IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs February 20, 2007

DOUGLAS B. BORUFF v. STATE OF TENNESSEE

Direct Appeal from the Circuit Court for Blount County
No. C-14434 D. Kelly Thomas, Jr., Judge

No. E2005-02714-CCA-R3-PC - Filed March 1, 2007

The petitioner, Douglas B. Boruff, appeals the order dismissing his petition for post-conviction relief, arguing that he received the ineffective assistance of counsel at trial. Following our review, we affirm the post-conviction court's order of dismissal.

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 DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Julie A. Rice, Knoxville, Tennessee (on appeal), and Mike Hickman, Maryville, Tennessee (at post-conviction hearing), for the appellant, Douglas B. Boruff.

Robert E. Cooper, Jr., Attorney General and Reporter; Jennifer L. Bledsoe, Assistant Attorney General; Michael L. Flynn, District Attorney General; and Robert L. Headrick, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The petitioner was convicted of rape of a child and sentenced to twenty-three years in the Department of Correction. This court set out the facts of the petitioner's underlying crime on direct appeal:

> The victim was three years old and had been adopted by her grandmother, Judy Lumpkin. The victim resided with Lumpkin as did Angela Burger (the victim's natural mother and the daughter of Lumpkin), Burger's two other young children and the [petitioner], who was Burger's boyfriend.

On May 1, 1998, at approximately 10:00 a.m., Lumpkin gave the victim a bath. The victim was normal and made no complaint of pain.

The [petitioner] was not working on this date and consumed a six-pack of beer by noon. Shortly after noon, the [petitioner] went into the bedroom to take a nap. The victim and her younger brother were also in the bedroom. Lumpkin observed the victim "belly to belly" on top of the [petitioner]. Shortly thereafter, the victim left the bedroom and sat with Lumpkin in the living room. A few minutes later the victim went back into the bedroom.

After being in the bedroom for approximately ten minutes, the victim came out of the bedroom crying and claiming that the [petitioner] had hurt her "cootchie" with his hand and finger. Lumpkin examined the victim in the bathroom and observed that her vaginal area was "real red." Lumpkin confronted the [petitioner], who denied any wrongdoing and contended he was asleep.

Approximately forty minutes later Lumpkin's friend, Sharon Vilchez, entered the residence. The victim, who would ordinarily run to and hug Vilchez, appeared "real upset, real nervous and scared." The victim pulled down her underwear and told Vilchez that the [petitioner] had "touched my cootchie." While the victim was clinging to the leg of Vilchez, Vilchez confronted the [petitioner] in the bedroom. Vilchez asked the victim to explain what had occurred. According to Vilchez, the victim "put her hand on her vagina, and she said he put his finger in my cootchie."

Lumpkin and Vilchez subsequently carried the victim to the sheriff's office to report the incident. After reporting the incident, they ate at a restaurant where the victim used the restroom. At that time the victim experienced pain in her vaginal area and cried.

The victim was examined by a pediatrician, Dr. Heather Edgley, at approximately 6:30 p.m. on the same date. Dr. Edgley testified that the victim had experienced a torn labial adhesion with the top layer of skin pe[e]led off. This injury was very painful and not self-inflicted. In her opinion a blunt object, consistent with a finger, penetrated the child causing the injury. According to Dr. Edgley, the injury was "very fresh" and more than likely occurred within twelve hours of the examination.

The [petitioner] was interviewed by investigators from the sheriff's department. He stated that he had drunk a six-pack of beer that morning and went to sleep in the bedroom. He conceded that at one point the victim had been on him while he was trying to sleep; however, he had no recollection of doing anything inappropriate to the victim. When asked if it was possible that something occurred

> in view of his consumption of six beers and falling asleep, he stated, "I don't want to say that it was possible that something coulda [sic] happened because I know that it could have, but I don't wanna [sic] believe that, you know."
>
> Angela Burger testified for the defense and stated that she, not Lumpkin, had given the victim a bath that morning. Burger acknowledged that the victim came out of the bedroom crying and saying, "her cootchie was hurting" and that "Bryan hit me down there."
>
> The [petitioner] testified that he was asleep in the bedroom and noticed at one point that the victim was on his chest. The victim then left, and he went back to sleep. His next recollection was being accused of wrongdoing. The [petitioner] denied that he ever touched the victim in the genital area.

State v. Douglas Bryan Boruff, No. E1999-00274-CCA-R3-CD, 2000 WL 284186, at *1-2 (Tenn. Crim. App. Mar. 17, 2000) perm. to appeal denied (Tenn. Mar. 11, 2002).[1]

At his motion for a new trial, the petitioner presented as newly discovered evidence the affidavit of Sherry Inman, in which she stated that on the morning in question, she was at Lumpkin's house and "the victim was playing on a swing set, began crying and 'had quite a bit of blood on her.'" Id. at *5. The trial court denied the motion, "noting that Inman could have been discovered prior to trial, and there was no indication where the alleged blood was located on the victim." Id.

On March 7, 2003, the petitioner filed a *pro se* petition for post-conviction relief, arguing that he was denied the effective assistance of counsel for several reasons.[2] The post-conviction court found the petition presented a colorable claim and appointed counsel. An amended petition was filed on September 3, 2003, supplementing the original claims with five interrelated assertions that trial counsel was ineffective for failing to: (1) "seek and obtain by discovery the past medical records of the [victim]" from her primary care physician and defense witness, Dr. Cecil Howard, or question him as to whether she had received relevant treatment prior to the day of the offense; (2) clarify in the affidavit submitted at the motion for a new trial regarding Inman that counsel was unaware of her existence prior to trial; (3) properly brief the issues for this court on direct appeal due to

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[1] We note that our supreme court designated this court's opinion as "Not for Citation." We cite it for background information only. See Tenn. Sup. Ct. R. 4(F)(2).

[2] The petitioner claimed that trial counsel was ineffective for failing to: (1) file pretrial motions for a psychological evaluation and "to impeach the credibility of witness 'hearsay' evidence"; (2) interview and call Sherry Inman, who "could have testified at the trial, that saw [sic] the victim hurt herself earlier in the morning playing on a swing"; (3) investigate the petitioner's "mental health history"; (4) prepare the petitioner to testify on his own behalf or inform him of the probable consequences of doing so; (5) file a motion "to recant the [petitioner's] statement, even though he was well aware that the [petitioner] had been drinking"; (6) challenge the credibility of Dr. Edgley after the court had refused to qualify her as an expert witness; (7) bring to light the fact that Dr. Edgley contradicted herself regarding the victim's blood loss while testifying; and (8) because in representing the petitioner on direct appeal, trial counsel "was only trying to protect himself and cover up for his mistakes."

distractions caused by professional misconduct sanctions;[3] (4) file a routine motion to suppress the petitioner's statement to test the circumstances in which it was obtained; and (5) obtain the petitioner's psychiatric records "in spite of knowing that in 1989 or 1990, the [p]etitioner made a suicide attempt and was or had been prescribed psychotropic medications."

The post-conviction court held a hearing on June 22, 2005, at which the petitioner testified that he hired trial counsel to represent him because he thought "maybe another lawyer could help [him] more than" the public defender, who had indicated he might be able to negotiate a fifteen-year plea bargain agreement. He acknowledged that he agreed to pay trial counsel $7500 but never paid him the entire amount. The petitioner said that he and counsel had "somewhere around eight" meetings before trial and that each meeting was "pretty brief." He said that counsel never inquired about his mental health history or discussed the statement he had given to the police, but counsel encouraged him to testify without explaining his rights or preparing him for cross-examination. He stated they did not discuss the State's witnesses or the potential testimony of Inman. He also said that counsel did not see him prior to his sentencing hearing or have him complete paperwork in order to create a presentence report.

Asked if he considered trial counsel's representation to be unusual, the petitioner said:

> Well, at the time I trusted this person, you know, to represent me fairly. I didn't know hardly anything about the law or anything. I'd only had misdemeanors in my past that I'd always copped out to. So, you know, I just thought, you know, they're going to offer something and I'd take it and that's how it works, you know.

The petitioner admitted that "[t]here might have been a few times" when he had been drinking before he met with trial counsel.

The petitioner's father testified that he was not sure if he met with trial counsel prior to testifying at the sentencing hearing. Trial counsel died before the hearing.

Following arguments, the post-conviction court continued the matter until November 14, 2005, in order to allow for the preparation of a presentence report and for the petitioner to ascertain whether Dr. Howard's records indicated any relevant treatment of the victim prior to the morning of the offense. The presentence report and Dr. Howard's medical notes regarding the victim were admitted as exhibits at the second hearing. The petitioner's aunt, Evelyn Carver, testified that the petitioner had lived with her and her children for "about a year and a half" when he was "about 16 or 17 " years old and that she had never seen any indication from him that he would harm a child.

[3] Trial counsel was charged with contempt and his license to practice law was temporarily suspended because of his initial actions in this case: he assured the trial court that it would not cause a delay if he was allowed to assume representation of the petitioner two weeks prior to the scheduled trial date and then subsequently moved for a continuance, admitting he knew he would not be ready from the very beginning.

Dr. Howard's notes revealed that the only "treatment involving the [victim's] private area" occurred more than two years before the incident.

At the conclusion of the hearing, the post-conviction court denied relief and dismissed the petition. The petitioner appealed.

ANALYSIS

Standard of Review

The post-conviction petitioner bears the burden of proving his allegations of fact 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 post-conviction court "are entitled to substantial deference on appeal unless the evidence preponderates against those findings." Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001); see also Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review is of purely factual issues, the appellate court should not re-weigh 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, 40 S.W.3d at 458; Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999).

Ineffective Assistance of Counsel

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 (1984); see also 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." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065) (other citation omitted). 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.

On appeal, the petitioner argues that this court should grant post-conviction relief because he received ineffective assistance of counsel at trial. He claims that evidence presented at the post-conviction hearings shows that trial counsel was ineffective for a number of reasons.

First, he claims that counsel was ineffective for not obtaining Dr. Howard's treatment records of the victim. Whether counsel reviewed these records is immaterial because, as noted by the post-conviction court, they "showed no treatment afforded the victim close to the time of this incident in May of [1998] that would have any impact on the physical findings relative to the [victim]." As such, any failure on trial counsel's part to obtain or introduce the medical records does not meet the prejudice prong of Strickland. Id.

Second, the petitioner contends that trial counsel did not adequately prepare him to testify on his own behalf because he failed to "go over [his] statement with him pre-trial and advise him of its use for impeachment purposes," or discuss with him the impact his prior theft conviction would have on his testimony. The petitioner testified that he "probably wouldn't have got on the stand" if trial counsel had explained the consequences of testifying to him. Even if assumed accurate, these allegations do not demonstrate how the petitioner was prejudiced by trial counsel's oversights. Had the petitioner not testified and his credibility not been impeached with his statement and prior conviction, ample evidence – including Lumpkin's testimony, the victim's statements, and the clinical proof presented by Dr. Edgley – would have remained. Moreover, the petitioner has not shown that his statement would not have been admitted had he not testified. Accordingly, this argument does not create the reasonable probability of a different outcome and thereby also fails to meet Strickland's second prong.

Third, the petitioner argues that trial counsel was ineffective at sentencing for failing to submit a presentence report or adequately prepare the petitioner's father to testify at the sentencing hearing. The post-conviction court reviewed the subsequently prepared presentence report and concluded that the information contained therein would have enhanced, rather than mitigated, the petitioner's sentence. Additionally, the petitioner has not shown how he would have received a lesser sentence had his father been more prepared to testify at the sentencing hearing. This argument is without merit.

Fourth, the petitioner asserts that trial counsel was ineffective for failing to "find and interview witnesses prior to trial" or call Inman to testify as to the newly-discovered evidence. However, none of these potential witnesses were presented at the post-conviction hearings. As such, this argument fails to establish prejudice because, as previously stated by this court:

> 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 . . . 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.

Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990).

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the post-conviction court's order of dismissal.

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ALAN E. GLENN, JUDGE