

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs July 21, 2009

**LADARIUS L. REFFEGEE v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Davidson County  
No. 2004-C-2504 Steve Dozier, Judge**

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**No. M2008-02197-CCA-R3-PC - Filed October 20, 2009**

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A Davidson County jury convicted the Petitioner, Ladarius L. Reffegée, of second degree murder and unlawful carrying a handgun with the intent to go armed. Subsequently, he pled guilty to possession of more than 0.5 grams of cocaine with the intent to sell. He was sentenced to a total effective sentence of thirty-three years to be served in the Tennessee Department of Correction (“TDOC”). This Court affirmed the Petitioner’s convictions and sentences on direct appeal. *State v. Ladarius L. Reffegée*, No. M2005-02891-CCA-R3-CD, 2007 WL 1836697, at \*1 (Tenn. Crim. App., at Nashville, June 27, 2007), *perm. app. denied* (Tenn. Oct. 15, 2007). The Petitioner timely filed a petition for post-conviction relief, which was amended by appointed counsel. In his petition, he alleged relevant to this appeal that he received the ineffective assistance of counsel and that ballistic evidence offered by the State was unreliable, which caused him actual prejudice. The post-conviction court dismissed the petition, and, after a thorough review of the record and applicable authorities, we affirm the post-conviction court’s judgment.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Cynthia M. Fort, Nashville, Tennessee, for the Appellant, Ladarius L. Reffegée.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Sophia S. Lee, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Amy Eisenbeck and Rachel Sobrero, Assistant District Attorneys General, for the Appellee, State of Tennessee.

**OPINION**

**I. Facts**

### **A. Jury Trial and Guilty Plea Hearing**

In our opinion on the Petitioner's appeal of his convictions, we recited the facts underlying his convictions as follows:

James Pleasant, the victim, was shot and killed at Club Prism, a night club on Nolensville Road, in the early morning hours of July 12, 2004. Jonathan Pleasant, the victim's younger brother, testified that a week prior to the shooting, the victim was involved in a minor automobile accident near Club Dream, a night club in downtown Nashville. The driver of the other automobile was Zedrick Brown. After the accident, the victim offered to pay money for the minor damage to Brown's car and everyone went their separate ways. Jonathan noted that a Corey McGee was with Brown at the time of the accident but the [Petitioner] was not.

Jonathan Pleasant testified that a few minutes after the accident, he and the victim met the victim's friend, Bubba Stone at another local club, called Night Life. Jonathan observed that Brown, McGee, and Julius Johnson were standing in line at this club. At this time, Jonathan observed Stone shoot McGee in the stomach. Jonathan stated that the [Petitioner] was not present at the time. On cross-examination, Jonathan acknowledged that his brother, the victim, was a member of a gang, the Tre-07 Underground Crips. Jonathan also acknowledged that after the earlier car accident some individuals were wa[.]ving guns around. However, Jonathan stated that the victim and Brown were acting calm in response to the accident.

Tomario Pleasant, the victim's cousin, testified that the night the victim was killed, he and the victim were at Club Prism. At some point, both men left the club and headed back to the car. Tomario got into the car, but the victim turned around and headed back to the club, saying "he would be right back." Tomario then heard two gunshots, got out of the car, walked back to the club, and saw the victim lying on the ground. On cross-examination, Tomario acknowledged that the victim was known to carry a gun in the past, but he did not have one on him the night he was shot and killed.

Ashley Caulder testified that she was at Club Prism in the early morning hours of July 12, 2004 and saw the [Petitioner] talking to the victim outside the club. The conversation appeared to be friendly. She heard the victim say he was leaving and saw him walk away, then she heard three or four gunshots. When she looked, she saw the [Petitioner] "over the top of [the victim], shooting." She heard the [Petitioner] say "[s]omeone is shooting, someone is shooting." Ms. Caulder also noted that the [Petitioner's] "left hand was messed up or something." Ms. Caulder stated that she did not see the victim with a gun.

Julius Johnson testified that he was friends with the [Petitioner], McGee, and Brown and had grown up with them. He stated that he was in another car when the accident between the victim and Brown took place. He recounted that Brown and the victim did not “get into a fight or anything,” rather they were talking. Johnson stated that he was at the club when McGee got shot. Johnson acknowledged that the victim did not shoot McGee. Johnson recalled that on July 11, 2004, he and some other people including the [Petitioner] decided to go to Club Prism. The [Petitioner] drove Johnson’s car because he had a driver’s license. Johnson lost contact with the [Petitioner] until after the shooting when he and the [Petitioner] met up in the parking lot near Johnson’s car. However, Johnson went back to the club and the [Petitioner] left with Johnson’s car. According to Johnson, people were running everywhere, panicking, trying to get safe.

Several police officers testified regarding their role in securing the crime scene and the recovery and collection of evidence. According to their testimony, the police arrived a few minutes after the shooting and secured the crime scene. Four spent bullet casings were recovered from the crime scene. Two projectile bullets were recovered from the victim’s body after the autopsy. No gun was found on the victim’s person or at the crime scene. After questioning the security personnel at Club Prism, the shooter was identified as wearing a gray t-shirt, dark shorts, and he had a deformed left hand. Eventually, the [Petitioner] became a suspect. Ms. Caulder was asked to view a photographic lineup whereupon she identified the defendant as the shooter. Based on her identification, a warrant was issued for the [Petitioner’s] arrest.

Detective Charles Robinson of the Nashville Police Department testified that he arrested the [Petitioner] at the Cumberland View Apartments. At the time of his arrest, the [Petitioner] was standing in the parking lot near his Suburban. After placing the [Petitioner] under arrest, Detective Robinson shined a flashlight into the rear area of the [Petitioner’s] vehicle and noticed the barrel of a handgun lying on the floorboard with a bunch of other stuff. Detective Robinson then told the [Petitioner] that he could either give consent to search his vehicle or a search warrant would be obtained. The [Petitioner] agreed to the search with the condition that his vehicle would not be impounded or taken so that his girlfriend could use it to get to work. Detective Robinson agreed and the [Petitioner] signed a consent to search form. After searching the [Petitioner’s] vehicle, Detective Robinson found two guns.

Police Officer George Bouton testified as to the identification of the weapons found in the [Petitioner’s] vehicle on July 15, 2004. He identified the two guns as a P-89 Ruger, nine-millimeter handgun and a Tec DC9, nine-millimeter handgun. Officer Bouton noted that both guns were loaded and explained how he documented and labeled the guns and the ammunition retrieved from the guns. Officer Michael Pyburn of the Nashville Police Department

testified as an expert in ballistic and firearms examination. According to Officer Pyburn, the bullet casings recovered from the crime scene and the bullet projectiles recovered from the victim's body were found to have been discharged from the Ruger, nine-millimeter, semi-automatic handgun. Dr. Feng Li, the county's assistant medical examiner, testified that the victim's autopsy report revealed that the victim was shot once in the chest and once in the back and died as a result. At the close of the [S]tate's proof, the jury was allowed to view the [Petitioner's] hands.

The [Petitioner] testified on his own behalf. He stated that he knew his friend, McGee, got shot by Stone over a car accident involving Brown and the victim. According to the [Petitioner], the victim and Stone were members of the Tre-07 Underground Crips, a real bad gang in Nashville. The [Petitioner] further asserted that the victim was known to be violent and to carry a gun. On July 11, 2004, the [Petitioner] went out with his friends to Club Prism. The [Petitioner] drove Johnson's vehicle because he had a driver's license. When they reached the club, the [Petitioner] began to get nervous about the crowd and asked another friend, Anthony Dyer, for a gun, and was given the Ruger. The [Petitioner] claimed that he wanted the gun for protection because he had previously witnessed violence at the club and at "the VIP line, they don't search you. . . . All you got to do is just pay extra."

The [Petitioner] stated that he was denied entrance into the club, so he decided to go to the back of the club and "pay . . . extra to get in through the back." While walking around to the back of the club, the [Petitioner] encountered the victim. According to the [Petitioner], the victim approached him and said, "Are y'all n\* \*ers looking for me?" The [Petitioner] responded, "Dude, I don't even know you . . . [h]ow am I gonna be looking for you?" The [Petitioner] noted that at this time he saw the victim wa[.]ving something in his hand. Further conversation ensued, where the victim identified himself as part of the Tre-07 gang and accused the [Petitioner] of being part of the group looking for him. The [Petitioner] asserted that while the victim was yelling at him, the victim had his right hand on his waist belt and was "looking at me . . . real eager like he just gonna pull it out and just shoot me." The [Petitioner] stated that he raised his shirt and turned in a circular motion to show the victim that he did not have a weapon. Then, he took the gun from his groin area, shot the victim, and took off running. The [Petitioner] acknowledged that he did not see the victim pull out a gun, but asserted that he was 100% certain the victim had a weapon. The [Petitioner] asserted that he left the club in Johnson's vehicle because he did not know if he shot the victim or not, was scared of the gang, and was afraid for his life.

The [Petitioner] testified that he volunteered to give a statement to police a couple of days after the shooting, but he lied to police because he was afraid

someone would come after him and his family. The [Petitioner] claimed that he had the two guns in his vehicle for protection.

Julius Johnson and Zedrick Brown were called to testify on behalf of the [Petitioner]. Johnson testified that the victim was part of a Crip gang, which had a reputation for violence. Johnson also claimed that Club Prism had a reputation for having trouble and violence. Brown testified that the Tre-07 Underground Crips had a reputation for violence. Brown further testified that Club Prism had a reputation for problems and violence and that “it was so simple to get a gun in Prism.”

Detective Robinson was also called to testify on the [Petitioner’s] behalf. Detective Robinson acknowledged that he met with the members of the victim’s family. He stated that certain members of the victim’s family acknowledged that the victim was a member of the Tre-07 Underground Crips and the victim was known to carry a gun on his person or inside his vehicle.

*State v. Ladarius L. Reffegge*, 2007 WL 1836697, at \*1-4. Based upon this evidence, the jury convicted the Defendant of second degree murder and carrying a handgun with intent to go armed. The Defendant then pled guilty to possession of cocaine. On appeal, this Court affirmed the judgments of the trial court.

## **B. Post-Conviction Hearing**

The Defendant timely filed a petition for post-conviction relief, amended by appointed counsel, in which he alleged relevant to this appeal that, due to a deficiency in the report of the ballistics expert witness who testified at his trial, his trial counsel could not effectively cross-examine the witness and challenge the ballistics evidence. At the hearing on the petition for post-conviction relief, the following evidence was presented: The Petitioner testified that his family hired his trial counsel (“Counsel”) after hearing that Counsel had a reputation as a good attorney. He said he met with Counsel for varying durations “quite often” at the jail. During these meetings, the two discussed whether the Petitioner would plead guilty and, later, the evidence facing the Petitioner. Counsel informed the Petitioner about possible eyewitnesses, including Ashley Caulder, who the Petitioner learned was unavailable to testify. The Petitioner said that, when discussing defense strategies later with Counsel, he assumed that Caulder was still unavailable.

The Petitioner said he had several discussions with Counsel about the bullet and the casings that were matched to the Ruger. He expressed to Counsel his concern that the police experts were saying that a bullet that was “mutilated” had been matched to the Ruger. Counsel hired an independent firearms investigator, who generated a report showing that the bullet used as the test bullet matched the Ruger. The Petitioner said he found this impossible because the Ruger was not the weapon that was used to shoot the victim. In order to show that someone tampered with the evidence against him, the Petitioner requested that the bullet taken from the victim’s body be tested for DNA. He believed the results of such a test would show that the

bullet taken from the victim's body was not fired from the gun found in his possession. The Petitioner said he understood the testing he requested was not usually performed in similar cases.

The Petitioner asked his post-conviction counsel to obtain the information upon which the State's ballistic expert, Officer Michael Pyburn, based his report. He received this information and was surprised to find no visual model or chart. He and his post-conviction attorney reviewed the worksheets attached to the report detailing the bullets Officer Pyburn received and the projectiles discharged, including the one from the victim's body. The Petitioner testified that he and Counsel were surprised to discover that there was not a chart, memo, or report stating the stria of Bullet A matched that of Bullet B.

The Petitioner further testified that he learned on the eve of his trial that the State had located Caulder and that she would be testifying against him at trial. He said he had only minutes to discuss this with his attorney and thought that the trial would be postponed, but his case was not continued.

On cross-examination, the Petitioner agreed that Counsel gave him a copy of the State's response to discovery, which the Petitioner reviewed before trial. This packet contained a police report, which summarized the interview with Caulder. The summary of Caulder's interview revealed that Caulder told police that she saw the Petitioner, whom she was able to accurately describe, standing over the victim firing the gun into him and that she got a very good look at the Petitioner. The Petitioner testified that his trial testimony that he had shot the victim was untrue. He said that he and Counsel fabricated this version of the events surrounding the shooting to support his claim of self-defense.

The Petitioner explained that he wanted a DNA test of the bullet retrieved from the victim's body because, as he did not commit this killing, the bullet retrieved from the victim's body could not possibly have been fired from the gun police found in his possession. The Petitioner conceded that Counsel hired an expert to examine the State's ballistic evidence and that the expert concluded the State's ballistic evidence was accurate.

Counsel testified he had tried multiple murder cases, and he represented the Petitioner in this case. Counsel said he hired an independent ballistics expert, David Brundidge, who re-evaluated the State's evidence. He received a report from Brundidge and shared that report with the Petitioner.

Counsel explained that he obtained the services of an expert in this case, based upon the Petitioner's statement to him that the Petitioner had thrown the gun he used to shoot the victim into the Cumberland River, and, therefore, police could not possibly have the gun. Counsel, therefore, hired an expert to examine whether the State had made a mistake. Counsel said, when Brundidge's report confirmed Officer Pyburn's findings, Counsel determined that the Petitioner must have thrown the wrong gun into the river.

At that time, the evidence against the Petitioner was primarily that the police had a gun and that the bullets found in the victim matched the gun. Counsel said the State also had two eyewitnesses, but neither appeared at the preliminary hearing. It was unclear whether they would appear at trial, and Counsel said his philosophy in this case was to keep his options open, in case any of the witnesses materialized. Counsel said that the Petitioner told him he shot the victim because he was scared the victim had a gun. The Petitioner, however, did not want to assert self-defense. Counsel said the Petitioner wanted to assert absolute innocence, and Counsel thought this defense had merit if the eyewitnesses against the Petitioner did not testify. He filed a motion for a speedy trial, hoping the State would be unable to locate their witnesses. On the Friday before trial, the State found Caulder. Counsel testified he notified the Petitioner when the State found Caulder, and he told the Petitioner that they needed to assert self-defense. He expressed concern that if he sought a continuance, the State might find the second eyewitness against the Petitioner.

On cross-examination, Counsel testified that two females gave statements to police implicating the Petitioner and that only one of these females, Caulder, was available to testify at trial. The Friday before trial, the State informed Counsel they had found and placed in custody Caulder. When the police found Caulder, Counsel's advice to the Petitioner about trial strategy changed. Counsel testified his ballistics expert, Brundidge, met with the State's ballistic expert, but Counsel was unsure what information Brundidge relied upon in formulating his opinion.

Based upon this evidence, the post-conviction court dismissed the Petitioner's petition for post-conviction relief. The post-conviction court found, in relevant part, that:

[T]he [P]etitioner avers the expert testimony of Officer Michael Pyburn was essential to his conviction and that Officer Pyburn's reliability is highly suspect. The testimony of Officer Pyburn was presented to a jury of the [P]etitioner's peers. The jury returned a verdict against the [P]etitioner and the [P]etitioner has provided no evidence supporting this allegation. Therefore, because the [P]etitioner has failed to carry his burden of clear and convincing evidence, the Court must respectfully dismiss this allegation.

It is from this judgment that the Petitioner now appeals.

## **II. Analysis**

On appeal, the Petitioner contends that the post-conviction court erred when it dismissed his petition for post-conviction relief based upon its finding that the Petitioner had not proven that the ballistics evidence was unreliable. He asserts that Counsel should have been privy to all the underlying data relied upon by Officer Pyburn in order to effectively cross-examine the officer. The State counters that the Petitioner failed to prove his allegations regarding Officer Pyburn and that the Petitioner's claim essentially challenges the sufficiency of the evidence, which is not a cognizable claim in a post-conviction proceeding.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2006). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2006). Upon review, this Court will not re-weigh 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 trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's factual findings are subject to a de novo review by this Court; however, we must accord these factual findings a presumption of correctness, which can be overcome only when a preponderance of the evidence is contrary to the post-conviction court's factual findings. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court's conclusions of law are subject to a purely de novo review by this Court, with no presumption of correctness. *Id.* at 457.

The right of a criminally accused to representation is guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. White*, 114 S.W.3d 469, 475 (Tenn. 2003); *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The following two-prong test directs a court's evaluation of a claim for ineffectiveness:

First, the [petitioner] 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 [petitioner] by the Sixth Amendment. Second, the [petitioner] must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable. Unless a [petitioner] makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

*Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Melson*, 772 S.W.2d 417, 419 (Tenn. 1989).

In reviewing a claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competence demanded of attorneys in criminal cases. *Baxter*, 523 S.W.2d at 936. To prevail on a claim of ineffective assistance of counsel, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." *House v. State*, 44 S.W.3d 508, 515 (Tenn. 2001) (citing *Strickland*, 466 U.S. at 688).

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland*, 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the



attorney's perspective at the time. *Strickland*, 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential 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. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronin*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. *House*, 44 S.W.3d at 515 (citing *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)). However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation. *House*, 44 S.W.3d at 515.

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is 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; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994). When a petitioner makes a claim of ineffective counsel within the context of a guilty plea, the petitioner must demonstrate a reasonable probability that, but for counsel's deficiency, the petitioner would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985); *Manning v. State*, 833 S.W.2d 635, 637 (Tenn. Crim. App. 1994).

As we best understand the Petitioner's argument, he is asserting that the ballistics evidence presented at trial was unreliable and that Counsel was prevented from effectively cross-examining Officer Pyburn or challenging his report because Counsel was not provided data, models or charts reflecting the process and procedures employed by Officer Pyburn to test the bullets retrieved from the victim's body and from the Petitioner's gun. The Petitioner, however, does not assert what Counsel failed to do or point out which actions by Counsel fell below a reasonable standard, which would be the appropriate inquiry in this post-conviction proceeding.

Further, we have thoroughly reviewed the transcript and we can find no unprofessional errors on Counsel's behalf. The Petitioner told Counsel that the police had the wrong gun because the Petitioner threw the gun that he used to shoot the victim into the Cumberland River. Based upon this information, Counsel hired an expert to examine Officer Pyburn's ballistics evidence. The expert, who appears from the record to be well-qualified, met with Officer Pyburn, reviewed the officer's findings, conducted his own tests, and created a report. The expert gave this report to Counsel, and Counsel reviewed this report with the Petitioner. The Petitioner has not proven that Counsel was in any way deficient with regard to dealing with the ballistics evidence at trial.

Any assertion about Officer Pyburn's methodology or the accuracy of his report is not an appropriate ground for post-conviction relief because such an assertion goes to the weight and sufficiency of the evidence presented at the Petitioner's trial and not the abridgement of a constitutional right. *See* T.C.A. § 40-30-103 (2006). Accordingly, the post-conviction court did not err when it dismissed the Petitioner's petition for post-conviction relief.

### **III. Conclusion**

After a thorough review of the record and the applicable law, we conclude that the Petitioner is not entitled to post-conviction relief. As such, we affirm the post-conviction court's judgment.

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ROBERT W. WEDEMEYER, JUDGE