

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs March 5, 2019

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Appellate Courts

ANTHONY BAYMAN v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 11-06593 Chris Craft, Judge

No. W2018-01655-CCA-R3-PC

The Petitioner, Anthony Bayman, appeals the Shelby County Criminal Court's denial of his petition for post-conviction relief from his 2014 conviction for second degree murder and his sentence of thirty-two years. The Petitioner contends that he received the ineffective assistance of counsel and that an amendment to the indictment violated principles of due process. We affirm the judgment of the post-conviction court.

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

ROBERT H. MONTGOMERY, JR., J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT L. HOLLOWAY, JR., JJ., joined.

Terrell Tooten, Cordova, Tennessee, for the appellant, Anthony Bayman.

Herbert H. Slatery III, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Melanie Cox, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Petitioner's conviction relates to the May 4, 2011 shooting death of Melvin Ray. This court affirmed the conviction and summarized the facts of the case as follows:

. . . Sharon Ray, the victim's mother, testified that he was thirty when he was killed by a gunshot wound to his head on May 4, 2011.

Darium Moore, the Defendant's nephew, testified that on May 4, 2011, he lived with his mother and little sister He recalled that he was at his house that evening watching sports on television. His mother, his sister, the Defendant and the victim, whom he knew as "Little Melvin," were there also.

Everyone was drinking that evening, and the Defendant cut the victim's hair for him. Mr. Moore recalled seeing the victim with an automatic weapon, and he said that the victim put the gun under the couch at around 11:00 p.m.

Mr. Moore testified that, at around 1:00 a.m., he was in his room preparing for sleep when he heard gunshots, specifically one gunshot followed by about "three . . . or four more." He said that he "jumped up" and went to the door of his bedroom. He saw the Defendant standing in the living room with the front door wide open. The Defendant was firing an automatic weapon outside the front door. Mr. Moore testified that, after firing the shots, the Defendant left the house.

Mr. Moore said that, after the Defendant left, he went to a back bedroom and got his mother and sister and took them out of the back of the house. They went to a nearby gas station where his mother called the police . . . Mr. Moore said that he, his mother, and his sister returned to the house after police had arrived. Mr. Moore went to the police station, where he identified the Defendant from a photographic lineup.

During cross-examination, Mr. Moore testified that he told the police after the shooting that, because he had not seen the Defendant carry a weapon before, he believed that the weapon the Defendant fired belonged to the victim. Mr. Moore had seen the victim carry a gun on a previous occasion. Mr. Moore said that the Defendant had previously cut hair at his mother's home.

Vanessa Bayman, the Defendant's sister, testified that she had known the victim for a few months before his death. She said that, on the evening of his death, she invited him to her house to get a haircut. . . .

Ms. Bayman said that, when she returned to her house and while people came in and out of the house to have their hair cut, those present at the home watched a basketball game. There were multiple people going in and out of the house that evening who were coming to socialize, get their haircut, or watch the game. Ms. Bayman said that she and her visitors were drinking alcohol. Ms. Bayman recalled that when she left the group to go to her bedroom for the night, no one appeared to be upset.

Ms. Bayman testified that, after falling asleep, Mr. Moore woke her to tell her that the Defendant had just shot the victim. Ms. Bayman said that she

went to her living room and found the Defendant outside. The Defendant came back inside the house, and Ms. Bayman asked him what he had done. The Defendant said that “Little Melvin shouldn’t play with [him],” and then he ran out of the door. Ms. Bayman said she “panicked,” woke up her daughter, and left the house with her children.

Dr. Miguel Laboy, a Shelby County forensic pathologist, testified that he conducted the autopsy on the victim’s body. He said that the victim had suffered a gunshot wound to his head from an “intermediate range.” Dr. Laboy said that the . . . victim’s blood alcohol content at the time of his death was .277, what Dr. Laboy described as a “toxic level.” There was also the presence of marijuana in his blood stream.

James Walton, an officer with the Memphis Police Department, testified that . . . [w]hen he arrived, the front door to the residence was locked. He looked through the front window and saw a body lying in a pool of blood in the front room. Officer Walton . . . and other officers secured the crime scene and interviewed witnesses. Officer Walton recounted that he spoke with the son and daughter of Ms. Bayman, who was the original caller.

Justin Sheriff, an officer with the Memphis Police Department, testified that he processed the scene as a crime scene investigator. He offered photographs that he had taken at the scene. He showed the jury pictures of the house and of the victim’s body as it was found at the scene. Officer Sheriff recalled that officers found marijuana and cocaine in the victim’s pants pockets. . . .

Officer Sheriff testified that he found a shell casing near the victim’s body on the carpet inside the home. The officer also found four spent bullet casings outside in the front yard by the porch. The officer opined that the shell casings were from a .40 caliber handgun, which discharges its shell casings to the right of the weapon when fired.

Isreal Taylor, a sergeant with the Memphis Police Department, testified that he . . . became aware that Mr. Moore and Ms. Bayman had given statements indicating that the Defendant had shot the victim. Sergeant Taylor notified the victim’s family of his death and attempted to gather information about the Defendant’s whereabouts. He and another officer, Sergeant Mundy Quinn, looked at various locations for the Defendant and informed people that they saw to tell the Defendant that they were looking for him. Sergeant Taylor

testified that the Defendant called the police and turned himself in to police custody.

Shun Robertson testified that he was forty years old and grew up in Chicago, Illinois. At the time of this shooting he resided in Memphis, Tennessee. . . . In May 2011, Mr. Robertson was a bartender at the Holiday Inn Airport in Memphis.

Mr. Robertson said that he did not know the Defendant but that he was friends with the victim. Mr. Robertson recounted the events leading up to the shooting. Mr. Robertson said that he had been in contact with the victim that day, in part because the victim was supposed to come to Mr. Robertson's place of work. Mr. Robertson recounted that the victim had been at the Defendant's house all day, getting his hair cut and watching football. Mr. Robertson said that, after he stopped working for the evening, he went to the house where the Defendant was located. Mr. Robertson said that, when he approached the house, he heard arguing. He saw the victim leaving the house, and he heard the victim say that the victim had left something at the house. The victim asked the Defendant if he could go inside the house to see if he could find it. The Defendant denied his request, and the two exchanged angry words. Mr. Robertson recalled that the victim appeared intoxicated, as indicated by his slurred speech. During the argument, there were other men present, one who was around six feet six or seven inches tall, and another man with the victim. Mr. Robertson said that he and the "tall man" present were trying to get the victim to leave while the third man encouraged the victim to enter the home.

Mr. Robertson said that the Defendant turned and went into his house, and he and the victim turned to walk away. Mr. Robertson said that he and the victim walked "two or three steps" before the victim turned and walked back to the porch. When he got to the porch, the victim raised his hand to the open door, and Mr. Robertson walked up the steps, standing behind the victim. The door opened, the victim moved to the left, and Mr. Robertson saw a gun in his face. He noted that the Defendant was holding the gun in his left hand, and that the weapon was an automatic weapon. Mr. Robertson said that he turned and began running, and he heard one gunshot. He turned to run down the side of the house and felt two gunshots come past him. He then ran toward a brick wall, jumped over it, and then heard four more shots. Mr. Robertson said that, after he ran a bit farther, he called the victim's sister to see if the victim had escaped the shooting. He saw police responding to the scene, so he walked back toward the house. When he arrived, he informed the police that he had

been present at the shooting, and he went to the police station to give a statement.

During cross-examination, Mr. Robertson testified that he never entered the home where the Defendant was located. He said that he did not stay to check on the victim after the shots were fired. Mr. Robertson conceded he was unable to identify anyone from a photo spread shown to him by the police.

The Defendant testified that, on May 4, 2011, he was at his sister's house on Bond Street, where she lived with her children He said that he stayed there occasionally. That day, he gave haircuts to several people, including the victim. The Defendant agreed that those present at the house that day were drinking and watching television, and he participated in these activities. During the day, the victim did not appear intoxicated to him. When the Defendant began to cut the victim's hair, the victim stood up, pulled a gun out of his waistband, and put it under the cape for the haircut, and then sat back down. After the victim received his haircut, he paid the Defendant \$10. The Defendant admitted that he had previously been a "drug dealer" but that he had ceased doing so and began cutting hair for income. He noted that, during his days as a drug dealer, he had been convicted of theft of property valued over \$10,000.

The Defendant testified that, later that evening when the "altercation" occurred, the victim appeared to be intoxicated. The Defendant said that he and the victim were outside at some point, and the victim grabbed his shirt. The Defendant said that he tried to get the victim to let him go, and, when he was finally successful, he went into the house and closed the door. The victim pursued him and knocked on the house door. The Defendant said he asked the victim, "What the F are you doing?" The victim grabbed him and tried to push his way into the house. The two men struggled in the doorway for a few seconds. The Defendant noted that he was aware that the victim was armed, so he attempted to disarm him. He reached for the victim's gun, having seen him put it in his waistband after the haircut, and he took hold of the weapon.

The Defendant testified that "in the heat of that moment" he discharged the weapon. He said that, after he fired the gun, he "ran off and left the gun." The Defendant explained that he ran because he had never been "in that situation before." He stated that he turned himself in to police custody and had cooperated with them and accepted responsibility for firing the weapon. It was his position, however, that he acted in self-defense. The Defendant

offered his sympathy to the victim's sister and mother who were present in the courtroom.

During cross-examination, the Defendant agreed that he and the other people present that evening had also been using cocaine. He said that he offered a statement to police when he was arrested. In his statement he said that he shot the gun only one time. He said that he tried to give an honest statement but that he was intoxicated. He agreed the evidence showed that he fired the weapon more than once. The Defendant agreed that his statement to police also did not include the fact that the victim had returned to the house door and knocked on it twice. The Defendant agreed that he also told police that he was the closest to the door because he was "opening the door for [the victim] to leave." He explained that, at the time of his statement, he could not remember exactly what had happened but just knew that they had struggled in the doorway. The Defendant maintained that he dropped the gun and said that he did not know why police did not find it. The Defendant said that he did not recall anyone being with the victim that evening and that he did not recall firing four more shots.

During redirect examination, the Defendant testified that he told the police that he was responsible for shooting the victim. He told them that the gun belonged to the victim and that he wished it had never happened. The Defendant told police that he was sorry for the shooting.

Mr. Robertson was recalled, and he testified that he would have heard it if the victim had knocked on the door to the house. He said that he never saw the victim touch the Defendant, and he never saw the two engage in a physical altercation of any kind. Mr. Robertson said that he also had been "tussling" with the victim that night, and he never felt a weapon of any kind in his waistband.

State v. Anthony Bayman, No. W2014-01537-CCA-R3-CD, 2015 WL 12978649, at *1-4 (Tenn. Crim. App. Aug. 17, 2015), *perm. app. denied* (Tenn. Dec. 14, 2015).

The Petitioner filed the instant petition for post-conviction relief, alleging multiple instances of the ineffective assistance of counsel. After the appointment of counsel, an amended petition was filed in which post-conviction counsel alleged that the Petitioner received the ineffective assistance of trial counsel and that the Petitioner was deprived of his due process rights in the conviction proceedings. Our review of the evidence is limited to the issues raised on appeal.

At the post-conviction hearing, trial counsel testified that his interaction with the Petitioner was good. Counsel recalled that the date of the offense contained in the indictment was incorrect and that, on the day of the trial, the prosecutor made an oral motion to amend the indictment to correct the year. Counsel said that he did not object to the amendment because the Petitioner “insisted that it be amended orally so he could go forward that day.” Counsel said he told the Petitioner that if the defense objected, the State would submit the case to the grand jury again, which would have only delayed the case for several months.

Trial counsel testified that the chosen defense was self-defense and that he never considered consulting an expert in bullet trajectory because he did not know that an angle or entry of a bullet was relevant to whether someone engaged in self-defense or homicide. Counsel recalled that the gun was fired from an intermediate range. Counsel acknowledged that the home where the shooting occurred later burned and said that he and the Petitioner thought it was “a revenge arson” because the timing was odd. Counsel said he told the jury that the home burned but that he did not emphasize the victim and his associates were dangerous. Counsel said he wanted the jurors to infer that it was a revenge arson. Counsel recalled the home burned before counsel could visit the scene.

Trial counsel testified that Shun Robertson was a material witness and that counsel attempted to show Mr. Robertson and the victim were good friends in order to impeach Mr. Robertson’s credibility. Counsel said he understood that the victim and Mr. Robertson had been friends for about seven years. Counsel said that he had no information showing Mr. Robertson and the victim were related. Counsel recalled showing that Mr. Robertson could not have seen the entire incident because Mr. Robertson stood behind the victim. Counsel said that Mr. Robertson testified at the preliminary hearing, that counsel was familiar with the testimony, that counsel had the testimony “typed up” before the trial, and that the prosecutor provided Mr. Robertson’s Chicago contact information. Although counsel’s file did not reflect a notation, he was certain he attempted to call Mr. Robertson.

On cross-examination, trial counsel testified that he had been licensed for thirty-six years and had worked in the public defender’s office for about twenty-nine years. He recalled having a good relationship with the Petitioner and said they communicated well. Counsel said that self-defense was the chosen theory of the case from the beginning of his representation and that, as result, he knew the Petitioner would testify at the trial. Counsel said that the defense had no alibi witness because the Petitioner did not claim to be in another location at the time of the shooting. He said that changing the year in the indictment did not prejudice the defense or impact the chosen theory because the Petitioner admitted shooting the victim. Counsel recalled that the trial court questioned the Petitioner about whether the Petitioner “demanded that it go forward that day,” that the court explained to the

Petitioner the only way to move the case forward was to amend the indictment by changing the year, and that the defense consented to the amendment.

Trial counsel testified that a bullet trajectory expert was unnecessary because the Petitioner intended to testify that he shot the victim in self-defense and that the identity of the shooter was not disputed. Counsel did not know who burned the home where the shooting occurred but said that it was possible the fire was related to this case and that he attempted to infer the fire and the shooting were related. Counsel did not connect the events explicitly because he did not think it was relevant to the shooting and because the trial court would have intervened. Counsel said that Mr. Robertson never identified the shooter and that counsel found Mr. Robertson's testimony credible.

On redirect examination, trial counsel testified that the Petitioner made the decision to amend the indictment in order for the trial to begin the same day. Counsel said the Petitioner decided to proceed to a trial months before the scheduled trial date and that the decision to consent to the amendment belonged "strictly" to the Petitioner.

The Petitioner testified that Mr. Robertson, the State's key witness, provided false testimony at the trial. The Petitioner stated that Mr. Robertson was not at the home on the night of the shooting and that trial counsel failed to present evidence in the form of Mr. Robertson's police statements to impeach Mr. Robertson's credibility. Mr. Robertson's police statement and a document purported to be a supplemental police report were received as exhibits. The Petitioner agreed the documents were included in the discovery materials.

The Petitioner testified that Mr. Robertson's police statement was dated September 29, 2009, but that the shooting occurred on May 4, 2011. The Petitioner said that Mr. Robertson falsely told police that a woman known as "Boo Boo" was outside the home at the time of the shooting. The Petitioner identified the woman as Stephanie or Sandra Patterson. The Petitioner noted that Mr. Robertson told the police that Mr. Robertson knew about Ms. Patterson's being at the home because Ms. Patterson told Mr. Robertson that she was at the home "during the argument." The Petitioner interpreted Mr. Robertson's statement as "an inadvertent confession" because it showed that Mr. Robertson learned about the shooting from Ms. Patterson and that Mr. Robertson was not a witness to the shooting. The Petitioner said that Mr. Robertson "made up" the six-foot man referenced in Mr. Robertson's police statement.

The Petitioner testified that the State "built up" Mr. Robertson to show that Mr. Robertson did not have a motive to lie about the shooting. The Petitioner said that Mr. Robertson testified at the trial that Mr. Robertson and the victim were friends and that Mr. Robertson convinced the victim to walk away from the argument. The Petitioner said that Mr. Robertson's police statement contradicted this testimony. The Petitioner noted that Mr.

Robertson told the first responders that the victim was Mr. Robertson's cousin, that Mr. Robertson pulled the victim away from the home during the argument, and that the victim "broke away" and returned to the home. The Petitioner said that if the victim broke away from Mr. Robertson, the victim did not intend to leave and wanted to continue "the altercation." The Petitioner said that counsel never attempted to show during Mr. Robertson's cross-examination that the victim was "aggressive," which was relevant to self-defense. The Petitioner said that the jury should have heard evidence of Mr. Robertson's bias.

The Petitioner testified that at the time the indictment was amended, his case had been pending for approximately thirty-two months. He said that he was told "there would be no going back" when his case was scheduled for trial and that his trial would begin on the scheduled date. The Petitioner said that his trial date was January 6, 2014, and that an issue with the indictment arose on the trial date. He said that he was told the indictment contained a typographical error relative to the year of the offense. He said that in order for his trial to begin on January 6, he had to consent to amending the indictment to reflect the correct year, that he had already been confined for thirty-two months, that he wanted his "case heard," and that the trial would be delayed until a new indictment with the correct date could be returned if he did not consent to the amendment. He said trial counsel advised that if the Petitioner did not consent to the amendment, the trial would have been delayed four to six months. The post-conviction court stated that the Petitioner had not been able to post bond and that the Petitioner would have remained in custody had the trial been delayed. The Petitioner said he was in a difficult position because his case had remained unresolved for almost three years.

The Petitioner testified that he wanted trial counsel to challenge the medical examiner's conclusion that the shooting occurred from an intermediate range. The Petitioner said that Angela Baker, the medical examiner who responded to the scene, determined that the gun was fired approximately one foot from the victim and that this evidence supported his claim of self-defense. The Petitioner said that he and the victim struggled in the doorway of the home. The Petitioner disagreed with counsel's stipulating that the medical examiner was an expert witness and said that Dr. Baker should have testified for the defense.

On cross-examination, the Petitioner testified that he received a thirty-two-year sentence when asked to explain how consenting to the amendment harmed his case. The Petitioner agreed that his self-defense claim required him to testify at the trial. He agreed that the September 2009 date on Mr. Robertson's police statement was incorrect, that the statement was related to the May 4, 2011 homicide, and that the end of the statement reflected Mr. Robertson's signature on May 4, 2011, at 5:46 a.m.

On redirect examination, the Petitioner testified that nobody told him that if he had not consented to amending the indictment, his case would have been dismissed and that he

would have been released from custody until a new indictment was returned by the grand jury. He had understood that he would have remained in jail had he not consented to the amendment. The Petitioner said that trial counsel did not mention the Petitioner's being released if the case were dismissed.

The post-conviction court denied relief. The Petitioner alleged that trial counsel provided ineffective assistance during his cross-examination of Shun Robertson by failing to show that Mr. Robertson and the victim were cousins. The Petitioner asserted that, as a result, counsel failed to impeach Mr. Robertson's credibility and to show his bias. The post-conviction court determined that the Petitioner presented no evidence at the evidentiary hearing to show that Mr. Robertson and the victim were cousins. The court found that the jury was presented with evidence of possible bias based upon Mr. Robertson and the victim's friendship. The court found that Mr. Robertson's trial testimony and police statement each reflected that Mr. Robertson and the victim were good friends. The court determined that trial counsel did not provide deficient performance by failing to question Mr. Robertson about whether he and the victim were cousins.

The Petitioner alleged that trial counsel provided ineffective assistance by failing to present evidence contained in a supplemental police report showing the victim's violent and aggressive nature. The post-conviction court found that the unsigned supplemental police report stated that Mr. Robertson pulled the victim, who was Mr. Robertson's cousin, away from the scene but that the victim broke away and approached the front door of the home. The court found that the unsigned report could have contained multiple layers of hearsay. The court found that Mr. Robertson's trial testimony and police statement each reflected Mr. Robertson convinced the victim to walk away from the home, that the Petitioner went inside the home, and that two or three steps later, the victim turned around to get his belongings and walked to the front porch of the home before the front door opened and the Petitioner walked outside with a firearm. The court determined that the testimony and the police statement did not reflect any violent or aggressive act by the victim. The court determined that counsel did not provide ineffective assistance in this regard.

The Petitioner alleged that trial counsel provided ineffective assistance by failing to question Mr. Robertson about when he gave his police statement. The Petitioner argued that Mr. Robertson was not present during the shooting because Mr. Robertson's police statement was dated September 29, 2009, which was more than one and one-half years before the date of the offense. The post-conviction court found that it "should be obvious to this court, and to anyone else, that the typed date . . . was in error, as the statement about the shooting could not have happened prior to the shooting itself." The court found that the last page of the statement reflected Mr. Robertson's signature and was dated May 4, 2011, at 5:46 a.m. The court determined that this allegation was without merit.

The Petitioner alleged that the improper amendment to the indictment violated principles of due process. The post-conviction court determined that, on the day of the trial but before the jury was sworn, it was discovered that the indictment contained the wrong year in the date of the offense. The court found that the State requested the date be amended from “between May 2, 2010 and May 5, 2010” to “on or before 5/4/11,” that trial counsel agreed to the amendment, and that the trial judge questioned the Petitioner about the amendment. The post-conviction court found that, at the time, the Petitioner had been in custody for more than two years, that the Petitioner wanted to proceed with the trial and did not want the delay resulting from the State’s resubmitting the case to the grand jury, and that the Petitioner agreed to the amendment to prevent a delay, although “he would rather have had the indictment dismissed.” The court determined that the defense was not unfairly surprised by the amendment and noted that the Petitioner’s theory of the case was self-defense, not an alibi defense. The court determined that the Petitioner had failed to show any prejudice in this regard. This appeal followed.

Post-conviction relief is available “when the conviction or sentence is void or voidable because of the abridgement of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” T.C.A. § 40-30-103 (2012). A petitioner has the burden of proving his factual allegations by clear and convincing evidence. *Id.* § 40-30-110(f) (2012). A post-conviction court’s findings of fact are binding on appeal, and this court must defer to them “unless the evidence in the record preponderates against those findings.” *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997); *see Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). A post-conviction court’s application of law to its factual findings is subject to a de novo standard of review without a presumption of correctness. *Fields*, 40 S.W.3d at 457-58.

I. Ineffective Assistance of Counsel

The Petitioner contends that trial counsel provided ineffective assistance during his cross-examination of Shun Robertson. The Petitioner asserts that (1) counsel failed to show Mr. Robertson’s bias as the victim’s cousin, (2) counsel failed to question Mr. Robertson about the victim’s “aggressive manner” at the time of the offense, and (3) counsel failed to question Mr. Robertson about the date reflected on Mr. Robertson’s police statement. The Petitioner also asserts that counsel provided ineffective assistance by failing to inform him adequately that a dismissal was a possible remedy for the defective indictment.

To establish a post-conviction claim of the ineffective assistance of counsel in violation of the Sixth Amendment of the United States Constitution, a petitioner has the burden of proving that (1) counsel’s performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). The Tennessee Supreme Court has

applied the *Strickland* standard to an accused's right to counsel under article I, section 9 of the Tennessee Constitution. *See State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

A petitioner must satisfy both prongs of the *Strickland* test in order to prevail in an ineffective assistance of counsel claim. *Henley*, 960 S.W.2d at 580. “[F]ailure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.” *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). To establish the performance prong, a petitioner must show that “the advice given, or the services rendered . . . , are [not] within the range of competence demanded of attorneys in criminal cases.” *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); *see Strickland*, 466 U.S. at 690. The post-conviction court must determine if these acts or omissions, viewed in light of all of the circumstances, fell “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. A petitioner “is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision.” *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994); *see Pylant v. State*, 263 S.W.3d 854, 874 (Tenn. 2008). This deference, however, only applies “if the choices are informed . . . based upon adequate preparation.” *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992). To establish the prejudice prong, a petitioner must show that “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. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.*

A. Cross-examination of Mr. Robertson

1. Mr. Robertson’s Bias

The Petitioner asserts that trial counsel should have presented evidence that Mr. Robertson and the victim were cousins in an effort to establish Mr. Robertson’s bias and lack of credibility. The State responds that Mr. Robertson was sufficiently impeached regarding his and the victim’s friendship.

A document purported to be a supplemental police report was received as an exhibit. The document was entitled “Case Notes” and provided a case number. In the document, the unidentified author wrote that Mr. Robertson “stated he was pulling his cousin, [the] victim . . . away from the scene when [the victim] broke away and approached the front door” of the home. This is the only reference contained in the record to a familial relationship between Mr. Robertson and the victim, and trial counsel testified that he received no information showing that the victim and Mr. Robertson were related. However, the post-conviction court stated in its order denying relief that the document was provided to the Petitioner during the discovery process. In any event, the unauthenticated document containing hearsay did not

establish a familial connection between Mr. Robertson and the victim, and the Petitioner presented no evidence showing that Mr. Robertson and the victim were cousins. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990).

Mr. Robertson's signed police statement was received as an exhibit and reflects that he told the police he and the victim were friends, that Mr. Robertson's and the victim's mothers were childhood friends, and that Mr. Robertson had known the victim about seven years at the time of the shooting. Mr. Robertson's trial testimony was consistent with his police statement. Trial counsel questioned Mr. Robertson on cross-examination about his friendship with the victim in an effort to show Mr. Robertson's potential bias toward the victim. Therefore, Mr. Robertson's possible bias as a challenge to his credibility was presented to the jury. The record supports the post-conviction court's determination that counsel did not provide ineffective assistance of counsel. The Petitioner is not entitled to relief on this basis.

2. The Victim's Aggressive Manner

The Petitioner asserts that trial counsel should have questioned Mr. Robertson about the victim's aggressive conduct at the time of the offense. The Petitioner argues that the evidence showed that the victim pulled away from Mr. Robertson and returned to the home and that this information supported the theory of self-defense. The State responds that no reliable proof showed the victim had been aggressive.

The evidence upon which the Petitioner relies is the "Case Notes" document that provided a case number. Again, the document does not identify the author, and the document was not authenticated at the post-conviction hearing. The document reflected that "Shun Robertson advised" that Mr. Robertson had seen the victim arguing with an unknown African-American man and an unknown African-American woman, that Mr. Robertson pulled the victim "away from the scene when [the] victim . . . broke away from him and approached the front door" of the home.

Mr. Robertson's signed police statement reflected that after the victim and the Petitioner argued, Mr. Robertson "was able to get [the victim] to leave," that the victim said he needed to get his belongings from inside the home, and that the victim "turned around and started walking back to the [home]." At the trial, Mr. Robertson provided consistent testimony about the incident. Mr. Robertson also testified that after the victim turned and walked back toward the home, the victim walked onto the porch and raised his hand as though he were going to open the door before the Petitioner opened the door and began shooting. Evidence showing that Mr. Robertson and the victim initially walked away from the home but that the victim returned to the home was presented to the jury. Likewise, the evidence supports the post-conviction court's determination that the victim's returning to the

home to obtain his belongings was not a display of aggression. As a result, the record supports the court's determination that counsel did not provide ineffective assistance in this regard. The Petitioner is not entitled to relief on this basis.

3. Mr. Robertson's Police Statement

The Petitioner asserts that trial counsel should have questioned Mr. Robertson about when he provided his police statement because evidence showed the statement was provided before the shooting occurred. The State responds that the 2009 date contained in the police statement was a clerical error.

Mr. Robertson's police statement initially states that Mr. Robertson spoke to the police on September 29, 2009, approximately one and one-half years before the shooting. However, the last page of the statement reflects Mr. Robertson's signature and the date and time as May 4, 2011, at 5:46 a.m. The handwriting of the date and time are consistent with Mr. Robertson's signature. The report supports the post-conviction court's findings that the 2009 date initially reflected in the Mr. Robertson's statement was a clerical error, that Mr. Robertson signed the report on May 4, 2011, and that it would have been impossible for Mr. Robertson to speak with the police about this shooting in 2009. As a result, the record supports the court's determination that trial counsel did not provide ineffective assistance by failing to question Mr. Robertson about the 2009 date reflected in the police statement. The Petitioner is not entitled to relief on this basis.

B. Amendment to the Indictment

The Petitioner asserts that trial counsel provided ineffective assistance relative to the amendment to the indictment. The sole statement in the Petitioner's appellate brief addressing this allegation is that counsel was ineffective because counsel did not inform the Petitioner properly "that a potential remedy to a defective indictment was to have the case dismissed, with or without prejudice." The Petitioner does not cite to the record or to legal authority supporting his assertion. *See* Tenn. Ct. Crim. App. R. 10(b); T.R.A.P. 27(a)(7)(A). The State responds that appellate review of this allegation is waived for failure to raise it in the petition for relief.

The record reflects that, in the petition for post-conviction relief, the allegation regarding the amendment to the indictment was framed in the context of whether the Petitioner's due process rights were violated by the trial court. The Petitioner argued that due process principles were violated when the case was not dismissed and the prosecution was permitted to amend the indictment on the day of the trial. The Petitioner alleged that the trial court "led [the Petitioner] to believe that there would be no harm or prejudice to him" because his theory was self-defense and that the Petitioner was "denied an opportunity of

making a clear and informed decision.” The Petitioner did not allege that trial counsel provided ineffective assistance regarding the amendment. Therefore, appellate review of the issue is waived because the Petitioner raised it for the first time on appeal. *See State v. Rowland*, 520 S.W3d 542, 545 (Tenn. 2017) (“Generally, issues raised for the first time on appeal are waived.”); *see also* T.C.A. § 40-30-106; T.R.A.P. 36(a). The Petitioner is not entitled to relief on this basis.

II. Due Process

The Petitioner contends that the amendment to the indictment violated principles of due process. He asserts that he was denied the “freedom and ability to make an informed decision, without pressure, threat or coercion, about whether or not to have his trial heard at that time.” He argues that he was “denied the opportunity of having” the indictment dismissed and that because he had been in confinement for approximately thirty-two months, the indictment should have been dismissed with prejudice. The State responds that appellate review of this issue is waived because the Petitioner consented to the amendment.

The record reflects that the post-conviction court found that on the day of the trial but before the jury was sworn, the parties discovered that the indictment reflected the wrong year for the date of the offense, that the State requested the date be amended from “between May 2, 2010 and May 5, 2010” to “on or before 5/4/11,” that trial counsel agreed to the amendment, and that the trial judge questioned the Petitioner about the amendment. The post-conviction court also determined that, at the time of the trial, the Petitioner had been in confinement for more than two years, wanted to proceed with the trial, did not want a delay resulting from the State’s resubmitting the case to the grand jury, and agreed to the amendment.

The relevant trial transcript showing the discussion between the trial court judge, trial counsel, the Petitioner, and the prosecutor is not contained in the record. The Petitioner has the burden of preparing a fair, accurate, and complete account of what transpired relative to the issues raised on appeal. *See, e.g., State v. Bunch*, 646 S.W.2d 158, 160 (Tenn. 1983). This included the obligation to have a transcript of the evidence or proceedings prepared. *See* T.R.A.P. 24(b). We caution counsel that “[w]hen the record is incomplete, or does not contain the proceedings relevant to an issue, this [c]ourt is precluded from considering the issue” and “must conclusively presume that the ruling of the [post-conviction] court was correct in all particulars.” *State v. Miller*, 737 S.W.2d 556, 558 (Tenn. Crim. App. 1987); *see State v. Jones*, 623 S.W.2d 129, 131 (Tenn. Crim. App. 1981).

In any event, the relevant transcript was included in the record of the appeal from the conviction proceedings. The transcript reflects that the State made an oral motion to

amendment the indictment because it erroneously reflected an offense date between May 2, 2010, and May 15, 2010. The prosecutor told the trial court that the correct date was “on or about” May 4, 2011. Trial counsel objected to the amendment and told the trial court judge, “Your Honor, that is the first thing that would be said on a post-conviction is that I should not have joined in.” When the trial judge asked for counsel’s basis and stated that he thought the Petitioner wanted his case tried, the Petitioner interjected and said, “I do.”

The trial court judge questioned the Petitioner about whether the Petitioner wanted to consent to the amendment. The judge told the Petitioner that the indictment contained a typographical error relative to the year of the offense and that the Petitioner did not have to consent to amending the indictment. The judge stated that if the Petitioner’s defense was that he had an alibi for an offense date between May 2, 2010, and May 5, 2010, the State would not change the date at the last minute and “blow your defense.” Trial counsel told the court that the chosen defense was not an alibi. The court stated that if the Petitioner did not consent to the amendment, and the trial proceeded on the 2010 date, the Petitioner would be acquitted but that the State would obtain a new indictment from the grand jury for the correct year, which would not implicate double jeopardy principles. The judge told the Petitioner that the other option was to consent to changing the year and to proceed with the trial. The judge asked whether it was a surprise to the defense to learn of the incorrect year, and the Petitioner said, “No, sir. I’ve been seeing that on my copy and I knew that it was probably a mistake. I want to take this case to trial today.” The judge asked if the Petitioner wanted to waive his “right to be indicted for that new date,” and the Petitioner responded, “Yes, sir.” The judge asked if the Petitioner wanted to agree to the amendment, and the Petitioner said, “Yes, sir, I agree.” The Petitioner responded, “No, sir,” when the judge asked if he had any questions, but the trial court provided the Petitioner the time to discuss the matter with counsel before amending the indictment. After a brief recess, counsel told the court that the Petitioner wanted to go forward with the trial and that the chosen defense did not rely upon the date of the offense. The Petitioner, again, confirmed for the court that he wanted to amend the indictment.

The trial court record supports the post-conviction court’s determinations that the Petitioner wanted to proceed with the trial and that he knew the 2010 offense date was “probably a mistake.” Furthermore, the record reflects that trial counsel and the trial court explained to the Petitioner that if the defense objected to the amendment, the State would simply resubmit the case to the grand jury again to obtain an indictment with the correct date and that the trial would have only been delayed. Counsel testified at the post-conviction hearing that the Petitioner “insisted that it be amended orally so he could go forward that day.” Counsel recalled that the trial judge questioned the Petitioner about whether he wanted to consent to the amendment, that the judge explained to the Petitioner that the only way to move the case forward was to amend the indictment, and that the defense consented to the amendment. Counsel said that the decision to consent to the amendment belonged to the

Petitioner and that the Petitioner had decided to proceed to a trial months before the scheduled trial date. Counsel's post-conviction testimony is supported by the trial court record.

The Petitioner consented to amending the date in the indictment because he did not want to delay the trial court proceedings any further. Tennessee Criminal Procedure Rule 7(b)(1) allows a trial court to amend an indictment with a defendant's consent. *See State v. Stokes*, 24 S.W.3d 303, 306-07 (Tenn. 2000) ("We . . . hold that to amend an indictment pursuant to . . . [Rule 7(b)], an oral or written motion to amend should be made, and the defendant's oral or written consent to the motion must be clear from the record."). The State made an oral motion to amend the year in the date of the offense, and the Petitioner consented. The Petitioner's due process rights were not violated.

In any event, a trial court may amend an indictment without a defendant's consent and before jeopardy attaches "if no additional or different offense is charged and no substantial right of the defendant is prejudiced." Tenn. R. Crim. P. 7(b)(2). This court has previously determined that "a defendant is not charged with a new crime when the date in the indictment is merely corrected in order for the original charge to stand." *State v. Kennedy*, 10 S.W.3d 280, 284 (Tenn. Crim. App. 1999); *see State v. Badgett*, 693 S.W.2d 917, 919 (Tenn. Crim. App. 1985). As a result, the Petitioner is unable to establish the trial court violated principles of due process. The record supports the post-conviction court's determination that the Petitioner failed to establish his allegation. The Petitioner is not entitled to relief on this basis.

Based upon the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

ROBERT H. MONTGOMERY, JR., JUDGE