

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs November 9, 2022

AARON DODSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 2015-A-791 Steve R. Dozier, Judge

No. M2021-01257-CCA-R3-PC

The Petitioner-Appellant, Aaron Dodson, appeals the denial of post-conviction relief from his convictions of first-degree felony murder, especially aggravated robbery, and aggravated kidnapping. The Petitioner asserts that he received ineffective assistance of counsel and that the post-conviction court erred in limiting proof at the post-conviction hearing to only alleged errors of trial counsel.¹ After review, we affirm the judgment of the post-conviction court.

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

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which ROBERT H. MONTGOMERY, JR. and TOM GREENHOLTZ, JJ., joined.

Daniel J. Murphy, Lewisburg, Tennessee, for the Petitioner-Appellant, Aaron Dodson.

Herbert H. Slatery III, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Glenn R. Funk, District Attorney General; and J. Wesley King, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual Background. The instant case arose from the especially aggravated robbery and shooting death of Ricky A. Burgett and the aggravated kidnapping of Thomas Moreno. State v. Aaron Dale Dodson, No. M2018-01333-CCA-R3-CD, 2020 WL 200780, at *1 (Tenn. Crim. App. Jan. 13, 2020), no perm. app. filed. A Davidson County Grand Jury indicted the Petitioner and his co-defendant, Oral Patterson, each for one count of first-degree felony murder, especially aggravated robbery and aggravated kidnapping. The

¹ The Petitioner raised multiple claims relating to ineffective assistance of trial counsel in his amended petition for post-conviction relief that we deem waived on appeal because they were not argued at the post-conviction hearing and similarly not asserted in the Petitioner's brief.

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Petitioner's case was severed for trial. Id. He was convicted as charged and sentenced to life imprisonment for the first-degree felony murder conviction, seventeen years for the especially aggravated robbery conviction, and ten years for the aggravated kidnapping conviction. The sentences imposed were set to run concurrently to one another.

On direct appeal, the Petitioner alleged that there was insufficient evidence to sustain the first-degree felony murder and the especially aggravated robbery convictions. The facts underlying the Petitioner's convictions were summarized by this Court as follows:

At trial, Mr. Moreno testified that the victim was his longtime friend and roommate and that at the time of the victim's death, they had been living in Nashville for about nine months. Mr. Moreno acknowledged that he had a 2015 felony conviction for forging a driver's license and a prior felony conviction for "some other type of [assault] offenses against police[.]" On September 21, 2014, Mr. Moreno and the victim planned to go to a cell phone store to buy new phones. Mr. Moreno arrived home from work first. When the victim arrived, he gave Mr. Moreno some food he picked up and then went into the bathroom. Five to ten minutes after the victim went into the bathroom, Mr. Moreno was sitting on his bed eating when the [Petitioner] entered the front door of the apartment. The [Petitioner] pointed a gun at Mr. Moreno, ordered Mr. Moreno to get on the floor, and asked him where "the money was." Mr. Moreno noted that the [Petitioner's] voice "wasn't too loud." Mr. Moreno laid chest-down on the floor and noted that an African-American man, later identified as Oral Patterson, entered the apartment. The [Petitioner] stood over Mr. Moreno and pointed the gun at him; Mr. Patterson searched the house. Mr. Moreno stated that he did not have any money to give the men and that both men were unknown to him.

Mr. Moreno testified that he heard the victim's cell phone ring inside the bathroom, that the [Petitioner] handed the gun to Mr. Patterson, and that Mr. Patterson tried to open the bathroom door. Mr. Moreno could see the bathroom door from his vantage point on the floor. The [Petitioner] continued to stand above Mr. Moreno; Mr. Patterson opened the bathroom door; and Mr. Moreno heard "some tussling" and a gunshot. Mr. Moreno did not see the shooting. A couple of seconds later, Mr. Patterson walked backwards out of the bathroom, and the victim, who had been shot once, came out and fell onto the floor. Mr. Patterson resumed searching the apartment, and Mr. Moreno noted that "they were going through everything." Mr. Moreno did not know if the men spoke to one another, and he did not

see them take anything. Mr. Moreno agreed that the [Petitioner] “did all of the talking” and denied that Mr. Patterson spoke to him or threatened him.

In order to get the men out of his apartment, Mr. Moreno told them that he had money “stashed” in another apartment. The [Petitioner] told Mr. Moreno to take them to it. As Mr. Moreno led the men downstairs, the [Petitioner] walked behind Mr. Moreno and told him, “[D]on’t do nothing stupid[.]” Mr. Patterson had the gun and walked behind the [Petitioner]. When asked whether Mr. Moreno felt free to leave, Mr. Moreno answered negatively.

In the apartment courtyard, Mr. Moreno encountered two friends, LaNise Scott and Kelsey Hill, whom he attempted to signal by putting up his hands and giving “a look.” The [Petitioner] told Mr. Moreno to put his hands down and not to “be stupid.” Mr. Moreno saw the women stop “because they knew something wasn’t right.” Mr. Moreno led the [Petitioner] and Mr. Patterson to a vacant apartment and knocked on the door.

Mr. Moreno continued knocking at the door, and after an interval Mr. Patterson said, “[F]orget this[,] we got to get out of here right now.” The [Petitioner] and Mr. Patterson ran away. Mr. Moreno ran back to the apartment, passing Ms. Scott and Ms. Hill. Mr. Moreno told the women that the victim had been shot and to call the police and an ambulance. When Mr. Moreno reached the victim, Mr. Moreno “could hear him trying to breathe[,]” although the victim could not communicate. Mr. Moreno dragged the victim outside, and some neighbors helped Mr. Moreno carry him down the stairs. Although Ms. Scott and Ms. Hill called 9-1-1, they were put on hold, and the women ultimately drove the victim and Mr. Moreno to the hospital. Mr. Moreno spoke with the police in the hospital waiting room. Mr. Moreno did not know why the [Petitioner] and Mr. Patterson came into the apartment; to his knowledge, the victim did not know the men either. Mr. Moreno acknowledged that the police found “an amount of marijuana” in the apartment, although they did not find any scales or “small sandwich bags.” He noted that he did not own a weapon. Mr. Moreno denied being a drug dealer. Mr. Moreno identified the [Petitioner] and Mr. Patterson in photographic lineups on September 26, 2014.

On cross-examination, Mr. Moreno agreed that the [Petitioner] did not point the gun at or threaten the victim, take anything from the victim, or shoot the victim. Mr. Moreno further agreed that Mr. Patterson shot the victim. When asked whether the [Petitioner] directed Mr. Patterson to shoot the

victim, Mr. Moreno responded, “I don’t know what they were talking about.” Mr. Moreno did not recall the [Petitioner’s] yelling at Mr. Patterson to shoot the victim. Mr. Moreno agreed that Mr. Patterson shot an unarmed man. Mr. Moreno also agreed that Mr. Patterson kicked the bathroom door, which was locked, until it opened, and that Mr. Patterson was holding the gun during this process. Mr. Moreno denied that Mr. Patterson appeared “shocked or surprised” after shooting the victim. After Mr. Patterson shot the victim, Mr. Patterson did not “indicate they needed to leave right away[.]” When Mr. Moreno stood up after the shooting, Mr. Patterson did not point the gun at him. Mr. Patterson attempted to conceal the gun as the three men left the apartment. Mr. Moreno knew Mr. Patterson still had the gun, and Mr. Moreno expected the gun to be loaded after the victim was shot. Mr. Moreno stated that when he was on the apartment floor, he looked toward the door and not at the ground. Mr. Moreno stated that the [Petitioner] did not take anything from him or injure him. The [Petitioner] did not have a weapon when they were outside the apartment after the shooting.

On redirect examination, Mr. Moreno testified that when the [Petitioner] and Mr. Patterson entered his apartment, they did not search the other rooms and seemed to think Mr. Moreno was home alone until the victim’s cell phone rang from the bathroom. The [Petitioner] gave Mr. Patterson the gun and told him to “go check it out[.]” When asked who was “running the show,” Mr. Moreno responded, “I would say [the Petitioner].”

Aaron Dale Dodson, 2020 WL 200780, at *1-2. This Court affirmed the Petitioner’s convictions, finding sufficient evidence to sustain his convictions. Id. at *10

Post-Conviction. The Petitioner filed a pro se petition for post-conviction relief, alleging “ineffective assistance and any other colorable claim available.” With assistance of post-conviction counsel, the Petitioner filed an amended petition for post-conviction relief, alleging ineffective assistance of counsel due to trial counsel’s failure to be aware of the applicable law, failure to prepare for Petitioner’s representation at trial, failure to properly investigate relevant issues in the case, failure to properly investigate statements made by the Petitioner, failure to advise Petitioner of his right to testify, and failure to properly explain the process of trial, discovery and potential penalties. The post-conviction court held an evidentiary hearing on September 30, 2021.

At the hearing, the Petitioner and trial counsel testified. The Petitioner testified that on September 21, 2014, he and Patterson met to purchase marijuana from Thomas Moreno, whom they knew from a mutual acquaintance, Chris Doty. The Petitioner understood the purchase to be with one person, but when the Petitioner and Patterson got to the apartment,

there were two persons present. He stated that Patterson “took it as a set up” and “killed the other guy that was in the apartment.” The Petitioner testified that once they were inside the apartment, they heard some noises coming from the bathroom. Patterson then went to the bathroom door, which was locked. Patterson rammed his shoulder into the bathroom door until it opened. The Petitioner heard Patterson scuffle with the victim, and then he heard a gunshot while he was in another room with Moreno. As Patterson exited the bathroom, the victim fell to the floor behind him. The Petitioner stated that Patterson then grabbed Moreno by the collar of his shirt and demanded that he take them to “where the drugs or money was being kept.” The Petitioner explained, “being that [Patterson] felt he was being set up, he was going to turn and take the drugs that we were there to buy.” Both the Petitioner and Patterson left the apartment together. Asked why he did not just leave after he saw Patterson kill the victim, the Petitioner explained that they rode in the same car, and he did not want to “put [his] life in jeopardy and turn against a man who has a gun when I don’t.”

The Petitioner initially understood trial counsel’s strategy as attempting to get the lowest offer possible from the State, but the State did not offer anything. At some point, it was communicated that the person who came forward to testify would be offered a deal. Asked whether trial counsel advised him of the deal, the Petitioner stated “he had said a little bit, but I had stopped him pause [sic] I’m not going to tell on somebody.” The Petitioner said he did not entertain the offer to testify and refused to listen to the idea of his testifying against someone. The Petitioner understood that he had a right not to testify, but he signed the waiver not to testify because, in his view, he was going to prison if he testified or not. He understood the trial strategy as attempting to get a verdict for a lesser offense, not necessarily a verdict of not guilty.

The Petitioner said he was not feeling well the morning after jury selection. He “threw up” on his way to the courtroom, and he “told them I didn’t know that I would be able to come into the courtroom and not throw up during trial.” The Petitioner stated that he did not feel well the entire trial, and that he had to leave the courtroom two or three times to “throw up.” The Petitioner agreed that his sickness during the trial interfered with his ability to perceive what was happening during trial and assist in his defense. The Petitioner further agreed that had he been in a better condition, he could have assisted trial counsel in the cross-examination of Moreno, urging trial counsel to ask questions about his status as a drug dealer from the items that were found in his apartment.

Post-conviction counsel attempted to discuss the Petitioner’s experience with appellate counsel, but the court sustained the State’s objection, finding that issues relating to appellate counsel were not raised in the amended petition. The court noted that the “enumerated items in the petition...start with trial counsel,” the word “counsel” was singular throughout the petition, and the word “appellant” was not included in the petition.

Post-conviction counsel agreed that the word appellant was absent from the petition, but he argued that the amended petition could be construed to allow discussion of appellate issues.

On cross-examination, the Petitioner agreed that the trial court had a nurse check on him, but the Petitioner denied the shot offered by the nurse because he was concerned with his potential reaction to it. Although he “threw up a time or two more” after speaking with the nurse, the Petitioner agreed that he was not diagnosed with anything.

The Petitioner clarified that trial counsel came to visit him “pretty often” in preparation for trial but that the Petitioner did not think they discussed what “should have been covered,” as the jail would not allow them to talk too long. The Petitioner agreed that he did not alert the trial court to any deficiencies in trial counsel’s representation.

The Petitioner clarified that before the instant drug deal, he and Patterson “hung out” a few times. He denied ever meeting Moreno before September 21, 2014. He reiterated that Chris Doty arranged the deal to buy drugs from Moreno. The Petitioner agreed that he did not think the drug deal was a set up and the victim was in the bathroom when he was shot and killed. The Petitioner was aware that Patterson had a gun once they entered the apartment, but he had never seen Patterson with a firearm before then. The Petitioner brought \$300 to the drug deal, and the plan was for Patterson and the Petitioner to combine their funds to purchase two ounces of marijuana from Moreno.

The Petitioner emphasized that Patterson grabbed Moreno by the collar and demanded he take them to where the drugs or money was located after shooting the victim. The Petitioner clarified that when they left the apartment he walked behind Patterson and Moreno while Patterson held a gun to Moreno. The Petitioner agreed that Patterson did not have a gun pointed at or on him, that he could have left and that he and Patterson drove away together. The Petitioner repeated that he did not know a robbery was going to occur, that he did not take anything from anyone, that he did not hold a gun on anyone, and that he did not shoot anyone.

The Petitioner did not recall anything on the night of his arrest because he was under the influence of Xanax and alcohol. He also did not remember telling an officer “[you] might as well shoot [me] in the head,” or stating to an officer that he was “facing 15 to 20 for murder.” Further, the Petitioner agreed that he was disrespectful to his mother in phone calls while in custody.

The Petitioner agreed that trial counsel explained the charges against him and that he understood he was facing a life sentence for first-degree felony murder. He agreed that trial counsel explained before trial that he could be convicted of first-degree felony murder

if the State proved he was involved in a robbery and someone died. Further, the Petitioner agreed that he and trial counsel discussed the pros and cons of his case. The Petitioner clarified that trial counsel discussed whether he was going to testify multiple times but he “denied the conversation” because “[he] was not going to do that.” The Petitioner explained that he found out that Patterson was going to testify at his trial a week or two prior to trial, but it did not change his decision not to testify. He clarified that he knew he was going to prison either way and he would rather serve his time safely because “if you are a snitch in prison, you get stabbed.” Asked whether trial counsel did anything wrong in terms of finding other potential witnesses, the Petitioner responded, “I don’t really know how he could have gone by [sic] finding witnesses.”

On redirect examination, the Petitioner clarified that trial counsel explained, “if [the Petitioner] testified [, he] would get a lesser sentence and the other person would get life.” The Petitioner further clarified that he did not have a discussion with trial counsel about whether he should or should not testify. He agreed that he was not prepared to testify by trial counsel. The Petitioner denied having discussions with trial counsel to locate Chris Doty as a potential witness or speaking with a private investigator retained by trial counsel.

Trial counsel testified that when he originally began to represent the Petitioner on the underlying offenses, he “kept up a little bit with [the Petitioner]” and did not “make a lot of visits.” He stated that the first thing he did on the Petitioner’s case was to hire a private investigator. Once the Petitioner was indicted, trial counsel began discussing the case with the Petitioner, and he shared his idea of focusing the trial strategy on minimizing the Petitioner’s role in the offenses. Trial counsel admitted he knew of Chris Doty from his discussions with the Petitioner. Trial counsel was surprised the Petitioner discussed Doty in the instant hearing because the Petitioner did not want trial counsel to mention his name during the trial. Trial counsel attempted to locate Doty with the help of two investigators because he thought Doty could help minimize the Petitioner’s role in the offenses, but they were unsuccessful in locating him.

Trial counsel agreed with the Petitioner that the plea negotiations with the State went “horrible” because they could not get the State to make an offer. Trial counsel and the Petitioner discussed making serious offers to the State, and each offer, from twenty-two years to thirty-two years, was rejected. Trial counsel explained that he and the Petitioner did not have a conversation concerning testifying as a way to get a deal from the State, because the issue of Patterson’s testifying did not arise until six weeks before trial when trial counsel received a letter from the District Attorney informing him that Patterson would be testifying at trial. Trial counsel sent a copy of the letter to the Petitioner the same day he received it and began researching Patterson’s jail calls for impeachment evidence. Trial counsel ultimately decided the strategy for Patterson’s testimony was to highlight his willingness to “say anything just to get himself out of trouble.”

Trial counsel did not think it was a good idea to focus on discrediting the victim by throwing “mud” because he did not want to lose sight of minimizing the Petitioner’s role. He thought if he focused on the victim’s status as a drug dealer, that would make the Petitioner look more culpable of robbery. Trial counsel explained that he was able to get two of Moreno’s prior convictions on the record. He further explained that he was able to impeach one of the State’s detectives with his report because he testified in his direct examination that he found “just a little bit of marijuana” but his report described it as a “big bag of marijuana.”

Trial counsel testified that two of the State’s witnesses, LaNise Scott and Kelsey Hill, positively identified the Petitioner and described the Petitioner as one of the persons that put Moreno in fear. Those two identifications proved difficult in light of the defense strategy to minimize the Petitioner’s role.

Asked whether he and the Petitioner discussed the Petitioner’s potentially testifying prior to trial, trial counsel replied, “several times,” and he agreed with the Petitioner’s testimony that “there was not a lot to talk about.” Trial counsel stated, “if [the Petitioner] had asked for my advice, I would have said don’t.” Trial counsel explained that he did not view the Petitioner as someone that would come across well to the jury, and there was never a time when the Petitioner expressed second thoughts about not testifying. Trial counsel did not have a problem with the Petitioner’s decision because he understood the Petitioner’s perspective about the hardship he would face in prison.

Trial counsel knew from the Petitioner and independent investigation that the victims in the case were drug dealers, that Doty had a relationship with Moreno, and that Doty sent the Petitioner and Patterson to rob Moreno. Trial counsel reiterated that he did discuss with the Petitioner the “use immunity agreement” made between Patterson and the State. A copy of the immunity agreement was entered as an exhibit.

On cross-examination, trial counsel clarified that the main point of the defense strategy was to minimize the Petitioner’s role, but he did attack the credibility of Moreno and Sergeant Taylor. He explained that a part of the defense strategy was to shed light on why the police “got it wrong” in the Petitioner’s case by highlighting the rude and threatening tactics the detective used in Patterson’s interrogation. Trial counsel recalled the direct examination of Moreno, which gave the impression that Moreno was not a drug dealer. Trial counsel said that he did not pursue that line of questioning on cross-examination because he did not have evidence to refute it and proving that Moreno was a drug dealer was not going to acquit the Petitioner. Trial counsel agreed that there may have been some value in attacking Moreno’s credibility and that attacking his credibility would have been useful in minimizing the Petitioner’s role. Trial counsel further agreed that he

was familiar with the search warrant that included a reference to black digital scales and sandwich bags being found in Moreno's apartment. The search warrant was introduced as an exhibit.

Trial counsel agreed that Scott and Hill's testimony stating they had to take the victim to the hospital because 9-1-1's line was busy was suspicious. He explained that it seemed that "they didn't want the police to come to the apartment right then." When asked why he did not highlight that suspicion for the jury, trial counsel replied "you know for me to come up with an answer, I would be coming up with one that I thought [up right] now and probably not one that I thought of prior."

Trial counsel clarified that he did prepare a small outline just in case the Petitioner changed his mind about testifying at trial. He explained that he did not discuss the benefits of testifying with the Petitioner because he did not feel that the Petitioner's testimony would have presented well and that the Petitioner would not have answers to all of the questions he could have been confronted with on cross-examination.

Trial counsel explained that the Petitioner was not sick. Rather, the Petitioner was having a bad reaction after attempting to get "high" the night before trial. Trial counsel admitted that the Petitioner told him that he had to "throw up," and he did not know how many times he would need to "throw up." Trial counsel clarified that he did address the trial court concerning the Petitioner's condition on the second day of trial and described it to the trial court as the Petitioner having "stomach issues." From trial counsel's previous interactions with the Petitioner, "it did not seem as if he was mentally not there[,] he just was having a terrible stomach ache." The first time the Petitioner "threw up," trial counsel alerted the trial court. The trial court took a "natural break," and the jury left and did not see anything. The second time the Petitioner became vomitous, trial counsel "signaled to the court officer who relayed the message to the [trial] court." The Petitioner was taken to the holding cell and vomited outside the presence of the jury. The trial court instructed the jury to "pay no attention to that, he's just not feeling well." Trial counsel agreed that he did not ask for a continuance because he did not think the Petitioner was "incapable of sitting there and talking with me."

In closing, post-conviction counsel stated that trial counsel's strategy to minimize the Petitioner's role was sound, but there were issues with its execution. Post-conviction counsel argued that had trial counsel established that Moreno was a drug dealer and pointed out the flaws in the story told by the State's witnesses, the case would have been much more persuasive to the jury. Post-conviction counsel argued that the Petitioner was not competent to stand trial nor was he able to understand the proceedings because of his illness. Post-conviction counsel argued that had the Petitioner been feeling well, he would

have been able to assist trial counsel during trial. Post-conviction counsel requested the Petitioner's convictions be set aside and that he be granted a new trial.

The post-conviction court denied the Petitioner's petition by written order. In denying the petition, the post-conviction court found that the Petitioner was not deprived of his constitutional right to effective assistance of counsel because he failed to prove his issues by clear and convincing evidence. The Petitioner timely filed a notice of appeal.

ANALYSIS

On appeal, the Petitioner argues that the post-conviction court erred in denying the Petitioner relief because the Petitioner did not have effective assistance of counsel at trial. Although framed broadly in the Petitioner's amended petition for post-conviction relief, we glean the precise issues presented for our review based on the proof presented at the post-conviction hearing and the post-conviction court's order denying relief. See Holland v. State, 610 S.W.3d 450, 458 (Tenn. 2020) (noting that Tennessee appellate courts may only consider issues that were not formally raised in the post-conviction petition if the issue was argued at the post-conviction hearing and decided by the post-conviction court without objection). The Petitioner specifically contends that trial counsel's representation was ineffective because counsel (1) failed to move for a continuance knowing the Petitioner was sick and (2) failed to impeach a State's witness, Thomas Moreno, in relation to his status as a drug dealer. The Petitioner also alleges that the post-conviction court erred by refusing to allow testimony regarding errors made by appellate counsel because his amended petition for post-conviction relief was broad enough to include both trial and appellate counsel issues.

In response, the State argues that the post-conviction court properly denied relief, asserting that the Petitioner was unable to show that trial counsel's representation was deficient or prejudicial to the Petitioner by not moving for a continuance or impeaching the State's witness, Moreno. Further, the State contends that the post-conviction court properly limited proof relating to appellate counsel's alleged errors because the Petitioner's petition for post-conviction relief and his amended petition failed to include the issue. Upon careful review, we agree with the State.

I. Ineffective Assistance of Counsel. Post-conviction relief is only warranted when a petitioner establishes that his or her conviction or sentence is void or voidable because of an abridgment of a constitutional right. Tenn. Code Ann. § 40-30-103. A post-conviction petitioner has the burden of proving the factual allegations by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f); see Tenn. Sup. Ct. R. 28, § 8(D)(1); Nesbit v. State, 452 S.W.3d 779, 786 (Tenn. 2014). Evidence is considered clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn

from it. Lane v. State, 316 S.W.3d 555, 562 (Tenn. 2010); Grindstaff v. State, 297 S.W.3d 208, 216 (Tenn. 2009); Hicks v. State, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

A claim for post-conviction relief based on alleged ineffective assistance of counsel presents a mixed question of law and fact. Mobley v. State, 397 S.W.3d 70, 80 (Tenn. 2013) (citing Calvert v. State, 342 S.W.3d 477, 485 (Tenn. 2011)). A post-conviction court's findings of fact are conclusive on appeal unless the evidence in the record preponderates against them. Calvert, 342 S.W.3d at 485 (citing Grindstaff, 297 S.W.3d at 216; State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999)). "Accordingly, we generally defer to a post-conviction court's findings with respect to witness credibility, the weight and value of witness testimony, and the resolution of factual issues presented by the evidence." Mobley, 397 S.W.3d at 80 (citing Momon v. State, 18 S.W.3d 152, 156 (Tenn. 1999)). "However, we review de novo a post-conviction court's application of the law to its factual findings and accord no presumption of correctness to the court's conclusions of law." Id. (citing Grindstaff, 297 S.W.3d at 216; Finch v. State, 226 S.W.3d 307, 315 (Tenn. 2007); Vaughn v. State, 202 S.W.3d 106, 115 (Tenn. 2006)).

The right to effective assistance of counsel is protected by both the United States Constitution and the Tennessee Constitution. U.S. Const. amend. VI; Tenn. Const. art. I, § 9. In order to prevail on an ineffective assistance of counsel claim, the petitioner must establish (1) his lawyer's performance was deficient and (2) the deficient performance prejudiced the defense. Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996); Strickland v. Washington, 466 U.S. 668, 687 (1984). A petitioner proves deficient performance if the petitioner proves that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Id. (citing Strickland, 466 U.S. at 688; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). A petitioner proves that a deficiency resulted in prejudice if the petitioner establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 370 (quoting Strickland, 466 U.S. at 694). "Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." Goad, 938 S.W.2d at 370.

In assessing an attorney's performance, we "must be highly deferential and should indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." State v. Burns, 6 S.W.3d 453, 462 (citing Strickland, 466 U.S. at 689). In addition, we must avoid the "distorting effects of hindsight" and must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. 689-90. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the

variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.” Id. at 688-89. “The fact that a particular strategy or tactic failed or hurt the defense, does not, standing alone, establish unreasonable representation.” Goad, 938 S.W.2d at 369. “However, deference to matters of strategy and tactical choices applies only if the choices are informed ones based upon adequate preparation.” House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (quoting Goad, 938 S.W.2d at 369).

Failure to Move for a Continuance. The Petitioner argues that trial counsel was ineffective in failing to move for a continuance because he knew the Petitioner was sick on day two of the trial. The Petitioner suggests that because trial counsel knew the Petitioner “ingested a great deal of drugs the night before and was extremely high,” the Petitioner was not competent to stand trial. In support, the Petitioner relies upon State v. Reid, for the proposition that a defendant must have “the capacity to understand the nature and object of the proceedings against him, to consult with counsel and to assist in preparing his defense.” 164 S.W.3d 286, 306 (Tenn. 2005) (citing State v. Black, 815 S.W.2d 166, 174 (Tenn. 1991) (quoting Mackey v. State, 537 S.W.2d 704, 707 (Tenn. Crim. App. 1975)). Further, the Petitioner argues that had trial counsel asked for a continuance, “the trial court would have had no choice but to adhere to existing case law and reset the entire trial” until the Petitioner was competent to stand trial. In response, the State argues that the Petitioner failed to prove that trial counsel’s failure to move for a continuance fell below an objective standard of reasonableness, and therefore, trial counsel’s decision to proceed with trial was not deficient. The State contends that the post-conviction court properly determined that “there was no proof produced . . . to establish the Petitioner’s illness affected the outcome of trial.”

At the post-conviction hearing, trial counsel explained that the Petitioner was not sick. Rather, he was having a bad reaction from attempting to get “high” after the first day of trial. Trial counsel alerted the trial court of the Petitioner’s sickness and described the Petitioner as having “stomach issues.” The trial court addressed the issue by summoning a nurse who offered the Petitioner a shot to help with the nausea. The Petitioner refused the shot because he was concerned about the side effects. The Petitioner vomited twice outside of the presence of the jury, and the jury was instructed that the Petitioner was not feeling well. Trial counsel observed that the Petitioner was mentally present for trial, and that the Petitioner was able to sit and confer with him during trial. The post-conviction court accredited the testimony of trial counsel over the Petitioner’s testimony. The record supports the determination of the post-conviction court. Trial counsel made an informed decision not to move for a continuance and advised the trial court of the Petitioner’s condition. Moreover, while the Petitioner relies generally on Reid for the proposition that a defendant must be competent to stand trial, Reid also requires a defendant to prove that he or she is incompetent to stand trial by a preponderance of the evidence. Id. at 307 (citing

State v. Oody, 823 S.W.2d 554, 559-60 (Tenn. Crim. App. 1991)). Based on this record, the Petitioner has failed to establish that his nausea or becoming vomitous on the second day of trial equated to incompetence to stand trial. In other words, even if trial counsel had moved for a continuance based on the Petitioner's condition, the motion would not have been granted. Because the Petitioner has failed to establish deficient performance or prejudice arising therefrom, he is not entitled to relief.

Failure to Impeach State's Witness. The Petitioner asserts that trial counsel was ineffective in failing to impeach Moreno with his status as a drug dealer. In the Petitioner's view, attacking Moreno's credibility would have undermined the State's theory and increased the likelihood of success of their defense strategy to minimize the Petitioner's role in the offense. The Petitioner argues that trial counsel's strategy was "neither informed nor based upon adequate preparation." In response, the State argues that the proof presented at the post-conviction hearing established that trial counsel made a sound strategic decision not to impeach Moreno with his status as a drug dealer. The State contends that the Petitioner failed to establish prejudice because the jury heard proof that "Moreno had two prior felony convictions" and that "an amount of marijuana" was found in his apartment. In the State's view, even if trial counsel had established that Moreno was a drug dealer, the outcome of the Petitioner's trial would not have been different.

At the post-conviction hearing, trial counsel agreed that attacking Moreno's credibility would have been useful in the defense strategy. However, trial counsel explained that he did impeach Moreno with two prior convictions, but he declined to impeach Moreno regarding his status as a drug dealer because he wanted to focus on minimizing the Petitioner's role and not proving that the victims were drug dealers. Trial counsel recalled Moreno's direct examination, during which he testified that sandwich bags and a black scale were not found in his home. Trial counsel acknowledged that he knew the Petitioner was a drug dealer and that he was familiar with the search warrant, showing that marijuana, sandwich bags and a black scale were found in Moreno's home. Trial counsel reiterated numerous times that he did not want to "get caught up" attempting to prove the victim was a drug dealer. In trial counsel's view, proving that Moreno was a drug dealer would have made the State's theory that the Petitioner and Patterson went to Moreno's apartment to commit a robbery more plausible.

In finding that the Petitioner was not prejudiced by trial counsel's decision, the post-conviction court accredited the testimony of trial counsel. In review of this issue, the post-conviction court noted that the Petitioner's post-conviction counsel viewed the instant case to be "a very difficult case to win[.]" that it viewed this issue to be one of several "tactical" decisions by trial counsel, and that it did not want to "second-guess tactical decisions or strategy as determined by trial counsel." The record supports the determination of the post-conviction court. Giving great deference to trial counsel's

defense strategy, his decision not to impeach Moreno regarding his alleged status as a drug dealer was sound and well-informed. See House v. State, 44 S.W.3d 508, 515 (Tenn. 2001) (finding deference on matters of strategy and tactical choices when they are informed and based on adequate preparation); Strickland v. Washington, 466 U.S. 668, 690 (1984) (requiring judicial scrutiny of counsel’s performance to be highly deferential and highlighting that “strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable”). Because the Petitioner has failed to establish deficient performance or prejudice arising therefrom, he is not entitled to relief.

II. Waiver of Alleged Errors of Appellate Counsel. The Petitioner argues that the post-conviction court erred by refusing to allow testimony regarding errors made by appellate counsel because his amended petition for post-conviction relief was broad enough to include both trial and appellate counsel issues. In response, the State asserts that the petition did not include any reference to appellate counsel and that the post-conviction court correctly limited proof to the issues actually raised in the amended petition because vague issues lacking factual support fail to meet the requirements of the Post-Conviction Procedure Act. Additionally, the State notes that during the post-conviction hearing the Petitioner did not request to amend his petition after the State objected to inclusion of this claim.

The Post-Conviction Procedure Act states that a petition for post-conviction relief “must contain a clear and specific statement of all grounds upon which relief is sought, including full disclosure of the factual basis of those grounds.” Tenn. Code Ann. § 40-30-106(d). If the petitioner is granted an evidentiary hearing, the issues at the hearing are limited to those raised or stated in the petition. See id. § 40-30-110(c) (“Proof upon the petitioner’s claim or claims for relief shall be limited to evidence of the allegations of fact in the petition.”); Tenn. Sup. Ct. R. 28, § 8(D)(4) (requiring that the issues at the evidentiary hearing “be limited to issues raised in the petition”). However, the post-conviction court is directed to “liberally allow” petitioners to amend the petition “[i]f evidence [during the hearing] is objected to on the basis that it concerns issues not raised in the petition or answer.” Tenn. Sup. Ct. R. 28, § 8(D)(5). This approach promotes the proper preservation and airing out of all claims at the appropriate stage of the post-conviction proceedings. Holland v. State, 610 S.W.3d 450, 457 (Tenn. 2020).

At the post-conviction hearing, post-conviction counsel asked the Petitioner if he recalled whether appellate counsel raised “any issues that we discussed on the appeal,” and the Petitioner replied, “No.” The State objected, advised the post-conviction court that the issue was not included in the amended petition, and post-conviction counsel agreed that the issue was not included. Post-conviction counsel said that while he did not draft the amended petition and would have worded it differently, “there was just enough room” to

interpret the petition to include challenges to the effective assistance of appellate counsel. Post-conviction counsel agreed that the word “appellate” was absent from the petition, but argued that the amended petition could be construed to allow discussion of appellate issues because “it was written in a boiler plate fashion that would allow [the Petitioner] to raise any conceivable issue within reason that he wanted to raise before the post-conviction court.” The post-conviction court disagreed, and noted that since post-conviction counsel had been appointed to the Petitioner’s case, the petition had not been subsequently amended. The post-conviction court then reviewed the amended petition and noted that the “enumerated items in the petition . . . start with trial counsel,” the word “counsel” was singular throughout the petition, and the word “appellant” was not included in the petition. The post-conviction court sustained the State’s objection, finding that issues relating to appellate counsel were not raised in the amended petition. We agree with the determination of the post-conviction court. Because the amended petition failed to allege issues concerning appellate counsel and, upon being raised for the first time during the hearing, the Petitioner failed to seek an additional amendment or continuance after the objection by the State, the omitted issue must be considered waived by this court. Accordingly, the Petitioner is not entitled to relief on this basis.

CONCLUSION

Based on the foregoing, the judgment of the post-conviction court is affirmed.

CAMILLE R. MCMULLEN, JUDGE