IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 20, 2016

MICHAEL D. ELLINGTON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Monroe County
No. 14-156 Sandra Donaghy, Judge

No. E2015-02295-CCA-R3-PC – Filed December 1, 2016

The petitioner, Michael D. Ellington, appeals the post-conviction court's denial of his petition for post-conviction relief from his premeditated first degree murder conviction. On appeal, he argues that the post-conviction court erred in denying relief because the State either committed prosecutorial misconduct or he received ineffective assistance of counsel. After review, we affirm the denial of the petition.

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

ALAN E. GLENN, J., delivered the opinion of the court, in which THOMAS T. WOODALL, P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

Gerald L. Gulley, Jr. (on appeal) and Jamie E. Dailey (at hearing), Knoxville, Tennessee, for the appellant, Michael D. Ellington.

Herbert H. Slatery III, Attorney General and Reporter; Benjamin A. Ball, Senior Counsel; Stephen D. Crump, District Attorney General; and Paul D. Rush, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

The petitioner was convicted of the premeditated first degree murder of his girlfriend and sentenced to life imprisonment. State v. Michael Dewey Ellington, No. E2012-00908-CCA-R3-CD, 2013 WL 5718184, at *1 (Tenn. Crim. App. Aug. 13, 2013) (Witt, J. dissenting), perm. app. denied (Tenn. Jan. 15, 2014). His conviction was affirmed by this court on direct appeal, and the Tennessee Supreme Court denied his application for permission to appeal.

The underlying facts of the case were summarized by this court on direct appeal as follows:

> Deputy Clinton Blake Brookshire of the Monroe County Sheriff's Department testified that at 11:06 p.m. on March 17, 2009, he was dispatched to 1637 Old Highway 68. When he arrived at the residence at 11:10 p.m., he saw the [petitioner]'s two brothers at the back of the residence. The brothers told Deputy Brookshire that they entered the residence at 10:48 p.m., found the victim, and called the police.
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> Deputy Brookshire said that he entered the residence and discovered the victim lying face-down on the bedroom floor between a nightstand and the left side of the bed. He saw an unloaded, "single shot break action shotgun on the bed, with the action open." A spent shotgun casing was lying on the floor. Deputy Brookshire backed out of the bedroom and called for detectives and other necessary personnel. Emergency medical technicians (EMTs) Carlene Woods and Dennis Hughes arrived at the scene, and Deputy Brookshire led Hughes into the bedroom. Hughes rolled the victim onto her left side and felt her neck for a pulse. Finding no pulse, Hughes returned the victim to her original position and exited the room the way he had entered so as not to disturb the scene. Deputy Brookshire left the scene at 3:00 a.m.
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> On cross-examination, Deputy Brookshire testified that he did not know who placed the 911 call. He secured the scene and later turned the investigation over to Captain Michael Morgan. Deputy Brookshire did not see wadding, lead, or a knife in the bedroom; however, he saw one spent shotgun shell and one unspent round on the floor. Deputy Brookshire did not remember whether the bedroom door was open or closed when he arrived.
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> Dennis Reed Hughes, a Monroe County paramedic, testified that on the night of March 17, 2009, he responded to the scene on Old Highway 68. When he arrived, he went inside the residence to confirm the death of the victim. Inside the bedroom, he saw the victim lying face-down on the floor. Hughes checked the carotid artery in the victim's neck and did not find a pulse. He determined that the victim was dead.
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> On cross-examination, Hughes said that Deputy Brookshire followed him into the bedroom and stood at the foot of the bed while Hughes examined the victim. Hughes said that Deputy Brookshire "watched to

make sure I did nothing more than check for a pulse and breathing movements and that was it."

Monroe County Sheriff's Detective Travis Brian Jones testified that on the evening of March 17, he went to the crime scene and stayed approximately three minutes. While he was there, Captain Morgan instructed him to interview the [petitioner]. Detective Jones went inside the residence, quickly surveyed the scene, and went outside. The [petitioner] was placed in a patrol car and was transported to the sheriff's department by Sergeant Darian Goodman.

Detective Jones said that he followed Sergeant Goodman and, upon arriving at the sheriff's department, took custody of the [petitioner]. Detective Jones took the [petitioner] to an office and read the [petitioner] his rights. After the [petitioner] waived his rights, Detective Jones interviewed him. Captain Morgan and Sheriff Bill Bivens were also present for the interview. Detective Jones authenticated a video of the [petitioner]'s interview, and the video was shown to the jury.

During the interview, the [petitioner] said that he had known the victim for seventeen years, that he loved her, and that they usually stayed together at a house he and his older brother, Steve, owned. On the evening of March 17, the [petitioner] and the victim went to a Mexican restaurant in Lenoir City. They visited with friends and drank "a couple beers." When they left the restaurant, the [petitioner] and the victim argued about their relationship. The [petitioner] said that they had been arguing for nine months. That night, the victim told him, "If we ever break up, nobody – nobody is going to have you." Upon arriving home, the [petitioner] took the victim's purse inside the residence and put it on a chair. The victim walked into the kitchen, and the [petitioner] thought she was getting something to drink. The [petitioner] went to the bedroom, lay on the bed, and waited for the victim. He explained that they usually undressed together and watched television before going to sleep. A lamp in the corner of the room was turned on. The [petitioner] said that the victim came into the bedroom and approached him with "something shiny" and that he knew "it was a knife." He could not describe the knife or how the victim was holding the knife. The victim did not say anything. The [petitioner] got off the bed, pushed the victim, and she fell. When she started to get up, the [petitioner] grabbed a 12 gauge shotgun he kept behind the bedroom door. The victim "rolled over" and started to get up, with the knife still in her hand. The [petitioner] pushed the victim down a second time. When she

started to get up, the [petitioner] shot her. The victim fell back and rolled over, face down. He said that his stepfather had given him the gun because he had "been having problems with some people [who were] threatening our lives."

The [petitioner] said that the victim had a temper and that he feared she would cut him. The [petitioner] said that he and the victim had fought in the past; however, that night, the victim seemed "crazy" and had "snapped." After the shooting, the [petitioner] opened the gun and threw it on the bed. He left without touching the victim or the knife and drove to his mother's house where he spoke with his brothers. Detective Jones told the [petitioner] that he had talked to one of the [petitioner]'s brothers, who said that the [petitioner] told him that the [petitioner] killed the victim because "she was trying to set [the petitioner] up." The [petitioner] responded, "I don't know nothing about that." The [petitioner] said that he did not plant the knife on the victim. The [petitioner] said that he did not know how many shells the gun would hold, stating, "I ain't even shot it during my life. . . . I just pulled the trigger." The [petitioner] said that the victim took Xanax for depression and that he took medication for his thyroid, high blood pressure, and cholesterol. The [petitioner] denied using illegal drugs.

During the interview, Captain Morgan asked the [petitioner] if he loaded the gun or if the gun was already loaded when he grabbed it, noting that the police had found extra shells at the scene. After a lengthy pause, the [petitioner] said that the box of shells was behind the television. The [petitioner] said, "The gun had a shell in it, and when I thr[ew] the gun, I took the shell out of it, put the shell box down on the bed with the gun." He said that when he opened the gun, the shell bent and fell out of the gun. He left the empty shell on the floor and walked out of the room. The [petitioner] denied that he loaded the gun just prior to the shooting. The [petitioner] maintained that after he shot the victim, he grabbed the box of shells because he feared the victim would get up and come after him again. He said that he dropped the gun on the bed because he knew what he had done. The [petitioner] denied that he intended to reload the gun and asserted that he grabbed the box of shells, intending to put the used shell casing in the box.

After the interview ended, Detective Jones transported the [petitioner] to Sweetwater Hospital and watched as a blood sample was

taken from the [petitioner]. The blood sample was sent to the Tennessee Bureau of Investigation (TBI) for analysis.

On cross-examination, Detective Jones testified that when he arrived at the crime scene, the [petitioner] was standing outside. While Detective Jones was at the crime scene, he saw a knife and noticed that there was blood all over the knife. The crime scene was sealed for almost four hours and then was released to the family. Detective Jones testified that the police did not obtain fingerprints from the shotgun shells or the knife and that no DNA analysis was performed on those items. Regardless, the [petitioner] admitting touching the shotgun shells and the box. Detective Jones said that the [petitioner] was generally cooperative during the interview.

Dr. Stephen Cogswell, the Deputy Chief Medical Examiner for Knox and Anderson Counties, testified that on March 18, 2009, he performed an autopsy on the victim. The victim was sixty-two inches tall and weighed 199 pounds. Dr. Cogswell determined that the victim's death was caused by a single projectile slug that entered just behind and below the victim's right ear. The slug severed the victim's spine at the top two cervical vertebrae and exited the corner of the jaw at the front, left side of the chin. Dr. Cogswell found bruises of various ages on the victim's shoulders, back, left upper arm, and right hand. Dr. Cogswell estimated that the victim had been shot from a distance of between two and ten feet.

Dr. Cogswell testified that he took blood, urine, and vitreous samples from the victim and sent them to the lab for analysis. The results revealed that the victim had .13 micrograms per milliliter of methamphetamine in her system. The amount was "at the upper end of the therapeutic range" and could have been toxic to someone sensitive to methamphetamine. The results also revealed Fluoxetine or Prozac in her system in "a high therapeutic to low toxic range dose." The toxicology screen also revealed the presence of dihydrocodeinone, which was commonly found in cough syrup. Additionally, the victim's blood alcohol content was .10.

Monroe County Sheriff's Detective Douglas W. Brannon testified that on March 17, 2009, he responded to Old Highway 68 and that he processed and handled the crime scene. When he went into the bedroom, he saw the victim lying on the floor, surrounded by blood. She was lying next to the bed, and the wall was to her left. Detective Brannon testified

that a knife was found near the victim but that the knife was difficult to see. Detective Brannon saw four indentations on the bedpost nearest the victim's head. Something appeared to be embedded in the wood. Detective Brannon also found blood spatter on the quilt covering the bed.

Detective Brannon said that he also found a spent shotgun shell and an unfired shotgun shell on the bedroom floor. Additionally, on a table he found several shotgun shells that were not the same type as the shell found on the floor. On the bed, Detective Brannon found a single barrel hammer shotgun that had been "broke[n] open." He explained that loading the weapon required four separate actions: (1) placing a projectile in the barrel, (2) shutting the barrel, (3) cocking the hammer, and (4) pulling the trigger. Some clothing and a box for five, 12 gauge, Winchester, "sabot" shotgun shells were also on the bed. Two or three unspent shells were in the box. The shells in the box were the same type as the unfired shell and the spent shotgun shell found on the floor.

Detective Brannon said that around the knob or lock area of the bedroom door, "there was a crack, or some disfiguration or offsetting of the lock itself." He surmised that "there had been a force applied to that door at some point."

Detective Brannon inventoried the contents of the victim's purse and discovered prescription bottles, which contained hydrocodone and alprazolam.

On cross-examination, Detective Brannon said that he saw black scuff marks on the bedroom floor. He said that the victim was wearing tennis shoes, that law enforcement officers generally wore boots, and that he did not know what kind of shoes the [petitioner] was wearing. A butcher block containing knives with black handles and shiny metal blades was in the kitchen. The knives were the same type as the knife found in the bedroom.

Detective Brannon said that the [petitioner]'s booking sheet reflected that the [petitioner] was six feet and one inch tall and weighed 211 pounds.

Detective Brannon said that the shotgun was not tested to determine if it was operable and that the knife was never tested. Some items, including the pill bottles and a cellular telephone from the victim's pocket, were collected by the police then returned to the victim's family. He did

not recall opening the bottles, explaining that it was not relevant to the murder investigation.

Detective Brannon stated that he had received "[p]hysical contact training" and "[e]dged weapon training or reaction" as part of his law enforcement training. He had heard of a "21 foot rule," which suggested that "a person with an edged weapon within 21 feet is considered a dangerous threat." In other words, "if you are within a 21 foot zone and you are not prepared to defend yourself while you are in that zone then you could be the object of an attack, an actual physical danger [from the person with] the knife."

On redirect examination, Detective Brannon said that officers were taught about the "21 foot rule" for personal safety reasons and so that an officer could attempt to find nonlethal ways, such as retreating, to deal with a situation. However, he asserted that the rule did not "establish a zone in which you can justify killing another human being."

On recross-examination, Detective Brannon stated that he did not recall testifying at the preliminary hearing that the knife was found underneath the victim's body and that it was not visible until the body was moved.

Adam Gray, a forensic scientist with the TBI crime laboratory, testified that toxicological testing of the [petitioner]'s blood sample revealed the presence of less than .1 micrograms per milliliter of methamphetamine. No other drugs were found in the [petitioner]'s blood.

Margaret Massengale, a special agent forensic scientist with the TBI crime laboratory, testified that she tested the [petitioner]'s blood sample for alcohol and found none.

The State rested its case-in-chief, and the defense rested without submitting proof.

Id. at *1-5.

The petitioner filed a timely petition for post-conviction relief and, following the appointment of counsel, two amended petitions were filed. In his petitions, the petitioner raised numerous claims, including a myriad of allegations regarding counsel's rendering ineffective assistance and that the State committed a Brady violation by failing to

disclose favorable evidence to the defense. We will limit our recitation of the testimony from the post-conviction evidentiary hearing to that relevant to the claims the petitioner maintains on appeal: that the State failed to provide him with evidence with which to impeach former detective Douglas Brannon and/or that counsel rendered ineffective assistance to the extent she had prior knowledge of evidence with which to impeach Mr. Brannon and did not use it.

At the evidentiary hearing, former Monroe County Sheriff Bill Bivens testified that he was the sheriff in 2007 when former detective Douglas Brannon applied to the department. He stated that the department followed Peace Officers' Standards Training ("POST") requirements and conducted background checks on its applicants. Mr. Bivens said that, during his administration, his administrative captain, Mike Bledsoe, handled hiring and the accompanying paperwork but that the ultimate duty fell on him.

Mr. Bivens recalled interviewing Mr. Brannon and discussing his previous employment and years of service. He would have also been informed of "some background" on Mr. Brannon, given he was a new hire in the office. Mr. Bivens testified that he received notice from the POST Commission that Mr. Brannon had the necessary certification to be a police officer. Mr. Bivens acknowledged that the training checklist for Mr. Brannon indicated that a background investigation was not completed, but yet he had signed an application for certification as an officer that a background check had taken place and that Mr. Brannon was of good moral character. Sheriff Bivens testified that he had no prior knowledge that former detective Patrick Henry was going to pose as an attorney during the John Edward Dawson investigation.

Current Monroe County Sheriff Tommy Jones testified to the hiring procedures for the sheriff's office, including the performance of background checks and verification of employment history. Sheriff Jones said that an applicant had to meet the POST standards to be hired and that an officer who was terminated from his job in another state or agency for dishonesty or bad character would not be certifiable by the POST Commission in Tennessee.

Sheriff Jones testified that, when he became sheriff, he required all of the employees to reapply for their positions. Sheriff Jones noted that, on his most recent application, Mr. Brannon stated that he left his former position with the Sumter Police Department in South Carolina due to insubordination. Sheriff Jones said that such information on an application would cause him to request a waiver in order for that officer to be POST-certified in Tennessee. Sheriff Jones stated that he had no direct knowledge of the John Edward Dawson investigation but recalled hearing former detectives Brannon and Henry "ma[k]e a comment about having some type of card, about being attorneys."

Former detective Patrick Henry testified that he worked alongside Mr. Brannon in the investigation of the crime for which the petitioner was convicted, as well as in the unrelated investigation of John Edward Dawson. Mr. Henry admitted that, during the Dawson investigation, he sent letters in which he falsely pretended to be an attorney. He said that Assistant District Attorney Jim Stutts was aware of and approved of his plan to do so. Mr. Brannon was not involved in pretending to be an attorney but later became involved by posing as a mobster. Mr. Henry recalled pleading the 5th Amendment in a hearing for Mr. Dawson in May 2009 and, after that, having a meeting with Assistant District Attorney Stutts, former Sheriff Bivens, and Mr. Brannon in which the former detectives disclosed the full parameters of the tactics they had used during the Dawson investigation. On cross-examination, Mr. Henry stated that his involvement in investigating the petitioner's case consisted only of processing the crime scene with Mr. Brannon.

Former detective Douglas Brannon testified that he worked for the Monroe County Sheriff's Department from August 2007 until October 2014. Prior to that, he had worked in South Carolina for the City of Sumter Police Department from 1982 to 2006. After a period of disputes with the police chief, he offered his resignation. The police department did not accept his resignation and terminated him. He initiated his retirement within the state the same day. He received a separation notice in the mail signifying that his certification as a police officer was withdrawn in South Carolina. His change-in-status report from the South Carolina Criminal Justice Academy indicated that he was terminated for "a violation of an agency policy, involving misconduct, good character or moral turpitude." However, he explained that it was "a catch-all phrase for something that's not a violation of the law." Mr. Brannon reiterated that his termination was the result of "insubordination and inappropriate behavior to the chief's office . . . not a violation of the law, or any legal reason[.]" He noted that the Criminal Justice Academy viewed it as "an administrative matter between the parties." Mr. Brannon stated that his application with the Monroe County Sheriff's Department said that he retired from the Sumter Police Department, but he maintained that was an honest answer and that he received a retirement check every month.

Mr. Brannon testified that he presented himself to be a mobster while interviewing John Edward Dawson in a matter unrelated to the petitioner's case. He did not know if the sheriff was aware of his activities, and he was not the lead investigator on the case. Mr. Brannon stated that he was also not the lead investigator on the petitioner's case but instead was "one of several detectives . . . [that] assisted in the investigation." He was responsible for working the crime scene. Mr. Brannon recalled that they preserved some sort of bed covering but had not seen a quilt that family members brought in later for examination. A knife found at the scene was taken into evidence but was not tested for

fingerprints or gunshot residue because it was contaminated with blood. Part of the bed was taken into evidence after sawing it apart with a handsaw. Tape was placed on the area of the bed that contained "fragmentation and hair and blood," but Mr. Brannon could not recall who placed the tape on the bed.

Mr. Brannon recalled that defense counsel used his testimony at the petitioner's trial to support and reiterate the petitioner's self-defense claim.

Agent Jason Legg with the Tennessee Bureau of Investigation testified that, in 2009, the Monroe County District Attorney General asked him to investigate the undercover operation conducted in the jail by Mr. Brannon and Mr. Henry in the John Edward Dawson case. No criminal charges were filed as a result of the investigation.

James Harvey Stutts was an assistant district attorney involved in the prosecution of John Edward Dawson in 2009. Mr. Stutts said that he was not aware of the techniques used by Mr. Brannon and Mr. Henry to interview Mr. Dawson. He recalled that Mr. Henry had approached him about the legality of having a prisoner's cellmate record their conversations. He said that Mr. Henry did not show him a letter on a fabricated law firm's letterhead that he was going to send Mr. Dawson prior to Mr. Henry's sending the letter. The only letter related to the Dawson investigation that Mr. Stutts remembered seeing was one in which Mr. Henry assured Mr. Dawson's cellmate that prison guards would not reveal the recording device during searches of his cell. Mr. Stutts said that he became aware of all the letters sent by Mr. Henry during a hearing in Mr. Dawson's case. He did not recall disclosing this information to "any later defense counsels [sic] in any cases that those detectives had worked," but he noted that the letters "were pretty much public knowledge."

Mr. Stutts testified that he was involved as a prosecutor in Mr. Dawson's murder trial for a period of time, but he was not aware of an opinion from a criminal court saying that Mr. Brannon had committed perjury before the grand jury. He was no longer involved in the Dawson case at the time of its dismissal. However, after reading an order dismissing the indictment against Mr. Dawson, Mr. Stutts observed that, although the court found that false testimony was presented to the grand jury and that Mr. Brannon was one of the witnesses at the hearing, the court did not indicate that Mr. Brannon was the witness who presented false testimony. Mr. Stutts knew that Monte Cox had testified at the hearing that he gave a false statement to the grand jury at the behest of Mr. Henry. There was no allegation that Mr. Brannon had anything to do with false testimony being presented to the grand jury.

Mr. Stutts stated that he was also involved in the prosecution of the petitioner's case. He said that the petitioner's lead trial counsel would have been aware of the

dismissal in the Dawson case because she had served as Mr. Dawson's attorney for a period of time and was present during the court proceedings. In fact, counsel represented Mr. Dawson in the appeal before this court that led to the reversal of his convictions for burglary and robbery, and the court detailed the actions Mr. Brannon and Mr. Henry had taken. Mr. Stutts did not consider the dismissal in the Dawson case to be impeachment evidence against Mr. Brannon in the petitioner's case.

Mr. Stutts testified that he had no knowledge of Mr. Brannon's employment history. The sheriff did not send résumés of potential employees to the district attorney's office for approval. Mr. Stutts had never seen any papers from South Carolina relating to the conditions under which Mr. Brannon's employment there concluded. To Mr. Stutts' knowledge, the district attorney's office did not have any information about the status of Mr. Brannon's POST certification.

The petitioner's assistant trial counsel testified that he aided the petitioner's lead counsel during the trial. He was largely in charge of the mental health aspect of the case and retained Dr. Tom Biller to assist them with regard to the petitioner's mental condition at the time of the offense. Assistant counsel learned of the petitioner's history of mental illness, but Dr. Biller determined that a defense of diminished capacity or insanity could not be supported. Dr. Biller could have testified that the petitioner suffered from post-traumatic stress disorder in support of a theory of self-defense. However, they decided not to have Dr. Biller testify to his conclusion that the petitioner's mental condition made him more susceptible to fear for his life because that could have opened the door for the prosecutor to question the doctor concerning the petitioner's having been previously convicted of aggravated assault. The defense, likewise, did not have the doctor prepare a report because they would have been required to turn it over to the State. However, Dr. Biller wrote a letter to the defense with his opinion of the petitioner's mental health and, out of an abundance of caution, counsel disclosed the letter to the State in case it could be considered a report.

Assistant counsel testified that the petitioner gave a lengthy, videotaped statement in which he described the killing in great detail and recreated for the officers what had occurred, although alleging that he had acted in self-defense. The defense team decided not to have the petitioner testify after discussing the option with him because they decided that the statement would be nearly identical to how he would testify but would not subject him to cross-examination. The defense team also decided not to file a motion to suppress the petitioner's statement because the petitioner raised the defense of self-defense in it and because they felt the video statement was "good evidence" for the petitioner.

Lead trial counsel for the petitioner testified that she did not file a motion to suppress the petitioner's videotaped statement to police because she did not believe there was enough evidence to support an argument that the statement was not knowing and voluntary. She also believed that the video was beneficial to the petitioner.

Lead counsel acknowledged that, because of her representation of John Edward Dawson in a theft and drug case, she knew about Mr. Brannon's participation in the scheme involving Mr. Henry posing as an attorney. However, she was not given information by the State concerning Mr. Brannon's actions in either the case against John Edward Dawson for theft and drugs, or the case involving homicide on which she did not represent him. She said that she became aware that Mr. Brannon portrayed himself as a mobster when he testified about the ruse at a hearing in the course of her representation of Mr. Dawson. Thus, she was aware of this conduct when Mr. Brannon took the stand in the petitioner's trial but had not been given any additional information about his behavior or impeaching materials.

Lead counsel testified that she chose not to attempt to impeach Mr. Brannon with information concerning the ruse in the Dawson case because she needed Mr. Brannon to testify as to the "21-foot rule," a law enforcement training concept that a person with an edged weapon within twenty-one feet is a risk sufficient to justify the use of lethal force, for the purpose of establishing the defense of self-defense. She also noted that Mr. Brannon's role in the ruse in the Dawson case was "much more mitigated," and she did not think she "would gain enough in impeaching him on that issue than [she] would gain attempting to use him to show that [the petitioner] was truly in danger[.]"

Lead counsel testified that she was not aware of any questions concerning Mr. Brannon's previous employment at the time of her representation of the petitioner. It "bothered" her that the certification form from the South Carolina Criminal Justice Academy indicated that his termination was due to "misconduct, good character or moral turpitude" because she thought that "would tend to go more to his ability to . . . function as an investigator." She was also concerned that his résumé indicated that he had retired, rather than been fired. Lead counsel opined that the documents could have been used to attack Mr. Brannon's credibility, his "[b]asic credibility as to truthfulness." However, she was not able to say with certainty that the documents would have led her to alter her trial strategy, but she would have liked to have had the opportunity to make that decision.

Lead counsel testified that the State did not disclose any information relating to the dismissal of Mr. Dawson's case to her during the pendency of the petitioner's appeal. However, lead counsel stated that, even though she was not informed by the State, she knew that Mr. Dawson's case had been dismissed and understood that it was the result of misconduct by Mr. Henry. Lead counsel acknowledged that Mr. Brannon's termination

from his previous job in South Carolina due to a dispute with the chief was not something "[o]n its face" that would go to his credibility.

After the conclusion of the hearing, the post-conviction court entered a written order denying the petition, and the petitioner appealed.

ANALYSIS

The petitioner argues that the post-conviction court erred in denying relief based on either prosecutorial misconduct or ineffective assistance of counsel. He asserts that defense counsel did not "properly impeach[]" one of the crime scene investigators, former detective Brannon, who testified for the State "either because the [S]tate failed to provide exculpatory or impeaching materials to the defense, or because the defense failed to use such evidence without a 'strategic reason' for such failure."

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, our review of a post-conviction court's application of the law to the facts of the case is de novo, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed de novo, with a presumption of correctness given only to the post-conviction court's findings of fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001); Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999).

We will first address the petitioner's claim that the State failed to provide counsel with exculpatory evidence that could have been used to impeach former detective Brannon at trial. In Brady v. Maryland, 373 U.S. 83, 87 (1963), the United States Supreme Court held that the prosecution has a duty to furnish to the defendant exculpatory evidence pertaining either to the accused's guilt or innocence or to the potential punishment that may be imposed. The Court explained that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. In order to establish a Brady violation, a defendant must show that he or she requested the information, the State suppressed the information, the information was favorable to his or her defense, and the information was material. State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995). Evidence is "material" only if there is

a reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. United States v. Bagley, 473 U.S. 667, 682 (1985). The burden of proving a Brady violation rests with the defendant, and the violation must be proven by a preponderance of the evidence. Edgin, 902 S.W.2d at 389.

As to this issue, the post-conviction court found that the petitioner failed to demonstrate his claim by clear and convincing evidence. The court stated:

> Failure by the government to provide trial counsel with the limited information available at the time, when it was the very same attorney that exposed the officer misconduct (from the Dawson case), cannot be a Brady violation. At the time of [the petitioner]'s trial, the government had incomplete information. The full [e]ffect remained unknown until after the entire process had been reviewed by the appellate court. Although the Court of Criminal Appeals in the Dawson case chastised the officers' conduct, the legally significant problem was the erroneous ruling by the trial court characterizing Mr. Dawson's testimony as hearsay. It was this ruling that violated his constitutional rights and prevented Mr. Dawson from exposing the conduct of the officers during the trial. [Counsel] discovered and exposed the wrongdoings. Accordingly, she was in the best position to evaluate whether anything similar occurred in this case or whether the conduct of the officers could or should have been attacked. After hearing hours of testimony about the Dawson case, this court finds that the misconduct by the officers had little, if any, impeachment value. Trial counsel had valid reasons not to impeach Detective Brannon as his testimony on the "21 foot rule" was helpful to her case.

The court's oral findings additionally provided, "I also find that there is . . . insufficient facts to support a claim . . . for failing to provide to the Defense that Mr. Brannon lied on his application to the Sheriff's office. I find that that's not supported by the proof in this record."

On appeal, the petitioner appears to confine his argument that the State withheld exculpatory evidence to the matters surrounding Mr. Brannon's prior employment in South Carolina, as he does not address Mr. Brannon's involvement in the Dawson case in his discussion on this issue. We conclude that the petitioner failed to prove that the State withheld material, exculpatory evidence.

Former Monroe County Sheriff Bill Bivens, who hired Mr. Brannon originally, testified that his administrative captain handled background checks and personnel matters, but he had no knowledge of any problem with Mr. Brannon's qualifications and

he received notice from the POST Commission that Mr. Brannon had the necessary certification to be a police officer. Former assistant district attorney James Stutts testified that his office was not aware of Mr. Brannon's employment history and that the sheriff was not in the practice of giving information on prospective employees to his office for approval. It was not until late 2014 or early 2015 when the new Monroe County Sheriff, Tommy Jones, required all employees to reapply for their positions that any questions arose concerning Mr. Brannon's past employment. Mr. Brannon explained that his termination from the Sumter Police Department was the result of a dispute with his captain that he handled poorly, not the result of any misconduct. He likewise maintained that his indicating that he had retired on his initial application was not incorrect, as he initiated his retirement the day he was terminated and continued to receive a retirement check each month. Moreover, lead counsel testified that, although she would have liked to have made the decision whether to use evidence regarding Mr. Brannon's departure from the Sumter Police Department to attempt to impeach him, she could not say with certainty that the documents would have led her to alter her trial strategy. As finder of fact, the post-conviction court found that "[t]here's an allegation that the State participated in an action to cover up exculpatory information. That is not supported by this record. There's differing proof as to who knew what at which time, but I don't feel there's been a factual basis to support this allegation." We conclude that the petitioner failed to demonstrate by clear and convincing evidence that the State withheld material, exculpatory evidence from him.

We will next address the petitioner's alternative claim that counsel rendered ineffective assistance if she was aware of impeaching evidence and failed to use it. To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687 (1984); see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The Strickland standard is a two-prong test:

> First, the defendant 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 defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is satisfied by showing a reasonable probability, i.e., a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Courts need not approach the Strickland test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697; see also Goad, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

As to this issue, the post-conviction court found that the "choices by trial counsel were conscious decisions made as a trial tactic and with specific strategy." In its entirety as to this issue, the post-conviction court stated:

> As to the claims of ineffective assistance of counsel for failing to cross-examine Detectives Brannon and Henry concerning their misconduct on the Dawson case, these claims were unsupported by the evidence taken as a whole and wholly unrelated to the facts of the case. The Court recognized that impeachment evidence has value and that the conduct of these officers in the Dawson case was reprehensible. Nonetheless, the impact on impeachment was outweighed by the advantage of having a detective explain a principle important to the defense or set up a crime scene to allow a factual basis for the defense theory. Detective Henry appears to have been the more active actor, and perhaps more culpable actor, in the Dawson scheme. This man was not even called as a witness in the [petitioner's] case. These choices by trial counsel were conscious decisions made as a trial tactic and with specific strategy. This conclusion is bolstered by the candid admission by trial counsel, with the benefit of full knowledge and hindsight, that she most likely would have made the same decisions for strategic reasons.

On appeal, the petitioner confines his argument regarding counsel's ineffectiveness to "impeaching evidence" in the form of Mr. Brannon's behavior in the Dawson investigation. We conclude that the post-conviction court properly found that lead counsel's decision to not impeach Mr. Brannon fell within the realm of trial tactics

and strategy. Lead counsel testified that she did not attempt to impeach Mr. Brannon with information concerning the ruse in the Dawson case because she needed Mr. Brannon to testify as to the "21-foot rule," a law enforcement training concept that a person with an edged weapon within twenty-one feet is a risk sufficient to justify the use of lethal force, for the purpose of establishing the defense of self-defense. She also noted that Mr. Brannon's role in the ruse in the Dawson case was "much more mitigated," and she did not think she "would gain enough in impeaching him on that issue than [she] would gain attempting to use him to show that [the petitioner] was truly in danger[.]" As the petitioner failed to prove that counsel rendered deficient performance, we need not address whether the petitioner was prejudiced by counsel's failure to impeach Mr. Brannon.

CONCLUSION

Based on the foregoing authorities and reasoning, we affirm the denial of the petition.

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ALAN E. GLENN, JUDGE