

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs June 9, 2009

**DONALD WALLACE v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Stewart County**  
**No. 4-796-CR-96 Robert Burch, Judge**

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**No. M2008-01857-CCA-R3-PC - Filed September 23, 2009**

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The Petitioner, Donald Wallace, appeals the Stewart County Circuit Court's denial of post-conviction relief, arguing that: (1) he received ineffective assistance of counsel at trial; and (2) the State engaged in prosecutorial misconduct at trial. After 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**

DAVID H. WELLES, J., delivered the opinion of the court, in which THOMAS T. WOODALL and J.C. MCLIN, JJ., joined.

Clifford K. McGown, Jr., Waverly, Tennessee, for the appellant, Donald Wallace.

Robert E. Cooper, Jr., Attorney General and Reporter; Deshea Dulany Faughn, Assistant Attorney General; Dan. M. Alsobrooks, District Attorney General; and Carey J. Thompson, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

This Court previously summarized much of the history underlying this case:

This case has taken a rather Byzantine course through the Tennessee courts. Originally, the [Petitioner] was convicted of the 1996 first degree premeditated murder of Melinda Sue Perrin. This court reversed the conviction based upon insufficiency of the evidence of a premeditated killing. We imposed a conviction of second degree murder and remanded to the trial court for sentencing. See State v. Donald Wallace, No. 01C01-9711-CC-00526 (Tenn. Crim. App., Nashville, Sept. 30, 1998) (Wallace I). In Wallace I, this [C]ourt declined to adjudicate certain issues on

appeal for lack of a timely motion for a new trial. Id., slip op. at 7-8. On remand, the court imposed a sentence of 25 years, and this Court affirmed the sentence. See State v. Donald Wallace, No. M1999-00954-CCA-R3-CD (Tenn. Crim. App., Nashville, Nov. 29, 1999) (Wallace II). During the pendency of the sentencing appeal, the [Petitioner] filed a petition for post-conviction relief. The post-conviction court denied relief except to grant the [Petitioner] a new opportunity to file a motion for new trial and an appeal. See Donald Wallace v. State, No. M2001-02722-CCA-R3-PC (Tenn. Crim. App., Nashville, Dec. 9, 2002) (Wallace III). The post-conviction ruling was not appealed, but after the trial court denied the [Petitioner's] new motion for new trial, the [Petitioner] appealed the denial of the motion, resulting in the opinion in Wallace III. In that opinion, this [C]ourt held that the [Petitioner] was entitled to no statutory delayed appeal and that the post-conviction court had erred in availing a new opportunity for a new trial motion and appeal without requiring a showing of prejudice as a prerequisite of a claim of ineffective assistance of counsel. Wallace III, slip op. at 5-8. Our supreme court granted an appeal, reversed, and remanded the case to this [C]ourt for adjudication of the issues raised in the dispensatory motion for new trial and appeal in Wallace III. See Wallace v. State, 121 S.W.3d 652 (Tenn. 2003) (Wallace IV).

Donald Wallace v. State, No. M2004-02976-CCA-RM-PC, 2005 WL 292438, at \*1 (Tenn. Crim. App., Nashville, Jan. 31, 2005) (Wallace V). In Wallace V, we affirmed the Petitioner's conviction for second degree murder. Id. On November 30, 2005, the Petitioner filed a pro se petition for post-conviction relief. After being appointed counsel, he filed an amended petition on February 13, 2006.

In the petition for post-conviction relief, the Petitioner alleged that he received the ineffective assistance of counsel at trial because counsel did not properly investigate the charges, did not interview certain witnesses, did not object to certain evidence introduced at trial, did not object to certain arguments made by the prosecution at trial, and failed to introduce certain proof alleged to be beneficial to the Petitioner. The Petitioner also asserted that counsel was ineffective for advising the Petitioner not to testify at his trial. He also asserted in the petition that he had new evidence that the State's key witness, Dr. Charles Harlan, testified incorrectly about the cause of death. He also alleged that he had new evidence that the shotgun which was used to kill the victim had a "hair-trigger."

In Wallace I, we summarized the facts underlying this case:

Sometime on the afternoon of June 8, 1996, the [Petitioner], accompanied by his girlfriend, Melinda Sue Perrin, traveled to the home of the [Petitioner's] life-time friend, Charles Morgan. Shortly after the couple's arrival, the [Petitioner] asked Morgan if he could borrow Morgan's twelve-gauge pump shotgun. Both the stock and the barrel of the particular shotgun had been shortened. The weapon was described as being "sawed-off," approximately fourteen to sixteen inches in overall length with "a pistol grip handle." Although Morgan stated that he would not loan

the [Petitioner] the shotgun, the [Petitioner] continued in his request, explaining to Morgan that he needed the shotgun for protection because somebody was threatening to kill him. Although hesitant, Morgan eventually agreed to sell the weapon along with two shells of number six shot to the [Petitioner] for one hundred dollars. Melinda Perrin paid for the weapon with a hundred dollar bill.

After the sale was completed, Melinda mentioned that she was going to stay at Morgan's residence. Irritated by this comment, the [Petitioner] left the residence, got into his car, and began to back out of the driveway. Before the [Petitioner] got out of the driveway, Melinda caught up with him and got into the car.

After leaving Morgan's mobile home, the couple traveled to Clarksville, arriving at the residence of Norman and Linda Wallace around 3:00 p.m. Melinda carried a six pack of Zima, an alcoholic beverage, into the Wallaces' home. Thirty to forty-five minutes after they arrived, the [Petitioner] and Norman left in the [Petitioner's] car. Norman insisted on driving because the [Petitioner] had been drinking beer. They first drove to the home of the [Petitioner's] mother, and, then, the [Petitioner] asked Norman to drive him to Indian Mound. The [Petitioner] stated that he needed to talk to a man named "Red." He explained that he owed Red some money. As a result of this debt, Red had made threats against the [Petitioner's] mother and Melinda. The [Petitioner] hoped to make arrangements with Red to pay him back and to stop the threats to his mother and Melinda.

Just prior to reaching the Stewart County line, one of the tires on the [Petitioner's] dark blue Chrysler Fifth Avenue went flat. While the [Petitioner] was changing the tire, Norman noticed the shotgun, a box of ammunition, and a .22 target pistol in the car. The [Petitioner] stated that he and Melinda had just bought the gun. Once the tire was changed, the two continued to Indian Mound. Before reaching Red's house, the [Petitioner] asked Norman where the safety was on the shotgun. At trial, Norman testified that it was during this time that he believed the [Petitioner] loaded the weapon.

When they arrived at Red's house, the [Petitioner] instructed Norman to turn the vehicle around so that the passenger side was facing the front of Red's house. He told Norman that he was afraid that Red would come out shooting. However, Red was not at home. Norman then drove the [Petitioner] to the residence of Junior Shepard in Big Rock. Junior's wife, Beverly, came out to the car and told the [Petitioner] to leave or she would call the police.

Meanwhile, Melinda remained in Clarksville with Linda Wallace. Linda, a former beautician, cut Melinda's hair while the two women visited. Linda testified at trial that, during this visit, Melinda told her that she was afraid of the [Petitioner]

because he had previously pulled a gun on her. Linda stated that, although Melinda had consumed one Zima in her presence, she did not appear intoxicated.

The two men were gone approximately two hours before returning to Norman Wallace's residence. The two couples sat outside talking for approximately forty minutes before the [Petitioner] and Melinda left around 6:00 p.m., headed in the direction of Stewart County. The Wallaces testified that there did not appear to be any discord between the [Petitioner] and Melinda at any point during the visit. In fact, the [Petitioner] frequently called Melinda "baby" or "honey" and he told Norman that he and Melinda "got along real good together" and that "he wanted him and Melinda to take off and go someplace and move out of the country and be together the rest of their lives."

Shortly after 7:00 p.m., several customers at J.T.'s Bait Shop in Stewart County noticed a dark blue or black Fifth Avenue or LTD approaching from the direction of Clarksville. The vehicle drove onto the parking lot at a high rate of speed and then came to a sudden stop. The door on the driver's side of the vehicle opened and a man's foot emerged. The man leaned into the vehicle and appeared to have a shotgun in his hand. One witness, Heather Spiceland Stevens, testified that, when the car came to a halt, she observed the man slap his female passenger. A loud boom then reverberated from the vehicle and smoke came out the windows. Several bystanders described what appeared to them to be the head of the female passenger exploding. The driver of the vehicle backed the car out of the parking lot and drove in the direction of Dover. When the car was approximately three hundred yards from the parking lot, the bystanders heard another loud noise. At trial, the witnesses at the bait shop/convenience store identified the [Petitioner] as the male driver of the vehicle and Melinda Perrin as the female passenger.

Stewart County Deputy Kenny Anderson responded to the dispatch regarding the shooting at J.T.'s Bait Shop. Once at the scene, Deputy Anderson found pieces of human flesh scattered on the ground, as well as pieces of bone and parts of a denture plate.

That same evening, Ronald Buchanan had observed a dark colored vehicle leave from a secluded area on Riversbend Road in Stewart County between 6:30 p.m. and 8:00 p.m. and, later, had learned of the shooting incident at J.T.'s Bait Shop. The next afternoon, at around 3:00 p.m., Ray Richardson, Ronald Buchanan, and Harold Chester decided to ride their four wheelers in the Wilson Hollow area of Riversbend Road in search of the dark blue vehicle. The men had ventured onto an old logging road about one hundred and fifty yards off of Riversbend Road. They noticed fresh tire tracks on the road and Ray Richardson spotted an area where it appeared that something had been dragged through the weeds. The men decided to investigate.

They found a body approximately fifty-six feet off the logging road in the weeds. They notified the sheriff's department and led the authorities to the scene.

Dr. Robert Lee, the Stewart County Medical Examiner, and Tennessee Bureau of Investigation Special Agent Mike Breedlove arrived at the scene and discovered the body of a female, subsequently identified as Melinda Perrin, whose face had been obliterated by the shotgun blast. The body was sent to Dr. Charles Harlan, the chief medical examiner, who would conduct the autopsy.

Dr. Harlan determined that the thirty-nine year old victim had sustained a shotgun wound to the left side of the neck which was consistent with a near shotgun wound. As a result of the injury, the victim suffered multiple skull fractures, fractures of the jaw bone and the bone connecting the upper teeth, bruising to the brain, and a collapsed right eye. He opined that, after being struck by the shotgun blast to the head, the victim would have ceased being functional, and, most likely would have been rendered unconscious. The victim could have lived from between five to ten minutes from the delivery of the injury. Dr. Harlan determined that, based on the distance and angle of the gunshot wound, it would have been very difficult for the wound to have been self-inflicted. He was also able to determine that, at the time of death, the victim had a blood alcohol level of .12 per cent and that there were traces of Fluoxetine (a form of Prozac), Norpropoxyphene (the metabolic breakdown of Darvon, a painkiller), Dihydrocodeinone (a synthetic opiate) and ephedrine/pseudoephedrine (cold medicine) in her bloodstream.

On June 26, eighteen days after the homicide, the [Petitioner] turned himself into authorities. That evening during visiting hours, Deputy Anderson overheard the [Petitioner] tell one of his visitors that he could not understand why he was a suspect because he was not even with the victim that day or at the time of the murder. Neither the [Petitioner's] vehicle nor the murder weapon were ever recovered.

At his subsequent trial, the [Petitioner] pled not guilty to the charge of premeditated murder, and, in defense suggested that the fatal wound had been self-inflicted.

Wallace I, 1998 WL 670627, at \*1-4.

A hearing on the Petitioner's petition was held on June 26, 2007, at which the Petitioner was the only witness. He testified that his trial counsel did not prepare him to testify, although the Petitioner told him his version of the events underlying the case. The Petitioner also said that he wanted to testify but that trial counsel was vehemently against it because of the Petitioner's prior criminal record. The Petitioner recalled that he originally answered in the affirmative when the trial court asked him whether he would testify. He and trial counsel then had a conference in which trial counsel reiterated his opposition. The Petitioner said that trial counsel never informed him he had

a constitutional right to testify. After this conference, the Petitioner told the trial court that he would not testify, although the Petitioner maintained that he never waived his constitutional right to testify.

The Petitioner said he would have testified that he pulled his car into J.T.'s Bait Shop and set one foot out of its driver's side door when he heard Melinda say she would "blow his brains out." He and Melinda wrestled with the shotgun. It fired during the struggle, killing Melinda. His defense therefore would have been that he was acting in self-defense in handling the shotgun but that the trigger pull was an accident.

The Petitioner also alleged that trial counsel never investigated the Petitioner's claim that Charles Morgan had told him the shotgun had a hair trigger. The Petitioner also said that trial counsel never spoke to Heather Spiceland Stevens. Rather than arguing that the shooting was an accident, trial counsel then argued in closing that Melinda had committed suicide. Overall, the Petitioner did not feel he received effective representation at trial.

On cross-examination, the Petitioner admitted that trial counsel had, in fact, asked Mr. Morgan whether or not the shotgun had a hair trigger. Mr. Morgan responded that it did not. The Petitioner explained the absence of the gun or his car, saying that he had left the car by the side of the road near Manchester after it blew a tire. The car was stolen by the time he returned. The State also read into the record and confirmed with the Petitioner an exchange in which the Petitioner told the court he would like to testify but that it was his decision not to after speaking with trial counsel. He was also advised that he had a constitutional right to testify.

The State did not present proof. The Stewart County Circuit Court denied the Petitioner any relief in a lengthy and thorough memorandum opinion dated July 3, 2008. This appeal followed.

### **Analysis**

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.

#### **I. 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. To demonstrate prejudice, a defendant must show a reasonable probability that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 U.S. at 694. 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 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).

The Petitioner argues that the post-conviction court erred in concluding that his “uncontroverted” testimony was insufficient to provide him relief. The Petitioner’s brief contains a number of grounds on which he believes trial counsel was deficient, including trial counsel’s failure to: (1) object to a certain witness being referred to as a “gun expert”; (2) object to the State’s expressions of opinion on witness credibility; (3) object to the State’s expression of opinion regarding the strength of evidence against the Petitioner relative to similar cases; (4) allow the Petitioner to testify; (5) object to the trial court’s reference to the shotgun as “the murder weapon”;

(6) introduce evidence of the Petitioner's non-violent character; and (7) object to the trial court's statement that the Petitioner had "apparently escaped from custody while his case was on appeal."

We decline to address the issue of whether trial counsel was deficient in his representation on these issues. The Petitioner has simply not demonstrated that the result of his trial would have been different but for the alleged errors. See Strickland, 466 U.S at 694. After our review of the record, we cannot conclude that the post-conviction court erred in holding that the Petitioner was not prejudiced by any alleged deficient representation. The State presented a strong case against the Petitioner, including the testimony of several eyewitnesses to the shooting. Other witnesses established that the Petitioner was with the victim in a vehicle matching the description of the one seen at J.T.'s Bait Shop and that he had a shotgun with him. Witnesses also established that the victim's body had been driven to a remote location and discarded. Based on our review of the record, we cannot conclude that the trial court erred in finding that the Petitioner was not entitled to post-conviction relief based on the ineffective assistance of counsel.

## **II. Prosecutorial Misconduct**

The Petitioner next contends that the State committed prosecutorial misconduct by asserting a personal opinion as to witness credibility and making improper closing argument. We have noted above that the Petitioner also argued that trial counsel was ineffective because he failed to object to the prosecutor's arguments. We have concluded that the State's conduct was non-prejudicial even assuming it was improper. We decline to again address this issue in the manner we would if it were being presented in a direct appeal.

The Petitioner did not raise this issue in either of his direct appeals, however. See Wallace I, 1998 WL 670627; Wallace V, 2005 WL 292438. We have noted that "issues [of prosecutorial misconduct] are more properly the subject of direct appeal; as such, they are waived in the post-conviction setting. See Tenn. Code Ann. § 40-30-106(g)." John C. Johnson v. State, No. M2004-02675-CCA-R3-CO, 2006 WL 721300, at \*18 (Tenn. Crim. App., Nashville, Mar. 22, 2006). The Petitioner is not entitled to post-conviction relief on this issue.

## **Conclusion**

Based on the foregoing authorities and reasoning, we affirm the judgment of the Stewart County Circuit Court denying the Petitioner post-conviction relief.

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DAVID H. WELLES, JUDGE