

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
Assigned on Briefs June 9, 2009

**WALLACE WILLINGHAM v. STATE OF TENNESSEE**

**Appeal from the Circuit Court for Giles County  
No. 13260 Jim T. Hamilton, Judge**

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**No. M2008-01240-CCA-R3-PC - Filed August 25, 2009**

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The Petitioner, Wallace Willingham, appeals as of right the Giles County Circuit Court's denial of his petition for post-conviction relief. The Petitioner was convicted by a jury of possession of more than .5 grams of cocaine with the intent to sell, a Class B felony. He was sentenced to thirty years as a career offender. On appeal, he argues that the denial was error because he did not receive the effective assistance of counsel at trial or sentencing. Specifically, he contends that trial counsel failed to convey a plea offer from the State and failed to advise him of his sentencing range as a career offender. After the appointment of counsel and a full evidentiary hearing, the post-conviction court found that the Petitioner failed to prove his allegations by clear and convincing evidence and denied the petition. Following our review of the record, 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.

Kyle Dodd, Pulaski, Tennessee, for the appellant, Wallace Willingham.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; J. Michael Taylor, District Attorney General; and Richard Dunavant and Patrick Butler, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

**Factual Background**

A Giles County jury convicted the Petitioner of possession of more than .5 grams of cocaine with the intent to sell, a Class B felony. See Tenn. Code Ann. § 39-17-417. He was sentenced as a career offender to thirty years in the Department of Correction. His challenge on direct appeal to

the sufficiency of the convicting evidence was deemed without merit, and the judgment was affirmed. See State v. Wallace Wayne Willingham, No. M2005-00717-CCA-R3-CD, 2006 WL 3093204, at 3-4 (Tenn. Crim. App., Nashville, Nov. 1, 2006), perm. to appeal denied, (Tenn. Feb. 26, 2007).

On direct appeal, this Court summarized the facts established at trial as follows:

On May 10, 2001, Pulaski Police Department and Giles County Sheriff's Department officers executed a search warrant at the [Petitioner's] residence. The [Petitioner] and his girlfriend were present at the time. Once the law enforcement officers were inside, the [Petitioner] asked Investigator L.C. Gill to accompany him to the kitchen where the [Petitioner] pulled a bag of what appeared to be crack cocaine out from his sock and another bag out from his pocket. In searching a bedroom closet, Investigator Gill found another bag of what appeared to be cocaine hidden in a man's shoe. Among other things, the officers also uncovered \$940.00 in cash, digital scales with cocaine residue, marijuana, a crack pipe and cleaners, and an address book. Two forensic scientists with the Tennessee Bureau of Investigation (TBI) subsequently tested the substance that appeared to be cocaine and confirmed that it was cocaine, weighing a combined total of more than 17 grams.

Id. at \*1.

The Petitioner filed a petition for post-conviction relief on April 2, 2007. Counsel was appointed for the Petitioner, and an amended petition was filed. While the original petition is somewhat rambling, we discern three basic allegations of the Petitioner: (1) ineffective assistance of counsel; (2) the State suppressed evidence favorable to him; and (3) the convictions used to enhance his sentence were void. As grounds for ineffectiveness, the Petitioner contended that trial counsel failed to investigate and challenge the circumstances surrounding the search of the residence and, thus, waived the issue on appellate review. The Petitioner further complained that the lead detective, Lt. Gill, was tied to allegations of corruption. The amended petition only expounded upon the assertion that he was illegally sentenced as a career offender. A hearing was held on April 25, 2008, at which the Petitioner and trial counsel testified.

Trial counsel testified that he represented the Petitioner at trial and at the sentencing hearing. Trial counsel could not remember all the details surrounding his representation of the Petitioner, and no longer had his file in his possession. Subsequent to his representation of the Petitioner, trial counsel abandoned his law practice, and he was disbarred. He relocated to Las Vegas, taking his legal files with him. However, these files were later seized by authorities following trial counsel's arrest.

Trial counsel did recall plea negotiations. According to trial counsel, the original plea offer was "harsh," but he believed it was so because of the Petitioner's criminal record. At some point, the State offered a nine-year plea agreement, which the Petitioner rejected. He was "adamant about

not taking the plea.” Trial counsel testified that, relying upon his customary practices, he discussed all plea offers with the Petitioner. Even after the State filed a notice seeking enhanced punishment as a career offender, the Petitioner was still not amenable to the plea offer and chose to proceed to trial.

Trial counsel remembered three meetings with the Petitioner prior to trial while he was in custody at the Giles County Jail. Trial counsel could not recall if he ever filed a motion to suppress the drugs found in the residence. He did remember receiving discovery from the State and reviewing those documents with the Petitioner. Also, he discussed the facts and circumstances of the case with the Petitioner. According to trial counsel, the main issue at trial was the discrepancy in the weight of the drugs when weighed at the Pulaski Police Department and then later by the TBI, apparently due to the fact that the police department weighed the packaging while the TBI did not. Trial counsel also recalled “having many discussions about the trial, before and after, based on what went on in the trial[.]” Moreover, trial counsel did not personally know of any wrongdoing by Lt. Gill, what he knew was only “hearsay and rumor.”

Trial counsel recalled the Petitioner’s prior history of convictions. He also remembered that, after examining some of those convictions, he did not seek to challenge any of them. When asked whether he talked about sentencing ranges with the Petitioner, he stated that, while he could not recall the Petitioner’s case specifically, it was his custom and habit at the time to inform the client, at the “first initial contact,” of his possible sentencing exposure, including his range classification. “[I]n every case[.]” trial counsel informed clients of plea offers and range enhancement notices.

When questioned about the motion for new trial filed in the Petitioner’s case, trial counsel admitted that the motion wrongly challenged the sufficiency of the evidence for the Petitioner’s second degree murder conviction, when the Petitioner was convicted of possession of cocaine for resale. Trial counsel explained that he used a form to prepare the motion. Moreover, the Petitioner was found guilty on June 6, 2003, but the motion for new trial was not filed until September 5, 2003; thus, the motion was untimely. Trial counsel was positive he spoke with the Petitioner about appealing his case, stating that he spoke with the Petitioner after trial and that the Petitioner wanted to appeal. He could not recall if he discussed appealing the Petitioner’s sentence with him but stated it was his custom and habit to do so. When confronted about his errors in the filing of the motion for new trial, trial counsel agreed that “maybe [his] habit and practice didn’t always govern in this case[.]” We note that the sufficiency of the evidence supporting the Petitioner’s drug conviction was reviewed on appeal by this Court, and the evidence was deemed sufficient. See Willingham, 2006 WL 3093204, at \*3.

The Petitioner testified that he retained trial counsel approximately three months before trial. He relayed that they first met in the Giles County Jail and went over some paperwork. According to the Petitioner, they did not discuss his sentencing exposure as a career offender at that time. Trial counsel did review the evidence with the Petitioner and met with him a “couple of times[.]” According to the Petitioner, trial counsel opined that “the evidence was all screwed up, was all

messed up.” Additionally, trial counsel never provided any information to the Petitioner about how police initially entered the home, and no motion to suppress was ever filed.

The Petitioner claimed that the public defender, who initially represented the Petitioner, had received a six-year offer from the State, but a few months later, “they had took the deal away[.]” The Petitioner testified that, by the time trial counsel became involved in his case, the offer by the State was twenty years at 60%. Trial counsel wanted to get an offer carrying a sentence of eight to twelve years, a Range I sentence. The Petitioner stated that trial counsel never conveyed a nine-year plea offer to him. The Petitioner testified that, although he was aware of his range classification before trial, he was not aware of his career offender status during plea negotiations. The Petitioner testified that, if he had been aware of his sentencing exposure and the nine-year offer, he would have accepted the plea offer.

The Petitioner did not recall any meetings with trial counsel between trial and his sentencing hearing; trial counsel never reviewed the Petitioner’s prior convictions with him. The Petitioner recalled receiving the motion for new trial; however, he also wanted to challenge his prior convictions, which trial counsel did not do. According to the Petitioner, he did not ask trial counsel to appeal his case, but trial counsel stated that he was going to do so anyway because trial counsel believed the Petitioner received an illegal sentence. The Petitioner also claimed that, thereafter, he sent five or six letters to trial counsel but that trial counsel never responded to him. The Petitioner last spoke with trial counsel at the sentencing hearing.

After hearing the evidence presented, the post-conviction court denied relief. The post-conviction court ruled that the Petitioner had not satisfied his burden of proving that trial counsel was ineffective, noting the two offers (six and nine years) communicated to the Petitioner, which the Petitioner turned down, and noting that both the Petitioner and trial counsel testified that they discussed the Petitioner’s prior record supporting his range classification as a career offender. The post-conviction judge also recalled the “long list of convictions” recited at the sentencing hearing and acknowledged by the Petitioner. It was also noted that defense strategy was to attack the credibility of the police officers that entered the house and, additionally, that another attorney was able to perfect the Petitioner’s appeal despite an untimely motion for new trial. An order was entered to this effect on May 27, 2008. This appeal followed.

#### **ANALYSIS**

The Petitioner broadly alleges on appeal that trial counsel failed to provide the effective assistance of counsel guaranteed him by the United States and Tennessee constitutions at trial and at sentencing: “The [Petitioner] seeks review of the post-conviction court’s finding that the [Petitioner’s] trial counsel adequately advised the [Petitioner] of what sentence he could be facing if convicted, and adequately communicated with and prepared the [Petitioner] for sentencing.” The Petitioner then makes the following assertions in the argument portion of his brief: (1) Trial counsel failed to investigate and adequately advise him about his case; (2) Trial counsel failed to seek suppression of the evidence obtained during the search of the Petitioner’s residence; (3) Trial counsel

did not advise the Petitioner of his classification as a career offender; and (4) Trial counsel failed to relay a nine-year plea offer extended by the State.

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.

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. 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).

Here, the Petitioner alleges that counsel was constitutionally deficient "in advising and preparing [him] for trial and sentencing." The crux of his argument is that, had trial counsel communicated the nine-year offer made by the State and apprised him of his status as a career offender before "plea negotiations had broken down[.]" he would have accepted the offer, thereby receiving a much shorter sentence.

The post-conviction court found more credible trial counsel's testimony that he conveyed the nine-year offer to the Petitioner. We do not revisit the issue of credibility on appeal; we defer to the post-conviction court's ruling in that regard. Momon, 18 S.W.3d at 156. Moreover, the evidence does not preponderate against the post-conviction court's findings on the issue.

The Petitioner did not present any grounds to support possible suppression of the evidence or corruptive police practices, just a bald assertion that trial counsel failed to file a motion to suppress the evidence. The testimony at the post-conviction hearing reveals that trial counsel and the Petitioner met on multiple occasions to prepare for trial and that lines of communication were open and used by both the Petitioner and his trial counsel, allowing the Petitioner to make well-informed decisions and assist in his defense. Trial counsel reviewed discovery with the Petitioner, and they discussed the evidence in the case, including the discrepancy between the weights of the drugs as recorded at the police department and later at the TBI. Trial counsel's later abandonment of his practice and disbarment do not effect the determination that the Petitioner received effective representation at the time of his trial and sentencing.

Trial counsel testified that, at the time he was representing the Petitioner, it was his habit and practice to convey all offers to his clients. He remembered the nine-year offer from the State in this case and believed he conveyed it to the Petitioner. It was also his habit and practice to inform clients of their maximum sentence exposure, including range classification, during the very early stages of his representation. Trial counsel acknowledged that the State had filed a notice to seek enhanced punishment as a career offender and that, "[i]n every case[.]" he communicated this information to his clients. Moreover, there is no reasonable probability that any failure to convey the State's offer affected the outcome of the plea process. See Garrison v. State, 40 S.W.3d 426, 431-32 (Tenn. 2000). The Petitioner had previously neglected to accept a six-year offer while represented by the public defender's office.

The Petitioner has not shown that trial counsel failed to prepare for trial and investigate his case, failed to communicate the nine-year offer from the State, or failed to advise him about his sentencing range. The evidence does not preponderate against the findings of the post-conviction court. In consequence, the Petitioner has failed to establish that he was denied the effective assistance of counsel at trial or sentencing.

**CONCLUSION**

Based upon the foregoing, we conclude that the post-conviction court did not err by denying post-conviction relief. Accordingly, we affirm the judgment of the Giles County Circuit Court.

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DAVID H. WELLES, JUDGE