

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs August 7, 2007

RONNIE SIMS v. STATE OF TENNESSEE

**Appeal from the Criminal Court for Davidson County
No. 2002-C-1454 Steve Dozier, Judge**

No. M2006-02746-CCA-R3-PC - Filed August 15, 2007

The Petitioner, Ronnie Sims, appeals the post-conviction court's order denying his petition for post-conviction relief, arguing that relief is warranted because his trial counsel was ineffective for failing to obtain an audiotape recording of the victim's emergency telephone call to the Vanderbilt University Police Department and for failing to thoroughly investigate an alibi witness. Following our review, we affirm the post-conviction court's order denying relief.

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

DAVID H. WELLES, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

J. Chase Gober, Nashville, Tennessee, for the appellant, Ronnie Sims.

Robert E. Cooper, Jr., Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Amy Eisenbeck, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The facts of the Petitioner's underlying crimes were set out by this Court in detail on direct appeal. See State v. Ronnie D. Sims, No. M2004-02491-CCA-R3-CD, 2005 WL 3132441, at *1-5 (Tenn. Crim. App., Nashville, Nov. 22, 2005), perm. to appeal denied, (Tenn. Mar. 20, 2006). We briefly summarize the facts in this opinion.

At the Petitioner's trial, co-defendant Joseph Leach, testifying pursuant to a plea agreement, stated that on the morning of June 5, 2002, he and the Petitioner approached Bridgette Willette in a parking lot at Vanderbilt University with the intention of stealing her van. See id. at *1-2. Leach threatened Willette with a screwdriver in order to get the keys to the

vehicle, and then “[h]e and the [Petitioner] got in the van and drove away, with the [Petitioner] driving.” Id. at *1. Subsequently, Leach and the Petitioner led the police in a car chase. Id. Eventually, after swerving to avoid hitting a pedestrian, they wrecked the van (causing \$11,000 in damages) and fled on foot. Id. at *1–3. The police immediately apprehended Leach, but the Petitioner escaped. Id. at *1. The next time Leach saw the Petitioner, “about thirty to forty minutes later,” the police also had him in their custody. Id.

Willette testified that after the robbery, she made a call to the Vanderbilt Police Department and described the kind of shirt he was wearing:

Ms. Willette ran to a “Blue Phone” in the parking lot, which connected her automatically to the Vanderbilt Police Department. She reported that her van had been stolen by two men. She described them to the police as two black men, one wearing “blue plaid or some kinda plaid [shirt], and the other one had on [a] blue [shirt].” She recalled the [Petitioner] as wearing a plain blue tee shirt.

Id. at *2.

Shortly after Leach was apprehended, Willette identified him as the man who had threatened her with the screwdriver. Id. Five or ten minutes later, the police took Willette to view the Petitioner, and she immediately identified him as the driver:

They drove to the location [where the Petitioner was being held] and she saw a man on the sidewalk with some police officers. When she looked at the man, she told the police, “That’s the driver.” At that time, the man was wearing a blue tee shirt and some blue shorts. Ms. Willette testified, “I knew absolutely who it was.” Ms. Willette reiterated at trial that the [Petitioner] was one of her assailants and the man who had driven away in her van.

Id. at *3. Willette again identified the Petitioner at his trial, confirming that he was driving the van.

Officer Donald D. Dennis of the Vanderbilt University Police Department testified that he responded to Willette’s distress call and was with her when she first viewed the Petitioner. Id. “He stated that there was no hesitation on her part in making the identification and that she ‘was very sure that was the second individual.’ Upon seeing him, she ‘started to get upset again.’” Id. Officer Dennis also testified regarding the emergency telephone call:

Ms. Willette had given a physical description of the [Petitioner] when she “called it in” and . . . she repeated that description to him when he arrived. On cross examination, he recalled the initial call as describing the assailants as “two black men.” He stated that the call contained a “more detailed description,” but he could not recall “the specifics of it.”

Id. He stated that the audiotape recording of Willette's emergency telephone call had been destroyed after ninety days. Id. at *4.

Sergeant William L. Hood, also of the Vanderbilt University Police Department, testified that he was the officer who had engaged the robbery suspects in a vehicle pursuit and apprehended Leach. Id. Sergeant Hood also testified about the Petitioner's arrest:

After Sgt. Hood took the one suspect into custody, a Metro officer arrived and Sgt. Hood advised him about the other suspect's flight. Sgt. Hood testified that the fleeing suspect had been wearing jeans and a paisley shirt. After the suspect in custody was secure, Sgt. Hood began walking the area in an attempt to find the suspect who had fled. Within ten minutes, he saw a man who looked like the suspect because his "features just stood out." Sgt. Hood had encountered other black men during his search but they did not appear to him to be the suspect. With the assistance of another officer, Sgt. Hood stopped this man and spoke with him. Sgt. Hood testified that the man he stopped was "the same height, build" as the man he had seen get out of the van. Sgt. Hood also testified that the man "seemed very nervous, panting."

Sgt. Hood testified that the man he stopped was wearing jogging shorts and a blue tee shirt. The man also had on running shoes, which were wet and bore grass seeds. The appearance of the man's shoes was consistent with his having run through a field. Sgt. Hood had not yet taken the man into custody when [Willette] was brought over to view the man's appearance. Sgt. Hood was present during her observation and described her identification of the [Petitioner] as "adamant."

On cross-examination, Sgt. Hood acknowledged that, at the time he stopped the [Petitioner], he was not one hundred percent sure that the suspect was indeed the other man who had gotten out of the van. He further acknowledged that, at the time he came upon the wrecked van, the only description he had of the suspects was two black men, one wearing a plaid shirt. The man reported wearing the plaid shirt eventually turned out to be Mr. Leach. When Sgt. Hood saw the other suspect, he was wearing a paisley design shirt that buttoned. Sgt. Hood acknowledged that, at the time he stopped the [Petitioner], he was not wearing the same clothes that he had seen on the man who ran across the field. Sgt. Hood also acknowledged that, although the van had suffered serious damage, the [Petitioner] did not appear injured.

Sgt. Hood testified that, at the time Ms. Willette arrived for her viewing of the [Petitioner], the man was surrounded by three officers in uniform, including Sgt. Hood. After her identification, officers began searching the area for the clothing that Sgt. Hood had initially observed on the second suspect. They did not find the clothing. They did not attempt to collect fingerprints from the van.

During redirect examination, Sgt. Hood identified a pair of vice grip pliers that he had recovered from the area where he initially saw the two suspects running from the van. Sgt. Hood heard the tool hit the ground as the men were running.

Id. at *4–5.

The jury convicted the Petitioner of aggravated robbery, vandalism, and possession of burglary tools. Id. at *5. He was sentenced as a Range II, multiple offender to concurrent sentences of seventeen years for aggravated robbery, six years for vandalism, and to eleven months and twenty-nine days for possession of burglary tools. Id. at *9. In addition, his sentences were ordered to be served consecutively to a sentence for which the Petitioner was on parole at the time of his arrest.

This Court affirmed the Petitioner’s convictions and sentences, and our supreme court denied the Petitioner’s subsequent request for permission to appeal. Id. at *1.

He filed a timely, pro se petition for post-conviction relief, and an amended petition was filed after counsel was appointed. In his amended petition, he alleged “that his trial counsel committed errors that rendered his assistance ineffective, depriving him of his [c]onstitutional rights and thereby resulting in Petitioner’s convictions.” Specifically, the Petitioner asserted that trial counsel was ineffective for three reasons: (1) for failing to request a copy of the audiotape recording of Willette’s emergency telephone call to the Vanderbilt University Police Department before it was destroyed; (2) for not objecting to the authenticity and chain of custody of the alleged burglary tools found in the area; and (3) for failing to adequately prepare to cross-examine Leach about his testimony at trial.¹

The post-conviction court held a hearing, and the Petitioner testified that trial counsel began representing him after his preliminary hearing. According to the Petitioner, he reviewed discovery materials and the arrest report with trial counsel, but neither of them knew that Leach was going to testify for the State until the day of trial. As such, Petitioner and trial counsel did not have the opportunity to discuss Leach’s testimony prior to trial.

The Petitioner also testified that prior to trial, he told trial counsel that the reason he was in the area on the day of the crimes was because he had spent the previous night at his girlfriend’s house and was on his way home to go to work when he was arrested. He “was positive” that he told trial counsel about this potential alibi witness and that neither trial counsel nor the defense investigator interviewed her. He said that she was the only person who could corroborate his whereabouts the night before the crimes and that her name was “Tonya Johnson, or something like that. You know, I just had met her. We just got together and clicked off that evening.”

The Petitioner learned at his preliminary hearing that there was an audiotape recording of Willette’s emergency telephone call to the Vanderbilt University Police Department, and he testified that he relayed that information to trial counsel. However, the tape was never recovered, and the Petitioner found out at trial that it had been destroyed. The Petitioner asserted that the audiotape would have assisted his defense by bolstering his claim of misidentification and stressed that there were discrepancies between Willette’s and Officer Hood’s descriptions of

¹ The second and third issues raised in the Petitioner’s amended petition, those regarding the burglary tools and trial counsel’s cross examination of Leach, were not raised as issues on appeal.

the second suspect. However, under examination by the post-conviction court, the Petitioner agreed that trial counsel had argued this point to his jury.

Trial counsel testified that he contacted the Vanderbilt University Police Department several times to request a copy of the audiotape of Willette's emergency telephone call but "didn't have any luck." He also stated that his investigator tried to get a copy of the audiotape and, "ultimately, [the investigator] was told by Vanderbilt that it had been recorded over, that that was their policy." The investigator also tried "a couple of times" to interview Sergeant Hood, but he "refused to be interviewed."

Asked whether the Petitioner had told him anything about a potential alibi witness, trial counsel testified that he did not remember that an alibi witness was an issue in the Petitioner's defense:

I don't remember that name. I know that [the Petitioner] did tell me about being at someone's house. But I was looking through as he was testifying, but I didn't have any notes about that. And I did not have [the investigator] interview any sort of alibi witness. I didn't recall that really as—I guess, as even as [sic] being an issue. But I did not request that [the investigator] investigate an alibi witness.

On cross-examination, trial counsel stated, "I don't recall ever having a name or, you know, even a description of who it may have been."

At the close of the hearing, the post-conviction court denied post-conviction relief, ruling that the Petitioner had not carried his burden of proving that he was actually prejudiced by trial counsel's allegedly deficient performance:

I do not think that [trial counsel's] representation was deficient. But even if you leaned in that direction, I don't think—which I don't—I don't think that [the] second prong of Strickland has been met, either in terms of how [the Petitioner] was prejudiced, because all of what he's discussing should have come out—did come out and the jury factored that in, just decided under the circumstances with Ms. Willette's positive identification, the circumstances under which [the Petitioner] was apprehended right by the location of the van and Mr. Leach's testimony saying [the Petitioner] was the one that was with him, found it beyond a reasonable doubt that he was guilty of these offenses.

So I think [the Petitioner] received a fair trial. And it's not a case that he should be granted relief when it's his burden to prove how he was prejudiced. I don't find that that has been shown, even if arguably [trial counsel's] representation was deficient, which I don't think it was.

ANALYSIS

On appeal, the Petitioner argues that the post-conviction court erred in finding that trial counsel was not ineffective despite his failure to "[t]horoughly investigate an alibi witness

provided by [Petitioner]”² or “[r]equest a copy of a 911 tape recording from the Vanderbilt Police Department.”

I. Standard of review

To sustain a petition for post-conviction relief, a petitioner must prove his or her factual allegations by clear and convincing evidence at an evidentiary hearing. See Tenn. Code Ann. § 40-30-110(f); Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999). Upon review, this Court will not reweigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge, not the appellate courts. See Momon, 18 S.W.3d at 156; Henley v. State, 960 S.W.2d 572, 578-79 (Tenn. 1997). The post-conviction judge’s findings of fact on a petition for post-conviction relief are afforded the weight of a jury verdict and are conclusive on appeal unless the evidence preponderates against those findings. See Momon, 18 S.W.3d at 156; Henley, 960 S.W.2d at 578.

II. Ineffective assistance of counsel

The Sixth Amendment to the United States Constitution and article I, section 9 of the Tennessee Constitution guarantee a criminal defendant the right to representation by counsel. State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999); Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Both the United States Supreme Court and the Tennessee Supreme Court have recognized that the right to such representation includes the right to “reasonably effective” assistance, that is, within the range of competence demanded of attorneys in criminal cases. Strickland v. Washington, 466 U.S. 668, 687 (1984); Burns, 6 S.W.3d at 461; Baxter, 523 S.W.2d at 936.

A lawyer’s assistance to his or her client is ineffective if the lawyer’s conduct “so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland, 466 U.S. at 686. This overall standard is comprised of two components: deficient performance by the defendant’s lawyer and actual prejudice to the defense caused by the deficient performance. Id. at 687; Burns, 6 S.W.3d at 461. The defendant bears the burden of establishing both of these components by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); Burns, 6 S.W.3d at 461. The defendant’s failure to prove either deficiency or prejudice is a sufficient basis upon which to deny relief on an ineffective assistance of counsel claim. Burns, 6 S.W.3d at 461; Goad v. State, 938 S.W.2d 363, 370 (Tenn. 1996).

In evaluating a lawyer’s performance, the reviewing court uses an objective standard of “reasonableness.” Strickland, 466 U.S. at 688; Burns, 6 S.W.3d at 462. The reviewing court must be highly deferential to counsel’s choices “and should indulge a strong presumption that

² We note that this specific allegation of ineffective assistance was not contained in either the Petitioner’s pro se petition for post-conviction relief or his amended petition. See Tenn. Code Ann. §§ 40-30-104(g), -106(d). However, testimony was received on the issue at the post-conviction hearing, and the post-conviction court found that the Petitioner received the effective assistance of counsel. Accordingly, we deem the record sufficient to allow appellate review of the issue.

counsel's conduct falls within the wide range of reasonable professional assistance.” Burns, 6 S.W.3d at 462; see also Strickland, 466 U.S. at 689. The court should not use the benefit of hindsight to second-guess trial strategy or to criticize counsel's tactics, see Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982), and counsel's alleged errors should be judged in light of all the facts and circumstances as of the time they were made, see Strickland, 466 U.S. at 690; Hicks v. State, 983 S.W.2d 240, 246 (Tenn. Crim. App. 1998).

A trial court's determination of an ineffective assistance of counsel claim presents a mixed question of law and fact on appeal. Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). This Court reviews the trial court's findings of fact with regard to the effectiveness of counsel under a de novo standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. Id. “However, a trial court's conclusions of law—such as whether counsel's performance was deficient or whether that deficiency was prejudicial—are reviewed under a purely de novo standard, with no presumption of correctness given to the trial court's conclusions.” Id. (emphasis in original).

Regarding the Petitioner's claim that trial counsel's performance was deficient and prejudicial for failing to investigate and interview an alleged alibi witness, we note that this Court has previously stated that in order to establish such a claim, the witness should be presented at the 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. 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. In short, if a petitioner is able to establish that defense counsel was deficient in the investigation of the facts or calling a known witness, the petitioner is not entitled to relief from his conviction on this ground unless he can produce a material witness who (a) could have been found by a reasonable investigation and (b) would have testified favorably in support of his defense if called. Otherwise, the petitioner fails to establish the prejudice requirement mandated by Strickland v. Washington.

Black v. State, 794 S.W.2d 752, 757–58 (Tenn. Crim. App. 1990) (footnote omitted); see also State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986) (ineffective assistance of counsel not found where counsel did not investigate unknown alibi witnesses); Joseph Jackson v. State, No. W2005-01181-CCA-R3-PC, 2006 WL 784786, at *6 (Tenn. Crim. App., Jackson, Mar. 28, 2006) (stating that “a petitioner's failure to present the testimony of any witness that he claimed

should have been at his trial is fatal to his complaints regarding his attorney's investigation and failure to call witnesses.")

Accordingly, because the Petitioner did not present the alleged alibi witness in support of his petition for post-conviction relief, he has failed to show by clear and convincing evidence that trial counsel's performance was either deficient or prejudicial. This issue is without merit.

Similarly, we conclude that the Petitioner has not shown by clear and convincing evidence that trial counsel's failure to obtain a copy of the audiotape of Willette's emergency telephone call to the Vanderbilt University Police Department constituted deficient performance. The record shows that trial counsel and his investigator attempted to obtain a copy of the audiotape recording, but none was available because it had been recorded over pursuant to that police department's policy. Therefore, we cannot conclude that trial counsel's failure to present the audiotape at trial was an omission below "the range of competence demanded of attorneys in criminal cases." Baxter, 523 S.W.2d at 936. We also agree with the finding of the post-conviction court that the Petitioner failed to show by clear and convincing evidence that he was prejudiced by the failure to present a tape of the telephone call for the jury's consideration.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the post-conviction court's order denying the Petitioner's petition for post-conviction relief.

DAVID H. WELLES, JUDGE