IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 26, 2006 Session

HAROLD TOLLEY v. STATE OF TENNESSEE

Direct Appeal from the Criminal Court for Unicoi County
No. 4894 Lynn W. Brown, Judge

No. E2005-02260-CCA-MR3-PC - Filed December 21, 2006

The petitioner, Harold Tolley, appeals the post-conviction court's denial of his petition for post-conviction relief. On appeal, he argues that he received the ineffective assistance of counsel. Following our review of the record and the parties' briefs, we affirm the court's denial of post-conviction relief.

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 NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

Michael J. Flanagan, (on appeal) Nashville, Tennessee, and H. Randolph Fallin (at trial), Mountain City, Tennessee, for the appellant, Harold Tolley.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Joe C. Crumley, District Attorney General; and Anthony W. Clark and Fred Lance, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

The petitioner was convicted by a Unicoi County jury of first-degree murder and sentenced to life imprisonment. His conviction was affirmed by this court on direct appeal. *State v. Harold Tolley*, No. 03C01-9811-CR-00386, 2000 WL 21044 (Tenn. Crim. App., at Knoxville, Jan. 14, 2000), *perm. app. denied* (Tenn. Sept. 5, 2000). The facts of the underlying conviction as summarized in our opinion on direct appeal are as follows:

> The victim, Lattie Franklin, was 51 years old and the brother of the defendant's long-time girlfriend, Shirley Higgins. The relationship between the defendant and the victim had been rancorous since 1993, when the two men had argued over the

installation of a heating and air-conditioning system. At that time, the victim allegedly pushed the defendant, who then pulled a gun and threatened to kill the victim. During the years that followed, the defendant allegedly told others that he would kill the victim if he ever had a chance and that he could kill the victim or anyone else and get away with it because he was crazy, had the papers to prove it, and was on Prozac. The relationship between the two men took a turn for the worse the night before the shooting when the victim's sisters gave the victim permission to graze his cattle on land formerly used by the defendant.

The following morning, March 1, 1997, the defendant crossed 740 yards of open pasture land, crawled between the strands of a four-strand barbed wire fence, and walked to where the victim was talking to Jerry and Cleon Price. Jerry Price testified, in response to questions from General Garland, as to what occurred after the defendant approached them:

> A. And, we was all like this. And, Lattie-Lattie said, that'll be fine. And, Lattie turned and pointed towards Janie and Danny's trailer, and he said, I'll have Shirley to show me where to put the corner posts in. And, when he turned back around Harold either come out from his [sic] behind his shirt belt, or his back pocket; and, he shot Lattie once in the left temple. And, Lattie was dead before he hit the ground. And, he got right down over top of Lattie and he emptied it, and it snapped three times. And, the brains went all over me. And, I'll have that to live with the rest of my life. And, he never . . .
>
> Q. Now, when you say . . .
>
> A. . . . . he never said a word to me, or he never said a word to Daddy. He just give us a look as if, I ought to go ahead and do you; but, he'd done and shot all of his bullets. And, he put his gun back in his pocket, and turned and walked back through the field.
>
> Q. Walked?
>
> A. Walked right back through the field like he'd shot a dog.
>
> Q. And said nothing to either of you?
>
> A. No, sir. He never opened his mouth.
>
> Q. Were there . . .
>
> A. And, they-there was no struggle. There was no argument.

> Q. No heated, angry words by either of them?
>
> A. No. No. No, they was not. They wasn't.
>
> Q. Was there any kind of gesture on the part of Lattie Franklin towards Harold Tolley as-as if he were coming at him, or . . .
>
> A. No. Lattie didn't have a chance. When he turned around from pointing down the creek, when he turned back around Harold had him in his face point blank.

Cleon Price also described the shooting and how the defendant had suddenly produced the pistol:

> I don't know where he had in his hip pocket, or behind his belt, or where; but, anyway-emptied the gun. And, whenever he emptied it he snapped it probably three or four times, and turned around and walked off.

Anna Franklin, the sister-in-law of Lattie Franklin, and a friend of the defendant, also witnessed the shooting. She testified that on the morning of the shooting, as she was getting ready to go to work, she heard a truck pull up and, looking outside, saw that it was the defendant's. She watched as the defendant approached Lattie Franklin, Cleon Price, and Jerry Price. She described what she saw after the defendant had approached the group and raised his arm:

> Like this. But, I had no idea what, you know, he was doing. I'd just the second on my mind I thought-just as I thought what's he doing, then I heard the gun go off. And, Lattie began to fall. And, he fell to the ground and then Jerry dove for him. (Witness is crying) And, then I-I just went ahead started going-and I grabbed my-I remember grabbing my head, and I started screaming, you know, oh, God, he shot him! And, I went-I think it was like a squat position. And, I don't know how long I was down there, but, when I come up Harold was over Lattie. Then it was like he-right as I looked up he was there, and then he turned and walked off. I didn't even hear none of the other shots.

The defendant described the shooting in a totally different fashion than did Cleon and Jerry Price and Anna Franklin. He testified that he shot the victim because the victim cursed him, hit him, and then knocked him to the ground. The defendant explained that it was customary for him to carry a pistol when he was around the cattle which

he pastured on the land of Shirley Higgins. Her land was adjacent to that upon which the slaying occurred. The defendant described the shooting itself:

> I said, Lattie, I don't want no trouble. And, by the time I could get it out he-he-he cussed and he said, if you want trouble let's get it on. And, he hit me right in the jaw, knocked me down, and it spun me around a little bit, and-and-and, I reached in with my left hand, pulled the gun out to put it in this hand to-to keep him off of me. And-and, during that time the gun went off, and-and he-and, he fell. When-but, when the gun went off, I swear, I don't know what happened. There-there-there's no recollection in my mind to this day what happened. And, when I came to myself I had passed back where the garden was I'd fenced off for Shirley. I came to myself and I was walking back to my truck. And, when I walked back to my truck Ms. Franklin come out of-of Tommy-Tommy's yard and Anna was right behind her. And, she said, you're to pay for what you've done. And, Anna started hollering, Ms. Franklin, come back up here. And, they was-there was some people up there, and I didn't know what was happening, and I got in my truck, and I-I drove to my house.

Dr. William McCormick testified that the autopsy of the victim revealed the most reasonable scenario for the shooting was that the assailant shot the victim in the head while standing face-to-face, and that the other five wounds were consistent with the assailant's "walking toward the body, straddling the body, standing over the body, pointing the gun in a downward direction at the prong [sic] body, and firing those five shots into the chest area." Dr. McCormick also testified the victim had no injuries on his hands consistent with the defendant's claim that the victim punched him in the jaw.

Dr. Thomas Schacht, a forensic psychologist, testified as a defense witness concerning the defendant's mental condition at the time of the shooting. Dr. Schacht stated that the defendant did not meet the criteria for an insanity defense, but his conduct was consistent with a person suffering from post-traumatic stress hallucination. According to Dr. Schacht, this condition was triggered by prior confrontations involving the victim and the defendant. Dr. Schacht postulated that at the time of the shooting the defendant was having a flashback to an earlier incident during which the victim assaulted the defendant. According to Dr. Schacht, this condition could explain inconsistencies between the defendant's description of the shooting and the descriptions of the witnesses.

Id. at *1-3.

On January 8, 2001, the petitioner filed a pro se petition for post-conviction relief, and following the appointment of counsel an amended petition was filed.[1] An evidentiary hearing was conducted on August 10, 2004. At the hearing, the petitioner testified that he had a high school education and prior to the incident in this case his criminal record consisted of nothing more than speeding tickets. The petitioner said he injured his back in 1989 which forced him to retire from his job with CSX railroad company. As a result of his injury, the petitioner used medications such as Fiorinal with codeine, Soma 350, Prozac, and Lortab to manage his pain, which he used continuously until the commission of the offense. The petitioner was directed to take his medications three times a day for pain relief, but sometimes he took them more often because of his pain. The petitioner testified that the victim was his girlfriend's brother with whom he had a history of problems.

The petitioner testified that his brother, Lonnie Tolley, visited him in jail and told him that the District Attorney General, David Crockett, agreed to let the petitioner plead to second-degree murder for a sentence of twenty-five years served at thirty percent. The petitioner said that after he was released on bond counsel visited him at his brother's house. Counsel discussed the plea offer with the petitioner in the presence of the petitioner's brother, the petitioner's sister-in-law, and the petitioner's nephew. Counsel told the petitioner that the state had offered him a plea to second-degree murder with a sentence of twenty-five years. According to the petitioner, counsel said that a twenty-five-year sentence would be a life sentence because of his poor health and that "the worst [the offense] could be is second degree, and he said he would try to get it down to manslaughter." The petitioner claimed that counsel told him that a manslaughter conviction would be the most likely result of a trial. The petitioner recalled that they discussed the plea offer for at least an hour. The petitioner said that counsel advised him to take the case to trial because he would have to serve the entire twenty-five-year sentence and not get any good time credits if he took the plea.

The petitioner testified that he talked to counsel about the medications he was taking at the time of the offense and told counsel that the drugs affected him. The petitioner asked counsel to secure the results of the blood tests taken at the time of his arrest to use the results at trial. The petitioner said that counsel told him he got the test results, but the petitioner never saw them. The petitioner recalled that he told counsel that his use of pain medications was important because he had taken them for a long time.

On cross-examination, the petitioner stated that counsel insisted he take his case to trial. The petitioner admitted that Dr. Schacht was hired to testify on behalf of the defense and that Dr. Schacht testified that he consulted with the petitioner about the medications he was on. The petitioner said that Dr. Schacht testified at trial that he did not think that the petitioner's medications caused him to hallucinate because the petitioner had taken the drugs for a long time. The petitioner recalled that he testified at trial regarding the medications he was taking at the time of the offense and had said that he was taking the medications as prescribed. The petitioner could not recall how his medications affected him the day of the offense, but he "had enough sense to go feed [his] cattle."

[1] The record reflects that the parties agreed to a number of continuances and extensions of time prior to the filing of the amended petition.

On redirect examination, the petitioner testified that he kept a gun with him because of the aggressiveness of his cattle.

Christopher Tolley, the petitioner's nephew, testified that he was present at a meeting between the petitioner and counsel during which they discussed the state's plea offer of second-degree murder with a sentence of twenty-five years served at eighty percent. Mr. Tolley recalled that counsel said that the petitioner's case was not a first-degree murder case, but was at most second-degree murder or possibly manslaughter. Mr. Tolley assumed that by telling the petitioner his case was not a first-degree murder case, counsel meant that the petitioner should not take the plea because he could get a lesser sentence after a trial.

On cross-examination, Mr. Tolley admitted that counsel never outright told the petitioner to take his case to trial. When the offer of twenty-five years was made to the petitioner, Mr. Tolley recalled that it was his mother, Hazel Tolley, who made the statement that it was effectively a life sentence. Mr. Tolley said that the entire family discussed the offer with counsel, but the final decision was made by the petitioner.

Hazel Tolley, the petitioner's sister-in-law, testified that she was also at the meeting with the petitioner and counsel during which they discussed the plea agreement offered by the state. Mrs. Tolley recalled that the offer required that the petitioner serve twenty-five years at eighty percent, and she made a comment that "when you're fifty some years old, that's life." Mrs. Tolley said that counsel led them to believe that the petitioner's case was not a case of first-degree murder. On cross-examination, Mrs. Tolley admitted that the petitioner made the ultimate decision to go to trial.

David Crockett testified that he was the District Attorney General for the First Judicial District at the time of the offense. Mr. Crockett knew the petitioner's brother Lonnie and considered him a friend. Mr. Crockett vaguely remembered discussing the petitioner's situation with Lonnie. Mr. Crockett said that he probably discussed the potential convictions and accompanying sentences the petitioner faced, but he would not have made an offer to settle the petitioner's case. Mr. Crockett recalled talking to the assistant district attorney assigned to the case about a possible plea offer of twenty-five years. On cross-examination, Mr. Crockett said that any offer would have been conveyed through the assistant district attorney or the petitioner's counsel.

Kent Garland testified that he was the assistant district attorney assigned to prosecute the petitioner's case and he had no independent memory of offering the petitioner a plea agreement. Mr. Garland said that he must have made an offer to the petitioner though because he did recall counsel telling him that the petitioner's reaction to the offer was that it was basically a life sentence and he would take his chances at trial. Mr. Garland stated that it would have been highly unusual for Mr. Crockett to make an offer himself without going through the assistant district attorney.

The petitioner's trial counsel stated that he met with the petitioner many times in the course of preparing for trial. Counsel retained Dr. Schacht as an expert witness and had numerous communications with Mr. Garland. Shortly before trial, Mr. Garland offered the petitioner a plea

agreement to second-degree murder with a sentence of twenty-five years served at 100%, reducible by credits of up to fifteen percent. When asked what advice he gave to the petitioner regarding the plea offer, counsel said that he explained if the jury believed the petitioner's self-defense theory then he could be found guilty of second-degree murder, voluntary manslaughter, or acquitted, but if it did not accept the self-defense theory then there was a strong possibility of a first-degree murder conviction. Counsel reiterated that he told the petitioner his case was potentially a first-degree murder case.

Counsel testified that he examined the petitioner's clothing and did not see any stains that would substantiate the petitioner's claim that he was struck hard and knocked down. A doctor examined the petitioner after he was arrested and did not discover any injury that would verify that the petitioner had been struck by the victim, nor did counsel see any bruising on the petitioner when he saw him a day or two after the offense.

Counsel stated that he discussed the state's theory of the case with the petitioner and advised him of the pros and cons of his theory of self-defense. Counsel could not recall the specific conversation with the petitioner and his family, but he said that he never tells a defendant that he or she has to plead guilty. Counsel advised the petitioner that his case was very serious and he was in jeopardy of being convicted of first-degree murder. Counsel remembered that the petitioner's reaction to the state's offer was that a twenty-five year sentence was longer than he would live so "[w]hy shouldn't [he] go to trial and take [his] chances?" Counsel stated that he thought the petitioner should take the plea, but he understood why he did not want to. Counsel said he did not tell the petitioner he had a good chance of winning.

Counsel testified that Dr. Schacht was retained to determine what effect, if any, the medication the petitioner was taking had on him. Counsel said that the petitioner was adamant he acted in self-defense even though there was evidence to the contrary. Counsel explained that there apparently was an earlier incident where the victim attacked the petitioner and Dr. Schacht attempted to relate to the jury that the petitioner might have honestly believed the victim was attacking him due to the petitioner's medication use and the prior attack. Dr. Schacht's testimony was the only testimony counsel could find to attempt to support the petitioner's self-defense theory.

Counsel stated that in every case he handles, the client makes the decision whether to go to trial or accept a plea offer. Counsel said that he advises the client and allows him to make the ultimate decision. In this case, counsel recalled that the petitioner made the decision to go to trial because in his view a twenty-five year sentence was not a bargain. On cross-examination, counsel said that he urged the petitioner to strongly consider the state's offer because he thought it was a good offer.

Following the hearing, the post-conviction court denied the petitioner's petition, specifically resolving all credibility issues in favor of the state.

II. ANALYSIS

On appeal, the petitioner argues that the trial court erred in denying his petition for post-conviction relief because he received the ineffective assistance of counsel. Specifically, the petitioner argues that counsel was ineffective because his advice caused the petitioner to forego the state's plea offer. The petitioner also argues that counsel was ineffective in his presentation of the petitioner's defense theory.

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, such as findings concerning the credibility of witnesses and the weight and value given their testimony, is de novo with a presumption that the findings are correct. *See id.* Our review of the post-conviction court's legal conclusions and application of law to facts is de novo without a presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457-58 (Tenn. 2001).

Ineffective Assistance of Counsel

To establish ineffective assistance of counsel, the petitioner must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense rendering the outcome unreliable or fundamentally unfair. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Arnold v. State*, 143 S.W.3d 784, 787 (Tenn. 2004). 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. If either element of ineffective assistance of counsel has not been established, a court need not address the other element. *Id.* at 697; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). Also, 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). The fact that a particular strategy or tactical decision failed does not by itself establish ineffective assistance of counsel. *Goad*, 938 S.W.2d at 369.

After review of the petitioner's claim that counsel's advice caused him to forego the state's plea offer, we conclude that counsel's performance was not deficient. Counsel testified that he discussed the plea offer with the petitioner and members of the petitioner's family and told them that the petitioner's case was very serious and he was in jeopardy of being convicted of first-degree

murder. The petitioner decided that a twenty-five year sentence was longer than he would live and chose to go to trial. Counsel testified that he thought the petitioner should take the plea offer, and he urged the petitioner to consider the plea. However, counsel testified that the decision was left up to the petitioner. Counsel denied telling the petitioner that his case was only a second-degree murder case. The post-conviction court accredited counsel's testimony and found that counsel was effective. Likewise, we discern no deficiency in counsel's advice given to the petitioner.

Addressing the petitioner's contention that counsel was ineffective in his presentation of the petitioner's theory of defense, we likewise discern no deficiency. In this regard, the petitioner's allegations are two-fold: counsel failed to develop a defense based on his long history of medication use, and counsel should not have presented the testimony of Dr. Schacht who he claims undermined his theory of self-defense.

At the post-conviction hearing, the petitioner admitted that both he and Dr. Schacht testified at trial regarding the medications the petitioner was taking at the time of the offense. The petitioner could not recall whether he was impaired by his medications on the day of the offense, but he said he had enough sense to feed his cattle. Counsel testified that Dr. Schacht was retained to determine what effect, if any, the prescribed medication had on the petitioner. Dr. Schacht testified at trial that the petitioner might have believed that the victim was attacking him due to the combined effect of the petitioner's medication and the fact the victim had possibly attacked the petitioner in the past. Counsel testified that given the proof and the testimony of the witnesses who saw the petitioner shoot the victim, the approach taken by Dr. Schacht was the best that they could do to advance the petitioner's self-defense theory.

The post-conviction court found that the petitioner's defense was developed as fully as it could have been, especially since the petitioner maintained that the killing was in self-defense which ran counter to the killing being induced by a psychotropic medicated state. The court further found that Dr. Schacht's testimony supported the petitioner's claims to the greatest extent possible. We reiterate, the fact that a particular strategy or tactical decision failed does not by itself establish ineffective assistance of counsel. *Goad*, 938 S.W.2d at 369. Upon our review, we conclude that there was no deficiency in counsel's performance as to his presentation of the petitioner's defense.

III. CONCLUSION

Based on the foregoing reasoning and authorities, we conclude that the evidence does not preponderate against the post-conviction court's findings, and accordingly, we affirm the denial of post-conviction relief.

_____

J.C. McLIN, JUDGE