

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
October 2, 2019 Session

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JOHN BRENT v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 11-04915 Paula L. Skahan, Judge

No. W2018-01968-CCA-R3-PC

Petitioner, John Brent, was convicted by a Shelby County jury of aggravated robbery and aggravated burglary. The trial court sentenced Defendant to an effective sentence of 30 years' imprisonment for his convictions. Defendant's convictions and sentences were affirmed by this court on direct appeal. *State v. John Brent*, No. W2013-01252-CCA-R3-CD, 2014 WL 5342610, at *1 (Tenn. Crim. App. Oct. 21, 2014), *perm. app. denied* (Tenn. Apr. 13, 2015). Petitioner sought post-conviction relief, alleging that his trial counsel was ineffective. Following evidentiary hearings, the post-conviction court denied relief. Following our 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

THOMAS T. WOODALL, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ROBERT W. WEDEMEYER, JJ., joined.

Lance R. Chism, Memphis, Tennessee (on appeal) and Brandi L. Heiden, Memphis, Tennessee (at trial), for the appellant, John Brent.

Herbert H. Slatery III, Attorney General and Reporter; Zachary T. Hinkle, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Charles Summers and Leslie Byrd, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Trial

The evidence presented at trial was summarized by a panel of this court on direct appeal. *State v. John Brent*, 2014 WL 5342610, at *1-3. On July 11, 2011, Petitioner approached the victim, who was sitting on his front porch, and asked the victim for water.

The victim went into his house to get a glass of water. When the victim returned to the door, Petitioner had entered the house. The victim testified that Petitioner “grabbed [him] in a bear hug and said get down on your knees.” The victim felt “pressure on [his] neck” from “scissors, the end of the barrel of a pistol or what it was at that time.” Petitioner ordered the victim to undress, and he tied the victim’s hands and feet with twine. When the victim freed himself, he saw that Petitioner had stolen his vehicle. Petitioner also took the victim’s checkbook, \$60 cash, and a small knife. *Id.*

The victim described Petitioner to police, stating that Petitioner had “a cut . . . maybe 2 inches wide” on his wrist. He stated that it was healed and “kind of puffy.” Petitioner also had a tattoo on his chest that the victim saw “above the shirt that he was wearing.” *Id.*

On July 18, 2011, Petitioner was a passenger in the victim’s vehicle, which was stopped for a traffic violation in Atlanta. Officers learned that the vehicle, a green Ford Explorer, had been stolen. The driver of the vehicle told police that he had been given the vehicle by Petitioner. Detective D.L. Wareham of the Atlanta Police Department took a statement from Petitioner. Petitioner stated that the vehicle belonged to a relative in Memphis, and Petitioner gave the name of the victim. The victim identified Petitioner in both a pre-trial photographic lineup and at trial as the man who entered his house and robbed him. *Id.*

Post-conviction hearings

The post-conviction court heard evidence in support of the post-conviction petition at five separate evidentiary hearings.

As an initial matter, Petitioner’s trial counsel was deceased at the time of the post-conviction hearings. Gregory Carman, who was employed with the Shelby County Public Defender’s Office with trial counsel, testified in trial counsel’s stead. Mr. Carman testified that trial counsel was generally “a very thorough attorney when it came to trial[.]” Mr. Carman testified that he had reviewed Petitioner’s case file. Mr. Carman testified that trial counsel “typically would go in the back and spend quite a lengthy period of time on the first appointment of the case with a client.” Trial counsel’s notes on the case jacket of the file indicated that trial counsel met with Petitioner for an initial interview, but the file did not contain any notes about subsequent meetings with Petitioner.

Failure to call Marion Blaine

Trial counsel made a note of Marion Blaine's name and phone number in Petitioner's file. His notes indicated that Ms. Blaine was with Petitioner on the day following the robbery. Nothing in the file suggested that trial counsel contacted or interviewed Ms. Blaine. Mr. Carman testified that it "look[ed] like this was information [trial counsel] obtained from [Petitioner] about some of the basic facts of the case and some potential witnesses to speak to."

Marion Blaine, Petitioner's cousin, testified that she spoke to Petitioner on the phone on the afternoon of July 11, 2011. Petitioner told her that he wanted to arrange a time to go visit her, but that he "had to get a ride." The following day, Petitioner picked up Ms. Blaine and her daughter and drove them to Ms. Blaine's sister's house. Ms. Blaine testified that Petitioner was driving a truck that she believed was white. She testified that Petitioner's hair was braided. She did not see a "two inch gash" on Petitioner's wrist.

Ms. Blaine testified that she left "message[] after message[]" for trial counsel to contact her after she learned that Petitioner had been arrested. Ms. Blaine wanted trial counsel to know that she and her family had spoken to Petitioner on the day of the alleged incident and that they saw him on the following day. On cross-examination, Ms. Blaine acknowledged that she did not attend Petitioner's trial. She testified that she and her mother were at the courthouse on one of Petitioner's court dates, which she believed was his trial date, but they "didn't get the correct information on what courtroom he was in."

Petitioner testified that he tried to communicate with trial counsel about potential alibi witnesses and the State's discovery, and trial counsel did not respond to him. Petitioner testified that trial counsel told him that Ms. Blaine's testimony would not have helped his case.

Physical description

Trial counsel received discovery materials from the State on October 24, 2011. The discovery response contained the following physical description of Petitioner given by the victim on July 26, 2011:

Low afro hair, black male, about 25 to 30 years old, he had athletic arms. He had a cut behind where your watch would go, it was a gash about two inches long. It was old and puffy, but it had healed. He had a tattoo on his chest, I could only see the beginning of it.

The Memphis Police Department incident report contained the following physical description of Petitioner: “age of 27, male black, height 5’9[”], ethnicity non-Hispanic, weight 180 pounds, language English.” The description noted a “primary feature” under “scars, marks, and tattoos,” a “tattoo, upper chest, rope style.” Mr. Carmen testified that he “wouldn’t necessary rule [] as a problem” that the scar on Petitioner’s wrist was not mentioned in the description. Mr. Carmen testified that “[t]his was all brought out in [Petitioner’s] trial.”

Petitioner also introduced a copy of a report from the Fulton County Jail in Atlanta, Georgia, that did not have any notations on the section for “scars, marks, tattoos, and amputations.” Additionally, Petitioner introduced booking photographs from the Fulton County Jail. The photos were taken seven days after the incident involving the victim in this case. Mr. Carmen noted that in the photos, Petitioner’s hair appears to be “braided to the scalp.” Mr. Carmen testified that trial counsel “did develop [] as an issue at trial” the “discrepancies in the victim’s description versus [Petitioner]’s appearance.”

On cross-examination, Petitioner acknowledged that trial counsel cross-examined the victim at trial about his ability to identify Petitioner as the perpetrator when the victim testified that Petitioner “had him in a bear hug.”

July 13, 2011 traffic stop

On July 13, 2011, two days after the robbery and five days before Petitioner was arrested in Atlanta, Petitioner was given a traffic citation in Memphis. Mr. Carmen testified, “as far as [Petitioner] receiving a ticket in [the stolen vehicle] two days after the crime allegedly occurred[,] I’m not sure exactly how that would have been beneficial to know any additional information about that.” Petitioner testified that his case was “based [on] identity.” He testified that trial counsel should have interviewed the ticketing officer to get a physical description of Petitioner.

Motion to suppress photo lineup

Mr. Carmen testified that trial counsel did not file a motion to suppress the photo lineup. In Mr. Carmen’s opinion, the decision not to seek suppression of the photo lineup might have been a tactical decision. He testified that he believed it would have been “reasonable to consider filing a motion to suppress” the photo lineup, but he testified that in some cases, attorneys “might want to have more of [an] ambush attack at trial” and use that “sort of ammunition” during cross-examination.

Petitioner testified that he asked trial counsel to file a motion to suppress the victim's identification of him. He testified that he was "the only one in the photo array that had braids," and the victim stated that the man who robbed him "had a low afro to the scalp." Petitioner testified that trial counsel told him he would file a motion to suppress. When trial counsel did not file a motion, Petitioner prepared and filed a motion to suppress the photo lineup himself.

Motion to suppress Petitioner's statement

Petitioner testified that trial counsel should have sought to suppress the statement Petitioner gave to Detective Wareham of the Atlanta Police Department. Petitioner testified that he told Detective Wareham that he got the vehicle from someone named "Johnny B." to go visit his family in Atlanta. Detective Wareham asked Petitioner if he meant John Stuart, and Petitioner replied, "no." Petitioner denied that Detective Wareham advised him of his *Miranda* rights. Petitioner was a passenger in the vehicle.

Mr. Carmen testified that he "probably would have tried to suppress [Petitioner's statement] based upon the limited information in [Petitioner's] file." He testified, "I'm not saying I would have been successful," but that he would have sought to suppress the statement "because it involved [Petitioner]'s stating how he obtained the vehicle and from whom."

Detective Wareham testified that he took Petitioner's statement following Petitioner's arrest on July 18, 2011. He testified that he advised Petitioner of his *Miranda* rights before taking his statement and that Petitioner "said he understood and wanted to talk with [him] without a lawyer present[.]"

Hearsay testimony

At the time of Petitioner's arrest, the driver of the vehicle told Detective Wareham that he was given the vehicle by Petitioner. Mr. Carmen testified that he believed that the driver's statement to police was "potentially" hearsay, but some attorneys decide not to object to everything that is objectionable. Mr. Carmen testified that trial counsel might have decided not to object to the driver's statement as hearsay to establish that someone else was driving the victim's vehicle. Mr. Carmen testified that he "probably would not have objected" and that the driver's statement was not very damaging to Petitioner's case because "[a]ll the driver said is I'm driving the car cause [Petitioner] gave me the keys, essentially. That doesn't eliminate or implicate [Petitioner] in stealing the car."

Analysis

Petitioner contends that the post-conviction court should have granted him relief because his trial counsel was ineffective for failing to: 1) interview Marion Blaine and call her as a witness at Petitioner's trial; 2) obtain and introduce into evidence a report from Petitioner's arrest in Atlanta that omitted a scar on Petitioner's wrist, as described by the victim, from Petitioner's physical description; 3) obtain and introduce into evidence Petitioner's booking photo that shows Petitioner's hair was braided at the time of his arrest, which is inconsistent with the victim's description of a "low afro;" 4) file a motion to suppress the photo lineup as suggestive; 5) timely photograph Petitioner's wrist to show that Petitioner did not have a scar; 6) investigate Petitioner's traffic stop in Memphis; 7) file a motion to suppress Petitioner's statement to police during the traffic stop; 8) object to hearsay testimony of Detective Wareham about what the driver of the vehicle stated to him.

Post-conviction relief is available when a "conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States." T.C.A. § 40-30-103. The burden in a post-conviction proceeding is on the petitioner to prove his factual allegations by clear and convincing evidence. T.C.A. § 40-30-110(f); *see Dellinger v. State*, 279 S.W.3d 282, 293-94 (Tenn. 2009). On appeal, we are bound by the post-conviction court's findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Smith v. State*, 357 S.W.3d 322, 335-36 (Tenn. 2011) (citing *Dellinger*, 279 S.W.3d at 294)). The post-conviction court's application of law to its factual findings is reviewed de novo with no presumption of correctness. *Smith*, 357 S.W.3d at 336 (citing *Calvert v. State*, 342 S.W.3d 477, 485 (Tenn. 2011)).

Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. *Dellinger*, 279 S.W.3d at 293 (citing U.S. Const. amend. VI; *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)). When a claim of ineffective assistance of counsel is made under the Sixth Amendment to the United States Constitution, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "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 v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). The *Strickland* standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). Because they relate to mixed questions of law and fact, we review the post-conviction court's conclusions as to whether counsel's performance was deficient and whether that

deficiency was prejudicial under a de novo standard with no presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 457 (Tenn. 2001).

Deficient performance requires a showing that “counsel’s representation fell below an objective standard of reasonableness,” despite the fact that reviewing courts “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 688-89. When a court reviews a lawyer’s performance, it “must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s conduct, and to evaluate the conduct from the perspective of counsel at that time.” *Howell v. State*, 185 S.W.3d 319, 326 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 689). We will not deem counsel to have been ineffective merely because a different strategy or procedure might have produced a more favorable result. *Rhoden v. State*, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991). We recognize, however, that “deference to tactical choices only applies if the choices are informed ones based upon adequate preparation.” *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992) (citing *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)).

As to the prejudice prong, the petitioner must establish “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. “That is, the petitioner must establish that his counsel’s deficient performance was of such a degree that it deprived him of a fair trial and called into question the reliability of the outcome.” *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008) (citing *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999)).

Failure to interview witness

Defendant contends that trial counsel did not adequately investigate or present the testimony of Marion Blaine at trial. At a post-conviction hearing, when a petitioner presents a witness whom he claims should have testified at trial, the post-conviction court must determine whether such testimony would have been admissible and was material to the defense. *Nesbit v. State*, 452 S.W.3d 779, 796 (Tenn. 2014) (citing *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008)). “If the post-conviction court determines that the proffered testimony would not have been admissible at trial or that, even if admissible, it would not have materially aided the petitioner’s defense at trial, the post-conviction court is justified in finding that trial counsel was not deficient in failing to call that witness at trial.” *Pylant*, 263 S.W.3d at 869. If the proffered testimony is both admissible and material, the post-conviction court must assess whether the witness is credible. *Id.*

“Counsel is not required to interview every conceivable witness,” and “when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether.” *Nesbit v. State*, 452 S.W.3d 779, 796 (Tenn. 2014) (quoting *Strickland*, 466 U.S. at 691).

Here, the post-conviction court found that trial counsel made an “informed decision based upon adequate preparation” and that Petitioner failed to establish that trial counsel’s performance in failing to interview or present the testimony of Ms. Blaine was deficient. The post-conviction court found that “the witness would have given a physical description of Petitioner that differs from the description the victim gave police.” The court noted, however, that trial counsel “already made reasonable preparations to support his strategy” to challenge Petitioner’s identity as the perpetrator by focusing on discrepancies between the victim’s description of the perpetrator and Petitioner’s physical appearance at the victim’s deposition and by highlighting those discrepancies at trial. The court also noted that the victim admitted during his deposition that he was “not positive” that Petitioner had braids during the robbery.

Ms. Blaine testified at the evidentiary hearing that she saw Petitioner on the day following the incident, and Petitioner’s hair was “braided up.” The post-conviction court did “not find it convincing” that Ms. Blaine’s testimony “that Petitioner had a different hairstyle than what the victim” described would have changed the outcome of the case. Implicit in the post-conviction court’s finding was that Ms. Blaine’s testimony was not “material to the defense.” *See Nesbit*, 452 S.W.3d at 796.

The post-conviction court also concluded that Ms. Blaine’s testimony would not have changed the outcome of the trial and that Petitioner failed to establish that he was prejudiced by trial counsel’s alleged deficiency. The most incriminating proof at trial was not the victim’s description of the perpetrator, but rather evidence that Petitioner was apprehended in the victim’s stolen vehicle. Petitioner told police that he borrowed the vehicle from the victim and that the victim was a relative of his. Petitioner testified at the post-conviction hearing that he told police that he borrowed the vehicle from a friend named “Johnny B.,” not from the victim. The post-conviction court explicitly discredited this testimony, finding it “odd that Petitioner did not try to contact this ‘Johnny B.’ in order to testify on his behalf.”

Although it was not brought up by the State or the post-conviction court, we note one portion of Ms. Blaine’s testimony at the post-conviction hearing to which she presumably would have testified if she had been called as a witness at trial. Ms. Blaine testified that Petitioner told her he wanted to visit her, but in order to do so, he “had to get

a ride.” This conversation occurred in a phone call on the very day the victim was robbed and his vehicle taken. Ms. Blaine’s testimony could easily have been accepted by the jury as proof of Petitioner’s motive to commit the robbery of the victim. Accordingly, her testimony could have been additional evidence that Petitioner was not prejudiced by Ms. Blaine not being called as a witness at trial.

We conclude that the evidence does not preponderate against the post-conviction court’s conclusions that trial counsel’s failure to interview Ms. Blaine and present her testimony at trial was not deficient and did not affect the outcome of Petitioner’s trial. Defendant is not entitled to relief on this issue.

Failure to obtain or introduce evidence from Petitioner’s arrest

Petitioner contends that trial counsel was ineffective for failing to offer into evidence two items from his arrest in Atlanta: a report that did not list any “scar or mark” and a booking photograph that showed Petitioner with braided hair. Petitioner argues that both should have been presented to discredit the victim’s description of Petitioner as having a “low afro” and a scar on his wrist. The State responds that Petitioner has failed to establish that either of these potential exhibits would have changed the outcome of Petitioner’s case.

In its order denying relief, the post-conviction court did not make specific findings regarding the evidence that Petitioner claims counsel was deficient for failing to present. Generally, a post-conviction court is required to set forth in its written order “all grounds presented” and “state the findings of fact and conclusions of law with regard to each ground.” T.C.A. § 40-30-111(b). While this requirement has been construed as mandatory, a post-conviction court’s failure to follow this requirement does not necessitate reversal. *Michael Davis v. State*, No. W2017-01592-CCA-R3-PC, 2018 WL 3599959, at *5 (Tenn. Crim. App. July 26, 2018), *no perm. app. filed* (citing *State v. Swanson*, 680 S.W.2d 487, 489 (Tenn. Crim. App. 1984)). The legislature intended this requirement to facilitate appellate review of the lower court’s proceedings, and “the failure to meet the requirement neither constitutes constitutional abridgement nor renders the conviction or sentence of the appellant void or voidable.” *Swanson*, 680 S.W.2d at 489. The post-conviction court’s findings on related ineffective assistance of counsel issues and its general denial of the petition provide this court with insight regarding the post-conviction court’s conclusions and a foundation for appellate review. *Id.*

Although the post-conviction court did not make explicit findings regarding these claims, the post-conviction court’s findings and denial of Petitioner’s claim regarding Ms. Blaine’s testimony describing Petitioner’s physical appearance are sufficient to allow for this court’s review of this claim. As noted above, the post-conviction court found that

Ms. Blaine's description of Petitioner's hair as having been braided on the day following the incident was not convincing proof that the victim misidentified Petitioner. It follows that the booking photo taken one week after the incident would not likely have changed the outcome of the case.

Further, Ms. Blaine testified at the post-conviction hearing that she did not see a scar or gash on Petitioner's wrist. On Petitioner's arrest report, there is a box captioned "scars, marks, tattoos, amputations," and the box was left blank. Mr. Carmen testified at the post-conviction hearing that the fact that the arrest report "doesn't mention the gash on the arm" was not significant because such reports "don't necessarily notate every single potential scar" on an individual. The victim described the scar as an older cut that had healed but was still "puffy." Notably, the victim also stated that Petitioner had a tattoo on his chest, which is partially visible in Petitioner's booking photo; however, the arrest report makes no mention of Petitioner's tattoo either.

We conclude that Petitioner has not established that trial counsel's failure to present the Atlanta arrest report or booking photo was deficient or that Petitioner was prejudiced by the alleged deficiency. As discussed above, discrepancies in the victim's description of Petitioner were insignificant in light of the proof of Petitioner's guilt at trial. Petitioner is not entitled to relief on this issue.

Failure to suppress photo lineup

Petitioner contends that trial counsel was ineffective for failing to file a motion to suppress the victim's identification of Petitioner in the photo lineup because the lineup was unduly suggestive. The State responds that Petitioner has not established that trial counsel's decision not to file a motion to suppress the lineup was not strategic and that Petitioner has failed to establish that such a motion would have been granted.

Petitioner testified at the post-conviction hearing that he asked trial counsel to file a motion to suppress the photo lineup and that trial counsel indicated that he would file a motion, but trial counsel never filed such a motion. The post-conviction court found that trial counsel's decision not to seek suppression of the photo lineup was "tactical" and that Petitioner failed to establish that trial counsel's failure to file a motion to suppress the lineup was deficient. The post-conviction court noted that Mr. Carmen testified, "depending on your position and whether you want to pursue a motion to suppress a photo spread or you're willing to save t[h]at sort of ammunition of questions for the trial would have to be made by that individual attorney." The court agreed with Mr. Carmen's assessment and also noted that trial counsel "made adequate preparations when he highlighted the discrepancies between the victim's description of the culprit and Petitioner at the deposition." The post-conviction court further concluded that even if

trial counsel's performance was deficient, Petitioner failed to prove that he was prejudiced by counsel's failure to seek suppression of the photo lineup because trial counsel adequately challenged "the identity discrepancies" at trial.

Petitioner argues that the photo lineup was "quite suggestive." Petitioner asserts that his skin tone is darker than the other five individuals in the lineup, that he is "stockier" than the other five individuals in the lineup, and that Petitioner and one other individual in the lineup are the only ones who appear to have a "low afro" as the victim described. The State argues that the photos of the individuals in the lineup are not so "grossly dissimilar" that a motion to suppress the lineup would have been granted.

To establish that trial counsel's failure to file a pretrial motion to suppress evidence resulted in prejudice, a petitioner "must show by clear and convincing evidence that (1) a motion to suppress would have been granted, and (2) there was a reasonable probability that the proceedings would have concluded differently if counsel had performed as suggested." *Terrance Cecil v. State*, No. M2009-00671-CCA-R3-PC, 2011 WL 4012436, at *8 (Tenn. Crim. App. Sept. 12, 2011), *no perm. app. filed* (citing *Vaughn v. State*, 202 S.W.3d 106, 120 (Tenn. 2006)). "In essence, a petitioner should present a motion to suppress hearing within the petitioner's evidentiary hearing." *Danny Santarone v. State*, No. E2018-01312-CCA-R3-PC, 2019 WL 6487419, at *10 (Tenn. Crim. App. Dec. 2, 2019), *no perm. app. filed*.

"[C]onvictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons v. U.S.*, 390 U.S. 377, 384 (1968). In determining the validity of a pretrial identification, the trial court must first determine whether the identification procedure was unduly suggestive. *See Neil v. Biggers*, 409 U.S. 188, 198 (1972). "To be admissible as evidence, an identification must not have been conducted in such an impermissibly suggestive manner as to create a substantial likelihood of irreparable misidentification." *State v. Cribbs*, 967 S.W.2d 773, 794 (Tenn. 1998); *see Simmons*, 390 U.S. at 383. If the identification procedure was unduly suggestive, the second question is whether, under the totality of the circumstances, the identification was reliable despite the undue suggestion. *Biggers*, 409 U.S. at 198-99. In Tennessee, it is unnecessary to apply the totality of the circumstances test described in *Biggers* if the trial court determines that the identification procedure was not unnecessarily suggestive. *See State v. Butler*, 795 S.W.2d 680, 686 (Tenn. Crim. App. 1990).

When a defendant argues that a lineup is suggestive based on differences between the subjects of the lineup, this court has required that the subjects be "grossly dissimilar"

before it will find that the lineup is impermissibly suggestive. *See State v. Edwards*, 868 S.W.2d 682, 694 (Tenn. Crim. App.1993) (citing *U.S. v. Wade*, 388 U.S. 218 (1967); *Young v. State*, 566 S.W.2d 895 (Tenn. Crim. App. 1978); *Shye v. State*, 506 S.W.2d 169 (Tenn. Crim. App. 1973)).

We have reviewed the photo lineup that Petitioner introduced as an exhibit at the post-conviction hearing. With regard to Petitioner's claim that he is stockier than the other individuals in the lineup, only the individuals' heads are shown in the photos, making any difference in their stockiness very unnoticeable. With regard to Petitioner's claim that his complexion is darker than the other individuals in the lineup, the State notes that the photo lineup that was introduced at the post-conviction hearing is a "distorted version" of the photo lineup that the victim actually viewed, and the State asserts that the "lighting on the image" is different. In reviewing the photo lineup that was introduced at the post-conviction hearing, however, we do not discern an obvious difference in the skin tones of the six individuals pictured. With regard to Petitioner's claim that only he and one other individual have a "low afro" as was described by the victim, we first note that Petitioner testified at the post-conviction hearing that his hair was braided in the lineup. The post-conviction court noted that Petitioner testified "that the photo shows him with cornrows instead of an afro" and that he "was the only one in the photo lineup with that hairstyle[.]" It appears from the lineup that all six men, including Petitioner, have braided or twisted hair. Four of the men have longer braids or twists than Petitioner and one other individual, who both have shorter hair or hair that is braided closer to their scalps. Nevertheless, we conclude that the hairstyles of the men in the lineup are not so "grossly dissimilar" that a motion to suppress the lineup would have been granted.

We conclude that the lineup was not unduly suggestive and was not subject to suppression. Because the lineup was not unduly suggestive, consideration of the *Biggers* factors is not required. Petitioner has not established that a motion to suppress the photo lineup would have been granted. Petitioner is therefore not entitled to relief on this issue.

Failure to photograph Petitioner's scar

Petitioner contends that trial counsel was ineffective for failing to timely photograph the scar on his wrist. Petitioner argues that trial counsel should have taken a photograph of his wrist when he was first appointed to represent him in October, 2011, which Petitioner asserts "would have documented what Petitioner's wrist looked like approximately three months after the robbery." The State responds that the post-conviction court properly concluded that Petitioner failed to establish that trial counsel was deficient or that Petitioner was prejudiced by the alleged deficiency.

The post-conviction court did not specifically address whether trial counsel was ineffective for failing to timely photograph Petitioner's wrist. Petitioner testified at the post-conviction hearing that trial counsel took a photograph of his chest and wrists during his trial in November, 2012. The parties agree that trial counsel presented photos of Petitioner's wrist at trial that showed Petitioner did not have a two-inch wide "puffy" scar on his wrist as the victim had described. However, it is also agreed that the victim testified at trial that the scar must have healed in the 16 months between the robbery and Petitioner's trial.

In its brief on appeal, the State argues that because "there is nothing in the record that establishes what [P]etitioner's wrist looked like three months after the robbery[.]" Petitioner has failed to establish trial counsel's ineffectiveness or that Petitioner was prejudiced. The State acknowledges that "without a photograph of [Petitioner's] wrist from within this timeframe, it is simply impossible to tell" whether a photograph taken sooner would have been exculpatory. We agree with the State. In order to determine whether trial counsel's failure to introduce at trial a photo of Petitioner's wrist taken three months after the robbery constitutes deficient performance, Petitioner should have produced such a photo of his wrist at the post-conviction hearing. Because Petitioner did not produce any such evidence, he has not carried his burden of establishing ineffective assistance of counsel by clear and convincing evidence. Petitioner acknowledges as much on appeal, but he argues that trial counsel's failure "has left Petitioner in a position in which he is unable to show this Court what his wrist looked like in October of 2011."

Petitioner asks this court "to make an exception to the general rule stated in *Black* [v. *State*, 794 S.W.2d 752 (Tenn. Crim. App. 1990)] and conclude that Petitioner has established prejudice" Petitioner asserts that in light of Ms. Blaine's testimony at the post-conviction hearing that she did not observe a scar on Petitioner's wrist, as well as the Atlanta arrest report's omission of a scar on Petitioner's wrist, it is "likely that an October 2011 photograph of Petitioner's wrist would have been favorable to Petitioner." We have already concluded that Ms. Blaine's testimony was not material to Petitioner's defense and that the omission of any scars on the arrest report did not affect the outcome of Petitioner's case. We certainly cannot speculate, without any proof in the record, what a photograph of Petitioner's wrist taken three months after the robbery would have shown. Petitioner is not entitled to relief on this issue.

Failure to investigate traffic stop

Petitioner contends that trial counsel was ineffective for failing to investigate his July 13, 2011 traffic stop. Specifically, Petitioner asserts that trial counsel should have interviewed the officer who stopped Petitioner and asked him to describe Petitioner's hairstyle and whether Petitioner had a scar on his wrist. The State responds that

Petitioner is not entitled to relief because he did not present proof at the post-conviction hearing that any evidence related to the stop would have been favorable to his defense, and furthermore, proof that Petitioner was stopped while driving the victim's stolen vehicle two days after the robbery would have been harmful to Petitioner at trial.

Again, the post-conviction court failed to make any findings or conclusions regarding this claim by Petitioner. Nevertheless, as with Petitioner's other claims, we conclude that proof of Petitioner's hairstyle and the appearance of a scar on his wrist were of little value in light of other evidence of Petitioner's guilt. Trial counsel noted in Petitioner's file that Petitioner was given a traffic citation on July 13, 2011. Mr. Carmen testified at the post-conviction hearing that he did not understand how proof that Petitioner was stopped and given a traffic citation while driving the victim's stolen vehicle two days after the robbery would have been beneficial to Petitioner. Indeed, the logical conclusion from this proof at the post-conviction hearing is that Petitioner was fortunate that the State failed to prove the traffic stop at Petitioner's trial.

Moreover, Petitioner again acknowledges his failure to present the officer at the post-conviction hearing, but asks this court to "make an exception to the general rule" that a petitioner must introduce at the post-conviction hearing whatever evidence he is claiming that trial counsel should have introduced at trial. *See Black*, 794 S.W.2d at 757. Such an exception would allow post-conviction petitioners to shift the burden of proof to the State. *See Cauthern v. State*, 145 S.W.3d 571, 604 (Tenn. Crim. App. 2004) ("[T]he petitioner has the burden of persuasion, and that burden never shifts to the state.").

We conclude that Petitioner has failed to establish by clear and convincing evidence that trial counsel was deficient or that Petitioner was prejudiced by counsel's failure to investigate Petitioner's July 13, 2011 traffic stop. Petitioner is not entitled to relief on this issue.

Failure to file motion to suppress statement

Petitioner contends that trial counsel was ineffective for failing to file a motion to suppress his statement to Atlanta police on the grounds that he was not properly advised of his *Miranda* rights. The State responds that Petitioner explicitly waived this issue, and despite Petitioner's waiver of the issue, the State asserts that the post-conviction court properly denied relief.

Petitioner's memorandum of law filed after the conclusion of the post-conviction hearing, under the heading regarding trial counsel's failure to file a motion to suppress Petitioner's statement to police, states only that this issue is "WAIVED." Thus, we agree

with the State that Petitioner has waived this issue. Nevertheless, because the post-conviction court addressed the issue in its order, we will review Petitioner's claim.

The post-conviction court found that Petitioner failed to "present any clear and convincing evidence that he was not *Mirandized* other than stating that he was not." The post-conviction court implicitly accredited Detective Wareham's testimony at the post-conviction hearing that he provided *Miranda* warnings to Petitioner. On appeal, Petitioner "maintains that his testimony is more credible than Detective Wareham's testimony on this issue." However, appellate courts do not reweigh or re-evaluate the evidence or substitute their own inferences for those drawn by the trial court. *Fields*, 40 S.W.3d at 456 (citing *Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997)). Furthermore, questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the post-conviction judge. *Id.*

We conclude that the evidence does not preponderate against the post-conviction court's finding that Detective Wareham advised Petitioner of his *Miranda* rights. Therefore, we conclude that Petitioner has not established that a motion to suppress his statement likely would have been granted. Petitioner is not entitled to relief on this issue.

Failure to object to hearsay

Petitioner contends that trial counsel was ineffective for failing to object on the basis of hearsay to Detective Wareham's testimony that the driver of the stolen vehicle told him that he received the vehicle from Petitioner. The State argues that trial counsel's decision not to object was strategic and that Petitioner was not prejudiced by the admission of the statement.

In its order denying relief, the post-conviction court referenced instances when trial counsel objected on the basis of hearsay during Detective Wareham's testimony in the trial transcript. The State asserts that "the full context of Detective Wareham's testimony demonstrates why trial counsel did not object" to the "specific statement" by the driver of the vehicle to Detective Wareham that "he was just driving the vehicle and that [Petitioner] had given him the vehicle." The State cites several other instances in the trial transcript where trial counsel objected to Detective Wareham's testimony.

Regardless of whether the statement was hearsay or whether trial counsel's failure to object was deficient, we conclude that Petitioner was not prejudiced by the admission of the statement. Petitioner stated that he got the vehicle from "Johnny B.," who Petitioner stated was a relative in Memphis. Upon contacting the Memphis Police Department, Detective Wareham learned that the vehicle had been taken during a home

invasion robbery and that Petitioner and the victim, John Stuart, were not relatives. Petitioner was not prejudiced by the driver's statement that he got the vehicle from Petitioner because Petitioner, a passenger in the vehicle, admitted to police that he had gotten the vehicle from another individual, who police discovered was the victim. Petitioner has not established that admission of the statement "deprived him of a fair trial and called into question the reliability of the outcome." *Pylant*, 263 S.W.3d at 869.

Failure to establish either deficient performance or prejudice necessarily precludes post-conviction relief. *Strickland*, 466 U.S. at 697; *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004). Because a petitioner must establish both deficient performance and prejudice, a reviewing court need not address both prongs if the petitioner fails to demonstrate either prong. *Strickland*, 466 U.S. at 697. Petitioner is not entitled to relief on this issue.

Post-conviction counsel's ineffective assistance

Finally, Petitioner asserts that he is entitled to a second post-conviction hearing "based on post-conviction counsel's deficient performance." Petitioner complains that post-conviction counsel failed to present "two key witnesses who could have testified about the circumstances surrounding the victim's identification of Petitioner – the victim and Sergeant Wimbley." Petitioner also asserts that post-conviction counsel should have presented the testimony of the officer who stopped Petitioner on July 13, 2011 and gave Petitioner a traffic citation. The State responds that Petitioner is not entitled to a second post-conviction hearing because post-conviction counsel adequately represented Petitioner.

Petitioner acknowledges that he does not have a constitutional right to the effective assistance of post-conviction counsel. *Frazier v. State*, 303 S.W.3d 674, 680 (Tenn. 2010). The right to post-conviction counsel is statutorily based, found in the Post-Conviction Procedure Act. T.C.A. § 40-30-107(b). The justification for this statutory right "is to afford a petitioner the full and fair consideration of all possible grounds for relief." *Frazier*, 303 S.W.3d at 680. In furtherance of this purpose, our supreme court requires a minimum standard of service for all post-conviction counsel. *Id.* Tennessee Supreme Court Rule 28 outlines the obligations and responsibilities of post-conviction counsel. Specifically, post-conviction counsel "shall be required to review the *pro se* petition, file an amended petition asserting other claims which petitioner arguably has or a written notice that no amended petition will be filed, interview relevant witnesses, including petitioner and prior counsel, and diligently investigate and present all reasonable claims." Tenn. Sup. Ct. R. 28, § 6(C)(2).

While these rules do establish a minimum standard of service to which post-conviction counsel are held, failure to meet the minimum standard does not provide a basis for relief from a conviction or sentence. *Frazier*, 303 S.W.3d at 681; *David Edward Niles v. State*, No. M2014-00147-CCA-R3-PC, 2015 WL 3453946, at *7 (Tenn. Crim. App. June 1, 2015), *perm. app. denied* (Tenn. Sept. 17, 2015). Due process in the post-conviction context requires merely that “the defendant have ‘the opportunity to be heard at a meaningful time and in a meaningful manner.’” *Stokes v. State*, 146 S.W.3d 56, 61 (Tenn. 2004) (quoting *House v. State*, 911 S.W.2d 705, 711 (Tenn. 1995)). Specifically, a full and fair hearing requires only “the opportunity to present proof and argument on the petition for post-conviction relief.” *House*, 911 S.W.2d at 714.

The State recognizes that the record does not contain a certification by post-conviction counsel in compliance with Tennessee Supreme Court Rule 28(6)(C)(3). However, this court has repeatedly held that violations of Rule 28 by post-conviction counsel alone do not warrant a second post-conviction hearing. *Kenneth Brown v. State*, No. W2017-01755-CCA-R3-PC, 2019 WL 931735, at *12-13 (Tenn. Crim. App. Feb. 22, 2019), *no perm. app. filed* (citations omitted).

Despite the extensive authority holding that violations of Rule 28 do not warrant a second post-conviction hearing, Petitioner claims that he is entitled to relief pursuant to footnote 10 in *Thaddeus Johnson*, which states:

We likewise acknowledge that there could conceivably be a situation where counsel’s egregious violation(s) of Rule 28 might impermissibly violate the limited due process requirements for post-conviction proceedings so as to warrant a second post-conviction hearing; however, we reaffirm that there is no legal authority for the proposition that a Rule 28 violation, in itself, justifies another bite at the post-conviction apple.

Thaddeus Johnson v. State, No. W2014-00053-CCA-R3-PC, 2014 WL 7401989, at *9 n.10 (Tenn. Crim. App. Dec. 29, 2014), *perm. app. denied* (Tenn. May 18, 2015).

We conclude that no “egregious violation of Rule 28” occurred in this case. The record shows that following the filing of Petitioner’s *pro se* petition, post-conviction counsel filed three amended petitions, as well as a post-hearing argument and memorandum of law. Post-conviction counsel thoroughly investigated Petitioner’s claims and presented evidence on Petitioner’s claims. Because Petitioner received a full and fair hearing on his post-conviction petition with the assistance of post-conviction counsel, he is not entitled to relief.

CONCLUSION

Petitioner failed to establish that he received the ineffective assistance of counsel at trial. We, therefore, affirm the judgment of the post-conviction court denying relief.

THOMAS T. WOODALL, JUDGE