

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
March 29, 2006 Session

GREENDA RAY HARMER v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Knox County
No. 74969 J. Steve Daniel, Judge**

No. E2005-01580-CCA-R3-PC - Filed May 30, 2006

The petitioner, Grenda Ray Harmer, appeals the post-conviction court's denial of post-conviction relief. On appeal, he alleges that (1) he received the ineffective assistance of counsel with respect to his suppression hearing; and (2) his constitutional rights were violated by the loss and destruction of evidence relevant to the suppression hearing. Following our review of the record and the parties' briefs, we affirm the order of the post-conviction court.

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

J.C. McLIN, J., delivered the opinion of the court, in which JERRY L. SMITH and ALAN E. GLENN, JJ., joined.

Douglas A. Blaze, Knoxville, Tennessee, for the petitioner, Grenda Ray Harmer.

Paul G. Summers, Attorney General and Reporter; Renee Turner, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Phillip H. Morton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The petitioner was initially charged in a multiple count indictment for especially aggravated robbery, especially aggravated kidnapping, and aggravated kidnapping in Case No. 67232; attempted first degree murder, and especially aggravated robbery in Case No. 67748; indecent exposure, aggravated assault, and reckless endangerment in Case No. 67231; and reckless driving in Case No. 67233. Thereafter, the petitioner entered a plea of guilty to one count of especially aggravated robbery; one count of aggravated robbery; one count of especially aggravated kidnapping; one count of aggravated assault; and one count of reckless endangerment. As a result, he received an aggregate sentence of twenty-five years.

After entry of his guilty pleas, the petitioner timely filed a pro se petition for post-conviction relief. Following appointment of post-conviction counsel, an evidentiary hearing was held. At the hearing, the petitioner's original defense counsel testified regarding his strategy and performance at the suppression hearing. He testified that he filed a motion to suppress the evidence challenging the stop of the petitioner's vehicle. At the suppression hearing, he attacked the credibility of Police Officer Hagaman, exploring the fact that Officer Hagaman had assaulted a suspect and lied about the incident. Defense counsel recalled that he reviewed the warrants, arrest reports, and the preliminary hearing tapes in preparation for the suppression hearing. He also reviewed case law relevant to reckless driving and took photographs of the scene of the arrest. Defense counsel stated that the trial court found the felony stop was legal notwithstanding the fact that he was able to demonstrate inconsistencies in Officer Hagaman and Mr. Bailey's testimony.

Defense counsel testified that the discovery he received from the state indicated the Knoxville Police Department had a videotape of the stop and arrest. Defense counsel stated that pursuant to the rules of discovery, he asked for the videotape several times, but never received it. Defense counsel recalled that he later received a letter from the state indicating that the videotape no longer existed. Defense counsel said that the videotape might have been helpful in attacking the validity of Officer Hagaman's stop of the petitioner. Defense counsel also recalled that he was unable to gain access to the petitioner's car in order to verify that the engine made a knocking noise, as suggested by Officer Hagaman.

On cross-examination, defense counsel testified that he had extensive experience as a criminal defense lawyer. He stated that he reviewed and evaluated all the evidence that the state planned to introduce at trial. He said he discussed with the petitioner his case and the potential sentence he might receive if convicted at trial. Defense counsel said that the petitioner ultimately pled guilty to several charges involving four victims on the eve of trial. Defense counsel recalled that the state's original plea offer was thirty-five or forty years, but ultimately the state offered twenty-five years. He also recalled that the petitioner had a number of previous felony convictions.

The petitioner also testified at the post-conviction hearing. However, his testimony related only to his claim that he pled guilty because of the unsuccessful motion to suppress. On cross-examination, the petitioner acknowledged that he had previous convictions for escape, sexual assault, first degree burglary, and threatening the life of a president. The petitioner also acknowledged that he pled guilty and that his twenty-five-year sentence gave him the possibility of not spending the rest of his life in prison.

Following the hearing, the post-conviction court issued a written order denying post-conviction relief. Herein, the post-conviction court set forth its findings of fact and conclusions of law. The post-conviction court's finding of facts aptly summarizes the facts of the suppression hearing and the factual basis stipulated at the plea submission hearing. Accordingly, below is the post-conviction court's findings of fact relevant to the petitioner's issues on appeal:

On November 26, 1998 at 7:00 a.m. Ms. Connie Richards went to a car wash on Chapman Highway to [clean her car]. Within five minutes of her arrival at the car wash, she was grabbed from behind by a person who put a rope-like item around her neck and tightened it and told her that he would kill her if she screamed. Ms. Richards was robbed, [and taken] some two hundred eighteen feet from her vehicle, where she was tied to a tree and again threatened with death. Her attacker was naked from the waist down. He wore a ski mask or toboggan which covered his face, with the exception of his eyes and [eyebrow] area. He wore gloves, dark half boots and a green pullover shirt.

[On the same day, Melissa Ayers was attacked]. The location of this offense was at the Labor Ready employment business on Magnolia Avenue in Knox County. Ms. Ayers was in her place of employment at an early morning hour between 6:30 a.m. and 7:00 a.m. preparing payroll checks. Ms. Ayers was working at a back office when someone came up behind her, placed a rope-type item around her neck, and [choked] her to the point that she passed out. When she became conscious again, she was outside of her office where she had been dragged. Her assailant was naked from the waist down, wearing a toboggan-type mask and gloves along with brown shoes. The assailant robbed Ms. Ayers, taking her purse and its contents. An investigation of the crime scene revealed a tan boot string used [to] lace up construction boots. DNA analysis of the boot string revealed bodily fluids of the [petitioner] and Ms. Ayers. The [petitioner] had been previously a temporary worker who had used the Labor Ready services.¹

[Earlier, around 5:30 a.m., Roger Bailey was working with his wife at a Weigel's market when he heard his wife scream.] . . . [Mr. Bailey] overheard a co-employee cursing and hollering at an individual who had confronted her outside the store, this individual being a white male who was nude. Mr. Bailey exited the building and attempted to apprehend the individual. He chased the nude individual who was wearing a dark ski mask and dark boots. [This individual] . . . entered an older model automobile and attempted to run over Mr. Bailey . . . [Mr.] Bailey was able to get a partial license plate number, 264. He described the automobile as being of a 1970's square Chrysler-type vehicle, light blue rusty/ faded blue color, in his report to the investigating officer who was Officer Samuel Hagaman.

At 12:30 a.m. on November 27, 1998, [O]fficer Samuel E. Hagaman was on routine patrol traveling westbound on Kingston Pike approaching David Lane. David Lane apparently intersects Kingston Pike at a ninety degree angle. Officer Hagaman testified at the preliminary hearing that he observed a small dark colored automobile

¹ Of significance, the factual account stipulated at the plea hearing references the petitioner as the attacker in each of these instances. Also, the transcript of the plea hearing suggests that Ms. Ayers knew the defendant because he had previously sought employment in connection with Labor Ready.

coming toward Kingston Pike from behind Conoco Market on David Lane in the wrong lane of traffic. Hagaman executed a U-turn west of David Lane after the car in question made an eastbound turn on Kingston Pike. After falling in behind [the petitioner], the officer observed that the vehicle bore licen[s]e number 264 ADP and met the description of the older model automobile involved in the earlier aggravated assault at Weigel's, which he had investigated several hours earlier. Officer Hagaman then initiated a felony stop because of his knowledge of the prior felony complaint and . . . for the reckless driving which he allegedly observed. [The petitioner] was the driver and only occupant of the vehicle stopped by Hagaman. Hagaman's stop was a felony stop in which the occupant was removed from the vehicle, cuffed and placed in the patrol car. Hagaman testified that he observed in plain view a shoe lace in the floorboard of the automobile and a toboggan extending out of the glove compartment, both items matching the description of the items in the assault[s] of the previous day. Ultimately, DNA analysis of the orange boot lace found in the floorboard of the automobile linked [the petitioner] to [Ms.] Connie Richards' assault. Obviously, the toboggan and physical evidence in the automobile itself linked [the petitioner] to the Ayers and Bailey assaults.

. . . .

At the time of [the guilty] pleas [the petitioner] was represented by [defense counsel]. At the suppression [hearing] only two witnesses were presented. Those witnesses were Mr. Roger Bailey and Officer Samuel Hagaman. It was the [petitioner's] position that the traffic stop was pretextual and violated his Fourth Amendment right. Therefore, all of the evidence, i.e., boot lace, toboggan, etc., should be excluded. At the suppression hearing Officer Hagaman testified that he stopped [the petitioner] for three reasons; (1) He allegedly had observed [the petitioner] operating his car in a reckless manner, (2) the car matched a previous lead distributed BOLO, and (3) the vehicle allegedly matched the description of a car involved in an incident at Weigel's store the previous day to which Officer Hagaman had responded.

. . . .

. . . The trial court, after hearing the evidence at the suppression hearing, ruled that there was a valid stop and a valid arrest of [the petitioner] on three separate bases. The trial court overruled the Motion to Suppress in its entirety and found that the evidence which was seized at the time of the arrest was admissible.

II. ANALYSIS

In challenging the post-conviction court's denial of post-conviction relief, the petitioner asserts that: (1) he received the ineffective assistance of counsel with respect to the suppression

hearing; and (2) his constitutional rights were violated by the destruction evidence relevant to the suppression hearing. We begin our examination of the post-conviction court's denial of post-conviction relief by setting forth the standard of review. In order for a petitioner to succeed on a post-conviction claim, the petitioner must prove the allegations set forth in his petition by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, this court is required to affirm the post-conviction court's findings unless the petitioner proves that the evidence preponderates against those findings. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). Our review of the post-conviction court's factual findings is de novo with a presumption that the findings are correct. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001). Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Id.*

A. Ineffective Assistance of Counsel

In claiming ineffective assistance of counsel, the petitioner essentially argues that, but for his counsel's ineffective representation at the suppression hearing, he would not have pled guilty and instead insisted on going to trial. In support of his argument, the petitioner points out that Officer Hagaman testified at the suppression hearing that he had probable cause to conduct a felony stop of the petitioner's vehicle because (1) he observed the petitioner drive recklessly; (2) the petitioner's car matched a previous "Be On the Look Out" (BOLO) police broadcast; and (3) the petitioner's car matched the description of the car involved in the incident at Weigel's store. The petitioner claims that defense counsel was ineffective in failing to challenge the inconsistencies in Officer Hagaman's testimony regarding: (1) his reliance on the BOLO broadcast; (2) his observations of reckless driving; and (3) the description of the petitioner's car. The petitioner asserts that the record supports the numerous inconsistencies in Officer Hagaman's testimony and urges this court to look at counsel's deficient performance in failing to challenge these inconsistencies.

In order to prevail on a claim of ineffective assistance of counsel, the petitioner must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984) by proving: (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *See id.*; *see also Wiley v. State*, 183 S.W.3d 317, 329 (Tenn. 2006). Deficient performance is shown if counsel's conduct fell below an objective standard of reasonableness under prevailing professional standards. *Strickland*, 466 U.S. at 688; *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975) (establishing that representation should be within the range of competence demanded of attorneys in criminal cases). Prejudice is shown if, but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 694. When a petitioner claims ineffective assistance of counsel in relation to a guilty plea, the petitioner must show a reasonable probability that, but for the errors of his counsel, he would not have pled guilty. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Adkins v. State*, 911 S.W.2d 334, 349 (Tenn. Crim. App. 1994). A fair assessment of counsel's performance, "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). Both deficient performance and prejudice must

be established to prove ineffective assistance of counsel. *Strickland*, 466 U.S. at 697; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). If either prong of ineffective assistance of counsel has not been established, a court need not address the other prong. *Strickland*, 466 U.S. at 697.

Addressing the petitioner's ineffective assistance of counsel claim, the post-conviction court found that defense counsel failed to challenge certain inconsistencies in Officer Hagaman's testimony as to why he executed a felony stop of the petitioner's vehicle. The post-conviction court noted inconsistencies in Officer Hagaman's testimony regarding his observations of reckless driving and reliance on the BOLO report. The post-conviction court also noted inconsistencies in the automobile description given to Officer Hagaman by Roger Bailey. The post-conviction court stated:

[the] description given by Roger Bailey was that of a light blue or gray, four-door, 1970's square Chrysler-type vehicle with rust along the bottom, a knocking engine, and 264 on the licen[s]e plate. However, [the petitioner's] car varied from a majority of those descriptive elements in that it was a two-door not a four-door vehicle, dark blue, not light blue or gray, a 1986 model, not a 1970's model, and a Chevrolet and not a Chrysler.

However, the post-conviction court found Officer Hagaman's testimony provided other legitimate bases for the stop such as the partial license number and general description of the vehicle given to Officer Hagaman some eighteen hours earlier during the Weigel store investigation. The post-conviction court further found that defense counsel pursued many of the inconsistencies concerning the description of the petitioner's car and questioned Officer Hagaman about his misconduct in falsifying reports and warrants. In addition, the post-conviction court found that the petitioner "testified under oath that he was satisfied with the plea agreement and resolution of these cases. He also testified that he was satisfied with the services of his attorney." Consequently, the post-conviction court concluded that the petitioner failed to demonstrate ineffective assistance of counsel by clear and convincing evidence.

Upon our review of the record, we conclude that the petitioner has not proven his claim of ineffective assistance of counsel. To begin, we are not convinced that counsel's performance was deficient given his examination and impeachment of Officer Hagaman's testimony. As the post-conviction court noted, the transcript of the suppression hearing reflects that counsel made a vigorous effort to discredit Officer Hagaman's testimony. However, despite counsel's effort, the lower court ruled that evidence existed to support Officer Hagaman's felony stop. In our view, the fact that counsel did not add to his impeachment efforts does not demonstrate deficient performance of counsel. In sum, counsel should not be deemed to have been ineffective merely because he failed to employ additional modes of impeachment which may or may not have produced a different result. *See Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). A defendant is not entitled to perfect or error-free representation, only constitutionally adequate representation. *See Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996).

In addition, we conclude that the petitioner failed to demonstrate prejudice: that but for the errors of his counsel at the suppression hearing he would not have pled guilty. Certainly, we agree with the post-conviction court that Officer Hagaman's testimony relevant to his probable cause for stopping the petitioner was encumbered with inconsistencies. Nonetheless, as the post-conviction court found, there existed some evidence supporting Officer Hagaman's stop of the petitioner's automobile. As such, the felony stop was valid under the circumstances of this case. Furthermore, the record reflects that the petitioner stipulated to the facts of his guilt at the guilty plea hearing. Interestingly, the stipulated facts indicate that the state had recovered from one of the crime scenes a boot string with the petitioner's DNA on it. This incriminating evidence was independent of the evidence discovered as a result of the felony stop. Also, the record reflects that one of the victims knew the petitioner. Finally, the record reflects that the petitioner pled guilty on the eve of trial after being advised of his rights by both his counsel and the trial court. Therefore, given the totality of the evidence, it is our view that the petitioner did not prove by clear and convincing evidence that the exclusion of the evidence obtained by the allegedly illegal stop would have sustained the petitioner's resolve to not plead guilty and insist on going to trial. *See Hill*, 474 U.S. at 59 (determining that assessment of prejudice within the context of a guilty plea "will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial."). Accordingly, we conclude that the evidence does not preponderate against the post-conviction court's findings, and the petitioner is not entitled to relief on this issue.

B. Due Process: Loss and Destruction of Exculpatory Evidence

The petitioner next claims that his convictions should be set aside because the state lost or destroyed certain evidentiary items, thereby violating his due process rights to exculpatory evidence. Specifically, the petitioner argues that the state's loss or destruction of a videotape of the petitioner's arrest and the petitioner's automobile violated his due process rights because these evidentiary items could have been utilized by the defense to gain a favorable ruling at the suppression hearing. The petitioner cites *Brady v. Maryland*, 373 U.S. 83 (1963) and *State v. Ferguson*, 2 S.W.3d 912 (Tenn. 1999) for authority.²

In *Brady v. Maryland*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. Of significance, impeachment evidence, as well as exculpatory evidence, is evidence favorable to an accused. *See United States v. Bagley*, 473 U.S. 667, 676 (1985); *Johnson v. State*, 38 S.W.3d 52, 56 (Tenn. 2001). To prove a *Brady* violation, a defendant must demonstrate the following:

² We take opportunity here to note that the applicability of *Ferguson* to post-conviction proceedings is presently undetermined by our supreme court. We also question the efficacy of applying the *Ferguson* standard to this case where the petitioner pled guilty.

- 1) that the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);
- 2) that the State suppressed the information;
- 3) that the information was favorable to the accused; and
- 4) that the information was material.

Johnson, 38 S.W.3d at 56. The defendant bears the burden of proving a *Brady* violation by a preponderance of the evidence. See *State v. Edgin*, 902 S.W.2d 387, 389 (Tenn. 1995). The standard for measuring whether the suppressed information is material is whether “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Bagley*, 473 U.S. at 682 (noting that the standard for showing material aspect of a *Brady* claim is essentially the same as showing prejudice in an ineffective assistance of counsel claim). In other words, a defendant must show that “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.” *Kyles v. Whitley*, 514 U.S. 419, 435 (1995); see also *Irick v. State*, 973 S.W.2d 643, 657 (Tenn. Crim. App. 1998) (citing *Edgin*, 902 S.W.2d at 390). Thus, the materiality of the suppressed evidence must be evaluated within the context of the entire record as to how it impacts the innocence or guilt of the accused.

In *State v. Ferguson*, our supreme court addressed “what consequences flow from the State’s loss or destruction of evidence alleged to have been exculpatory.” *Id.* at 915. The supreme court explained that a reviewing court must first determine whether the state had a duty to preserve the lost or destroyed evidence. *Id.* at 917. The court noted that the state had a constitutional duty to preserve all evidence subject to the rules of discovery and other applicable law. *Id.* However, the court noted that “[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect’s defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.” *Id.* (quoting *California v. Trombetta*, 467 U.S. 479, 488-89 (1984)). Our supreme court ruled that when the state failed in its duty to preserve evidence, several factors need to be considered including: (1) the degree of negligence involved; (2) the significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence used at trial to support the conviction.³ The court noted that the reviewing court considers these factors within the context of the entire record to determine whether “a trial conducted without the destroyed [or lost] evidence, would be fundamentally fair.” *Id.* at 914-17.

Addressing the petitioner’s *Brady-Ferguson* claim, the post-conviction court found the destruction of the videotape and automobile by the state was inexcusable. The court also found that

³ We note that the factors set forth in *Ferguson* are useful in determining materiality for *Brady* purposes.

the state had a duty to preserve this evidence because it was subject to discovery and inspection pursuant to Rule 16 of the Tennessee Rules of Criminal Procedure. However, the post-conviction court found that other substantial and overwhelming evidence existed relevant to the petitioner's guilt. Thus, the post-conviction court concluded that the petitioner's guilty plea was fundamentally fair because the existing evidence overwhelmingly supported the petitioner's underlying convictions.

From our review of the record, it appears that only the "materiality" of the evidence is in dispute. As the post-conviction court found, the state possessed favorable evidence allegedly exculpatory and failed to provide this evidence to the defense. However, as previously stated, the materiality of the suppressed evidence must be evaluated within the context of the entire record as to how it impacts the innocence or guilt of the accused. *See, e.g., United States v. Agurs*, 427 U.S. 97, 112 (1976) (noting that the proper determination of materiality reflects concern with the justice of finding guilt). From this standpoint, we fail to discern any basis for the petitioner's due process claim. To begin, the exculpatory nature of the videotape and the automobile is tenuous at best because, even if preserved, these evidentiary items are not remotely probative of the petitioner's innocence or guilt. Instead, these evidentiary items are relevant only to impeach Officer Hagaman's testimony that he had probable cause to stop the petitioner. As such, we fail to see how the suppression of the petitioner's vehicle and the videotape undermined the confidence of the petitioner's guilty pleas. Also, it is abundantly clear that there was evidence of the petitioner's guilt independent of the videotape and car. In this case, sufficient evidence existed, including DNA evidence, that connected the petitioner to the crimes to which he ultimately pled guilty. Therefore, we conclude the petitioner failed to prove that the state violated his due process rights as contemplated by *Brady v. Maryland* and *State v. Ferguson*.

C. Collective Effect

The petitioner finally contends that the collective effect of counsel's deficient performance and the *Brady* violations warrant relief. However, because we have previously determined that the petitioner failed to prove claims of ineffective assistance of counsel and violation of due process, we conclude that the petitioner is not entitled to post-conviction relief on the basis of this claim.

III. CONCLUSION

Based upon the foregoing authorities and reasoning, we affirm the order of the post-conviction court.

J.C. McLIN, JUDGE