

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs August 6, 2013

JERMAINE MITCHELL GRAY v. STATE OF TENNESSEE

Appeal from the Circuit Court for Madison County
No. C-12-69 Donald H. Allen, Judge

No. W2013-00154-CCA-R3-PC - Filed January 14, 2014

Petitioner, Jermaine Mitchell Gray, was found guilty by a Madison County jury of aggravated robbery, and he was subsequently sentenced to serve 12 years as a Range I standard offender. This court affirmed the conviction, and our supreme court denied Petitioner's application for permission to appeal. *State v. Jermaine Mitchell Gray*, No. W2009-01260-CCA-R3-CD, 2010 WL 4544395 (Tenn. Crim. App. Nov. 10, 2010) *perm. app. denied* (Tenn. April 13, 2011). He subsequently filed a petition for post-conviction relief which was denied by the trial court following an evidentiary hearing. Petitioner appeals asserting that the trial court erred by denying him post-conviction relief because his trial counsel rendered ineffective assistance of counsel. We affirm the judgment of the trial court which denied post-conviction relief.

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

THOMAS T. WOODALL, J., delivered the opinion of the Court, in which JOHN EVERETT WILLIAMS and CAMILLE R. MCMULLEN, JJ., joined.

Jeremy B. Epperson, Jackson, Tennessee, for the appellant, Jermaine Mitchell Gray.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; James G. Woodall, District Attorney General; Al Earls, Assistant District Attorney General; and Shaun A. Brown, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

In his appeal Petitioner asserts two factual grounds of ineffective assistance of his trial counsel which he argues entitles him to post-conviction relief. The nature of the issues

presented does not require that we provide a lengthy quote in this opinion of the facts adduced at the jury trial.

On appeal Petitioner submits that his trial counsel rendered ineffective assistance of counsel as follows:

- (1) Trial counsel did not investigate Petitioner's juvenile court record, and as a result Petitioner's juvenile record "was used as an enhancement factor against [Petitioner] in determining the maximum sentence of twelve (12) years."
- (2) Trial counsel withdrew an issue from Petitioner's motion for new trial relative to alleged perjured testimony at Petitioner's trial by one of his co-defendants.

Post-Conviction Hearing

The extent of Petitioner's argument in his brief consists of his assertions that: (1) the failure to investigate Petitioner's juvenile court record resulted in the juvenile record being considered as a statutory enhancement factor in the sentencing decision; and (2) trial counsel's deficient performance by withdrawing the perjury issue from the motion for new trial "resulted in prejudice to [Petitioner] in that [Petitioner] presumably had grounds to undergo a new trial."

We will summarize the testimony presented at the post-conviction hearing only to the extent that it is relevant to the precise issues presented on appeal. Trial counsel testified that he was licensed to practice law in 2000 and primarily handled criminal cases. He was appointed to represent Petitioner in Jackson City Court and continued to represent him in Circuit Court after Petitioner was indicted. Petitioner was in detention at the jail from the time of arrest to trial, and trial counsel met with him numerous times. Trial counsel conferred with Petitioner regarding the discovery provided by the State, and trial counsel filed various pre-trial motions that were argued in the trial court.

As to Petitioner's prior juvenile record, trial counsel testified that one of the sentence enhancement factors urged by the State was that Petitioner had been found delinquent in juvenile court for an act which would have been a felony if Petitioner had been an adult at the time he committed the act. Trial counsel added that he was sure he met with Petitioner concerning the juvenile record prior to the sentencing hearing when they met to review the proposed enhancement factors filed by the State. Trial counsel specifically testified that he did not recall Petitioner ever saying that he had never been charged with any felonious acts as a juvenile.

Trial counsel testified that after the trial he received a letter purporting to be from one of Petitioner's co-defendants who had testified against Petitioner at trial. In this letter, the co-defendant recanted the testimony he gave at trial. As a result, trial counsel included a ground in the motion for new trial that this key witness for the State had committed perjury during the trial. Subsequently, trial counsel withdrew that ground for relief from the motion for new trial. Trial counsel had discovered that the co-defendant, during his own sentencing hearing, had stated under oath that he did not write the letter. The co-defendant also stated that his first name was misspelled in the letter. Trial counsel informed Petitioner of this development. Trial counsel testified that he withdrew the perjury/recantation ground from the motion for new trial because the co-defendant "testified under oath that [the recantation letter] wasn't his and I didn't see any need to call him if he was going to just testify again [the recantation letter] wasn't his."

During cross-examination by the State, trial counsel testified that Petitioner never mentioned anything to trial counsel about Petitioner's juvenile record during the sentencing hearing. During re-cross-examination, trial counsel acknowledged that one ground listed in Petitioner's motion for new trial referenced Petitioner's assertion that he had no juvenile record. Trial counsel admitted that the issue was presented to the trial court but was found to be without merit, as the motion for new trial was denied.

Petitioner testified that he told trial counsel that he (Petitioner) had "never been charged with [a]ggravated [b]urglary." Trial counsel had told Petitioner, based on information presumably provided by the State, that Petitioner had been charged as a juvenile with delinquency by committing an aggravated burglary. Petitioner asked trial counsel to research Petitioner's juvenile record. Trial counsel never presented proof to the trial judge that Petitioner's juvenile record did not include a charge of aggravated burglary.

Petitioner testified that trial counsel told him that he "was supposed to come back to court when [the co-defendant] [had] accepted his plea," but Petitioner never went back to court. As to the purported letter from the co-defendant recanting trial testimony, Petitioner testified that his only discussion with trial counsel was, "he just told me about the letter that he had received a letter prior to me going to my new trial - - for my [motion for my [n]ew [t]rial."

Petitioner's testimony at the post-conviction hearing during direct examination included the following which discusses Petitioner's thoughts on prejudice to his case by trial counsel's alleged deficient performance.

Q. We've gone over several alleged errors that you state that [trial counsel] has committed; is that correct?

A. Yes, sir.

Q. Do you believe those altered the outcome of your cases?

A. Yes, sir.

Q. How so?

A. I feel he didn't represent me the way he was supposed to have represented me, sir.

Q. If he had what would have happened?

A. If he had, I would have had a better outcome.

Q. By better outcome, what do you mean?

A. Possibly a lesser sentence or no sentence at all.

Q. And the sentence you received was what?

A. Twelve years.

Q. Is it your understanding that that's the maximum sentence?

A. Yes, sir.

During cross-examination, Petitioner testified that he had not been placed on probation in juvenile court for aggravated burglary. However, Petitioner volunteered the information that he was placed on probation in Juvenile Court for "receiving stolen property." Petitioner's mother testified that she told trial counsel at Petitioner's sentencing hearing that Petitioner's juvenile record was a finding of delinquency for "accepting stolen property" rather than aggravated burglary.

The trial court took the case under advisement following the testimony and subsequently entered an order denying post-conviction relief. The order incorporated a letter previously sent by the trial court to the parties detailing the court's ruling. Included in the order and the letter was a finding that Petitioner had failed to prove that trial counsel's performance was deficient. Also the trial court found that if any performance had been deficient no prejudice to Petitioner was shown. The trial court specifically found that

Petitioner's testimony was not credible "as to his trial attorney's [alleged] ineffectiveness in his case."

Analysis

In order to be granted post-conviction relief, a petitioner must prove the factual allegations supporting relief by clear and convincing evidence at an evidentiary hearing. T.C.A. § 40-30-110(f) (2010); *Ward v. State*, 315 S.W.3d 461, 465 (Tenn. 2010). The trial court's factual findings in its ruling in a post-conviction proceeding "are conclusive on appeal unless the evidence preponderates against those findings." *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Appellate review of legal issues, or of mixed questions of fact and law, such as in a claim of ineffective assistance of counsel, is de novo with no presumption of correctness. *Pylant v. State*, 263 S.W.3d 854, 867-68 (Tenn. 2008). A petitioner must satisfy both prongs of the two-prong test to prove ineffective assistance of counsel which is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Dellinger v. State*, 279 S.W.3d 282, 293 (Tenn. 2009). These prongs are (1) deficient performance of counsel, defined as "counsel's representation fell below an objective standard of reasonableness," *Strickland*, 466 U.S. at 687-88, and (2) prejudice to the defendant, defined as "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. If the petitioner fails to establish either one of the prongs, that is a sufficient basis to deny relief, and the other prong does not need to be addressed. *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004). If a petitioner alleges that trial counsel rendered ineffective assistance of counsel by failing to do an act such as call a witness, present tangible documents for evidence, and/or file a motion to suppress, among other actions, the petitioner is generally obliged to present the witness or the other evidence at the post-conviction hearing in order to satisfy the *Strickland* prejudice prong. See *Pylant*, 263 S.W.3d at 869. In other words, it is incumbent upon a petitioner to prove that what he says trial counsel should have done would have had merit and produced admissible, relevant evidence.

Failure to Investigate Juvenile Record

Petitioner failed to produce at the post-conviction hearing his actual juvenile record from the records of the juvenile court clerk. Petitioner failed to show prejudice. Accordingly, petitioner is not entitled to relief on this issue.

Withdrawal from Motion for New Trial of Issue Regarding Recantation/Perjury by State Witness

As noted above, in grounds such as this one alleging ineffective assistance of counsel, a petitioner should present the evidence in the manner he asserts trial counsel should have done - in this case it would consist of the testimony of the State witness who allegedly recanted, and the letter purportedly written by that witness. *See Pylant*, 263 S.W.3d at 869. In this case, failure to present this particular evidence at the post-conviction hearing results in a lack of any evidence of deficient performance by trial counsel. Also, obviously no prejudice could be shown without that evidence. Trial counsel explained why he withdrew the issue from the motion for new trial. In effect, Petitioner's failure to put on evidence that he says trial counsel should have presented endorses trial counsel's decision and his performance. Petitioner is not entitled to relief on this issue.

In conclusion, we affirm the judgment of the trial court which denied post-conviction relief.

THOMAS T. WOODALL, JUDGE