

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs November 13, 2013

JOSE LUIS VIZCAINO-RAMOS v. STATE OF TENNESSEE

Appeal from the Circuit Court for Hardeman County
No. 09-01-0830 J. Weber McCraw, Judge

No. W2012-02319-CCA-R3-PC - Filed November 20, 2013

Petitioner, Jose Luis Vizcaino-Ramos, was convicted by a Hardeman County jury of first degree premeditated murder and sentenced to life in prison. His direct appeal was unsuccessful. *See State v. Jose Luis Vizcaino-Ramos*, No. W2010-01325-CCA-R3-CD, 2011 WL 3330294, at *1 (Tenn. Crim. App. Aug. 3, 2011), *perm. app. denied* (Tenn. Nov. 16, 2011). Petitioner subsequently pursued post-conviction relief, which was denied by the post-conviction court. On appeal, petitioner contends that he received ineffective assistance of counsel at trial when trial counsel failed to properly investigate his case and failed to request a mental evaluation for appellant. Following our review, we affirm the judgment of the post-conviction court.

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

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

Andrea D. Sipes (on appeal), Jackson, Tennessee; and Terry Dycus (at post-conviction hearing), Somerville, Tennessee, for appellant, Jose Luis Vizcaino-Ramos.

Robert E. Cooper, Attorney General and Reporter; Meredith DeVault, Senior Counsel; D. Michael Dunavant, District Attorney General; and Joe Van Dyke, Assistant Attorney General, for appellee, State of Tennessee.

OPINION

I. Background

In our opinion disposing of petitioner's direct appeal, this court summarized the trial testimony as follows:

On March 6, 2004, the victim, Mary Graves, was fatally shot by her former boyfriend, [petitioner]. The victim's five-year-old son, C.G.,[FN 1] was present in the victim's car when the shooting occurred. [Petitioner] fled to Mexico after the shooting and the case remained dormant for several years. [Petitioner] was eventually extradited to Tennessee, and the trial began on January 13, 2010.

[FN 1] Due to the age of the victim's son, he will be referred to by his initials.

C.G., eleven years old at the time of trial, testified that [petitioner] and the victim had an argument while they were in the victim's car. C.G. observed [petitioner], whom he called "dad," shoot his mother. C.G. recalled that [petitioner] was the only person in the car with a gun. When the shooting occurred, C.G. was in the back seat of the victim's car, the victim was in the driver's seat, and [petitioner] was in the passenger seat. The shooting occurred in front of the victim's house. C.G. testified that after the shooting, [petitioner] dragged the victim's body out of the car and placed it by her house. C.G. was taken inside the victim's house and left alone that night.

Leo Dodd testified about an encounter with C.G. on the night of the shooting. Dodd was driving on a two-lane highway when he saw C.G. standing in the middle of the highway. Dodd knew C.G. was the victim's son. Dodd pulled C.G. off of the highway and asked him what he was doing. C.G. claimed his dad had killed his mom. C.G. also told Dodd that the victim's body was in the yard. Dodd said he flagged down a police officer and explained the situation.

Sergeant Arness Bowden of the Middleton Police Department responded to a call regarding the shooting. He testified that the victim's body was found by the side of a house. Sergeant Bowden said no other civilians were at the house. He claimed the police checked the surrounding area for the victim's car; however, they were unable to locate it. Sergeant Bowden testified that a weapon was not found at the house while he was present.

Special Agent Nathan Bishop of the Tennessee Bureau of Investigation and the criminal investigator for this case testified that the victim's body had multiple gunshot wounds. Special Agent Bishop thought the murder may have occurred at another location based on the absence of blood splatter. He was

informed that the victim lived with [petitioner], whose whereabouts were unknown. Special Agent Bishop testified that a nine millimeter handgun, spent shell casings, and rounds of ammunition were found at the scene. An unfired nine millimeter round was also found inside the victim's house. This unfired bullet was consistent with the other bullets found at the scene. Special Agent Bishop stated that the victim's car was later found in Texas.

Special Agent Cathy Ferguson of the Tennessee Bureau of Investigation testified that she interviewed C.G. after the shooting. C.G.'s description during the interview was consistent with his testimony at trial. Special Agent Ferguson stated that [petitioner] was discovered in Mexico sometime after October of 2008 when he was extradited to Tennessee. Special Agent Ferguson described several pieces of evidence that were found in the victim's car in Texas. These items included a spent shell casing that was fired from a handgun. The shell casing had the marking of a nine millimeter Luger.

A medical examiner testified that the victim's body had six gunshot wounds. These wounds were mostly to the right side of the victim's body and served as the cause of the victim's death.

Special Agent Dan Royse of the Tennessee Bureau of Investigation testified that he was assigned to the firearms identification unit. He examined the gun and the bullets that were recovered as evidence. Special Agent Royse examined the spent cartridge casings that were found outside the victim's house and inside the victim's car. He also examined the slug that was found inside the victim's body. Special Agent Royse determined that the casings and the slug were fired from the gun found at the crime scene.

Two witnesses testified about conversations that they had with [petitioner] around January 25, 2004. Dennis Brewer and Mike Kennamore said [petitioner] threatened to kill his girlfriend. The context of these conversations was not provided.

Officer Lisa Howard testified that she was a correction officer with the Hardeman County Sheriff's Department. Around September 26, 2009, [petitioner] admitted to Officer Howard that he shot the victim. [Petitioner] claimed he accidentally shot the victim while they were fighting over a gun. [Petitioner] reported that he argued with the victim over her relationship with another man. Officer Howard stated, "Basically, she was using him. He was

in love with her and she had another -- she was involved with another man.” [Petitioner] did not explain why the gun was fired six times.

Reba Thurmon and Alberto Vasquez were close friends of [petitioner]. Thurmon said [petitioner] visited her house shortly before the shooting. He was driven there by the victim, and Thurmon observed C.G. was also in the car. During the visit, Vasquez agreed to pick up [petitioner] from the victim’s house later that evening. When Thurmon and Vasquez drove to the victim’s house to pick up [petitioner], no one was there. As Thurmon and Vasquez were about to leave, they were stopped by the police. Thurmon said she talked to the police and they explained that the victim had been killed.

Vasquez corroborated Thurmon’s testimony about what transpired on the day of the shooting. Vasquez believed [petitioner] was staying with him because he was lonely. [Petitioner] was upset that his relationship with the victim had ended and had expressed a desire to commit suicide. Vasquez never heard [petitioner] talk about harming another person.

Jose Luis Vizcaino-Ramos, 2011 WL 3330294, at *1-2. Petitioner was convicted of first degree premeditated murder and sentenced to life in prison. *Id.* at *3. His conviction was subsequently affirmed by this court. *Id.* at *6.

II. Post-Conviction Proceedings

Petitioner filed his first petition for post-conviction relief on May 10, 2012. The post-conviction court appointed counsel to represent him, and he filed an amended post-conviction petition on June 29, 2012. Petitioner argued, *inter alia*, that he received ineffective assistance of counsel because of trial counsel’s failure to interview allegedly exculpatory witnesses and because trial counsel did not request that petitioner undergo a mental evaluation. The post-conviction court heard testimony from the witnesses who petitioner argued should have been interviewed, from trial counsel, and from petitioner himself at the September 17, 2012 evidentiary hearing.

Kimberly Michele Pannell testified that she met petitioner one time, approximately one to two weeks prior to the victim’s murder. She had difficulty recalling the exact conversation, but she recalled that it “seemed like [petitioner] said he might get Mikey” and that he accused Mikey of having an affair with his girlfriend, the victim. Ms. Pannell testified that she had heard rumors about the victim and Ms. Pannell’s husband, Anthony Pannell, as well as rumors about the victim and Mikey. She said that she had been estranged

from her husband at the time. On cross-examination, Ms. Pannell said that petitioner had been “very calm and collected” during their encounter.

Anthony Pannell testified that he “went out a few times” with the victim in 2004. He said that he never heard of a threat against him prior to the victim’s death but that afterwards, he heard a rumor that petitioner had killed the victim “and he was coming after” Mr. Pannell. Mr. Pannell said that he never had any contact with petitioner.

Trial counsel testified that she had been employed by the District Public Defender’s Office for twenty-two years. She was appointed to represent petitioner on June 23, 2009. She explained that the murder occurred on March 6, 2004, but petitioner was not tried until 2010 because he had to be extradited from Mexico. Trial counsel testified that she met with petitioner at least thirteen times and used an interpreter during those meetings. Trial counsel testified that she discussed with petitioner whether she would talk to the Pannells and whether their testimonies were pertinent to his case. She did not believe that Ms. Pannell’s testimony would have helped his defense.

Trial counsel testified that petitioner had been willing to plead guilty to manslaughter but that the State was not willing to make an offer. She said that she tried to argue at trial that he was not thinking rationally when he shot the victim, that “he was distraught[,] [b]ut [that] it was not to the point that he was incompetent or insane.” Trial counsel testified that appellant never said anything to her about temporary insanity, post-traumatic stress disorder, or mental disease or defect. She said that she was aware of petitioner’s encounter with Ms. Pannell and that his calm demeanor at that time supported a theory of premeditation. Trial counsel said that in her experience, petitioner was “pretty competent.” She agreed that there were experts who could have been hired in support of a manslaughter defense. Trial counsel testified that a mental evaluation would have been helpful for post-conviction purposes and that in hindsight, she wished that she had obtained a mental evaluation. She further testified that she did not believe a mental evaluation would have changed the outcome of the trial.

Trial counsel stated that she was unaware of a statement petitioner made to a jailer wherein he reported hearing voices. She said that had she been aware of the statement, it might have influenced her to move the court for a mental evaluation. Trial counsel testified that she had a letter in her file dated December 8, 2009, in which a jailer had written that petitioner reported hearing voices on June 23, 2009. Trial counsel noted that she had been appointed on June 23, 2009, and that the date on the letter was shortly before trial. She did not recall seeing the letter before reviewing her file during the post-conviction hearing. Trial counsel testified that she was not aware that the “[c]risis [team] had been called down to see” petitioner. Trial counsel said that a note from the jail administrator recounting how petitioner

cried after a telephone call would not have influenced her to move for a mental evaluation because petitioner “could easily turn off and on his tears.”

On cross-examination, trial counsel testified that June 23, 2009, was the first day that she met with petitioner and that she explained to him that day that he faced life in prison because he would be tried for first degree murder. She agreed that many clients would become upset when “the realization of trial actually hit them.” She said that she did not present proof during the trial that the victim had an affair because there was no proof of an affair. She said that she did not believe the victim’s having dated Mr. Pannell could be characterized as an affair because the victim was not married and Mr. Pannell was estranged from his wife. Trial counsel testified that the Pannells’ testimonies were not exculpatory. She said that petitioner never told her of any traumatic event in his life that would have caused him undue stress and that his history seemed “normal.” She was able to communicate with him, but she noted that petitioner did not like that the State would not make an offer and that he would become emotional.

Juan Pablo Vizcaino-Ramos, also known as Juan Martinez, testified that he was petitioner’s brother. He said that he knew petitioner and the victim had dated and that there had been rumors she had been seeing another man. Mr. Vizcaino-Ramos said that petitioner had been “real [sic] upset,” and he agreed that petitioner “seem[ed] to be out of his mind crazy about it.” He further said that he did not believe that petitioner needed “mental help.”

Petitioner testified that on the day he killed the victim, he had been contemplating suicide and that he had told trial counsel about his suicidal thoughts. He further said that he and the victim had argued and that she had tried to take his gun away from him, which is when he heard “the gun going off.” Petitioner said that he never asked trial counsel to request a mental evaluation but that he believed he should have had one because he had reported hearing voices. Petitioner also testified that he told trial counsel about the witnesses whom he wished to call to testify. On cross-examination, petitioner testified that he told trial counsel about the fight over the gun.

The State called trial counsel to testify in rebuttal. She testified that petitioner never asked for a mental evaluation and never exhibited signs to indicate that he needed one. Trial counsel said that petitioner never told her the version of events that he relayed during the post-conviction hearing. She said that she believed that if he had wanted to present a self-defense claim, he would have had the same difficulties as with the manslaughter claim because he shot the victim multiple times, left her body with her son, and fled to Mexico.

Following the hearing, the post-conviction court entered a written order denying petitioner’s petition for post-conviction relief. In the order, the post-conviction court

specifically accredited all witnesses' testimonies except for that of petitioner. The post-conviction court noted that trial counsel "successfully explained or refuted the complaint[s] made" by petitioner. The post-conviction court ruled that petitioner did not prove his factual allegations by clear and convincing evidence, did not show that trial counsel's performance was deficient, and did not show that he was prejudiced by deficient performance.

III. Analysis

On appeal, petitioner contends that he received ineffective assistance at trial because trial counsel did not properly investigate his case and did not request a mental evaluation. Regarding the investigation of his case, he contends that he asked trial counsel to interview and call to the stand three witnesses, all of whom testified at the post-conviction hearing. In addition, he argues that trial counsel's unfamiliarity with the notes from petitioner's jailers regarding his mental state shows that she did not properly review discovery. Regarding the mental evaluation, he posits that there were indicators present that should have led trial counsel to request a mental evaluation and that a mental evaluation would have supported his manslaughter defense. The State responds that the post-conviction court properly denied relief. We agree with the State.

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. 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). "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)).

In this case, petitioner failed to show that trial counsel's performance, whether deficient or not, caused him to suffer prejudice at trial. Petitioner's central argument with regard to trial counsel's investigation was that she did not interview the witnesses presented at the post-conviction hearing.¹ However, these witnesses -- the Pannells and petitioner's brother -- were not especially favorable to petitioner. Ms. Pannell testified that petitioner threatened "Mikey" and was calm and collected during their encounter. Mr. Pannell's testimony did not establish that he had a relationship with the victim while the victim was also in a relationship with petitioner. Petitioner's brother testified that petitioner had been upset but that he did not need mental help. In addition to the fact that the witnesses were not helpful to petitioner's theory, trial counsel testified that she was aware of petitioner's encounter with Ms. Pannell and concluded that testimony regarding that encounter would have supported the State's theory of premeditation. She also testified that she did not find any proof of the victim's having an affair, noting that she did not believe the victim's having dated Mr. Pannell rose to the level of an affair because the victim was not married and Mr. Pannell was estranged from his wife. Petitioner has not shown that there was a reasonable probability that his trial would have ended differently had these witnesses testified.

Furthermore, petitioner argues that a mental evaluation would have changed the result of his trial. However, he has not presented any evidence that a mental evaluation would have supported a diminished capacity defense as espoused by petitioner in his post-conviction proceedings nor that it would have supported a theory that he was only guilty of manslaughter. Without evidence regarding what the results of a mental evaluation would have been, we cannot conclude that a mental evaluation would have, with a reasonable probability, changed the results of petitioner's trial. *See, e.g., 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.). Thus, petitioner cannot show that he was prejudiced by trial counsel's performance, whether deficient or not, and he is without relief in this matter.

¹ Petitioner also claims for the first time on appeal, as part of his argument that trial counsel did not properly investigate his case, that trial counsel's performance was deficient because she failed to thoroughly review the discovery material, resulting in her not knowing about the jailer's reporting that petitioner had said he had heard voices. "It is well-settled that an appellant is bound by the evidentiary theory set forth at trial, and may not change theories on appeal." *State v. Alder*, 71 S.W.3d 299, 303 (Tenn. Crim. App. 2001). Therefore, petitioner has waived appellate review of this issue.

CONCLUSION

Based on the parties' briefs, the record, and the applicable law, we affirm the post-conviction court's denial of relief.

ROGER A. PAGE, JUDGE