatment several weeks following this incident.

No such evidence was offered to the trial court. No such evidence is in the record. And this Court is of the opinion that under the circumstances presented to [the trial judge] and would be available to any reviewing court would have concluded that [the trial judge] was correct in his decision based upon the rationale that he used.

And therefore, there is no reasonable probability that the outcome in this case would have been different had the transcript been filed with the court of criminal appeals to afford them an opportunity to review that transcript. So for those reasons, the Petitioner's request for post-conviction relief is denied.

Analysis

Petitioner contends that his appellate counsel was ineffective for failing to include a transcript from the hearing on the State's motion in the record on direct appeal. The State responds that Petitioner has failed to demonstrate that the outcome of the appeal would have changed had appellate counsel timely provided the transcript. Therefore, the State asserts, Petitioner has failed to prove that he was prejudiced by counsel's error.

A post-conviction petitioner must establish that his conviction or sentence is void or voidable due to the abridgment of any constitutional right. T.C.A. § 40-30-103. The petitioner bears the burden of proving the allegations of fact in the petition by clear and convincing evidence. T.C.A. § 40-30-110(f); *Ward v. State*, 315 S.W.3d 461, 465 (Tenn. 2010). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009) (quoting *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998)). The findings of fact made by a post-conviction court are conclusive on appeal unless the evidence preponderates against them. *Ward*, 315 S.W.3d at 465. This court may not substitute its own inferences for those drawn by the post-conviction court, and questions concerning the credibility of witnesses, the weight and value of the evidence, and the factual issues raised by the evidence are to be resolved by the post-conviction court. *State v. Honeycutt*, 54 S.W.3d 762, 766-67 (Tenn. 2001). A claim of ineffective assistance of counsel raises a mixed question of law and fact which this court reviews de novo. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001). The trial court's conclusions of law are reviewed under a purely de novo standard with no presumption of correctness. *Id.*

Both the Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee the accused the right to counsel. This right has been defined as the right to the "reasonably effective" assistance of counsel, or assistance "within the range of competence demanded of attorneys in criminal cases." *Pylant v. State*, 263 S.W.3d 854, 868 (Tenn. 2008) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

In order to establish that he received the ineffective assistance of counsel, a petitioner must show both that his lawyer's performance was deficient and that the

deficiency resulted in prejudice. *Pylant*, 263 S.W.3d at 868. Deficiency can be shown if the petitioner demonstrates that his attorney's services were below an objective standard of reasonableness under prevailing professional norms. *Id.* In determining prejudice, the post-conviction court must decide whether there is a reasonable probability that, but for the errors, the result of the proceeding would have been different. *Grindstaff*, 297 S.W.3d at 216. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Honeycutt*, 54 S.W.3d at 768 (quoting *Strickland*, 466 U.S. at 694). "[T]he Petitioner must establish that his counsel's deficient performance was of such a degree that it deprived him of a fair trial and called into question the reliability of the outcome." *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007). A claim may be denied for failure to prove either deficiency or prejudice, and a court need not address both prongs if the petitioner has failed to establish either deficiency or prejudice. *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996).

As with trial counsel, the right to representation of appellate counsel also "necessarily includes the right to effective assistance of counsel." *Campbell v. State*, 904 S.W.2d 594, 596 (Tenn. 1995) (citing *Evitts v. Lucey*, 469 U.S. 387 (1985)). The same principles apply in determining effective assistance of both trial and appellate counsel, and a petitioner must show both deficient performance and prejudice. *Id.* That is, a petitioner alleging ineffective assistance of appellate counsel must prove both that appellate counsel was deficient in failing to adequately pursue or preserve a particular issue on appeal and that, absent counsel's deficient performance, there was a reasonable probability that the issue "would have affected the result of the appeal." *Id.* at 597.

In the present case, the post-conviction court found that counsel's failure to file the transcript from the hearing did not affect the outcome of Petitioner's appeal because Petitioner failed to demonstrate that a reasonable probability existed that if the transcript had been provided, the outcome of his appeal would have been different. Petitioner asserts that if the transcript of the hearing had been included in the appellate record, this court would have "considered the merits of this issue [and] would have concluded that there was a reasonable probability that the outcome of the original trial [sic] would have been different; thereby entitling [] Petitioner to post-conviction relief."

Petitioner's statement of the issue is inaccurate. In order for Petitioner to be entitled to post-conviction relief, Petitioner must show that if a transcript of the hearing had been included in the appellate record, this court would not only have considered the merits of the issue, but would have reversed the judgment of the trial court based on the trial court's ruling regarding the victim's medical records.

Petitioner asserts that he "should have been allowed to present evidence that the alleged victim had been under the influence of drugs during the night of the incident, and

should also have been allowed to introduce medical records which showed that the alleged victim went to drug rehabilitation for an addiction to the same drugs that [] Petitioner claimed he gave her in exchange for sex on the night in question.”

We conclude that even if a transcript of the hearing on the State’s motion had been included in the record on appeal, the outcome of Petitioner’s appeal would not have changed. In our opinion on direct appeal, we noted that “nothing in the record before us shows that the victim sought treatment for an addiction to the same drug that [Petitioner] claimed to have given her on the night in question.” Having the benefit now of the transcript from the hearing in this post-conviction appeal, there is still nothing in the record to show that the victim sought treatment for an addiction to the same drug Petitioner claimed to have given her on the night of the incident. Furthermore, Petitioner’s theory of defense at trial was just that, a suggestion based solely on the argument of counsel. *See State v. Roberts*, 755 S.W.2d 833, 836 (Tenn. Crim. App. 1988) (citations omitted) (observing that the arguments of counsel are not evidence). There is no evidence in the record that the victim used drugs on the night of the incident, that Petitioner or the victim possessed drugs on the night of the incident, or that Petitioner traded her drugs for sex. Petitioner was allowed to cross-examine the victim at trial about her use of drugs on the night in question, and the victim denied that she knew Petitioner and denied that she and Petitioner traded drugs for sex.

Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Tenn. R. Evid. 401. A trial court’s evidentiary ruling based on relevance is reviewed on appeal for an abuse of discretion. *State v. Dubose*, 953 S.W.2d 649, 652 (Tenn. 1997). We cannot conclude that the trial court abused its discretion by excluding evidence of the victim’s drug use prior to or subsequent to the incident. Thus, Petitioner has failed to establish that he was prejudiced by counsel’s failure to include a transcript of the motion hearing in the record on direct appeal.

Petitioner also asserts in his statement of the issue on appeal, and nowhere else in his brief, that evidence of the victim’s prior drug use should have been admitted at trial to impeach her. Petitioner fails to cite any authority for his assertion, and it is therefore waived. Tenn. R. App. P. 27(a)(7); Tenn. Ct. Crim. App. R 10 (“Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court.”).

CONCLUSION

Based upon the record and the parties' briefs, we affirm the judgment of the post-conviction court.

THOMAS T. WOODALL, PRESIDING JUDGE