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

ANTWION DOWDY v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 15-00706 John W. Campbell, Judge

No. W2019-00398-CCA-R3-PC

In 2014, the Petitioner, Antwion Dowdy, was convicted of first degree premeditated murder and four counts of aggravated assault, and the trial court sentenced him to life imprisonment. The Petitioner appealed his convictions to this court, and we affirmed the judgments. *State v. Antwion Dowdy*, No. W2015-02342-CCA-R3-CD, 2016 WL 7654950 (Tenn. Crim. App., at Jackson, Feb. 21, 2016), *no perm. app. filed*. Subsequently, the Petitioner filed a petition for post-conviction relief, which the post-conviction court denied after a hearing. After review, we affirm the post-conviction court's judgment.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the Court, in which CAMILLE R. MCMULLEN and ROBERT L. HOLLOWAY, JR., JJ., joined.

Phyllis Aluka, District Public Defender; Harry E. Sayle, III, Assistant District Public Defender, Memphis, Tennessee, for the appellant, Antwion Dowdy.

Herbert H. Slatery III, Attorney General and Reporter; Samantha L. Simpson, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Leslie Byrd, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Facts and Background

This case originates from the Petitioner's shooting and killing the minor victim, Sharquette Smith, at a high school graduation party. Based on this incident, a Shelby County grand jury indicted the Petitioner for one count of first degree premeditated murder and four counts of aggravated assault.

A. Trial

The following is a truncated version of this court's summary of the facts presented at trial:

> This case arises from a May 18, 2013 graduation party, during which [the victim] died as a result of a single gunshot wound. At the trial, Albernesha Smith, [the victim's]'s sister, testified that [the victim] was age fifteen at the time of his death and the youngest of four children. She said that she and Mr. Smith both attended East High School at the time of the shooting, although Mr. Smith had attended Douglass High School previously. She did not attend the graduation party. On cross-examination, Ms. Smith testified Mr. Smith lived in the Mitchell Heights community and did not live near the location of the graduation party.
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> Jamie Foster testified that she attended Montero Rivers's graduation party with Jacques Wright and her sister-in-law, Kelia Johnson. Ms. Foster said that she attended Douglass High School with Mr. Rivers, although Ms. Foster had not graduated at the time of the shooting. She said that Ms. Johnson drove her red four-door car to the party. She said that the party had already begun when they arrived, that music was playing, and that they went inside the home. She said that it was a normal party for the first couple of hours but that the female homeowner took the microphone from the disc jockey and ordered everyone from Mitchell Heights to go outside the home. Ms. Foster said that she, Ms. Johnson, and Mr. Wright went outside as the woman directed.
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> Ms. Foster testified that outside the home, she saw four men on the sidewalk near the home arguing with Mr. Wright and Mr. Smith, who were standing in the middle of the street. Ms. Foster said that Ms. Johnson grabbed her and pulled her toward Ms. Johnson's car parked across the street. Ms. Foster said that she, Ms. Johnson, Mr. Wright, and Mr. Smith got in Ms. Johnson's car and drove down the street, that the street was a dead end, and that Ms. Johnson turned around the car. Ms. Foster said that Edward Grandberry jumped inside the car, that Ms. Johnson drove down the street, and that when they passed the home of the party, Mr. Smith stuck his head out the car window and yelled at the four men. She said Mr. Wright and Mr. Smith knew Mr. Grandberry.
>
> Ms. Foster testified that the Petitioner was one of the four men

arguing with Mr. Wright and Mr. Smith and that she knew the [Petitioner] from Douglass High School. She identified Tevin as one of the men standing with the [Petitioner] and said she did not know the remaining two men. Ms. Foster said that as Ms. Johnson drove by the home, Ms. Foster saw the [Petitioner] with a gun and that he stood in the middle of the street after Ms. Johnson drove by the home. She said that a second man was carrying a gun and was standing beside a truck parked near the home. She said the [Petitioner] and the second man had retrieved their guns from the truck. She said the man standing beside the truck had dreadlocks. She said that the [Petitioner] and the second man pointed their guns at Ms. Johnson's car, that Ms. Foster heard gunshots, and that Mr. Smith sustained a gunshot wound. Ms. Foster said that nobody inside the car had a weapon. She said Ms. Johnson immediately drove to the hospital. Ms. Foster stated that the police provided her a photograph lineup and that she identified the [Petitioner] as the person she saw standing in the street and shooting at Ms. Johnson's car.

On cross-examination, Ms. Foster denied that several people outside the home were dressed alike and said that she did not know what clothes the [Petitioner] wore at the time of the shooting. She said she did not know Justin Swain. She agreed Mr. Smith was intoxicated before he arrived at the party, but she did not know whether he smoked marijuana that night. She agreed that Mr. Smith and Mr. Wright were from Mitchell Heights but said she did not hear a commotion inside the home before the homeowner asked people from Mitchell Heights to leave.

Ms. Foster testified that Mr. Grandberry, Mr. Smith, and Mr. Wright sat in the backseat of Ms. Johnson's car, that Mr. Wright sat behind the driver's seat, and that Mr. Grandberry sat behind the front passenger seat. She said that she turned her head and looked back as Ms. Johnson drove past the home and that she saw the [Petitioner]. She agreed that Will Stacko was the second man carrying a gun and that Mr. Stacko wore a blue polo shirt and a baseball cap. She said that Mr. Stacko was standing in the street by the truck from where the [Petitioner] and Mr. Stacko retrieved the guns. She clarified that the truck was a white, four-door Ford SUV and said that she saw the [Petitioner] retrieve a gun from the truck when Ms. Johnson drove her car past the truck and that Ms. Foster immediately heard gunshots.

Ms. Foster testified that as Ms. Johnson drove past the home, Mr. Smith leaned his head out the window, turned his head, and looked back at

the men. She said that although she saw the [Petitioner] and Mr. Stacko holding guns, she did not see who fired the shots.

On redirect examination, Ms. Foster testified that the [Petitioner] and Mr. Stacko were two of the four people arguing with Mr. Smith and Mr. Wright outside the home. She said that as she and Ms. Johnson were attempting to leave, Ms. Foster saw the four men walking to the truck and saw the [Petitioner's] and Mr. Stacko's retrieving guns. She said that after Ms. Johnson turned the car around at the dead end and approached the home, the car passed the [Petitioner] first. She said that Tevin, who was with the [Petitioner] and Mr. Stacko, also retrieved a gun from the truck. Ms. Foster said that when she heard the gunshots, she looked back at the men and that she saw the [Petitioner] and Mr. Stacko holding guns. She said Tevin and the fourth man were standing on the sidewalk behind the truck. She did not see the fourth man holding a gun. She said that Tevin attended her high school but that she did not know his last name. She said that she saw Mr. Stacko fire his black gun once.

. . . .

Memphis Police Officer David Payment testified that he collected evidence from Ms. Johnson's red car. He identified photographs of the car, which showed a hole he said was consistent with a bullet strike on the right rear side of the car between the doors, circular defects in the cracked front windshield that were consistent with bullets striking the windshield from inside the car, and a red substance on the back seat and the right rear door. Officer Payment did not find any guns, cartridge casings, bullets, or any other weapons inside the car.

On cross-examination, Officer Payment testified that he had no training on bullet trajectory and that he did not know what might have been inside the car before the police secured it. He said the windshield defect near the driver's seat did not penetrate the outside of the windshield and that he could not determine how long the defect had been present. He noted, though, that he found black dust on the dashboard near the defect.

Memphis Police Officer James Sewell testified that he and Sergeant Quinn interviewed the [Petitioner] the day after the shooting and that the [Petitioner] was calm during the interview. Officer Sewell said that the [Petitioner] knew they were investigating Mr. Smith's death and that the [Petitioner] reported being inside the home when he heard gunshots. When

Officer Sewell told the [Petitioner] that witnesses identified the [Petitioner] as one of the shooters, the [Petitioner] denied being outside the home at the time of the shooting. Officer Sewell said that the [Petitioner] denied shooting a gun, holding a gun, or standing near someone who had fired a gun in the previous couple of days.

Officer Sewell testified that the [Petitioner] later stated he was outside during the shooting but was "being held back" by the homeowner in the yard. Officer Sewell said that he requested a crime scene officer test the [Petitioner's] hands for gunshot residue and that the [Petitioner] told the officer that he had not bathed since the shooting. After the test was completed, the officers said, "uh-huh," in the [Petitioner's] presence, and the [Petitioner] asked if it was too late to change his statement. Officer Sewell said that the [Petitioner] admitted firing a gun after the party and said he and a friend went to an open field in north Memphis and fired a .22-caliber gun. Officer Sewell said that Sergeant Quinn told the [Petitioner] the officers did not believe him and that the [Petitioner] provided a fourth version, which was reduced to writing and presented to the jury.

In the written statement, the [Petitioner] said that he was responsible for Mr. Smith's death and that he fired two rounds from a black "automatic" handgun while standing in the street. The [Petitioner] said he fired his gun at the back of the car in which Mr. Smith was traveling while standing on the left side of the street beside Carnesia Pierce's car. The [Petitioner] said he was twenty-five to thirty feet from Mr. Smith when the [Petitione]r fired the gun. The [Petitioner] said that Will Stacko and Dee Dee Montana also fired guns at the car. The [Petitioner] stated Mr. Stacko and Mr. Montana stood in the street and were closer to the car when they fired their guns. The [Petitioner] said Mr. Stacko and Mr. Montana walked toward the right side of the car and fired their guns as Mr. Smith got inside the car. The Petitioner said Mr. Smith fired a gun at the [Petitioner] and his friends and hung out the car window when the [Petitioner], Mr. Stacko, and Mr. Montana fired their guns. The [Petitioner] said that he obtained the gun he used from Kenny Lance and that he returned the gun to Mr. Lance after the shooting. The [Petitioner] said he had never seen Mr. Smith before the night of the party.

The [Petitioner] stated that he arrived at the party with Justin Swain, Freddy Williams, and two other men, that several people argued with Mr. Smith on the dance floor, and that the homeowner told all of the people from Mitchell Heights to go outside and all of the people from Douglass to

stay inside the home. The [Petitioner] said that the homeowner later told the people inside the home that it was okay to leave, that when he got outside, Mr. Smith was threatening people from Douglass, and that the [Petitioner] thought he, Mr. Stacko, and Mr. Montana were going to fight Mr. Smith. The [Petitioner] said that when he walked to where Mr. Smith, Mr. Stacko, and Mr. Montana were arguing, he saw a gun in Mr. Smith's hand. The [Petitioner] said that Mr. Smith pointed the gun at him and his friends, that Mr. Smith fired his gun, and that the [Petitioner] and his friends returned fire. The [Petitioner] said that Mr. Smith got into a silver four-door car while gun fire was being exchanged and that the car drove away.

The [Petitioner] stated that Ms. Pierce drove him home after the party in her green four-door car. He said that the windshield of Mr. Swain's car sustained a bullet hole when Mr. Smith fired his gun. The [Petitioner] did not believe he shot Mr. Smith because he was further away from Mr. Smith than Mr. Stacko and Mr. Montana. The [Petitioner] said his friends told him that they saw Mr. Smith pull out a gun first and that was the reason "we shot back."

On cross-examination, Officer Sewell testified that he did not speak to Mr. Stacko, Mr. Montana, or Mr. Swain. Officer Sewell did not record the [Petitioner's] interview but said Melinda Harris typed the statement as Officer Sewell asked questions and as the [Petitioner] provided answers. Officer Sewell said the [Petitioner] did not know the caliber of the gun he used.

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The [Petitioner] testified that he never changed his version of the events. He thought he signed release papers, not a statement, at the end of his interview. He said that the officers shackled his leg to the floor and denied his request for an attorney. The [Petitioner] said that he never denied being at the party and that he told the officers he heard gunshots, although he knew nothing about anyone being shot. He said that the first officer slapped the table and "got in [his] face" and that the second officer told the [Petitioner] to tell the truth because the second officer could not keep the first officer off the [Petitioner]. The [Petitioner] said he was scared but denied knowing anything about Mr. Smith's death. The Petitioner said that the officers left, that a third officer offered him a drink, and that the third officer said the officers would return with his release

> papers. He said the officers returned with papers and told him to sign and initial showing that "it" was read to him. The [Petitioner] said that he did not understand because nothing had been read to him, that the officer asked if the [Petitioner] wanted to go home, that the [Petitioner] said yes, and that the [Petitioner] signed and initialed the papers.
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> The [Petitioner] testified that he did not identify Mr. Stacko or Mr. Montana in his statement to the police, that the officers asked if he knew the men, and that he told the officers that although he knew who the men were, he did not know them personally. The [Petitioner] said he attended the party with Mr. Swain and Mr. Anderson. He said that although Mr. Montana attended the party, the [Petitioner] did not socialize with Mr. Montana. The [Petitioner] denied owning a gun or having a gun on the night of the shooting. . . .

Dowdy, 2016 WL 7654950, at *1-12. The jury convicted the Petitioner as charged, and the trial court sentenced him to life imprisonment for the first degree murder conviction and concurrent five-year sentences for each of the four aggravated assault convictions.

B. Post-Conviction Proceedings

The Petitioner filed a petition for post-conviction relief alleging that his conviction was based on his coerced confession to police and based on a violation of his privilege against self-incrimination. He further alleged that he had received the ineffective assistance of counsel on numerous bases; relevant to this appeal, he alleged that trial counsel ("Counsel") was ineffective for failing to file a pre-trial motion to suppress his statements to police.

The following evidence was presented at a hearing on the petition: Officer Mundy Quinn testified that he worked for the Memphis Police Department and assisted Sergeant Lundy, the case coordinator, with the investigation of this homicide. Witnesses had identified the Petitioner as the shooter, so Officer Quinn participated in an interview of the Petitioner. During this interview, the Petitioner admitted to being at the party where the shooting had occurred but denied being involved. Officer Quinn requested that a gunshot residue test be performed on the Petitioner. When the results of the test indicated the presence of gunshot residue on the Petitioner's hands, the Petitioner stated that he had fired a gun into the air at the party. Officer Quinn told the Petitioner that he was being untruthful at which point the Petitioner changed his story and said he had an altercation with someone at the party, who shot at the Petitioner, causing him to fire a weapon in response.

Officer Quinn testified that the Petitioner did not request an attorney during the interview and that the interview lasted two and a half hours. The interview was not recorded. A typed statement was produced, memorializing the Petitioner's verbal statement and he read and initialed the statement at the conclusion of the interview.

On cross-examination, Officer Quinn testified that he would have ceased the interview if the Petitioner had requested an attorney at any point.

Officer James Sewell testified that he also participated in the interview of the Petitioner. During the interview, the Petitioner provided multiple versions of the events at the party where the shooting occurred. Officer Sewell was present during the gunshot residue test. Throughout the interview and testing, the Petitioner never requested to speak to a lawyer. Had he requested one, the interview would have ceased. The Petitioner did not ask for his mother. The Petitioner told the officers that the victim of the shooting possessed a weapon at the time of the incident and that he wanted to make a claim of self-defense.

On cross-examination, Officer Sewell stated that, during the interview, the police officers did not use threats or coercion to obtain the statement. He recalled that, when the Petitioner saw the positive results of the gunshot residue test, he asked the officers if he could change his story.

The Petitioner testified that he was seventeen years old when the shooting occurred. He had been arrested prior to this incident but had never been read his *Miranda* rights and had no familiarity with his rights. During the interview with Officer Sewell and Officer Quinn, the Petitioner asked to speak to his mother and twice asked for a lawyer. The Petitioner confirmed that he had signed a waiver of rights form but stated that he thought it would allow him to leave. The Petitioner did not know if he read the form before he signed it.

During the interview, the Petitioner was shown a photographic lineup with his picture circled, indicating that he had been identified as the shooter by other party attendees. The Petitioner stated that he was under duress during the interview and willing to say anything to leave. The Petitioner agreed that he told law enforcement during his interview that he had fired a weapon at the scene of the shooting.

On cross-examination, the Petitioner agreed that he elected to go to trial despite facing a life sentence if convicted and despite being offered a plea deal.

On redirect-examination, the Petitioner testified that the statement he gave during the interview was an attempt to tell the officers what they wanted to hear so he could go

home. A typist was in the interview room transcribing the Petitioner's statement as he gave it, but the typist was interrupted by the officers telling him he was being untruthful.

Counsel testified that he represented the Petitioner at trial. He recalled being given a copy of the Petitioner's confession. Counsel's trial strategy was to undermine the State's theory that the Petitioner was the shooter by emphasizing the large number of people present and chaotic setting at the high school graduation party. He recalled mention of two rival gangs being present. Counsel testified that he cross-examined the police officer about the lighting conditions at the party based on the officer's statement that it was dark and it was difficult to identify anyone. On the subject of suppressing the Petitioner's statement to police, Counsel felt that the statement raised the issue of self-defense, which he factored into his decision not to seek suppression of the statement.

Counsel testified that his plan was to cast doubt on law enforcement's identification of the Petitioner as the shooter based upon the number of inconsistent eye witness accounts. His secondary strategy was to show that the Petitioner had fired the gun in self-defense. Counsel's "goal" was to use the Petitioner's statement to police in support of a self-defense theory. On this basis, Counsel advised the Petitioner not to testify because of his negative exposure on cross-examination. Counsel felt that most defendants do not perform well on cross-examination because of their inability to control their emotions and maintain a calm demeanor.

Counsel testified that multiple witnesses testified at trial that the Petitioner and another individual were wearing the same outfit on the night of the shooting and some witnesses testified that the Petitioner did not have a gun. Counsel pointed out multiple inconsistencies during witnesses' testimony, as well as the dark lighting, the confusion because of the crowd of people and the statements that multiple shooters were present. Counsel obtained an investigator prior to trial who interviewed witnesses and attempted to track down everyone at the party.

Counsel recalled that, at the close of the State's proof at trial, the State offered the Petitioner a fifteen-year plea deal; together, Counsel and the State's prosecutor talked with the Petitioner about the offer. Counsel viewed it as a "great" offer because it would be Range I and leave the Petitioner eligible for parole. Counsel asked the trial court to give the Petitioner one evening to consider the offer and a relative of the Petitioner's spoke with him about it. The next day, the Petitioner informed Counsel he would not take the offer. The case proceeded, and Counsel presented the defense witnesses, believing the case was still winnable if the Petitioner did not testify. The Petitioner elected to testify, which Counsel opined removed any doubt the jury had about his guilt.

On cross-examination, Counsel testified that he would have pursued a suppression

hearing if he thought grounds for suppressing the Petitioner's statement were present. Counsel reiterated that several witnesses testified that the Petitioner and another individual were wearing the exact same clothing. Counsel recalled that he presented a TBI witness who stated that the Petitioner did not test positive for gunshot residue but said the victim did test positive for gunshot residue. Counsel reiterated that he wanted the Petitioner's statement to be admitted to allow for the introduction of the self-defense theory. Counsel stated that this was a judgment call made before the Petitioner testified that his confession was false.

On redirect-examination, Counsel reiterated that he did not find grounds to challenge the Petitioner's statement and that he made a strategic decision not to suppress it and instead focus on the "helpful" parts, which he felt went to an argument that the State had not proven beyond a reasonable doubt that the Petitioner had the requisite intent for first degree murder. His dual strategy at trial was to use the statement to the Petitioner's benefit in a self-defense argument in case the witnesses failed to testify in a manner helpful to his primary defense strategy, mistaken identity.

The post-conviction court issued an order denying the petition, making the following findings relevant to the issues in this appeal:

> As to the Petitioner's allegations that [Counsel] should have prosecuted a motion to suppress the Petitioner's statement, the Petitioner called the two officers [at the post-conviction hearing] who took the Petitioner's statement and attempted to show that the motion to suppress had merit. After listening to the witnesses' testimony, the Court finds that the proof adduced would not have resulted in the suppression of the Petitioner's statement. The testimony of Sergeant Mundy Quinn and Lieutenant James Sewell showed that the Petitioner knowingly and voluntarily waived his Miranda rights and gave his statement. The Court accredits the testimony of the officers and finds them credible. The Petitioner's testimony about the proceeding lacks credibility. The Petitioner repeatedly claimed that he did not know what he told the police and he just signed the paper without reading it. The Petitioner also claimed that he never was read his Miranda rights even though the record shows that he signed a waiver and then initialed the waiver on his statement. The Petitioner denied that the officers used physical threats to get him to give a statement; he just thought Sgt. Quinn was mean. The Petitioner alleges that the use of the GSR test was a trick to overcome his will and therefore his statement was involuntary. The Petitioner alleges that the test used was a ruse and not a real test. From the testimony of the officers, it appears that the officers thought this was a valid test. They testified that they believed

> the results showed the Petitioner had fired a gun recently. The Petitioner has submitted no proof to show that the test performed was in fact a sham. Since the petitioner has not shown that he would have prevailed on a motion to suppress he has shown no prejudice and this claim is without merit. The Court will not second-guess a trial tactic and strategy unless those choices were uninformed because of inadequate preparation. [citing *Goad v. State*, 938 S.W.2d 363 (Tenn. 1996); *Hellard v. State*, 629 S.W. 2d 4 (Tenn. 1982); *Alley v. State*, 958 S.W.2d 138 (Tenn. Crim. App. 1997).] This issue is without merit.

It is from this judgment that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner contends that the post-conviction court erred when it denied his petition because he received the ineffective assistance of counsel because Counsel failed to file a motion to suppress the Petitioner's statement to police and failed to request a hearing on the matter. He contends that the totality of the circumstances indicate that he did not knowingly and intelligently waive his right against self-incrimination. He also contends that there was substantial benefit to be gained by litigating the suppression of the confession prior to trial because it would have given Counsel a chance to test the Petitioner's ability to withstand cross-examination and would have educated the Petitioner on the pitfalls of testifying, making him more amenable to the plea offer. The State responds that the evidence does not preponderate against the trial court's conclusion that Counsel was not ineffective based on his decision not to seek suppression of the statement. We agree with the State.

In order to obtain post-conviction relief, a petitioner must show that his or her conviction or sentence is void or voidable because of the abridgment of a constitutional right. T.C.A. § 40-30-103 (2014). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2014). The post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates against it. *Fields v. State*, 40 S.W.3d 450, 456-57 (Tenn. 2001). Upon review, this Court will not re-weigh or re-evaluate the evidence below; all questions concerning the credibility of witnesses, the weight and value to be given their testimony and the factual issues raised by the evidence are to be resolved by the trial judge, not the appellate courts. *Momon v. State*, 18 S.W.3d 152, 156 (Tenn. 1999); *Henley v. State*, 960 S.W.2d 572, 578-79 (Tenn. 1997). A post-conviction court's conclusions of law, however, are subject to a purely de novo review by this Court, with no presumption of correctness. *Id.* at 457.

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

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

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

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

When evaluating an ineffective assistance of counsel claim, the reviewing court should judge the attorney's performance within the context of the case as a whole, taking into account all relevant circumstances. *Strickland,* 466 U.S. at 690; *State v. Mitchell*, 753 S.W.2d 148, 149 (Tenn. Crim. App. 1988). The reviewing court must evaluate the questionable conduct from the attorney's perspective at the time. *Strickland*, 466 U.S. at 690; *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). In doing so, the reviewing court must be highly deferential and "should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Burns*, 6 S.W.3d at 462. Finally, we note that a defendant in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronic*, 466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have

produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). "The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation." *House*, 44 S.W.3d at 515 (quoting *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996)).

If the petitioner shows that counsel's representation fell below a reasonable standard, then the petitioner must satisfy the prejudice prong of the *Strickland* test by demonstrating "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694; *Nichols v. State*, 90 S.W.3d 576, 587 (Tenn. 2002). This reasonable probability must be "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *Harris v. State*, 875 S.W.2d 662, 665 (Tenn. 1994).

The evidence presented in this case does not preponderate against the post-conviction court's findings. The evidence presented was that Counsel formed a two-prong defense strategy, mistaken identification of the shooter and self-defense, and that he planned to present the self-defense theory if his mistaken identity theory was not borne out by the witnesses' testimony. In the situation of presenting self-defense as his primary theory, parts of the Petitioner's statement aided this theory and thus Counsel opted to keep the statement as part of the evidence, so he could use the helpful portions should this theory be presented. The evidence established that Counsel's tactical decision was based on the facts and circumstances known to him. Such strategic or tactical decisions are given deference on appeal if the choices are informed and based upon adequate preparation. *See* Goad, 938 S.W.2d at 369; *see also Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). This court will not conclude, in hindsight, that other decisions should have been made. The Petitioner is not entitled to relief.

III. Conclusion

After a thorough review of the record and the applicable law, we conclude the post-conviction court properly denied the Petitioner's petition for post-conviction relief. In accordance with the foregoing reasoning and authorities, we affirm the judgment of the post-conviction court.

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ROBERT W. WEDEMEYER, JUDGE