IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs August 6, 2013

FREDERICK[1] MOORE v. STATE OF TENNESSEE

Appeal from the Circuit Court for Madison County
No. C-12-72 Roy, B. Morgan, Jr., Judge

No. W2012-02189-CCA-R3-PC - Filed November 6, 2013

The petitioner, Frederick Moore, was convicted by a jury of first degree (premeditated) murder; first degree (felony) murder, a Class A felony; aggravated kidnapping, a Class B felony; and two counts of tampering with evidence, Class C felonies. The petitioner was sentenced to life plus twenty years. The petitioner now appeals the post conviction court's denial of his petition for post conviction relief in which he alleged he received ineffective assistance of counsel at trial. After review, we affirm the post conviction court's denial of relief.

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

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

Joseph T. Howell, Jackson, Tennessee, for the appellant, Frederick Moore.

Robert E. Cooper, Jr., Attorney General & Reporter; Clarence Lutz, Assistant Attorney General; James G. Woodall, District Attorney General; and Jody S. Pickens, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The petitioner's convictions are the result of the murder of the victim, the petitioner's ex-girlfriend Latoya Cole, on the day before the two were scheduled to appear in court

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[1] Although the petitioner's brief and the transcript of the post-conviction hearing spell the petitioner's first name "Fredrick," the opinion on direct appeal and the *pro se* post-conviction petition both use "Frederick."

regarding child support payments. At around 1:17 a.m. on December 9, 2007, someone dialed 911 from the victim's residence and then hung up. *State v. Moore*, No. W2009-01266-CCA-R3-CD, 2011 WL 856379, at *1 (Tenn. Crim. App. Mar. 9, 2011). Because a return call was not answered, police were dispatched to the residence and arrived approximately five minutes later. *Id.* They did not find the victim but did find a gruesome scene in the unlocked home. The bed was stained with urine and blood and on top were a bullet casing, human teeth, and gum fragments. *Id.* There was a hole that went through the bedding and mattresses, and, at the end of the trajectory, a bullet was lodged in the floor. *Id.* Analysis showed that the comforter had gunshot residue on it. *Id.* Brad and Dennis Smartt, who lived near the victim, both saw a vehicle matching the description of the petitioner's car parked in their driveway between 12:00 and 12:30 a.m. *Id.* at *2. At around 1:00 a.m., Brad Smartt saw a man and a woman walk into his yard from the direction of the victim's home; the man was helping the woman as though she were injured, and the woman appeared "[j]ell-o-like." *Id.* The man helped her into the car, picking up her feet to get her in. *Id.*

The victim's sister, who shared her home, came to the crime scene while officers were searching it, and she alerted her family. *Id.* at *2. The victim's mother and brother then began to call the petitioner, who took their initial calls but ultimately stopped answering the phone. *Id.* The proof at trial included evidence tracking the petitioner's cell phone calls that night. At 12:30 a.m., the petitioner called his ex-wife, Chantell Moore, and the call went out from a cell phone tower in Jackson, Tennessee. *Id.* at *7. The petitioner, who had two cell phones when he spoke to police later in the day, used his other cell phone to place a call at 1:46 a.m. to an aunt who lived in Pinson, Tennessee. *Id.* at *8. The call went out from a tower in Madison County, near Turk Creek. *Id.* He then received calls from the victim's mother and brother at 2:09 and 2:11 a.m., both of which went through a tower servicing Pinson, Tennessee. *Id.* The petitioner's phone received attempted calls and texts at 2:16 a.m. and 2:27 a.m., using a tower that serviced highways 100 and 22; at 2:39 a.m., using a tower north of highway 412, and at 10:08 a.m., using a tower in Memphis. *Id.* At 1:31 p.m., the petitioner used the first cell phone to call his step-brother, Terrance Morrow, using a tower located in Brownsville, Tennessee, between Jackson and Memphis. *Id.* at *7. Testimony established that a telephone call would normally go through the closest tower, and would go through the next closest if the closest were overloaded. *Id.* at *7, 8, 9.

The petitioner voluntarily came to the police station on the afternoon of December 9, 2007. *Id.* at *3. He had two cell phones in his possession. *Id.* He gave consent for police to search his car, which an officer testified was very clean, contained cleaning supplies, and smelled like it had just been cleaned. *Id.* Nevertheless, investigators found small amounts of the victim's blood in the passenger area. *Id.* at *3-4.

On March 24, 2008, the victim's decomposing corpse was recovered from Turk Creek

in Pinson, Tennessee. *Id.* at *4. The body was located approximately one mile from the home of the petitioner's cousin, where the petitioner had routinely spent part of his summers as a youth. *Id.* at *6. The victim had been shot in the upper right side of her jaw, breaking her teeth. The wound would have caused a swollen tongue, blood loss, and the aspiration of blood, any of which could have caused the victim's death. *Id.* at *4-5. The wound would not have been immediately fatal. *Id.* at *5.

The defense presented at trial the testimony of the petitioner's step-brother, Terrance Morrow, who testified that the petitioner arrived at his home in Memphis sometime between 11:30 p.m. on December 8, 2007 and 12:30 a.m. on December 9, 2007, just as Mr. Morrow was leaving for a party. *Id.* at *9. The petitioner was asleep on Mr. Morrow's couch when Mr. Morrow returned around 4:00 or 4:30 a.m. and was gone when Mr. Morrow woke between 10:00 and 11:00 a.m. *Id.*

The petitioner was convicted and appealed the sufficiency of the evidence. The conviction was affirmed.

The petitioner then filed a timely *pro se* petition for post-conviction relief. Appointed counsel amended the *pro se* petition. The amended petition avers that the petitioner's trial counsel was deficient in failing to seek a continuance when the indictment was amended the day prior to trial to reflect charges for two new offenses, felony murder and aggravated kidnapping; that trial counsel was ineffective in failing to obtain and examine evidence presented to the grand jury; that trial counsel's investigation was inadequate in that he did not interview or subpoena Jamie McClinton, who would have testified that the petitioner was in Nebraska during November 2007; that trial counsel failed to call Ashley Hanshaw to testify as an alibi witness or Steve Clark to testify that the petitioner's vehicle was inoperable at the time of the crime; that trial counsel failed to explore the validity of the search warrant for the petitioner's vehicle; that trial counsel failed to investigate prior domestic abuse as an alternate explanation for the presence of the victim's blood; and that trial counsel was ineffective in that he did not introduce proof that it did not rain on the day of the crime.

At the post-conviction hearing, the petitioner called his trial counsel to testify. Trial counsel testified that the petitioner wanted an alibi defense and that trial counsel went on a series of "wild goose chases," in which he was either unable to locate the witnesses provided by the petitioner, found that the witnesses were unwilling to communicate, or found that the witnesses's testimony did not provide an alibi. Trial counsel testified that one "alibi" defense involved out-of-state employment, but investigation revealed that the job had ended in November while the crime took place in December. Trial counsel also testified that the petitioner wanted trial counsel to introduce evidence that the victim's blood in the petitioner's vehicle was transferred prior to the killing, "when [the petitioner] had got into

beating her." Trial counsel testified that he investigated the incident and found records of altercations in two counties but felt introducing a pattern of the petitioner's violent behavior to the victim would have been poor trial strategy, particularly in light of the petitioner's insistence that he had nothing to do with the murder. Trial counsel testified that the case against the petitioner was very strong because he was tied to the crime through DNA evidence, through the cell phone records which indicated he was in the area where the murder occurred and in the area where the body was found, and through eyewitness descriptions of his vehicle.

Trial counsel summarized the witnesses and other evidence he investigated, including: witness Ron Burrough, who put a windshield into a silver Taurus for a black male in September 2007; the petitioner's work records, which indicated that the petitioner was working in Nebraska in late November but not in early December; witness Donald Steve Clark, who told the defense that he had not done any work on the petitioner's car in December 2007 and that he would not perjure himself; Abe Jones of the Jackson Police Department, who handled an incident in which the petitioner broke the victim's SUV windshield as part of a domestic altercation; Phillip Taylor, who related that the petitioner had used his equipment to put in a windshield on an SUV and who saw the victim and police arrive shortly; Sherea Shield, who refused to take calls from the defense but later told the investigator that she had not gone to Memphis with the petitioner on December 8, 2007; Chantell[2] Moore, who told investigators that the petitioner's vehicle had not been working on December 6 or 7, 2007, although other evidence established that the petitioner drove his vehicle to the police station after the murder; Darlene Bailey, who thought someone else committed the crime but was incoherent; and other witnesses that the defense attempted but failed to contact. Trial counsel also testified that the petitioner withheld the name and contact information of another witness who was allegedly an alibi witness. He also noted that the petitioner's own statement to police put him in Jackson on the night of the murder. However, he testified that the petitioner's step-brother, who was initially uncooperative with the defense, showed up at trial willing to testify, and trial counsel was ultimately able to introduce his alibi testimony.

Defense counsel testified that the State had called Jamie McClinton as a witness at the preliminary hearing and that he had prepared to cross-examine her about her past crimes, but the State, evidently fearing for her credibility, chose not to put her on at trial. According to Ms. McClinton's prior testimony, the petitioner had become enraged when she told him that the victim was seeing other men. Trial counsel did not recall if he or another attorney from his office visited the site where the body was recovered but recalled viewing a lot of

[2]The hearing transcript spells this witness's name as "Shontelle," but the opinion on direct appeal indicates that Chantell Moore was the petitioner's ex-wife. *Moore*, 2011 WL 856379, at *7.

photographs and maps of the area. He did not recall researching the weather the day of the victim's death.

The petitioner requested counsel not to move for a continuance when the indictment was amended. Trial counsel testified that the amended indictment did not allege any new facts but just presented new legal theories regarding what crimes those facts constituted. Trial counsel felt that the new counts of the amended indictment did not necessitate new preparation.

He also did not file a motion to suppress because the petitioner had given consent to search the vehicle, and he also felt that the police had probable cause to conduct the search. Trial counsel testified that Officer Crowell was not declared an expert witness but that in trial counsel's opinion, he was competent to testify regarding the state of the comforter on the bed. He also noted that the petitioner's theory of the case was not that the victim was not killed, but, rather that someone else committed the crime, so Officer Crowell's testimony neither helped nor hindered the defense. Trial counsel testified that he did not object to Investigator Parson remaining in the courtroom when other witnesses were excluded because his presence was proper under the rules.

Mike Parson, the lead investigator on the case, testified that he initially also investigated two other suspects but that all of the evidence pointed to the petitioner. Investigator Parson testified that he completed the affidavit for the search warrant for the car. He testified that the petitioner gave consent to search, but police wanted a search warrant because of the possibility that the petitioner would revoke consent during the time that would elapse while the forensic investigators were called in from Memphis. He testified that, as a basis for the affidavit, witnesses identified the petitioner's vehicle from a photograph; he did not create a photographic lineup of similar vehicles. Investigator Parson also testified he was aware of the petitioner's domestic assault upon the victim in Goodlettsville.

The petitioner testified regarding alleged errors by trial counsel. The petitioner listed witnesses who should have been called: Steve Clark, who would have testified that the petitioner's car had been inoperable on the day before the crime, and Ashley Hansew,[3] who would have testified he was with her at the time of the crime. He also faulted trial counsel for failing to ask the victim's sister about his abuse of the victim, failing to cross-examine the victim's neighbor about inconsistencies regarding whether he had seen the victim and the man on his lawn or driveway, and failing to ask Investigator Parson about tampering with witness statements. He had also wanted to discredit a witness who never testified at trial, Jamie McClinton, by using his work records to show he was out of town at Thanksgiving,

[3]The petition identifies this witness as Ashley Hanshaw.

when she claimed they had met. He felt trial counsel should have investigated the weather because it was dry and there should have been a trail of blood. He insisted that a bill of particulars would have informed him of where, how, and when the body was found, although he then acknowledged that a motion to clarify the time and place of death was filed and that he knew all the facts the bill of particulars would have sought. He testified he did not know that the amended indictment would contain aggravated kidnapping charges. He challenged the fact that investigators did not create a lineup of cars but only showed witnesses one photograph.

After candidly volunteering that he was a drug dealer who had seven cell phones, the petitioner presented a story, which he acknowledged that he was telling for the first time and that he had concealed from his trial counsel, and did not relate to his ineffective assistance of counsel claim. Rather, it presented an alternate, if improbable, story of the victim's death. According to the petitioner, the cell phone which had shown his presence both near the victim's home and near the site where her body was found was in his possession when he spoke with Jackson police on December 9, but a man named Rabu – whose death prevents him from paying for his crimes – had the phone at the time of the crime. Rabu, Montorius Brooks, and another unnamed man had kidnapped the victim as part of a robbery in an effort to get $60,000, which the petitioner had hidden down a convenient well. They held the victim for two days in Denmark before taking her body to an area within one mile of the petitioner's cousin's home in the part of the state in which the petitioner grew up.

The petitioner speculated that expert testimony would reveal that the bullet hole through the victim's bed might have been a rat eating through the bed, and he insist that he was not at the arraignment for the superceding indictment, despite the trial judge's notes on the docket sheet indicating his presence and despite apparent references to his presence in the transcript.

The post-conviction court denied relief, finding that trial counsel adequately investigated the alleged alibi witnesses and presented alibi proof; that the petitioner presented no proof regarding the testimony of absent witnesses and that alibi proof was in fact presented to the jury; that the petitioner did not want a continuance after the amendment of the indictment; that the petitioner did not show that defense counsel would have succeeded with a motion to suppress; that the petitioner failed to introduce evidence regarding the testimony of expert witnesses in ballistics or pathology; and that the petitioner's testimony lacked credibility.

ANALYSIS

A post-conviction court's findings of fact are binding upon the appellate court unless

the evidence preponderates otherwise. *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006). The appellate court does not reweigh or reevaluate the evidence, and factual questions involving the credibility of witnesses or the weight of their testimony are matters for the trial court's resolution. *Id.* A mixed question of fact and law, such as a claim of ineffective assistance of counsel, is reviewed de novo. *Dellinger v. State*, 279 S.W.3d 282, 294 (Tenn. 2009).

The Post-Conviction Procedure Act mandates relief when a conviction is void or voidable because of the abridgment of any right guaranteed by the Tennessee or United States Constitutions. T.C.A. § 40-30-103 (2010). 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). "Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence." *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

Article I, section 9 of the Tennessee Constitution and the Sixth Amendment to the United States Constitution guarantee an accused the right to the effective assistance of counsel. *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011). To establish that this right has been violated, the petitioner must show both that trial counsel's performance was deficient and that such a deficiency prejudiced the defense. *Pylant v. State*, 263 S.W.3d 854, 868 (Tenn. 2008). Because the petitioner must establish both deficiency and prejudice, a failure to establish either prong is grounds for denial of the petition for relief. *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). The appellate court need not examine both prongs if the petitioner has failed to establish one component. *Id.*

Trial counsel is not deficient if the services rendered fell within "the range of competence demanded of attorneys in criminal cases." *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). To establish deficiency, the petitioner must show that counsel's errors were "so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad*, 938 S.W.2d at, 369. The reviewing court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Burns*, 6 S.W.3d 453, 462 (Tenn. 1999). Evidence of a strategic decision's failure or of its detrimental impact on the defense does not, in and of itself, establish deficiency. *Goad*, 938 S.W.2d at, 369. "However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation." *Id.* "Counsel's duty is 'to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.'" *Felts*, 354 S.W.3d at, 277 (quoting *Strickland v. Washington*, 466 U.S. 668, 691 (1984)). The petitioner's statements and actions impact the reasonableness of investigation. *Id.*

Prejudice is established if the petitioner can show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Pylant*, 263 S.W.3d at 868. A "reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

On appeal, the petitioner alleges that the post-conviction court erred in dismissing his petition because trial counsel did not adequately investigate his alibi witnesses and did not present a ballistics expert. When a post-conviction petitioner premises relief on trial counsel's failure to call a witness in his defense at trial, the petitioner must present that witness at the post-conviction hearing. *Pylant*, 263 S.W.3d at 869.

> As a general rule, this is the only way the petitioner can establish that (a) a material witness existed and the witness could have been discovered but for counsel's neglect in his investigation of the case, (b) a known witness was not interviewed, (c) the failure to discover or interview a witness inured to his prejudice, or (d) the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner. It is elementary that neither a trial judge nor an appellate court can speculate or guess on the question of whether further investigation would have revealed a material witness or what a witness's testimony might have been if introduced by defense counsel. The same is true regarding the failure to call a known witness.

Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990)). The petitioner's failure to call any witnesses other than trial counsel and Investigator Parson is fatal to his claim for relief on the basis of these witnesses's testimony because he cannot establish prejudice. *See id.* at 758. Furthermore, the evidence amply supports the post-conviction court's finding that trial counsel conducted a thorough investigation of the witnesses given to him by the petitioner and that his performance was not deficient.

The petitioner also asserts that his trial counsel was deficient in failing to request a bill of particulars, in failing to file a motion to suppress the search warrant, and in failing to move for a continuance. However, the petitioner's own testimony acknowledged that his trial counsel did file a motion regarding the time and place of death and that he was aware of the information which he sought to be clarified in a bill of particulars. Accordingly, he cannot show prejudice. Next, trial counsel's testimony, which the post-conviction court credited, explained that he had informed the petitioner of the opportunity for a continuance but that the new charges in the indictment were based on the same set of facts, so there was

no new preparation necessary for trial. The petitioner, therefore, told trial counsel he did not want a continuance. The record supports the post-conviction court's conclusion that trial counsel's decision not to file for a continuance was not deficient. The post-conviction court also found there was no basis for filing a motion to suppress the evidence from the search of the vehicle and that the petitioner could show no prejudice. While the petitioner (without legal argument) intimates that the warrant was flawed because Investigator Parson did not create a photographic lineup of vehicles as a basis for probable cause, he acknowledged at the hearing that he gave consent to the search. Accordingly, law enforcement had a valid basis for their search because he consented to it, and he cannot show prejudice.

The petitioner further faults his counsel for refusing to introduce evidence of a domestic altercation as an alternate source of the victim's blood in the petitioner's vehicle. However, as a plausible strategic choice made after a thorough investigation, such a decision is "virtually unchallengeable." *See Felts*, 354 S.W.3d at 277 (quoting *Strickland*, 466 U.S. at 690). We note that the petitioner's appellate brief contains a second recitation of fact rather than legal arguments. Accordingly, any other issues are waived. Tenn. Ct. Crim. App. R. 10(b).

CONCLUSION

Because we conclude that the petitioner was not denied the effective assistance of counsel at trial, we affirm the judgment of the post-conviction court.

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JOHN EVERETT WILLIAMS, JUDGE