

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

November 18, 2008, Session

MICHAEL BRANHAM v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Hamilton County
No. 263911 Rebecca Stern, Judge**

No. E2008-00404-CCA-R3-PC - Filed January 23, 2009

Petitioner, Michael Branham, pled guilty to aggravated assault, and the trial court sentenced him to three years in the Tennessee Department of Correction (“TDOC”), with his sentence to be suspended after serving eleven months and twenty-nine days in the Hamilton County workhouse. Petitioner then filed a petition for post-conviction relief, which he later amended. After appointing counsel and conducting a hearing, the trial court denied his petition for post-conviction relief. In his appeal, Petitioner argues that the post-conviction court erred in when it denied relief because: (1) trial counsel provided ineffective assistance of counsel, (2) the post-conviction court failed to make formal written findings to support its denial of post-conviction relief, and (3) the post-conviction court dismissed Petitioner’s claim of prosecutorial misconduct without explanation. After a thorough review of the record and relevant authorities, we reverse the judgment of the post-conviction court and remand for the entry of findings of fact and conclusions of law as to each ground alleged in the Defendant’s petition, as required by the Post-Conviction Procedure Act.

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

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Robin Ruben Flores, Chattanooga, Tennessee, for the Appellant, Michael Branham.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Rachel West Harmon, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Bates W. Bryan, Jr., Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Factual Background

This case arises from Petitioner's guilty plea to aggravated assault. The record's only description of the underlying facts of Petitioner's conviction are within the guilty plea hearing transcript and the witnesses' statements Petitioner introduced in support of his petition for post-conviction relief. The guilty plea transcript contains the State's scant explanation that "the [Petitioner] and the [victim] were having a disagreement over something, and [the victim] was subsequently shot in the ankle by [Petitioner]." Examining the witnesses' statements, which were neither introduced nor read into evidence at his plea hearing, we glean the following information about the events underlying Petitioner's aggravated assault conviction: The victim, Jamaal Townsend, initially insisted that he did not know his shooter, claiming he was only a bystander to a dispute. However, he later told police he participated in the fight and knew his shooter. The victim said that, in September 2005, he argued with Stanford Steward and Petitioner at a nightclub. After the victim struck Steward, Steward threatened to shoot the victim. The victim, however, left the club, returned home, retrieved his revolver, and went to his sister's apartment in a housing project.

As the victim walked through a field connecting the project's housing buildings, he came upon Steward and Petitioner. The record contains conflicting statements about what happened next. According to Steward, the victim grasped Steward's neck with one hand and waived a gun with the other hand. Petitioner then began to shoot the victim. However, according to the victim, Petitioner simply started firing at him as soon as he and Steward began to argue again, and one of the shots hit him in the ankle. The victim said he fired five shots at Petitioner and Steward as they fled.

After Petitioner pled guilty to aggravated assault, the trial court sentenced Petitioner to three years, with eleven months and twenty-nine days to be served in confinement and the remainder to be served on probation. Petitioner then filed a petition for post-conviction relief, which he later amended, claiming that his trial counsel ("Counsel") was ineffective when she failed to obtain the witness statements before she advised Petitioner to plead guilty and that the State committed prosecutorial misconduct when it did not disclose the witness statements.

At the post-conviction hearing, Petitioner testified that he pled guilty based on Counsel's advice. He explained that, after he pled guilty, federal prosecutors brought charges against him and that his federal defender obtained and showed him several witness statements gathered during the State's investigation of the shooting. Petitioner then introduced the statements into evidence.

Petitioner said the statements showed the victim first told police he did not know his shooter, but, after the police agreed to drop warrants then pending against the victim, the victim identified Petitioner as the shooter. He said that Counsel had never shown the statements to him and that he, therefore, pled guilty without knowing of their existence. Petitioner testified he would not have pled

guilty had he known of the statements because the statements contained information that would impeach the victim's testimony.

On cross-examination, Petitioner said that, before pleading guilty, he read the plea papers and agreed that he was guilty "based upon the facts of what [Counsel] had discussed with [him]." Also, he conceded that, although the victim's statements conflicted, Steward's statement corroborated the victim's second statement, which implicated Petitioner. Further, he conceded the victim explained in his second statement that he did not originally identify the shooter because he was scared.

Counsel testified she entered into an agreed order of discovery with the State in January 2006, but the State never disclosed the witness statements at issue. She said the first time she saw the statements was after Petitioner filed his petition for post-conviction relief. Counsel testified that the victim's testimony would have been the most crucial evidence in the prosecution of Petitioner and admitted she was aware, before the plea hearing, that the victim was reluctant to identify the shooter. She attributed his reluctance, however, to the gang-related nature of the shooting. Counsel reiterated that she was aware only of the victim's reluctance and not of his specific statement denying knowledge of the shooter.

Explaining why she did not interview Steward, Counsel said the State suggested a plea deal in May 2006 although the case was not to be tried until September 2006. Therefore, she had not completed her investigation of the shooting when she advised Petitioner whether to accept the plea deal. She testified she told Petitioner "the State's case was crap" because she did not believe the State could procure the victim as a witness. She said Petitioner "wanted very much to get out of jail" and accepted the plea deal.

Asked whether she would advise Petitioner to accept the plea deal had she known of the witnesses' statements later disclosed, she said,

The charge was attempted first degree murder. I think at trial the State wouldn't have been able to prove that. But this was a greatly reduced offer of three years, split confinement, got him out of jail. I would have advised him that a trial is always a crap shoot. That if you get a victim up there that's going to testify that he was afraid of [Petitioner] because of some gang activity so therefore he didn't want to talk to the police, but then later went and talked to the police, I think he could have been taking a big risk going to trial.

On cross-examination, Counsel testified she believed the State had an "open-door policy" with respect to discovery, which meant the State allowed a defendant or his representative to freely examine the State's file on the defendant. She recalled that, when she went to the State's office, the prosecutors showed and explained all the documents they possessed but that, at that time, the State did not possess Petitioner's "entire case file." Also, she agreed that "in regard to all the circumstances" the plea deal was good for Petitioner.

On redirect-examination, Counsel testified that, had the State later obtained the statements and, without disclosing them to her, introduced them at trial, she would have “fought like hell” to have them excluded. On recross-examination, she agreed that, although she had not completed her investigation, to prevent Petitioner from pleading guilty would have been “unethical,” given the nature of the deal and Petitioner’s desire to accept it.

At the conclusion of the hearing, the post-conviction court said only, “I think all the circumstances show that he received effective assistance of counsel and that his plea was knowing and voluntary. Petition is dismissed.” The post-conviction court made no other factual findings or legal conclusions about the disposition of Petitioner’s case, and the record contains no written order or memorandum disposing of the petition. The only other record of the court’s order is an entry within the court’s minutes, which reads, “The Court after hearing [Petitioner’s petition], found that same is not well taken, and it is, therefore, dismissed. The Court found that the [Petitioner’s] previous guilty plea was knowing and voluntary and that the [Petitioner] did receive effective assistance of counsel.”

II. Analysis

Petitioner contends the post-conviction court erred when it denied post-conviction relief because: (1) trial counsel provided ineffective assistance of counsel, (2) the post-conviction court failed to make formal written findings to support its denial of post-conviction relief, and (3) the post-conviction court dismissed Petitioner’s claim of prosecutorial misconduct without explanation. The State responds that the record supports the post-conviction court’s denial of relief and that any deficiency in the court’s explanation of its ruling is harmless and, therefore, not a basis for reversal.

The Post-Conviction Procedure Act requires a court considering a petition for post-conviction relief to enter a final order and state in that order or in a written memorandum its findings of fact and conclusions of law with respect to each ground for relief presented in the petition. *See* Tennessee Code Annotated § 40-30-211(b) (2006). This requirement exists because a thorough explanation of a court’s ruling is necessary in order for a reviewing court to evaluate the ruling. *Isaac Earl Edgin v. State*, No. M1999-01620-CCA-R3-PC, 2001 WL 120578, *3 (Tenn. Crim. App., at Nashville, Feb. 1, 2001), *no Tenn. R. App. P. 11 application filed*. If, however, a court includes adequate oral findings on the record, then any failure to provide written findings and conclusions “may be deemed harmless.” *State v. Higgins*, 729 S.W.2d 288, 290-91 (Tenn. Crim. App. 1987); *see also* Tenn. R. App. P. 36(b); Tenn. R. Crim. P. 52(a). The order granting or denying relief under the provisions of the Act shall be deemed a final judgment. T.C.A. § 40-3-111(b) (2006).

In *Clark v. State*, this Court held that a post-conviction court’s failure to make adequate written findings was not harmless where the court’s oral findings were limited to the following announcement at the conclusion of the hearing: “I find that he had effective assistance of counsel. That this was actually a knowing and voluntary plea that he entered into and all of these things were probably done at the time in his best interest. The post-conviction petition is dismissed.” *Joseph*

Franklin Clark v. State, No. E2006-01171-CCA-R3-PC, 2006 WL 3813627, *3 (Tenn. Crim. App., at Knoxville, Dec. 28, 2006), *no Tenn. R. App. P. 11 application filed*.

In the case under submission, Petitioner raised two grounds for post-conviction relief in his petition: that his trial counsel (“Counsel”) was ineffective when she failed to obtain the witness statements before she advised Petitioner to plead guilty and that the State committed prosecutorial misconduct when it did not disclose the witness statements. However, the record contains neither a written order or memorandum nor a minute entry that lists the court’s findings of fact and conclusions of law as the Post-Conviction Procedure Act requires.

Further, as in *Clark*, the post-conviction court failed to make any oral findings of fact, stating only, “the circumstances show that he received effective assistance of counsel and that his plea was knowing and voluntary.” The post-conviction court made no findings about the credibility of the witnesses, and it failed to address Petitioner’s claim of prosecutorial misconduct. As such, we conclude that the court’s failure to clearly set out its basis for denying relief was not harmless. Therefore, we remand this case to permit the post-conviction court to enter an order or written memorandum addressing all grounds presented, with findings of fact and conclusions of law as required by the Post-Conviction Procedure Act. *See* T.C.A. § 40-30-211(b). Once the post-conviction court enters its order, Petitioner may again appeal as of right, if he so desires.

CONCLUSION

After a thorough review of the record and relevant authorities, we conclude the post-conviction court failed to comply with the Post-Conviction Procedure Act when it denied Petitioner post-conviction relief. Accordingly, we remand this case to the post-conviction court to revisit the grounds raised in the petition and, thereafter, enter findings of fact and conclusions of law as required by the Post-Conviction Procedure Act.

THOMAS T. WOODALL, JUDGE