

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 27, 2005 Session

RALPH DEWAYNE MOORE v. STATE OF TENNESSEE

**Direct Appeal from the Circuit Court for Roane County
No. 12621 E. Eugene Eblen, Judge**

No. E2005-01007-CCA-R3-PC - Filed November 17, 2005

The petitioner, Ralph Dewayne Moore, appeals the denial of his petition for post-conviction relief, arguing that the post-conviction court erred in finding he received effective assistance of trial counsel. Following our review, we conclude that the petitioner failed to meet his burden of showing either that counsel was deficient in his representation or that any alleged deficiency prejudiced the outcome of the petitioner's trial. Accordingly, we affirm the denial of the petition.

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

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH and NORMA MCGEE OGLE, JJ., joined.

Mart S. Cizek, Clinton, Tennessee, for the appellant, Ralph Dewayne Moore.

Paul G. Summers, Attorney General and Reporter; David E. Coenen, Assistant Attorney General; Scott McCluen, District Attorney General; and Roger Delp, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

On October 22, 2002, the petitioner was indicted by the Roane County Grand Jury on one count of aggravated kidnapping, a Class A felony, and two counts of aggravated assault, a Class C felony, based on his August 12, 2001, attack upon his wife, Crystal Moore. At the conclusion of the March 18, 2003, trial, the trial court granted defense counsel's motion to dismiss the counts of the indictment charging the petitioner with aggravated kidnapping and aggravated assault causing serious bodily injury, leaving the jury to consider only the aggravated assault by use or display of a deadly weapon count of the indictment. Following deliberations, the jury convicted the petitioner of that count and the trial court subsequently sentenced him to nine years

in the Department of Correction as a Range II, multiple offender. The judgment of conviction was entered on April 10, 2003. Pursuant to a guilty plea agreement with the State in connection with a separate case, as well as the State's agreement not to appeal the petitioner's multiple offender classification for the aggravated assault, the petitioner waived his right to a direct appeal in the case.

On April 7, 2004, the petitioner filed a timely *pro se* petition for post-conviction relief in which he alleged trial counsel was ineffective for, among other things, failing to request a jury instruction on felony reckless endangerment as a lesser-included offense of aggravated assault. Post-conviction counsel was appointed, and an evidentiary hearing was held on February 8 and April 15, 2005. Trial counsel, the sole witness at the hearing, recalled that the petitioner's trial had been short, involving only two or three witnesses, including the victim and the police officer who had responded to the victim's 9-1-1 call. He said the victim had told him several times that she did not want to testify against the petitioner and, thus, proved to be a reluctant witness for the State. In addition, a letter that the victim had written to the district attorney's office, asking that the case be dropped, had been entered into evidence. Trial counsel acknowledged he had succeeded in getting the trial court to drop the aggravated kidnapping and aggravated assault causing serious bodily injury counts of the indictment, based on the lack of evidence in support of those charges.

At the conclusion of the hearing, the post-conviction court found that trial counsel had done "a more than adequate job of representing" the petitioner. On April 26, 2005, the post-conviction court entered a written order denying the petition. Thereafter, the petitioner filed a timely appeal to this court.

ANALYSIS

Although the petitioner raised a number of allegations of ineffective assistance of counsel in his post-conviction petition, he confines himself on appeal to arguing that trial counsel was ineffective for failing to request a jury instruction on felony reckless endangerment as a lesser-included offense of aggravated assault by use or display of a deadly weapon. In the alternative, he argues that the trial court "was remiss in not sending the lesser included offense of reckless endangerment to the jury." The State argues that the petitioner has waived the issue of whether the trial court properly instructed the jury on the lesser-included offenses of aggravated assault by his failure to raise the issue in any prior proceeding and that the evidence preponderates in favor of the post-conviction court's finding that the petitioner received effective assistance of trial counsel. In support, the State notes that the prosecutor requested at trial that the trial court instruct the jury on felony reckless endangerment as a lesser-included offense, but the trial court, relying on State v. Moore, 77 S.W.3d 132 (Tenn. 2002), refused the request.

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2003). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn.

1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998).

The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court's findings of fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001); Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999). To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984); see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The Strickland standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S. Ct. at 2064.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goat v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is satisfied by showing a reasonable probability, i.e., a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

Initially, we note that the post-conviction court's order denying the petition contains no findings of fact or conclusions of law. Following a post-conviction hearing, a post-conviction court is required to enter written findings of fact and conclusions of law addressing all grounds for relief. See Tenn. Code Ann. § 40-30-111(b) (2003); Tenn. Sup. Ct. R. 28, § 9(A). Moreover, the post-conviction court's oral pronouncement of findings from the bench was neither detailed nor extensive. Nevertheless, given the trial court's oral findings and the limited issue presented on appeal, we conclude that the lack of written findings of fact and conclusions of law in this case is harmless. See Tenn. R. App. P. 36(b).

We further conclude that the record fully supports the post-conviction court's finding that the petitioner failed to show he was denied the effective assistance of counsel. On appeal, the petitioner bases this claim solely on counsel's failure to request a jury instruction on felony reckless endangerment as a lesser-included offense of aggravated assault. However, as the State points out, the prosecutor requested the same lesser-included offense instruction and was refused

by the trial court. Furthermore, in Moore, 77 S.W.3d at 136, the case upon which the trial court relied in rejecting the proposed jury instruction, our supreme court concluded that felony reckless endangerment is not a lesser-included offense of aggravated assault when the aggravated assault is committed by intentionally or knowingly causing another to reasonably fear imminent bodily injury by use or display of a deadly weapon.

The petitioner argues, nonetheless, that felony reckless endangerment was a lesser-included offense of his aggravated assault charge because there was proof in his case that the victim suffered some physical injury during the attack. In support, he cites State v. Hatfield, 130 S.W.3d 40 (Tenn. 2004). In that case, our supreme court, distinguishing Moore on its facts, concluded that felony reckless endangerment is a lesser-included offense of aggravated assault when the aggravated assault is charged as being committed by causing bodily injury by use of a deadly weapon:

The facts in this case are different from those in Moore, in that in this case, the defendant actually inflicted bodily injury by use of a deadly weapon and did not merely cause fear of injury. *When aggravated assault is charged as being committed by causing bodily injury by use of a deadly weapon*, felony reckless endangerment is a lesser-included offense under part (b)(2) of Burns because actual bodily injury to another person as the result of an aggravated assault is necessarily a greater harm than the merely placing a person in danger of serious bodily injury or death. . . . Because of this, felony reckless endangerment is a lesser-included offense of aggravated assault committed by intentionally or knowingly causing bodily injury to another by the use of a deadly weapon.

Id. at 42-43 (emphasis added).

The petitioner's reliance on Hatfield, however, is misplaced. Count three of the indictment, the only count that went to the jury, specifically charged that the petitioner "did unlawfully, knowingly, and intentionally assault Crystal Moore while displaying a deadly weapon, to wit: scissors, cause [sic] Crystal Moore to reasonably fear imminent bodily injury" Thus, because the indictment charged the petitioner with causing the victim to reasonably fear imminent bodily injury by use or display of a deadly weapon as opposed to causing bodily injury to the victim by use or display of a deadly weapon, compare Tenn. Code Ann. § 39-13-101(a)(1) with Tenn. Code Ann. § 39-13-101(a)(2), felony reckless endangerment was not a lesser-included offense of the petitioner's aggravated assault charge.

CONCLUSION

_____ We conclude that the petitioner has not met his burden of showing that he is entitled to post-conviction relief from his aggravated assault conviction. Accordingly, we affirm the denial of the petition for post-conviction relief.

ALAN E. GLENN, JUDGE