IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs November 13, 2013

CLAUDE PHILLIPS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 06-09192 W. Otis Higgs, Jr., Judge

No. W2013-00440-CCA-R3-PC - Filed November 20, 2013

Petitioner was convicted of one count of aggravated robbery and one count of aggravated assault. The trial court sentenced petitioner to twenty years as a Range II, multiple offender for his aggravated robbery conviction and to fifteen years as a Range III, persistent offender for his aggravated assault conviction, to be served consecutively. He unsuccessfully appealed his convictions and sentences. *See State v. Claude Phillips*, No. W2008-02810-CCA-R3-CD, 2010 WL 2695328, at *1 (Tenn. Crim. App. July 7, 2010). Petitioner then filed the current petition for post-conviction relief in which he alleged that he received ineffective assistance of counsel at trial. Following an evidentiary hearing, the post-conviction court denied relief. On appeal, petitioner argues that he received ineffective assistance of counsel when trial counsel failed to properly investigate petitioner's mental health condition and failed to present mitigating evidence at his sentencing hearing. Following our review of the parties' arguments, the record, and the applicable law, we affirm the judgment of the post-conviction court.

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

ROGER A. PAGE, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Sean H. Muizers (on appeal) and Juni Ganguli (at post-conviction hearing), Memphis, Tennessee, for appellant, Claude Phillips.

Robert E. Cooper, Attorney General and Reporter; Jeffrey D. Zentner, Assistant Attorney General; Amy P. Weirich, District Attorney General; and David Zak, Assistant District Attorney General, for appellee, State of Tennessee.

OPINION

I. Facts

A. Trial

This court summarized the facts presented at trial in our opinion addressing petitioner's direct appeal:

> The [petitioner] was involved in an incident at a Sears store located in the Hickory Ridge Mall in Memphis. The [petitioner] removed a box of merchandise from the store and tried to return the item to a different Sears location. The second Sears location notified the Hickory Ridge location that someone had attempted to return the merchandise.
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> John Lee, a Sears security manager, testified that he reviewed surveillance videotape from the store and saw the [petitioner] get out of a vehicle, enter the store, and leave with a white box containing a mosquito fogger. No alarm was attached to the merchandise. A search of the store revealed an empty spot on the shelf where the item had been. This item was the only one in the system and had been on the shelf for some time.
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> When the [petitioner] attempted to return the merchandise at the original location, it was discovered that the store number and shipping number on the item matched the item missing from the inventory. The security manager confronted the [petitioner]. The [petitioner] refused to go to the office after being confronted, armed himself with a box cutter, took the merchandise from behind a register, and exited the store. The [petitioner] told the security manager that he was leaving with the merchandise and threatened to cut anyone that tried to follow or stop him. When he noticed employees following him to the parking lot, the [petitioner] dropped the merchandise and ran toward the security manager. Police arrested the [petitioner] while he was still in possession of the box cutter.
>
> During the security manager's testimony, several photographs were admitted into evidence including photographs of the merchandise, the [petitioner] holding the merchandise, and the [petitioner] returning the merchandise. There was also a photograph admitted into evidence showing the security manager with his hand up while the [petitioner] is behind the register. The security manager said that he had his hand up because the [petitioner] had the box cutter in his hand. The final photograph admitted into

evidence depicted the [petitioner] exiting the store with the merchandise in his hand while he was approached by Susan Sadler.

Susan Sadler, the Sears district security manager, also testified that the [petitioner] threatened her with a box cutter when she tried to detain him.

Officer Charles Winbush of the Memphis Police Department testified that he was on patrol on May 24, 2006, when he received a call that a man had stolen some merchandise and tried to return it the same day to get a refund. When he arrived at the store, the [petitioner] was kicking the door. He assisted in detaining the [petitioner] and found a box cutter in one of his pockets.

Detective Josh Robinson of the Memphis Police Department testified that while he was on patrol on May 24, 2006, he received a call that officers were holding a prisoner at a Sears. Robinson arrived on the scene to find Officer Winbush who gave him a box cutter, a DVD, and the [petitioner] to transport to the jail at 201 Poplar. He transported the [petitioner] to the jail for processing and took the evidence to the property evidence storage room.

Officer Paul Neely of the Memphis Police Department testified that he came into contact with the [petitioner] on May 25, 2006, while investigating the aggravated robbery case. He advised the [petitioner] of his rights before they spoke about the events at Sears. The [petitioner] acknowledged that he had a box cutter at the Sears and characterized the events as an "incident" rather than a robbery. The [petitioner] said that Sears got the property that was taken and that he got "a lot of trouble." The [petitioner] told the officer that he went into the Sears with a friend and took the merchandise out of the store. He then tried to exchange it for a gift card. He told the officer that they tried to exchange it at a different store but were referred back to the Hickory Ridge Mall location. He took the box to the lawn and garden section of the store. The clerk asked if the merchandise was used or damaged, and the [petitioner] said he used his box cutter to show that the fogger was in good condition. He told the officer that until loss prevention intervened, he was under the impression that he was going to get a gift card.

The officer testified that the [petitioner] told him he removed the fogger from behind the counter and took it outside. The [petitioner] told him that he tried to go back in the store[,] but the doors were locked. He said that he kicked at the doors until the police arrived and placed him under arrest. The [petitioner] further stated, "I know this wasn't no robbery. I had a box cutter and took the fogger, but it wasn't no robbery."

> The [petitioner] was convicted of aggravated robbery, a Class B felony, and of the aggravated assault of Susan Sadler, a Class C felony. He was sentenced to twenty years as a Range II, multiple offender for the Class B felony and to fifteen years as a Range III, persistent offender for the Class C felony, with the sentences to run consecutively.

Claude Phillips, 2010 WL 2695328, at *1-2.

B. Post-Conviction

Petitioner filed his petition for post-conviction relief on April 5, 2011, and filed an amended petition on May 23, 2012. The post-conviction court held an evidentiary hearing on May 23, 2012.

Trial counsel testified that she was employed with the Shelby County District Public Defender's Office and that she began representing petitioner on June 28, 2007. She testified that after petitioner told her he was schizophrenic, she had a mental health evaluation conducted to see if a mental health defense was viable. She stated that petitioner was deemed competent and that when she spoke with petitioner, he seemed to understand and be able to discuss the issues related to trial. She said that nothing in the psychologist's report indicated that petitioner's assertions of suffering from a mental health condition were true. Trial counsel conceded that petitioner was evaluated at Midtown Mental Health Center by Dr. John Worley and that this facility generally declares most people competent.

Trial counsel stated that she could not pursue a mental health defense because she did not have a psychologist to testify that petitioner's mental health was the catalyst for the crime. Trial counsel also stated that although petitioner told her he suffered from paranoid schizophrenia and depression, petitioner's mental evaluation did not support his claims. In addition, petitioner never stated that his crime was a result of his mental illness. Trial counsel conceded that during petitioner's *Momon*[1] hearing, petitioner stated that he suffered from paranoid schizophrenia, anti-depression, and hallucinations. Trial counsel did not introduce any mitigating evidence at petitioner's sentencing hearing.

Petitioner testified that he suffered from paranoid schizophrenia, hallucinations, depression, and anxiety in 2006, 2007, and 2008. He asserted that he had been diagnosed with these ailments in his "early twenties or [] late teens." He said that since that time, he had been examined by three or four doctors. He stated that he was taking the medications Geodon, Risperdal, Remeron, and Cogentin when this crime occurred. Petitioner told trial

[1] *See Momon v. State*, 18 S.W.3d 152 (Tenn. 1999).

counsel that he suffered from hallucinations and paranoid schizophrenia and that he was under psychiatric care when this crime occurred.

Petitioner acknowledged that he had been evaluated by Dr. Worley at Midtown Mental Hospital. Petitioner asserted that the evaluation was "[v]ery fast," lasting approximately fifteen to twenty minutes. Trial counsel informed petitioner of the results from his evaluation. Petitioner also testified that trial counsel did not present any mitigating witnesses at his sentencing hearing. On cross-examination, petitioner acknowledged that he stole merchandise from Sears and that he had a box cutter in the store.

Following the hearing, the post-conviction court denied the petition by written order. The post-conviction court stated that trial counsel obtained the services of a mental health professional to investigate petitioner's mental health issues. The post-conviction court also found that petitioner had failed to prove that trial counsel's pre-trial investigation regarding petitioner's mental health was inadequate. The post-conviction court determined that petitioner failed to show that trial counsel was ineffective.

II. Analysis

Petitioner argues that trial counsel provided ineffective assistance by failing to properly investigate his mental health condition and failing to present mitigating evidence at his sentencing hearing. The State responds that the post-conviction court properly denied the petition for post-conviction relief. We agree with the State.

A. Standard of Review

To obtain relief in a post-conviction proceeding, a petitioner must demonstrate that his or her "conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." Tenn. Code Ann. § 40-30-103 (2012). A post-conviction petitioner bears the burden of proving his or her factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f) (2012). "'Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.'" *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010) (quoting *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009)).

Appellate courts do not reassess the trial court's determination of the credibility of witnesses. *Dellinger v. State*, 279 S.W.3d 282, 292 (Tenn. 2009) (citing *R.D.S. v. State*, 245 S.W.3d 356, 362 (Tenn. 2008)). Assessing the credibility of witnesses is a matter entrusted to the trial judge as the trier of fact. *R.D.S.*, 245 S.W.3d at 362 (quoting *State v. Odom*, 928 S.W.2d 18, 23 (Tenn. 1996)). The post-conviction court's findings of fact are conclusive on

appeal unless the preponderance of the evidence is otherwise. *Berry v. State*, 366 S.W.3d 160, 169 (Tenn. Crim. App. 2011) (citing *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997); *Bates v. State*, 973 S.W.2d 615, 631 (Tenn. Crim. App.1997)). However, conclusions of law receive no presumption of correctness on appeal. *Id.* (citing *Fields v. State*, 40 S.W.3d 450, 453 (Tenn. 2001)). As a mixed question of law and fact, this court's review of petitioner's ineffective assistance of counsel claims is de novo with no presumption of correctness. *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011) (citations omitted).

The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and article I, section 9 of the Tennessee Constitution require that a criminal defendant receive effective assistance of counsel. *Cauthern v. State*, 145 S.W.3d 571, 598 (Tenn. Crim. App. 2004) (citing *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975)). When a petitioner claims that he received ineffective assistance of counsel, he must demonstrate both that his lawyer's performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Finch v. State*, 226 S.W.3d 307, 315 (Tenn. 2007) (citation omitted). It follows that if this court holds that either prong is not met, we are not compelled to consider the other prong. *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004).

To prove that counsel's performance was deficient, petitioner must establish that his attorney's conduct fell below an objective standard of "'reasonableness under prevailing professional norms.'" *Finch*, 226 S.W.3d at 315 (quoting *Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006)). As our supreme court held:

> "[T]he assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. It is a violation of this standard for defense counsel to deprive a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. . . . Defense counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest, undeflected by conflicting considerations."

Id. at 315-16 (quoting *Baxter*, 523 S.W.2d at 934-35). On appellate review of trial counsel's performance, this 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).

To prove that petitioner suffered prejudice as a result of counsel's deficient performance, he "must establish a reasonable probability that but for counsel's errors the result of the proceeding would have been different." *Vaughn*, 202 S.W.3d at 116 (citing

Strickland, 466 U.S. at 694). "A 'reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). As such, petitioner must establish that his attorney's deficient performance was of such magnitude that he was deprived of a fair trial and that the reliability of the outcome was called into question. *Finch*, 226 S.W.3d at 316 (citing *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999)).

B. Petitioner's Claims

1. Failure to Investigate Petitioner's Mental Health Condition

In this case, petitioner failed to show that trial counsel's performance was deficient or that trial counsel's performance caused him to suffer prejudice at trial. Petitioner claims that trial counsel was deficient for failing to properly investigate his mental health condition. However, trial counsel had petitioner evaluated at the Midtown Mental Health Center. After the evaluation, Dr. Worley determined that petitioner was competent, which did not support petitioner's contention that he suffered from mental illnesses. When viewed in hindsight, there may have been other possible avenues of investigation regarding petitioner's mental health. However, this 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). Here, after petitioner informed trial counsel that he suffered from a mental condition, trial counsel pursued a reasonable course of action to determine if a mental health defense was viable. Petitioner's mental health evaluation did not support petitioner's contention, and trial counsel determined that the defense was not valid. Therefore, we agree with the post-conviction court that trial counsel's performance was not deficient.

Furthermore, petitioner did not present any evidence at the post-conviction hearing that further investigation into his mental health would have changed the outcome of the trial or sentencing. Although petitioner testified that he had a history of mental illnesses, petitioner presented no mental health experts to testify at his post-conviction hearing. *See Jerry Burke v. State*, No. W2001-01700-CCA-MR3-PC, 2002 WL 31852866, at *4 (Tenn. Crim. App. Dec. 20, 2002) (Petitioner could not support claim that trial counsel should have requested a mental evaluation due to his alleged history of mental illness when no mental health experts testified at the post-conviction proceedings.). "Whenever [a] claim of ineffective assistance [of counsel] is based on the failure to submit proof, there must be a showing of what the evidence would have been." *Brimmer v. State*, 29 S.W.3d 497, 512 (Tenn. Crim. App. 1998) (citing *Davis v. State*, 912 S.W.2d 689, 698 (Tenn. 1995)). Petitioner has failed to prove the extent of his illness and what, if any, effect further proof related to his illness would have had on the outcome of his trial. Thus, even if trial counsel

had been deficient, petitioner cannot show that he was prejudiced by trial counsel's performance, and he is without relief in this matter.

2. Presentation of Mitigating Evidence

Related to the above claim, petitioner contends that trial counsel was also ineffective by failing to call mitigation witnesses at his sentencing hearing. Petitioner claims that if trial counsel had conducted a proper investigation, counsel would have been able to call mitigation witnesses related to petitioner's mental health. Petitioner asserts that "[t]estimony regarding [his] conditions could have been put forth by any physician that had treated or evaluated [him] in the past." However, petitioner failed to present any of these physicians at his post-conviction hearing.

> When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing. 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.

Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). By not presenting a mitigating witness or mitigating evidence at the post-conviction hearing, petitioner has failed to prove that he was prejudiced by trial counsel's performance, whether deficient or not, and therefore, he has failed to prove ineffective assistance of counsel.

CONCLUSION

Based on the parties' arguments, the record, and the applicable law, we affirm the judgment of the post-conviction court.

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ROGER A. PAGE, JUDGE