

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs May 13, 2015

**ABBAS NEJAT v. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County  
No. 2008-C-2274 Steve R. Dozier, Judge**

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**No. M2014-01730-CCA-R3-PC – Filed June 5, 2015**

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Abbas Nejat (“the Petitioner”) challenges the denial of his petition for post-conviction relief. On appeal, the Petitioner argues that he received ineffective assistance of counsel when trial counsel failed to include the transcript of the Petitioner’s Rule 404(b) hearing in the record on direct appeal. Upon review of the record, we conclude that the Petitioner’s challenge to admission of evidence about his membership in the Kurdish Pride Gang under Tennessee Rule of Evidence 404(b) is without merit. Accordingly, the Petitioner has failed to show that he was prejudiced by trial counsel’s deficiency. We affirm the judgment of the post-conviction court.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the Court, in which JAMES CURWOOD WITT, JR., and ROBERT H. MONTGOMERY, JR., JJ., joined.

Laylah V. Smith, Nashville, Tennessee, for the Appellant, Abbas Hasam Nejat.

Herbert H. Slatery III, Attorney General and Reporter; Meredith DeVault, Assistant Attorney General; Victor S. Johnson III, District Attorney General; and Rachel Sobrero, Assistant District Attorney General, for the Appellee, State of Tennessee.

## OPINION

### **Factual and Procedural Background**

#### *Trial Proceedings*

The record reflects that the Petitioner, along with two other co-defendants, was indicted with one count of coercion of a witness and one count of retaliation for a past action. On direct appeal, this court summarized the facts presented at trial as follows:

This case resulted from [the Petitioner]'s making a threatening telephone call to a witness in a prior matter. At trial, Metropolitan Nashville Police Detective Lee Freeman testified that in late 2006, brothers Aso and Ako Nejat planned retaliation against Darien Coleman and Brian Woods, who had robbed them. *See State v. Aso Hassan Nejad*, No. M2009-00481-CCA-R3-CD, 2010 WL 3562015, at \*1 (Tenn. Crim. App. at Nashville, Sept. 14, 2010), *perm. to appeal denied*, (Tenn. 2011). At Ako's instruction, Delsosh Ahmed called Coleman and Woods to lure them to Edwin Warner Park with the promise of a drug deal. Brushsa Salee was parked there as the "bait," while Aso, Ako, and Nejee Benjuja waited in the tree line to shoot Coleman and Woods. However, before Coleman and Woods arrived, Officer Jim Spray patrolled the area and approached Salee. Salee, who was on probation and had a gun in the passenger seat of his car, quickly drove away. Officer Spray pursued in his vehicle. Salee wrecked his car and ran away; he was apprehended later that night. When Officer Spray stepped out of his car, he discovered numerous bullet holes in his vehicle.

Detective Freeman testified that after the perpetrators involved were apprehended, Ahmed agreed to testify against Ako and Aso. Detective Freeman said the trial began on Monday July 14, 2008, and lasted three days. At around 4:30 p.m. on Wednesday July 17, 2008, the jury found Ako guilty of conspiracy to commit first degree murder. Aso was found guilty of conspiracy to commit first degree murder and attempted second degree murder. Later that night, either Detective Mark Anderson or District Attorney General Rob McGuire informed Detective Freeman that Ahmed had received threatening telephone calls.

Delsosh Ahmed testified that he was originally from Iraq and that he had been in Nashville since 2003. He said that he was friendly with other members of the Kurdish community and that all members of the community knew each other. He had had frequent contact with [the

Petitioner] and had spoken with him on the telephone. He said that he believed [the Petitioner] was the cousin of Ako and Aso.

[Mr.] Ahmed said that after the Edwin Warner Park incident, he was arrested and was appointed trial counsel. After negotiations, [Mr.] Ahmed agreed to testify against Ako and Aso. Following his testimony, Ahmed entered a guilty plea to conspiracy to facilitate aggravated robbery and received a five-year probationary sentence. [Mr.] Ahmed confirmed that his trial testimony mirrored the version of events related by Detective Freeman. Additionally, he testified that he left before the shooting because he got scared. [Mr.] Ahmed recalled that he testified the day before the verdict was returned and that nothing happened the night of his testimony.

The following day, July 17, 2008, [Mr.] Ahmed went to work at Azido's Tight Whips, which sold automobile accessories. That afternoon, he received three threatening telephone calls, one of which was made by [the Petitioner]. [Mr.] Ahmed said that when [the Petitioner] called, [the Petitioner] "told [me] that he was going to kill [me] because [I] snitched on [the Petitioner's] brother." [Mr.] Ahmed stated that although he could not remember the exact words used, he definitely recalled that his life was threatened and that the call scared him.

[Mr.] Ahmed said that after the calls, he telephoned the police and his attorney. Additionally, because he wore an ankle monitor as part of his probationary sentence, he called the "monitoring people" to obtain permission to go home early. After being granted permission to leave, [Mr.] Ahmed went home around 5:00 p.m. Thereafter, a policeman came to his home, and [Mr.] Ahmed told the officer about the threatening calls. [Mr.] Ahmed said that after the calls, he left Tennessee. He explained, "I wouldn't have left the state if it wasn't that serious."

On cross-examination, [Mr.] Ahmed acknowledged that he could not recall the order in which the threatening calls were received. However, he recalled that the telephone call from [the Petitioner] "was real threatening."

On redirect examination, [Mr.] Ahmed stated that he was not a member of the Kurdish Pride Gang but that [the Petitioner], Ako, and Aso were members. [Mr.] Ahmed acknowledged that a person did not have to be a member of the gang or be "affiliated" with the gang in order to "hang out" with the members. [Mr.] Ahmed said that at one time he stored [the Petitioner]'s telephone number in his cellular telephone and that he used to be familiar with the number. However, at the time of trial, he could not

remember [the Petitioner]'s telephone number. He maintained that at the time of the threatening call, he recognized that the call was coming from [the Petitioner]'s telephone number. He recalled that [the Petitioner] had come to [Mr.] Ahmed's mother's house a couple of days before Ako and Aso's trial to "make sure [Mr. Ahmed] wouldn't talk."

Officer Richard Michael Wilson testified that around 6:50 p.m. on July 16, 2008, he responded to [Mr.] Ahmed's residence at 4911 Pearson Place because of Ahmed's complaint of threatening telephone calls. [Mr.] Ahmed told Officer Wilson that he had received threatening telephone calls from family members of people whom he had testified against earlier that day. [Mr.] Ahmed said that around 4:40 p.m., [the Petitioner] called from telephone number (615) 589-5371 and said, "You testified against my brother, I'm going to kill you." Officer Wilson recalled that [Mr.] Ahmed was "scared," "twitchy," and "honestly nervous." [Mr.] Ahmed insisted that they speak near the officer's car because he feared for his family's safety.

Jim Merklung, an employee of Cricket Communications, testified that [Mr.] Ahmed's cellular telephone records reflect that at 4:39 p.m. on July 16, 2008, [Mr.] Ahmed received a telephone call from (615) 593-1578. Merklung said that the number from which the call originated belonged to a subscriber named Amir Nejad, whose address was 661 North Sugar Mill Drive in Nashville. Merklung also confirmed that following that call, [Mr.] Ahmed called the police.

Detective Mark Anderson testified that he worked with the Metropolitan Nashville Police Department's gang unit. The trial court allowed Detective Anderson to testify as an expert in the Kurdish Pride Gang. Detective Anderson said that the Kurdish community was tight knit and acted as "a city within a city." He explained, "They have their own businesses, they interact with themselves quite often." He said that the gang members were very close, considered each other to be family, and called each other brothers. He stated that the leaders of the gang were the older members and that they were known as "OG's, or original gangsters." [The Petitioner], Ako, and Aso were the "[m]ost prevalent" OG's. Detective Anderson said that Ako and Aso were brothers and that [the Petitioner] was their cousin.

Detective Anderson testified that [Mr.] Ahmed told him that following Ako and Aso's trial, he received a telephone call from [the Petitioner], during which [the Petitioner] threatened to kill him. Detective

Michael Gooch arrested [the Petitioner] at [the Petitioner]’s residence at 661 Sugar Mill Road, then [the Petitioner] was taken to the Criminal Justice Center (CJC). After [the Petitioner] arrived at the CJC, Detective Anderson told [the Petitioner] that he had been arrested because of allegations that [the Petitioner] had threatened someone after a trial the week before. [The Petitioner] responded that he had not called anyone. When Detective Anderson said that he had not mentioned a telephone call, [the Petitioner] asked to speak to his attorney.

Detective Anderson said that he reviewed the cellular telephone records associated with (615) 589–5371, the origin of the threatening call [Mr.] Ahmed had attributed to [the Petitioner]. The records reflected that the number was registered to Amir Hasan, [the Petitioner]’s brother, who lived at 661 Sugar Mill Drive.

On cross-examination, Detective Anderson acknowledged that [Mr.] Ahmed was never physically assaulted. He also acknowledged that he did not know if Detective Gooch had mentioned the telephone calls to [the Petitioner].

On redirect, Detective Anderson stated that Detective Gooch did not file a supplemental report to reflect anything said during [the Petitioner]’s arrest. Detective Anderson stated that the Kurdish Pride Gang was involved in “[a]ssaults, intimidation, [and] retaliation.”

On recross-examination, Detective Anderson said that when [the Petitioner] was arrested, he stated that his home telephone number was (615) 781–4074. [The Petitioner] did not give a cellular telephone number, and Detective Anderson could not recall if [the Petitioner] had a cellular telephone when he was arrested.

State v. Abbas H. Nejat, M2010-00783-CCA-R3-CD, 2012 WL 5289597, \*1-3 (Tenn. Crim. App. Oct. 24, 2012) (footnotes omitted). The jury found the Petitioner guilty of retaliation for a past action. Id. at \*3.

On direct appeal, the Petitioner argued that the trial court erred when it admitted evidence about the Petitioner’s involvement in the Kurdish Pride Gang under Tennessee Rule of Evidence 404(b). However, the Petitioner had failed to include the transcript of the Rule 404(b) hearing in the appellate record. Therefore, this court stated that it was “unable to consider the merits of [the Petitioner]’s issues regarding the introduction of gang evidence.” Id. at \*5.

The Petitioner has included the transcript of the Rule 404(b) hearing in the record for the instant appeal. At the hearing, Detective Mark Anderson testified the Petitioner was a confirmed member of the Kurdish Pride Gang and held a leadership role in the organization. The Petitioner's cousins, Ako and Aso Nejad,<sup>1</sup> were known to hold leadership positions in the Kurdish Pride gang. Additionally, Detective Anderson explained that the Kurdish Pride Gang had developed a reputation for retaliation against anyone who they suspected of "snitching." At the conclusion of the hearing, the trial court ruled that, although gang membership could be considered "bad acts," evidence of the Petitioner's gang membership was probative as to motive, intent, and identity. Additionally, the trial court found that evidence of the Petitioner's gang affiliation was necessary to explain the Petitioner's relationship to Aso and Ako Nejad, and exclusion of the evidence would create a void which would lead to jury confusion. The probative value of the evidence was not outweighed by the prejudice.

### *Post-Conviction Proceedings*

The Petitioner filed a pro se petition for post-conviction relief on May 10, 2010. On January 2, 2014, the Petitioner filed a "Motion to Amend Post-Conviction." Post-conviction counsel was appointed, and an amended petition was filed. Additionally, post-conviction counsel filed two supplemental petitions for post-conviction relief. In the amended and supplemental petitions, the Petitioner claimed he received ineffective assistance of counsel based on trial counsel's: (1) refusal to communicate with the Petitioner; (2) failure to provide the Petitioner with evidence necessary to decide whether to plead guilty or proceed to trial; (3) failure to contact or investigate witnesses who may have been able to assist with the Petitioner's defense; (4) refusal to initiate or pursue plea negotiations; (5) failure to file his appellate brief within the time required by the Tennessee Rules of Appellate Procedure; and (6) failure to provide this court with transcripts of the Rule 404(b) hearing and sentencing hearing. Additionally, the Petitioner averred that he was not informed of the charges against him for nearly three days after his arrest and that "there may be newly discovered evidence in this case" which would rebut the victim's testimony. On appeal, however, the Petitioner only addresses his assertion that trial counsel was ineffective for failing to include the transcript of the Rule 404(b) hearing with the record in the direct appeal.

As relevant to the issue presented on appeal, trial counsel admitted at the post-conviction hearing that he failed to include the transcript of the Rule 404(b) hearing in the record on direct appeal, even though he challenged the admissibility of evidence concerning the Petitioner's gang membership on appeal. He stated that he thought he had requested all the pertinent transcripts but that he did not check to see whether the Rule

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<sup>1</sup> Although Ako and Aso's surname was spelled "Nejat" in the direct appeal of this case, the Petitioner spells their name "Nejad." Therefore, we will use the Petitioner's spelling in this opinion.

404(b) hearing transcript was included in the record before the record was filed with this court. Consequently, this court did not address the issue on its merit in the direct appeal.

In a written order, the post-conviction court found that, even if trial counsel was deficient for failing to include the transcript of the Rule 404(b) hearing in the record on direct appeal, the Petitioner could not prove he was prejudiced because there was no basis to overrule the trial court's ruling as to the admissibility of the evidence. Therefore, the post-conviction court found that no prejudice had been shown and that the Petitioner had failed to prove his allegation by clear and convincing evidence. This timely appeal followed.

### Analysis

On appeal, in what appears to be an attempt to show prejudice, the Petitioner argues that the trial court erred by admitting evidence related to the Petitioner's membership in the Kurdish Pride Gang. Additionally, or perhaps alternatively, the Petitioner asserts that trial counsel's failure to include the transcript of the Rule 404(b) hearing amounts to a circumstance where "counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing" and prejudice should be presumed. See United States v. Cronin, 466 U.S. 648, 659 (1984). The State argues that evidence of the Petitioner's gang membership was properly admitted at trial and that the Petitioner cannot show he was prejudiced by trial counsel's failure to present a complete record on appeal. We agree with the State.

In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f) (2012); Jaco v. State, 120 S.W.3d 828, 830 (Tenn. 2003). "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)). Whether the petitioner has met his burden of proof is a question of law that this Court reviews de novo. Arroyo v. State, 434 S.W.3d 555, 559 (Tenn. 2014).

Post-conviction relief cases often present mixed questions of law and fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). We review a post-conviction court's findings of fact under a de novo standard with a presumption that those findings are correct unless otherwise proven by a preponderance of the evidence. Id. (citing Tenn. R. App. P. 13(d); Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997)). A trial court's conclusions of law are reviewed "under a purely *de novo* standard, with no presumption of correctness . . ." Id. When reviewing a trial court's findings of fact, this Court does not reweigh the evidence or "substitute [its] own inferences for those drawn by the trial court." Id. at 456. Additionally, "questions concerning the credibility of the 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.” Id. (citing Henley, 960 S.W.2d at 579).

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove two factors: (1) that counsel’s performance was deficient; and (2) that the deficiency prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687 (1984); see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven in order for the court to grant post-conviction relief. Strickland, 466 U.S. 687; Henley, 960 S.W.2d at 580; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

As to the first prong of the Strickland analysis, “counsel’s performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases.” Henley, 960 S.W.2d at 579 (citing Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)); see also Goad, 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate “that the counsel’s acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms.” Goad, 938 S.W.2d at 369 (citing Strickland, 466 U.S. at 688); see also Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975).

Even if counsel’s performance is deficient, the deficiency must have resulted in prejudice to the defense. Goad, 938 S.W.2d at 370. Therefore, under the second prong of the Strickland analysis, the petitioner “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Id. (quoting Strickland, 466 U.S. at 694) (internal quotation marks omitted). In cases where trial counsel failed to present an adequate record for an issue to be addressed on appeal, the petitioner suffers no prejudice ““unless the omitted issue has some merit[.]”” Gene Booker v. State, No. W2007-02481-CCA-R3-PC, 2009 WL 482647, at \*4 (Tenn. Crim. App. Feb. 24, 2009), perm. app. denied, (Tenn. 2009) (quoting Carpenter v. State, 126 S.W.3d 879, 887 (Tenn. 2004)).

In this case, trial counsel admitted that he failed to ensure that the transcript of the Rule 404(b) hearing was included in the record on direct appeal. As we have noted in other cases, failure to provide an adequate record on direct appeal constitutes deficient performance. Id. Therefore, we must examine whether the Petitioner was prejudiced by the deficiency.



The Petitioner appears to ask this court to view trial counsel's failure to file the Rule 404(b) hearing transcript as a "complete denial of counsel" and to presume prejudice. See Cronic, 466 U.S. at 659. However, as previously stated, in cases where an issue is waived due to counsel's failure to present an adequate record on appeal, the petitioner may only demonstrate prejudice by proving that the issue had some merit. See Gene Booker, 2009 WL 482647, at \*4. Therefore, we will not presume prejudice in this case.

The Petitioner claims that, had trial counsel included the Rule 404(b) hearing transcript in the record on direct appeal, this court would have reversed the trial court's ruling admitting the evidence of the Petitioner's gang membership. As stated previously, the trial court ruled that the evidence was relevant to the Petitioner's motive, intent, and identity. Moreover, the trial court found that the evidence was admissible because it was necessary to explain to the jury how the Petitioner was related to Aso and Ako Nejad. Without evidence of the Petitioner's gang membership, the jury would be left with a conceptual void that would lead to confusion of material issues. Additionally, the trial court found that the probative value of the evidence was not outweighed by unfair prejudice.

The Petitioner argues that his gang membership was not necessary to explain his relationship to Aso and Ako Nejad or to explain his motivation for calling Mr. Ahmed. He claims that the fact that Aso and Ako Nejad were his cousins and the close-knit nature of the Kurdish community would be sufficient to fill any conceptual void.

Generally, this court reviews a trial court's decision to admit evidence based upon its relevancy under an abuse of discretion standard. State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). Likewise, when such evidence is offered under Tennessee Rule of Evidence 404(b) and the trial court has "substantially complied" with the procedural requirements in that rule, we review the trial court's decision under an abuse of discretion standard. Id. We will reverse the trial court's decision "only when the court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining." State v. Gilliland, 22 S.W.3d 266, 270 (Tenn. 2000) (quoting State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999)) (internal quotation marks omitted).

Tennessee Rule of Evidence 401 defines relevant evidence as "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. Nevertheless, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . ." Tenn. R. Evid. 403.

Tennessee Rule of Evidence 404(b) reads as follows:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

- (1) The court upon request must hold a hearing outside the jury's presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
- (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
- (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

In cases where the State seeks to introduce evidence under Rule 404(b) that is relevant only to give contextual background to the case,

the state must establish and the trial judge must find that (1) the absence of the evidence would create a chronological or conceptual void in the state's presentation of its case; (2) the void created by the absence of the evidence would likely result in significant jury confusion as to the material issues or evidence in the case; and (3) the probative value of the evidence is not outweighed by the danger of unfair prejudice.

Gilliland, 22 S.W.3d at 272.

In this case, the trial court substantially complied with the procedural requirements in Tennessee Rule of Evidence 404(b). Therefore, we will apply an abuse of discretion standard.

We discern no abuse of discretion in the trial court's decision to admit evidence of the Petitioner's membership in the Kurdish Pride Gang. The trial court found that such evidence was relevant to the Petitioner's motive, intent, and identity. Additionally, the trial court specifically found that exclusion of such evidence would create a void that would lead to jury confusion of material issues. The record supports these findings. Evidence of the Petitioner's gang membership certainly was relevant to the Petitioner's identity as well as his motive and intent in making threatening telephone calls to Mr.

Ahmed. Additionally, Mr. Ahmed testified that the Petitioner threatened to kill him because he had testified against the Petitioner's "brother." The Petitioner was actually a cousin of Ako and Aso Nejad. Such discrepancy could create a void which would cause jury confusion without evidence that the Petitioner and his cousins were members of a gang and often referred to each other as "brothers." Moreover, the trial court found that the probative value of the evidence was not substantially outweighed by unfair prejudice.

Accordingly, we conclude that the trial court did not abuse its discretion in admitting evidence of the Petitioner's membership in the Kurdish Pride Gang. The Petitioner's challenge as to the admission of such evidence is without merit. Therefore, the Petitioner cannot demonstrate that he was prejudiced by trial counsel's failure to include the transcript of the 404(b) hearing in the record on direct appeal. See Gene Booker, 2009 WL 482647, at \*4. He is not entitled to relief for his post-conviction claim.

### **Conclusion**

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

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ROBERT L. HOLLOWAY, JR., JUDGE