

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON

Assigned on Briefs June 24, 2014 at Knoxville

CARL RANDLE v. STATE OF TENNESSEE

Appeal from the Circuit Court for Madison County
No. C-13-205 Donald H. Allen, Judge

No. W2014-00136-CCA-R3-PC - Filed July 18, 2014

A Madison County jury convicted the Petitioner, Carl Randle, of aggravated assault and attempted voluntary manslaughter. The trial court merged the convictions and ordered the Petitioner to serve six years in the Tennessee Department of Correction. The Petitioner appealed, and this Court affirmed the judgments of the trial court. *State v. Carl Randle*, No. W2011-02374-CCA-R3-CD, 2012 WL 3642730, at *11 (Tenn. Crim. App., at Jackson, Aug. 27, 2012), *no Tenn. R. App. P. 11 filed*. The Petitioner filed a petition for post-conviction relief, in which he alleged that his trial counsel was ineffective. The post-conviction court dismissed the petition after a hearing, and the Petitioner appealed that dismissal. After a thorough review of the record and applicable law, we affirm the post-conviction court's judgment.

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

ROBERT W. WEDEMEYER, J., delivered the opinion of the Court, in which JOSEPH M. TIPTON, P.J. and D. KELLY THOMAS, JR., J., joined.

Joseph T. Howell, Jackson, Tennessee, for the Appellant, Carl Randle.

Robert E. Cooper, Jr., Attorney General and Reporter; Clark B. Thornton, Senior Counsel; James G. Woodall, District Attorney General; and Shaun Brown, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Facts

A. Trial

This case arises from the Petitioner's pushing the victim, Samuel Evans, to the ground and shooting him in the buttocks. A Madison County grand jury indicted the Petitioner for attempted first degree premeditated murder and aggravated assault. On direct appeal, this Court summarized the underlying facts of the case as follows:

Samuel Evans ("the victim") testified that the [Petitioner] dated his wife's sister, Jaden Moses. The victim said that on December 9, 2010, at around 2:00 or 3:00 p.m., he saw the [Petitioner] at Lincoln Courts apartment complex, where the victim's mother-in-law lived. The victim explained that he and his wife, Leighasia, were taking their children to stay with his mother-in-law while he and his wife went Christmas shopping. The victim said that he ran into the [Petitioner] in the apartment complex parking lot, and the two spoke briefly. Later in the day, at around 5:00 p.m., the [Petitioner] called the victim at his mother-in-law's apartment, asking for a cigarette. The victim said that he stepped outside his mother-in-law's apartment to give the [Petitioner] a cigarette, but the [Petitioner] never appeared.

The victim testified that, at around 8:00 p.m., the victim, his wife, and Moses went to Wal-Mart, K-Mart, and the mall. At around 9:00 p.m., the [Petitioner] and the victim had an argument over the telephone. The victim said the argument was over his belief that the [Petitioner] was "trying to set me up." The victim did not remember the majority of the conversation but said that he called the [Petitioner] "an S.O.B."

The victim testified that he, his wife, and Moses returned to his mother-in-law's apartment at around 11:00 p.m. As the victim walked to his mother-in-law's apartment, the [Petitioner] approached the victim and said, "What's all that S-H-- you was saying?" The [Petitioner] then pulled out a .32 caliber handgun, placed it against the victim's head and said, "I bet you ain't talking that S-H-- now." The victim testified that he was afraid and did not know what to do. The [Petitioner] pushed the victim with his free hand, and the victim fell to the ground. The victim was lying on his stomach when the [Petitioner] fired a shot into the victim's right buttock, and then Moses and the [Petitioner] fled.

The victim testified that, after being shot, he was "freaked out" and began running in circles because he could not feel his leg. The victim's mother-in-law came outside of her apartment and helped the victim sit down on the front porch. The victim's wife called the police, and the victim was

transported to the hospital, where he was treated for the gunshot wound overnight. The victim testified that the bullet remained lodged in his buttock and he continued to experience “sharp pains that shoot down [his] leg into [his] foot.”

The victim testified that he did not have a weapon on his person at the time of the shooting. The victim recalled that the [Petitioner] was wearing a blue jacket with the hood pulled up over his head that night. The victim said that, when he first saw the [Petitioner] in the Lincoln Courts parking lot, he told the [Petitioner] he was in town to Christmas shop for his children. The victim said that he had \$100 in his wallet and “about 700 on [his] card.” The victim clarified that he believed the [Petitioner] was trying “to set [him] up” to rob him when he asked the victim to step outside to give him a cigarette. Even though the [Petitioner] never showed up, the victim was angry about it and expressed as much to the [Petitioner] during their 9:00 p.m. telephone conversation.

Leighasia Evans, the victim’s wife, testified that the [Petitioner] and her younger sister, Jaden Moses, had a child together. Evans said that, on December 9, 2010, she and the victim brought their children to visit her mother and to do some Christmas shopping in Jackson where her mother lived. When they arrived at her mother’s apartment complex, Evans saw the [Petitioner] near the parking lot on the sidewalk. Evans did not speak with the [Petitioner], but she said the victim spoke with him. Evans said that they spent the afternoon at her mother’s apartment and, at one point, the victim went outside to talk with the [Petitioner]. Evans said that the next time the victim spoke with the [Petitioner] was during a telephone conversation that night while they were Christmas shopping. Evans said that she, the victim, and her sister went Christmas shopping together, and the [Petitioner] kept texting and calling Moses on the victim’s cellular phone. At some point, the victim answered his cellular phone and spoke with the [Petitioner] briefly. She recalled that the victim called the [Petitioner] a name, because the victim believed the [Petitioner] set him up to be robbed earlier in the day.

Evans testified that she, the victim, and her sister returned to her mother’s apartment around 11:00 p.m. that night. As they were walking to the apartment, she saw the [Petitioner], who was wearing a blue zip-up jacket with a hood over his head, walking toward them. The [Petitioner] walked up to the victim, put a gun to his head and said, “What’s all that sh** you was talking about earlier?” Evans said she heard a gunshot and then saw the victim on the

ground. The [Petitioner] and Moses “wrestl[ed] a little bit” and then they both fled. Evans said that she beat on her mother’s front door while the victim ran around “hysterical” because he was “hurting and in shock.” The victim was treated at the hospital for a gunshot wound to his buttock.

Daniel Long, a Jackson City Police Department investigator, testified that, on December 9, 2010, he responded to a call about a shooting at Lincoln Courts apartment complex. Investigator Long recalled that, when he arrived, the victim was lying on the steps in front of an apartment. The victim told Investigator Long that the [Petitioner] had shot him and Investigator Long observed a gunshot to the victim’s buttock. An ambulance was called to the scene and the victim was transported to the hospital for treatment. Investigator Long said that neither a weapon nor bullet were recovered from the scene.

Jaden Moses testified, on the [Petitioner]’s behalf, that she and the [Petitioner] were in a relationship and had a child together. Moses said that on December 9, 2010, she went to her mother’s house at around 4:30 p.m. or 5:00 p.m. When she arrived, her sister and the victim were there. At some point, she left to go to her GED orientation and the victim also exited the apartment at the same time to go to his car. Moses said that she returned to her mother’s home at around 7:00 p.m. or 8:00 p.m. The victim and Moses’s sister were going Christmas shopping for their children, so Moses joined them. While they were out that night, Moses overheard the victim call the [Petitioner] a curse word during a telephone conversation.

Moses testified that she, her sister, and the victim returned to her mother’s apartment at around 10:30 p.m. or 11:00 p.m. As they were getting out of the victim’s car, Moses saw the [Petitioner] walking toward them. The [Petitioner] approached, and he and the victim began arguing. Moses said she could not tell what they were arguing about and that she was “confused.” The argument continued as they walked toward the apartment and, when they reached the porch of the apartment, the two men began shoving one another. Moses said that she could not see what happened because it was “real dark outside,” but she heard a gun fire, and the victim began “hollering.” Moses did not see either the [Petitioner] or the victim with a gun that night. After the gunshot, the [Petitioner] ran and Moses followed him. When she caught up with him, they began arguing. Moses asked the [Petitioner] what had happened, and the [Petitioner] replied that he did not know. The [Petitioner] then ran again, and Moses returned to the [Petitioner]’s mother’s apartment and told her what had occurred.

On cross-examination, Moses denied ever telling the victim that the [Petitioner] was setting the victim up to rob him when the [Petitioner] asked the victim to bring him a cigarette. Moses said that the victim initiated the phone call that she overheard between the victim and the [Petitioner]. Moses said that, on the night of the shooting, the [Petitioner] wore a blue jacket with the hood pulled over his head. She said that, when the [Petitioner] approached the victim after they returned from Christmas shopping, the [Petitioner] was mad, but it was the victim who first pushed the [Petitioner]. Moses maintained that the [Petitioner] did not have a gun that night. Moses confirmed that she never spoke with police regarding the events of that night.

The [Petitioner] testified that, on the day of the shooting, he briefly spoke with the victim at 1:00 p.m. or 2:00 p.m. At around 5:00 p.m. the two “made contact on the phone” to arrange for the [Petitioner] to meet the victim at the Lincoln Courts apartment complex to sell the victim “some crack cocaine.” The [Petitioner] said that he was not surprised by the victim’s request because he had sold the victim drugs on previous occasions. Although the two arranged the location, they did not set a specific time to meet. The [Petitioner] was watching his sister’s children, so he could not leave but sent “the dude named Justin” to sell to the victim. The victim later called the [Petitioner], and he was “real paranoid” and “nervous.” The victim told the [Petitioner] that he did not want any one else to sell drugs to him, only the [Petitioner]. The [Petitioner] denied being angry about the conversation and said that he “was like, you know, okay.”

The [Petitioner] testified that, at around 10:30 p.m. or 11:00 p.m., the victim called him and asked him to meet again. The [Petitioner] walked from a friend’s house to Lincoln Courts apartment complex and waited for the victim to arrive. When the victim arrived at the apartment complex, he again called the [Petitioner]’s cellular phone to tell him that he had returned from shopping. The [Petitioner] recalled that he met with the victim, they spoke briefly, and, when the [Petitioner] “got ready to sell him the dope,” the victim pulled a gun out from his fleece jacket. The [Petitioner] said he was “shocked” and “afraid.” He reached out, grabbed the victim’s arms and the two men began “scuffling.” The [Petitioner] said that he held the victim’s arm toward the ground to prevent the victim from shooting either himself or the [Petitioner]. The men wound up on the ground where the [Petitioner] had the victim’s arm bent back and then the gun “went off.” After the gun fired, the [Petitioner] was scared and fled to a friend’s apartment in Lincoln Courts, where he remained for the night. The [Petitioner] said that he did not contact

police because he was scared and did not know what had happened.

The [Petitioner] testified that, the following day, his mother called and told him the police were waiting for him at his sister's house. After speaking with the police over the phone, he returned to his sister's house and turned himself in to the police. The [Petitioner] agreed that he did not initially tell police officers the truth. He apologized for making a false statement and explained that he was scared and had never been to jail before this incident. He was afraid that, if he told the police he was selling drugs, he would receive charges for that conduct.

On cross-examination, the [Petitioner] agreed that, when he first saw the victim in the afternoon, the victim told him he was going Christmas shopping for his children. Even though in his police statement the [Petitioner] said that he called the victim asking for a cigarette, the [Petitioner] denied ever making such a call. He explained that he made up the story, because he did not want to tell police that the phone calls were about drugs. The [Petitioner] agreed that he initially told police that he was arguing with Moses nearby when the victim was shot.

The State called Danielle Jones, a Jackson City Police Department investigator, as a rebuttal witness. Investigator Jones testified that she interviewed the [Petitioner] after his arrest. The investigator wrote down the events of the previous night, as described by the [Petitioner], had the [Petitioner] review the statement to make sure it was correct, and then asked the [Petitioner] to sign it. Investigator Jones identified the signed rights waiver form and the [Petitioner]'s signed statement. Investigator Jones read the [Petitioner]'s statement as follows:

The dude that got shot is [the victim]. He is my girlfriend's brother-in-law. I have known him about a year and three months. Yesterday Josh, a dude I know from the area, told my girlfriend, Jaden Moses, that I sent him to jump on [the victim]. She saw him about to do it and called his name and he stopped and that's when he told her that. [Moses] told [the victim] that and he started calling my phone trying to confront me about it. I had nothing to do with that. I was at my sister, Tereva Thompson's house. Me and [Moses] got into it over that. Around 11:00 that night I saw [the victim] and his wife, Leighasia, at Leighashia's [sic] mom's house. [Moses] was with

him. [Moses] came to me when she saw me walking in Lincoln Courts. I was backing back because I know [Moses] likes to fight. She came to me and we had an altercation. When [the victim] was shot, he was by [Moses's] mom's house. Me and [Moses] were still having an altercation. I think they said I shot [the victim] because Josh put me in it earlier. Before the Josh incident, I called [the victim] and asked him if he had any cigarettes. He said he did and I asked him to bring me one and he said okay. It was early when I talked to him. I couldn't meet [the victim] and get the cigarette because I was doing something for my sister. [Moses] doesn't have a cell phone, but she lives at 156D Lincoln Circle.

Randle, 2012 WL 3642730, at *1-4. Based upon this evidence, the jury convicted the Petitioner of aggravated assault and attempted voluntary manslaughter. The trial court merged the convictions and ordered the Petitioner to serve six years in the Tennessee Department of Correction. *Id.* at *5.

B. Post-Conviction Hearing

The Petitioner filed a petition for post-conviction relief, claiming that he had received the ineffective assistance of counsel and that his conviction violated the protection against double jeopardy. The post-conviction court held an evidentiary hearing, where the parties presented the following evidence: The Petitioner testified that he was represented by a public defender ("Counsel") in his trial for aggravated assault and attempted first degree premeditated murder. He stated he was convicted by a jury of aggravated assault and attempted voluntary manslaughter. The Petitioner stated that he appealed his convictions, and they were upheld on appeal. The Petitioner stated that Counsel should have raised the issue of double jeopardy at trial, because the Petitioner had "two separate charges holding the same elements of the other charge committed of one single act which [] limits the punishment to double jeopardy." The Petitioner stated that he had included case law supporting that position in his post-conviction petition.

The Petitioner testified that he did not think his trial counsel had adequately cross-examined the witnesses, specifically the victim and his wife. He stated that Counsel did not cross-examine the State's witnesses about the Petitioner and victim's background, and the fact that the two men were "practically family," which the Petitioner said was relevant to his defense. He stated that Counsel failed to question inconsistencies between the victim's and the victim's wife's testimony. The Petitioner asserted that, had Counsel "properly" questioned them about the inconsistencies in their testimony, the outcome of the Petitioner's

trial would have been different.

The Petitioner stated that he “barely” met with Counsel during the nine months he was awaiting trial and that Counsel only spoke with him for five or ten minutes the day before trial. He stated that Counsel “didn’t come as often as he should have” to visit the Petitioner. He stated that, if Counsel had met with him more often, they could have discussed the double jeopardy issue.

The Petitioner also testified that he was not adequately prepared by Counsel to testify at trial. He said that Counsel did not discuss trial procedure with him and that he had never been through a jury trial before, so he “didn’t know the ins and outs of trial.” The Petitioner further stated that Counsel had failed to explore the theory of self-defense or argue the facts surrounding that theory to the jury. He stated that there were witnesses who would have testified that the victim was the primary aggressor and those witnesses were not called to testify.

The Petitioner testified that Counsel failed to raise the issue of the Petitioner’s competency to stand trial due to the Petitioner’s history of depression. The Petitioner stated that Counsel was aware that the Petitioner was prescribed multiple medications that he should have been taking, and was not, when he shot the victim. The Petitioner testified that he was not competent at the time his case went to trial.

The Petitioner testified that he felt that there was an issue at his trial regarding gun powder residue, and he said he was “pretty sure” that, if the victim had been “tested” for residue, there would have been gun powder residue on his hands, indicating that the Petitioner had acted in self-defense. The Petitioner also stated that Counsel failed to explain any “plea possibilities” to him and failed to make a counteroffer to the State. He stated that Counsel had a careless and inattentive attitude during his trial.

Counsel testified that he was the Assistant Public Defender who represented the Petitioner at his trial and throughout the Petitioner’s appeal. Counsel stated that the Petitioner was cooperative throughout the representation. In regard to the Petitioner’s double jeopardy claim, Counsel stated that the two counts were “alternative theories” and that there was no legal basis upon which to challenge the two counts in the indictment. Counsel agreed that the Petitioner was charged with a Class A felony, but was convicted of a Class C felony, and that the two counts were merged into one judgment of conviction.

Counsel testified that he met with the Petitioner in jail and in the courthouse on nine different dates in 2011. He stated that they met to discuss the Petitioner’s side of the case and “any potential witnesses” that the Petitioner wanted Counsel to interview. He stated their

initial discussions were about a possible plea deal but that the victim contacted the District Attorney's office requesting the case to go to trial, so plea negotiations were no longer an option. Counsel stated that his trial strategy then changed to the position that the Petitioner did not "show up" with a gun and that the victim had a gun and "there was a fight over the gun and somehow [the victim] got shot." He stated that this theory was presented at trial and that the witness whom the Petitioner provided, Jaden Moses, testified in support of this theory.

Counsel stated that the Petitioner testified at trial that he and the victim got into an argument over cocaine, the victim pulled out a gun, and the Petitioner grabbed it from him. Counsel recalled that the Petitioner testified at trial that the two men struggled over the gun and that it went off and shot the victim. Counsel stated that Ms. Moses's testimony at trial was that she "could not see exactly what happened" because it was dark but that she knew the Petitioner had not arrived at the scene with a gun. Counsel agreed that the State presented witnesses who testified to a much different account.

Counsel stated that it was the Petitioner's decision to testify at trial and that Counsel advised him of the potential problems involved with testifying. Counsel could not recall if he requested a self-defense jury instruction, but he stated that, as part of the Petitioner's theory of self-defense, the angle he presented to the jury was that the shooting occurred during the two men's struggle and was accidental. Counsel stated that the Petitioner was "definitely not" incompetent at the time of trial. Counsel stated that the Petitioner's relationship with the victim was developed at trial and that the Petitioner participated with Counsel preparing questions to ask the witnesses about their relationship. Counsel stated that he explained to the Petitioner why he did not ask certain questions, including the reasons the questions might "backfire."

Counsel stated that he did not make a counteroffer to the original plea offer from the State because the offer was later withdrawn at the request of the victim. Counsel stated that he was prepared for trial and would not have prepared differently or done anything differently during the trial.

On cross-examination, Counsel reiterated that he discussed with the Petitioner his decision to testify, and he stated that ultimately he felt that the Petitioner testifying did not prejudice him. Counsel stated that he felt it was a good thing for the jury to see how young the Petitioner was and that perhaps the jury might determine it was not a premeditated attempted killing. Counsel reiterated that he could not recall the Petitioner or his family members raising with him any concern about the Petitioner's competency. Counsel stated that with regard to the inconsistencies in the victim's and his girlfriend's testimony, Counsel questioned the witness about the inconsistencies during cross-examination.

The trial court questioned Counsel about his communication with the Petitioner. Counsel stated that he was appointed to represent the Petitioner in March of 2011 and that he then met with the Petitioner in April and May while the Petitioner was in jail. Counsel agreed he later met with the Petitioner in the courthouse on three other dates and in jail on three other occasions. He agreed that, during each of these meetings, they discussed preparing for trial. Counsel stated that Ms. Moses was the only witness the Petitioner indicated he wanted to call to testify.

Based upon this testimony, the post-conviction court issued an order denying post-conviction relief. It is from this judgment that the Petitioner now appeals.

II. Analysis

On appeal, the Petitioner contends that the post-conviction court erred when it dismissed his petition because Counsel's representation fell outside the standard proscribed in *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975). The Petitioner contends that his convictions violate his constitutional protection against double jeopardy. He contends that the "manner" in which Counsel presented the theory of self-defense at trial was inadequate. Finally, the Petitioner contends that he was incompetent at the time of trial due to his long history of mental illness and depression. The State responds that the Petitioner's double jeopardy claim has no legal basis and that Counsel was not ineffective for failing to raise the same at trial. The State further responds that the Petitioner has not shown that Counsel's strategy in regard to the self-defense theory was professionally unreasonable and has not presented any evidence that he was incompetent at trial. 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 (2012). 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). Upon our review, the trial judge's findings of fact are given the effect and weight of a jury verdict, and this Court is "bound by the trial judge's findings of fact unless we conclude that the evidence contained in the record preponderates against the judgment entered in the cause." *Black v. State*, 794 S.W.2d 752, 755 (Tenn. Crim. App. 1990). Thus, 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 court 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. *Fields v. State*, 40 S.W.3d 450, 457 (Tenn. 2001).

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 [Petitioner] in a criminal case is not entitled to perfect representation, only constitutionally adequate representation. *Denton v. State*, 945 S.W.2d 793, 796 (Tenn. Crim. App. 1996). In other words, "in considering claims of ineffective assistance of counsel, 'we address not what is prudent or appropriate, but only what is constitutionally compelled.'" *Burger v. Kemp*, 483 U.S. 776, 794 (1987) (quoting *United States v. Cronin*,

466 U.S. 648, 665 n.38 (1984)). Counsel should not be deemed to have been ineffective merely because a different procedure or strategy might have produced a different result. *Williams v. State*, 599 S.W.2d 276, 279-80 (Tenn. Crim. App. 1980). “The fact that a particular strategy or tactic failed or hurt the defense does not, standing alone, establish unreasonable representation. 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).

In its order denying the Petitioner relief, the post-conviction court found that Counsel’s advice and services rendered to the Petitioner “were certainly within the range of competence demanded” and that the Petitioner had failed to show that Counsel’s performance was deficient. The post-conviction court stated that it “did not credit” the Petitioner’s testimony at the post-conviction hearing, and it concluded that “none of [Counsel’s] actions or omissions were so serious as to fall below the objective standard of reasonableness under prevailing professional norms[.]” Further, the post-conviction court found that Counsel sufficiently communicated with and met with the Petitioner throughout the period before his trial and that he prepared a trial strategy that was consistent with the Petitioner’s testimony at trial.

The evidence in this case does not preponderate against the post-conviction court’s findings in this matter. We conclude that the double jeopardy protections of the Sixth Amendment were not implicated in this case, as the Petitioner’s convictions were alternative theories of prosecution, and the convictions were merged into one judgment of conviction by the trial court. Thus, we conclude that Counsel was not ineffective in failing to raise this argument at trial.

We agree with the post-conviction court’s findings that Counsel was not deficient in his presentation of the self-defense theory at trial. The Petitioner and Counsel met nine times before the trial. Counsel spoke with the Petitioner about his version of the events and subpoenaed the witness who the Petitioner indicated could corroborate his story. Counsel stated that a theory of self-defense was presented to the jury, but the jury chose to accredit the State’s theory, returning a conviction of the lesser-included offense of attempted

voluntary manslaughter. In our view, the fact that the jury returned a guilty verdict for a lesser-included offense indicates that Counsel was successful in presenting the argument that the Petitioner acted without premeditation and possibly in self-defense. Counsel's presentation of the Petitioner's theory did not fall below the standard of professional reasonableness.

Finally, we agree with the post-conviction court's determination that Counsel was not ineffective for failing to raise the issue of the Petitioner's competency. No evidence was presented at trial or in the post-conviction proceedings that the Petitioner was incompetent, and the mere assertion by the Petitioner that he had a long history of mental illness is insufficient to meet the Petitioner's burden of proof on this issue.

The Petitioner has not shown by clear and convincing evidence that Counsel was ineffective for failing to present the issue of double jeopardy, that Counsel's presentation of the theory of self-defense was insufficient, or that the Petitioner was incompetent. Accordingly, we do not conclude that Counsel's representation fell below an objective standard of reasonableness. Thus, the Petitioner is not entitled to relief.

III. Conclusion

After a thorough review of the record and relevant authorities, we conclude that the post-conviction court properly denied relief. Accordingly, we affirm the judgment of the post-conviction court.

ROBERT W. WEDEMEYER, JUDGE