IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs February 2, 2016

KENNETH LEWIS v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 0900033 J. Robert Carter, Jr., Judge

No. W2015-01249-CCA-R3-PC - Filed September 21, 2016

The petitioner, Kenneth Lewis, appeals the denial of his petition for post-conviction relief. The petitioner is currently serving a thirty-five-year sentence for second degree murder. On appeal, the petitioner contends that he should have been granted relief because: (1) he was denied his rights to the effective assistance of counsel; (2) the trial court erred in failing to grant his request for a transcript of the jury selection or to allow introduction of notes detailing reasons certain jurors were struck from the panel; and (3) that the law should be changed to allow funding for expert witnesses in non-capital post-conviction cases. Following review of the record, we affirm the denial of post-conviction relief.

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

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which CAMILLE R. MCMULLEN and TIMOTHY L. EASTER, JJ., joined.

Eugene L. Belenitsky, Memphis, Tennessee, for the appellant, Kenneth Lewis.

Herbert H. Slatery III, Attorney General and Reporter; Caitlin Smith, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Bridgett Stigger, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background and Procedural History

The facts underlying the petitioner's conviction, as recited by this court on direct appeal, are as follows:

> Helen Traylor, the sister of the victim, James Mosby, testified that the victim had been diagnosed with schizophrenia and had lived with their mother, his caregiver, prior to his death. Traylor was not aware of the victim using or selling drugs during his lifetime. She said that prior to the attack, the victim weighed approximately 120 pounds and was five feet, seven or eight inches tall.
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> Traylor stated that she and her mother filed a missing persons report for the victim after they had not seen or heard from him for several days. In addition, they posted flyers with pictures of the victim around their neighborhood. After talking to some employees at the M and M Express convenience store, Traylor and her mother began looking for the victim at the local hospitals and eventually found him at the Regional Medical Center at Memphis. Prior to their arrival at that hospital, the victim was known only as "John Doe." Traylor said that when she first saw her brother after the attack, she noticed that he had "stitches across his head and . . . was swollen. He didn't look like himself." She said that her brother never regained consciousness following his attack and that in March 2007, the hospital transferred him to St. Peter's Villa, a nursing home, where he stayed for several months until his death. She stated that her brother's condition never improved.
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> Abbas Alkubechy, a manager at the M and M Express convenience store, stated that he was working at the store the night the victim was attacked. Alkubechy said he had known [the petitioner] for eleven years at the time of the attack and also knew the victim. He remembered [the petitioner] coming into the store with his car title and asking him for a twenty-dollar loan, which he refused to give him. Alkubechy turned to look at the security television, which showed live footage from the security cameras, and saw [the petitioner] leaving the store as the victim walked into the store's parking lot and faced [the petitioner]. Alkubechy explained that although he was able to view the live security footage, this footage was not recorded. Alkubechy then saw "a black guy with a white jumpsuit" take [the petitioner's] bicycle and ride away from the store. At that point, he stopped looking at the security camera footage because he had to help a

customer. Once he finished assisting the customer, he looked back at the security footage and saw [the petitioner] hit the victim, which caused the victim to fall, and heard someone, probably [the petitioner], yelling. Alkubechy immediately ran outside and when he saw [the petitioner] stomping on the victim's head, he told [the petitioner] to stop hurting the victim. At the time, he saw "thick blood" seeping out of the victim's head and noticed that the victim was breathing heavily. [The petitioner] left the victim and entered the store, where he stole a can of beer and told Alkubechy that he could call the police. Alkubechy called 9-1-1 and gave the dispatched a description of [the petitioner]. He said that the victim was unresponsive when the police arrived on the scene.

On cross-examination, Alkubechy said that [the petitioner] came to the store two times that night. He said the first time [the petitioner] came into the store he bought a six-pack of Corona Light and asked for the twenty-dollar loan in exchange for his car title. He said the . . . second time [the petitioner] came into the store was when [the petitioner] attacked the victim.

Howard Catron testified that he stopped at the M and M Express convenience store close to midnight on March 6, 2007, and saw several people standing outside. As Catron was about to buy some gasoline, he saw a man, later identified as [the petitioner], ride into the store's parking lot on a bicycle and park it near two men, an "older guy," later identified as the victim, and a "younger guy." When [the petitioner] went inside the store, the younger guy stole the bicycle and rode away. At that point, the victim approached Catron and asked for some change. Catron said that when [the petitioner] exited the store, he noticed that his bicycle had been stolen, and he became angry. [The petitioner] asked the victim if he had stolen it, and when the victim told him that he had not taken it, [the petitioner] hit the victim until he fell to the ground. He said [the petitioner] began to "stomp [the victim] with his feet." Catron said [the petitioner] continued to stomp the victim with both feet until the victim lay "motionless on the ground." At that point, [the petitioner] asked Catron if he had "something to do with his bike getting stolen[,]" and Catron denied that he was involved. As Catron was leaving the store, [the petitioner] began to hit the victim again[,] and [Catron] heard [the petitioner] tell the victim that he knew the victim had stolen his bicycle. He then heard [the

petitioner] tell the victim: "[Y]ou still alive? I'm going to kill you now. I'm going to kill you now." Before Catron left the store, he saw [the petitioner] stomping the victim again. Catron left the store and went to work, where he was told to leave because he had gotten to work too late. When he returned from work, he saw police cars and an ambulance in front of the convenience store. He stopped at the store and identified [the petitioner] as the victim's attacker for the police.

On cross-examination, Catron admitted that he never mentioned in his statement to police that [the petitioner] stomped on the victim with both feet. He also admitted that he never called the police about the attack.

Brian Moore, an officer with the Memphis Police Department, testified that he responded to the scene in the early morning hours of March 7, 2007, after dispatch notified him that an assault had taken place. When he arrived at the scene, Officer Moore saw the victim lying on the ground and bleeding from his head. He stated that the victim was unresponsive. Officer Moore said he developed [the petitioner] as a suspect because the store's employee was able to give him a description of the victim's attacker.

Cedric Claxton, another officer with the Memphis Police Department, testified that he located [the petitioner], who matched the description of the attacker, approximately one block away from the store. Officer Claxton stated that he placed [the petitioner] in custody and took him to the store, where Alkubechy identified him as the victim's attacker. At his lieutenant's request, he checked [the petitioner's] shoes, which had blood on the bottom of them. Officer Claxton said [the petitioner] was transported to the felony response unit at 201 Poplar, where he became agitated, uncooperative, and loud. He stated that [the petitioner] had no injuries at the time of his arrest.

David Galloway, a crime scene officer with the Memphis Police Department, testified that he made photographs of [the petitioner's] clothing and shoes. Officer Galloway said he collected [the petitioner's] shoes, so that the blood on them could be tested for DNA.

Degrah Bell, an officer with the felony response unit of the Memphis Police Department, testified that she was at the scene when [the petitioner] was taken into custody. Officer Bell stated that when [the petitioner] was brought to the felony response unit, he became "very agitated, very excited, really belligerent." She stated that because [the petitioner] appeared to be under the influence of an intoxicant, he was taken to the Regional Medical Center at Memphis.

Olevia Bexton, a registered nurse at St. Peter's Villa nursing home, testified that she took care of the victim at the nursing home. She stated that the victim was "in a vegetative state" from the time that he arrived at St. Peter's Villa until he passed away on November 17, 2008.

Affidavits regarding the victim's medical records were obtained from the custodian of records for the Regional Medical Center at Memphis and St. Peter's Villa nursing home. These medical records were entered into evidence by agreement of the parties.

Dr. Karen Chancellor, the Shelby County Chief Medical Examiner, testified that she performed the victim's autopsy on November 18, 2008. She stated that the victim's cause of death was complications of blunt force injury to the head and that the victim's manner of death was homicide. During the autopsy, Dr. Chancellor noticed that the victim's body was in a contracted state, which indicated that the victim had not moved or been moved recently and was unable to care for himself. She also noticed that the victim was wearing a diaper, had a tracheotomy tube to assist with his breathing, and had a feeding tube because he was unable to feed himself. In addition, Dr. Chancellor observed a scar, two and a half inches in length, on the victim's forehead and stated that this injury had been noted by the hospital at the time he was admitted. Dr. Chancellor opined that the victim had sustained "damage to all parts of the brain" and that the condition of the victim's brain was consistent with traumatic brain injury.

Qadriyyah Debnam, a former forensic scientist with the Tennessee Bureau of Investigation, testified that she tested the DNA obtained from the bottom of [the petitioner's] shoes while working as a special agent in the

serology unit. Debnam stated that this blood matched the victim's DNA. She also stated that the blood from the crime scene matched the victim's DNA.

[The petitioner] testified in his own behalf. He admitted that he had two felony convictions for robbery and aggravated burglary and had three misdemeanor convictions for theft. [The petitioner] stated that he had learned of his uncle's death the day of the victim's attack. He said he went to his mother's house around 11:30 a.m. to spend time with his family and drank around "five 40 ounces" of beer. Sometime after 10:00 p.m., [the petitioner] decided to leave his mother's house. Because he had locked his keys inside his car, [the petitioner] took his stepfather's bicycle to the M and M Express convenience store. [The petitioner] stated that he did not want to borrow his stepfather's truck because they did not get along.

[The petitioner] said that before he left his mother's house, he smoked two "primos," which he described as "crack cocaine crushed down and mixed with weed[.]" He rode the bicycle to the convenience store to buy a cigar so that he could use the cigar-paper to make another "primo." When he got to the store, he bought a cigar and a six-pack of Corona Light. He immediately exited the store, made the "primo," and lit it because he was in a hurry to get high. At that point, the victim and another man, nicknamed "Slick," approached him for the purpose of buying drugs. [The petitioner] gave the two men some crack cocaine for free, and the victim "pulled out [a] crack pipe," which he and "Slick" used to smoke the crack cocaine. [The petitioner] said he stood in the parking lot with the two men for approximately ten minutes.

[The petitioner] then left the store and rode the bicycle back to his mother's house. A short time later, he decided he wanted to smoke another "primo," so he returned to the store some time around midnight to buy another cigar. When he arrived at the store the second time, the victim and "Slick" were still standing outside the store. The victim asked to buy more drugs, and [the petitioner] lied and told him that he did not have any more drugs. [The petitioner] left his bicycle beside the two men and entered the store, where he bought another cigar. He said he was in the store for four to five minutes because he was talking to Alkubechy. When he exited the

store, he saw that his stepfather's bicycle had been stolen and he got "mad and upset." [The petitioner] said that the victim approached him and informed him that he would have to pay ten dollars to get the bicycle back. [The petitioner] refused and slapped the victim "with an open hand." Then the victim hit him in the face, and he hit the victim a second time with his left closed fist, which caused the victim to fall on the ground and to hit his head on the concrete curb. [The petitioner] admitted that he kicked the victim after he fell to the ground. He said he never believed that he could kill someone by kicking them and that he was "sorry." [The petitioner] said that after he kicked the victim, the victim began "snoring" as if he were asleep. He thought that the victim was "just knocked out" and would eventually awaken. [The petitioner] admitted telling the victim that he "better be lucky [he was] still breathing because [he] ought to kill [him]."

On cross-examination, [the petitioner] acknowledged that he kicked the victim because he "was full of a lot of emotions at the time" and was upset that the victim and "Slick" would "take [his] kindness for weakness [after he had] just [given] them [crack cocaine] and [had] told them they could keep the change." He admitted that he was addicted to crack cocaine and had smoked two "primos" before going to the store the first time. He also admitted he had previously stolen items to support his crack cocaine habit. [The petitioner] said that during the fight with the victim, his primary objective was to get the bicycle back. He said, "I would never try to kill nobody. Death was not on my mind at all, period." When the State noted the disparity in Catron's version and [the petitioner's] version of the attack and asked [the petitioner] if he agreed that Catron had no reason to lie about what happened the night of the attack, [the petitioner] replied, "But [Catron] left the lot." Then [the petitioner] stated, "[H]ow do I know that [Catron] didn't buy my bike" from the victim and "Slick." Then [the petitioner] mentioned Catron's failure to appear at [the petitioner's] last trial, which caused the State to object, and the trial court instructed [the petitioner] to answer the questions posed by the State. [The petitioner] said Catron was laughing during his fight with the victim, which is why he asked Catron if he had something to do with the missing bicycle.

State v. Kenneth Lewis, No. W2011-02219-CCA-R3-CD, 2013 WL 1965226, *1-4 (Tenn. Crim. App. May 13, 2013), *perm. app. denied*, (Tenn. Oct. 16, 2013).

After hearing the evidence presented, a jury convicted the petitioner, as charged, of second degree murder. The trial court sentenced the petitioner to thirty-five years, as a Range II offender. This court upheld both the conviction and sentence on appeal.[1] *See id.*

The petitioner filed a timely direct appeal to this court following his conviction and sentencing. On appeal, he argued that: (1) the evidence was insufficient to support the verdict; (2) the trial court abused its discretion in denying the request to question a witness about the witness's failure to appear at two prior court proceedings in the case; and (3) his sentence was excessive. *State v. Kenneth Lewis*, 2013 WL 1965226, *1. After reviewing the evidence presented, this court found no error and affirmed the conviction and sentence.

Thereafter, the petitioner filed a timely pro se petition for post-conviction relief. In the petition, the petitioner raised claims of ineffective assistance of counsel, along with multiple issues not cognizable in a petition for post-conviction relief. Counsel was appointed, and an amended petition was filed. In the amended petition, the main ground asserted for post-conviction relief was ineffective assistance of counsel. Also, at the bequest of the petitioner, certain grounds were again included which were not cognizable in a petition for post-conviction relief. Additionally, post-conviction counsel filed a "Motion for Funds to Hire a Medical Expert," although he conceded that the law only provided for such in capital cases. A preliminary hearing was held at which the petitioner was granted permission to preserve a record to support his argument that the law should be changed to allow for funding for experts in non-capital post-conviction cases. Additionally, it was noted that the court had denied the petitioner's request to have a

[1] A subsequent sentencing hearing was held at which the State introduced the pre-sentence report and a letter from the victim's sister. Additionally, the State introduced certified copies of the petitioner's prior convictions, which included twenty-six various offenses. The petitioner also acknowledged that he had begun drinking at age twelve and smoking marijuana at age thirteen. He further testified that he switched to powdered cocaine at the age of nineteen before switching to crack cocaine at age twenty-six. The petitioner introduced no proof.

After hearing the evidence, the trial court determined that the petitioner was a Range II multiple offender, noting that the petitioner faced a range of twenty-five to forty years for his Class A felony conviction. The court found only one applicable mitigating factor based upon the petitioner's "element of remorse" in his trial testimony. With regard to enhancing factors, the trial court gave great weight to the petitioner's prior history of criminal convictions and behavior, which included multiple assaults, and some weight to the factor that the victim was particularly vulnerable because of a mental disability. The trial court then imposed a thirty-five-year sentence to be served at 100 percent.

transcript of voir dire prepared to aid the petitioner in establishing racial irregularities in the composition of the jury. The court noted that it had indeed denied the request because a transcript would not aid the petitioner in establishing the racial composition of the jury. A post-conviction hearing was subsequently held in the case.

The first witness called was Michael McCusker, the prosecutor in the petitioner's case. The petitioner was initially charged with criminal attempt, second degree murder, as the victim remained alive on life support. During the pendency of the case, the State offered the petitioner a plea deal which carried a ten-year, Range I sentence, despite the petitioner's extensive record. The offer was rejected. In November of 2008, when the victim died, the case had still not proceeded to trial because the petitioner's attorney had health problems and because there had been a series of mental health evaluations conducted on the petitioner. Following the victim's death, the case was resubmitted to a grand jury, and a new indictment was returned charging the petitioner with second degree murder. He did not recall any further offers that were forthcoming from the State. The case proceeded to trial with appointed counsel, but the jury was unable to reach a unanimous verdict, and a mistrial was declared. Thereafter, the petitioner retained trial counsel, and the case was again tried before a jury, with the petitioner being convicted as charged.

Mr. McCusker was questioned regarding his method of conducting voir dire and the notes he kept regarding potential jurors. In this particular case, he noted that the State struck five potential jurors, the defense three, and the trial court one for cause.[2] In his notes, there is no reference to the race of those jurors. Mr. McCusker noted that one was struck because she did not understand English well, and the others were struck based upon their demeanor or how they answered questions. He specifically testified that race had no bearing on his decision to strike those potential jurors.

The petitioner testified that he had been released from the Memphis Mental Health Institute just prior to his arrest in this case. At that time, he was taking the prescription medications Zoloft and trazodone. The petitioner testified that his attorney was aware of this prior to trial. The petitioner acknowledged that he was evaluated for competency and

[2] There is some confusion as to the exact number of challenges exercised, as the post-conviction court noted that the official record indicates that both the State and the defense each used four of their eight challenges.

capacity on two occasions prior to the first trial, but he explained that he "don't call that a mental evaluation, they were just asking me simple questions."

The petitioner complained that it took approximately two years before his case was brought to trial the first time. He acknowledged that his original appointed counsel had filed for a speedy trial motion, but he claimed "it's like they [the State] waited for [the victim] to die." He recalled that about twenty months after the incident, while his case was still pending, he was re-indicted for second degree murder following the victim's death. The petitioner denied that the delay in his trial was at his request. He also denied that his original appointed counsel had requested any delays, and he stated "it was on the [S]tate." The petitioner did concede that during this period, he was seen by a clinical psychologist, not a psychiatrist, at West Tennessee Forensic Services. He admitted that his original counsel had requested said evaluation early in the case. He further seemed to agree that it took nearly two years in order to receive the results of the evaluation which found the petitioner competent to stand trial. The petitioner also reluctantly admitted that his second trial, at which he was represented by trial counsel, was held a mere four months after the conclusion of his first trial.

The petitioner, an African American, next testified regarding the selection and composition of the jury. He stated that his jury was composed of one "black girl and the rest was white people that was old, older." He stated that he did not believe that to be a jury of his peers because "they don't understand what's going on in the neighborhood, a black neighborhood." The petitioner also recalled that the State struck three African Americans from the panel, as well as an Indian. He did not recall his attorney requesting that any potential jurors be struck. The petitioner testified that he informed trial counsel that he knew of one of the stricken potential jurors and knew that she was familiar with the neighborhood, which he characterized as high crime. He stated that he informed trial counsel that he needed jurors like her that were aware of the circumstances in the neighborhood.

When questioned by the State, the petitioner admitted that there might have been more than one African American on the jury panel which heard his case. He stated that he did not "recall it just totally clear," but he reiterated "that it was older white people."

The petitioner also testified that he believed that Mr. Catron, the eyewitness in the case, would not have been able to see the events of the crime as he testified to at the trial

because of his location in the parking lot. The petitioner testified that he informed trial counsel that he should investigate the layout in order to better question Mr. Catron. The petitioner testified that he could not recall trial counsel thoroughly questioning Mr. Catron about his vantage point during the trial. On cross-examination, the petitioner claimed he was only able to see or hear Mr. Catron after the altercation when he was walking back toward the entrance of the store.

When asked about any other issues which he wanted considered on post-conviction, the petitioner stated that he felt he was overcharged in the case because he did not intend to kill the victim. He also complained that the jury did not consider all of the facts that led up to the event, including that he was emotionally distraught over his uncle's death, that he was robbed by men he had given drugs to, and that he needed anger management. The petitioner testified that he believed that he should have been given a more thorough mental evaluation before he went to trial. He did not believe that the competency evaluation, where he was allegedly only asked very simple questions, was sufficient to be termed a mental evaluation. As his final complaint, the petitioner stated that it was not fair that the jury had heard that the victim was a paranoid schizophrenic, but he was unable to offer proof that he was diagnosed as manic depressive when he was nineteen and had left MMHI within thirty days of the incident.

Following questioning by the State and his own attorney, the petitioner was questioned by the post-conviction court regarding letters written by the petitioner to the trial judge in the first trial of the case. Although the petitioner testified he did not specifically recall writing them or their content, he did acknowledge that they were in his handwriting. In the first letter, dated prior to the May 17, 2010 date on which the case was set for trial, the petitioner stated that he had serious problems with his original appointed counsel because she was pushing him to accept a twenty-year plea offer made by the State. A second letter dated May 17, 2010, and apparently written in the afternoon following the proceedings during which the case was re-set, stated that the petitioner had become aware that his original trial counsel's doctor told her to take four weeks off. After being reminded of this, the petitioner agreed that it was fair to say that, at least this trial re-set, was caused by his original counsel's illness, not the State. He also acknowledged requesting a new lawyer because he did not want the case to be reset again.

Trial counsel testified that he was retained by the petitioner's family to represent the petitioner in his second trial shortly after the petitioner's mistrial. Although he could

not remember the exact dates, trial counsel testified that it was not a long period between when he was retained and when the second trial began. Trial counsel indicated that he met with the petitioner and that they discussed the facts of the case and a plan for trial. In preparation for trial, trial counsel testified that he and the petitioner discussed potential witnesses, but no favorable witnesses were found.

Trial counsel testified that he was aware that the petitioner had recently been released from MMHI, but he stated he was not sure that was information he wanted before the jury. He was also aware that the petitioner was taking prescription medications for psychosis. He had also reviewed the results of the mental evaluations performed during the first trial and discussed the results with original appointed counsel. Based upon his reading, trial counsel did not conclude that they established any mental deficiencies which would be beneficial to pursue as defenses at trial. Trial counsel testified that, had he seen issues or had problems communicating with the petitioner, he would have requested another evaluation be conducted during his representation of the petitioner.

Trial counsel testified that the State conveyed a plea offer for a twenty-five-year sentence in exchange for pleading guilty to second degree murder. However, the petitioner was open only to accepting a plea agreement to voluntary manslaughter. When trial counsel conveyed the offer to the petitioner, he refused to plead to second degree murder. Trial counsel testified that the petitioner felt he deserved a sentence of fifteen years because he did not knowingly kill the victim.

Trial counsel recalled that Mr. Catron was brought into court by the Sheriff's Department to testify in the case. Trial counsel did recall cross-examining him regarding whether he could see the fight between the petitioner and the victim. He asked questions about how far away Mr. Catron was, which pump he used, and where he was in relation to the petitioner and the victim. Trial counsel testified that he did not himself go to the crime scene to investigate, but he related that pictures had been included with discovery. He recognized that there was in fact an issue of what Mr. Catron could see from his vantage point, which is why trial counsel asked him those questions on cross-examination. He conceded that he did not specifically ask about Mr. Catron's vantage point and what exactly he could see, as he did when he cross-examined Mr. Alkubechy.

Trial counsel acknowledged that he did not retain an expert to evaluate whether or not smoking the "primos," together with drinking alcohol and the loss of a member of the petitioner's family, would have contributed to the beating which resulted in the victim's death. Trial counsel explained that he had reviewed the case law and concluded that voluntary intoxication, *i.e.*, smoking the "primos" and consuming alcohol, would not have afforded the petitioner any relief as a defense. Trial counsel acknowledged that he did not investigate the side effects of the prescription medications the petitioner was taking. He testified that those side effects could have been important to the defense, if those medications had been combined with the illegal narcotics and alcohol, but maintained that the issue would be a "question of law" that involved "no [then-existing] legal authority."

Trial counsel did recall that some of the police officers testified at trial that the petitioner had been arrested and was incarcerated prior to trial. While acknowledging that reference to such is not properly admissible, trial counsel testified it was immaterial because the pivotal issue in the case was mental state.

After reviewing the chart he prepared during voir dire, trial counsel was able to ascertain that three African Americans, three Caucasians, and one Indian were challenged by the parties and removed. The State challenged the three African Americans and the Indian woman. Trial counsel testified that he did not object to any of the State's challenges, but he testified that he would have had he felt that the State did not have neutral reasons for its challenges. Trial counsel testified that his challenges were based on concerns of having people in the medical field on the jury.

After hearing all the evidence presented, the post-conviction court took the matter under advisement and subsequently entered a written order denying relief. The petitioner timely appealed that denial.

Analysis

The petitioner argues that trial counsel was ineffective by: (1) failing to object to a State witness testifying regarding the petitioner's pre-trial incarceration; and (2) failing to effectively cross-examine Mr. Catron regarding his vantage point and ability to see the

incident. The petitioner also contends that the post-conviction court erred by denying his request for a transcript of the jury selection hearing and by failing to allow introduction of exhibits, specifically the State's notes, containing notations regarding the reasons potential jurors were struck. Lastly, the petitioner argues that the law should be changed to allow funding for expert witnesses in non-capital post-conviction proceedings.

In order to obtain post-conviction relief, a petitioner must prove that his or her conviction or sentence is void or voidable because of the abridgement of a right guaranteed by the United States Constitution or the Tennessee Constitution. T.C.A. § 40-30-103 (2010); *Howell v. State*, 151 S.W.3d 450, 460 (Tenn. 2004). A post-conviction petitioner must prove allegations of fact by clear and convincing evidence. T.C.A. § 40-30-110(f); Tenn. Sup. Ct. R. 28, § 8(D)(1); *Dellinger v. State*, 279 S.W.3d 282, 293-94 (Tenn. 2009). "'Evidence is clear and convincing when there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.'" *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009) (quoting *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998)). In an appeal of a court's decision resolving a petition for post-conviction relief, the court's findings of fact "will not be disturbed unless the evidence contained in the record preponderates against them." *Frazier v. State*, 303 S.W.3d 674, 679 (Tenn. 2010).

I. Ineffective Assistance of Counsel

A criminal petitioner has a right to "reasonably effective" assistance of counsel under both the Sixth Amendment to the United States Constitution and article I, section 9, of the Tennessee Constitution. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). The right to effective assistance of counsel is inherent in these provisions. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984); *Dellinger*, 279 S.W.3d at 293. To prove ineffective assistance of counsel, a petitioner must prove both deficient performance and prejudice to the defense. *Strickland*, 466 U.S. at 687. Failure to satisfy either prong results in the denial of relief. *Id.* at 697.

For deficient performance, the petitioner must show that "counsel's representation fell below an objective standard of reasonableness" under prevailing professional norms, despite a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 688-89. "In other words, the services rendered or the advice given must have been below 'the range of competence demanded of attorneys in criminal cases.'" *Grindstaff*, 297 S.W.3d at 216 (quoting *Baxter v. Rose*, 523

S.W.2d 930, 936 (Tenn. 1975)). The petitioner must prove that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. When reviewing trial counsel's performance for deficiency, this court has held that a "petitioner is not entitled to the benefit of hindsight, may not second-guess a reasonably based trial strategy by his counsel, and cannot criticize a sound, but unsuccessful, tactical decision made during the course of the proceedings." *Adkins v. State*, 911 S.W.2d 334, 347 (Tenn. Crim. App. 1994). The reviewing court "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). However, "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).

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Burns*, 6 S.W.3d at 462 (quoting *Strickland*, 466 U.S. at 691). "[W]hen a petitioner has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Strickland*, 466 U.S. at 691. "Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed." *Baxter*, 523 S.W.2d at 933.

Prejudice requires proof of "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In *Strickland*, the Supreme Court noted that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* at 691. The Court clarified that prejudice "requires showing that counsel's errors were so serious as to deprive the petitioner of a fair trial, a trial whose result is reliable." *Id.* at 687. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

A claim of ineffective assistance of counsel raises a mixed question of law and fact. *Burns*, 6 S.W.3d at 461; *Grindstaff*, 297 S.W.3d at 216. Consequently, this court

reviews the trial court's factual findings de novo with a presumption of correctness, unless the evidence preponderates against the trial court's factual findings. *Grindstaff*, 297 S.W.3d at 216. However, the trial court's conclusions of law on the claim are reviewed under a purely de novo standard with no presumption of correctness. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001).

In its order denying relief, the post-conviction court found as follows:

> In this case at hand, trial counsel was clearly prepared and involved with petitioner in deciding upon a trial strategy. The fact that the jury did not agree with the characterization of this beating as "just a fight" is not the fault of the attorney.
>
> Further there is no evidence that the delay in initially proceeding to trial was the fault of petitioner's first attorney. The extended mental evaluation and the illness of the attorney were clearly the causes of any delay.
>
> petitioner suggests that the composition of the jury was responsible for the fact of his conviction. This is not born[e] out by the proof in the hearing.
>
> ….
>
> In summary, petitioner has not shown that the performance of any of his attorneys was deficient.

A. Testimony Regarding Pre-Trial Incarceration

First, the petitioner alleges that trial counsel was ineffective in failing to object to a State witness mentioning the fact that the petitioner had been incarcerated for almost two years following the crime until the trial. According to the petitioner, this allowed the State to freely elicit testimony of his incarceration which violated his constitutional "right to be presented to the jury free of physical indicia of incarceration."

The challenged testimony centers around an investigator's stating that he visited the petitioner in the jail two years after the incident in order to obtain a DNA sample.

The investigator also testified that he used the petitioner's "jail band" to confirm his identity. It is not disputed that trial counsel failed to object to this very brief statement made by the investigator.

The petitioner argues that this reference to prison is essentially equivalent to forcing him to appear before the jury in prison garb. *See Estelle v. Williams*, 425 U.S. 501, 518 (1976) (prison garb "surely tends to brand [the accused] in the eyes of the jurors with an unmistakable mark of guilt); *Willocks v. State*, 546 S.W.2d 819, 820 (Tenn. Crim. App. 1976) ("Included in the presumption of innocence, which is mandated by due process and which attaches in each criminal case, is the petitioner's right to the 'physical indicia of innocence.'") (quoting *Kennedy v. Cardwell*, 487 F.2d 101, 104 (6th Cir. 1973)).

The petitioner acknowledges and attempts to distinguish his case from *State v. Taylor*, 240 S.W.3d 789, 797 (Tenn. 2007), in which our Supreme Court cautioned trial courts that "unnecessary displays of a criminal petitioner bearing the badges of custody should be avoided" but held that a brief video tape of a petitioner in jail clothing did not violate his constitutional rights. The circumstances in *Taylor* are similar in that both *Taylor* and the petitioner were actually tried wearing street clothes. *Id.* at 796. In *Taylor*, the jury was shown a videotape of the petitioner wearing jail attire. However, that tape was introduced only after the jury heard the testimony of a former cellmate of the petitioner that the petitioner had confessed to the crime while in that cell. Thus, the jury was already aware that the petitioner in *Taylor* had been in jail. *Id*.

It is that distinction that the petitioner relies upon here. He claims his case is distinguishable because the jury was not already aware that he had been in jail for almost two years prior to trial, only that he had been arrested following the crime. The petitioner claims the testimony was unnecessary because the investigator could have used another method to identify the petitioner other than through his "jail band." He asserts that trial counsel's failure to object to this testimony allowed the petitioner "to be branded in the eye of the jury 'with [an] unmistakable mark of guilt . . . .'"

As the State notes, the defense strategy in this case was that the petitioner was guilty of voluntary manslaughter, not second degree murder. It was not disputed that the petitioner was the person responsible for the blows which caused the victim's death; rather, the question was one of intent. At the post-conviction hearing, trial counsel

testified that he did not believe that he should have objected to the brief statements because he saw no need to do so pursuant to the theory the defense was pursuing. This was a strategic decision made by trial counsel. Deference must be shown to such a decision. *See Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). As such, we do not find that trial counsel's performance was deficient.

Neither has the petitioner demonstrated prejudice. While the petitioner vehemently argues to the contrary, we simply cannot conclude that the brief statements made by the investigator in this case rise to the level as those which brand a petitioner "with an unmistakable mark of guilt." We cannot equate a passing reference to imprisonment with a petitioner being forced to appear in jail clothes or in shackles throughout trial proceeding. In *Taylor*, even a brief video of the petitioner in jail clothing did not warrant protection based upon the circumstances. While the petitioner attempts to distinguish *Taylor*, we cannot conclude that mere reference to a "jail band" requires relief.

Although trial counsel conceded at the post-conviction hearing that it was important to present the petitioner to the jury in the best light, *i.e.* free of indicia of guilt, the theory of the defense still only centered upon the petitioner's mental state and his level of guilt, not whether he was innocent. The petitioner testified at trial that he administered the blows to the victim. We conclude that a short colloquy regarding the collection of DNA from the petitioner in a jail cell would not have an impact on the verdict in this case. The petitioner has failed to establish that he is entitled to relief on this ground.

B. Cross-Examination of Witness Regarding Vantage Point

Next, the petitioner faults trial counsel for failing to effectively cross-examine Mr. Catron, a critical witness, regarding his vantage point and ability to see and hear the crime being committed. The petitioner contends that the record establishes that Mr. Catron could not have heard or seen much of the incident from his position at the gas pump, because the incident occurred around the side of the building. The petitioner believes that the incident occurred completely out of the view of Mr. Catron and that trial counsel, in order to present a proper defense, should have cross-examined him "as to his location or ability to see or hear the incident." The State counters that the record establishes that trial count carefully reviewed the exhibits depicting the layout at the

crime scene and effectively cross-examined Mr. Catron regarding his ability to observe the crime.

While we acknowledge that trial counsel stated that he may not have questioned Mr. Catron in as much detail regarding his vantage point as he did another witness, trial counsel testified that he had cross-examined Mr. Catron during the proceedings regarding whether he could see the altercation. The following colloquy occurred during the cross-examination of Mr. Catron by trial counsel:

Q. And you were parked at the gas pump?

A. Far pump . . . Pump two.

Q. Okay. Is that the far pump? [showing Mr. Catron an exhibit]

A. Yeah.

Q. How far away is that from the entrance to the store?

A. I would say probably give or take 50 feet.

Q. Okay. So you're about 50 feet away?

A. Uh-huh.

Q. It's nighttime?

A. Yeah.

. . . .

Q. And were you inside your car when you saw this incident occur?

A. Yes, I did. Yes, I was.

Q. Okay. And now if you were inside your vehicle, how could you hear any statements made by anyone?

A. Because he was speaking pretty loud and I had my windows down.

Q. But you were 50 feet away?

A. Yeah.

While perhaps not the most thorough cross-examination, we cannot conclude that it did not effectively inform the jury as to the location of Mr. Catron and potential problems he could have had in viewing the incident. The post-conviction court found that trial counsel cross-examined the eyewitnesses regarding their vantage point and ability to see the altercation which occurred between the petitioner and the victim. Likewise, the post-conviction court found that trial counsel was well-prepared for trial. On this record, we cannot conclude that any evidence in the record preponderates otherwise. As such, the petitioner is not entitled to relief.

II. Voir Dire Transcript and Exhibits

The petitioner next contends that the post-conviction court erred in denying his request for a transcript of the jury selection proceedings and in refusing to admit into evidence notes, or a chart, prepared by the State reflecting why potential jurors were challenged. The record does reflect that the petitioner raised the issue of possible racial bias in the State's exercise of its peremptory challenges in his post-conviction petitioner. It further reflects that four of the State's peremptory challenges were made against non-whites, specifically three African Americans and an Indian.

The post-conviction court denied the petitioner's request to have the voir dire portion of the proceeding transcribed, but the court made clear that the petitioner, or his counsel, would be allowed access to the audio recording of the proceeding. In denying the request, the court noted that the transcript would not aid the petitioner in establishing a racially-motivated bias. The court also denied the petitioner's request to admit into evidence the prosecutor's jury selection chart which contained the reasons that each potential juror was challenged. The court concluded that the document was protected as attorney work product. It was also pointed out by the post-conviction court that neither the State nor the petitioner exercised all of their available challenges. Moreover, trial counsel made no contemporaneous objection to the State's exercise of its challenges.

The petitioner is correct that article I, section 8 of the Tennessee Constitution and the Equal Protection Clause of the United States Constitution prohibit the racially motivated exercise of peremptory challenges. *Batson v. Kentucky*, 476 U.S. 79, 96-98 (1986). However, failure to object to a *Batson* issue prior to the swearing of the jury results in waiver of the issue on direct appeal. *State v. Christopher Knighton*, No. E2000-00746-CCA-R3, 2001 WL 125952, at *5 (Tenn. Crim. App. Feb. 15, 2001). The

procedure for addressing a *Batson* challenge is: 1) the party making the challenge must establish a prima facie case for a discriminatory motive; 2) the opposing side is allowed to rebut the prima facie case by establishing a race-neutral reason for the challenge; and 3) the party making the challenge must have an opportunity to respond as to why the reason is pre-textual. *See Woodson v. Porter Brown Limestone Co.*, 916 S.W.2d 896, 906 (Tenn. 1996).

Following his recitation of the applicable law, the petitioner asserts that:

> In this case, the trial counsel could have been able to establish the prima facie case for racial bias – according [to] trial counsel at least three of the four struck jurors were African-American. . . . The State would have offered a neutral explanation for the strikes, as offered by McCusker at the post-conviction hearing. . . . But the petitioner was unable to cross-examine on the "neutral explanation" of why each juror was struck because the post-conviction court, acting *sua sponte*, denied the motion for jury selection transcript. . . . Had the transcript been available, petitioner would have an opportunity to review the transcript and compare questions that white jurors were asked versus questions that non-white jurors were asked to create neutral grounds for their strikes. . . .

As an initial matter, we note that, on appeal, the petitioner is not raising this issue in the context of ineffective assistance of counsel. Nowhere in his appellate argument does he allege that trial counsel was ineffective in failing to raise the possible violations prior to the swearing of the jury or on direct appeal. As such, we are precluded from reviewing that issue. The petitioner only argues that the post-conviction court's action prevents him from being allowed to establish evidence of a possible *Batson* claim.

At the outset of our review, we note that questions concerning the admissibility of evidence are reviewed under an abuse of discretion standard. *State v. Dotson*, 254 S.W.3d 378, 392 (Tenn. 2008). Moreover, this court is bound by the post-conviction court's findings of fact unless the preponderance of the evidence is otherwise. *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006).

After reviewing the record, we are unable to conclude that the petitioner is entitled to relief with regard to the issue of the transcript. The petitioner claims that he should have been given a transcript of the voir dire to compare the questions asked of various potential jurors, which would allow him to cross-examine the State on its motivations for excluding a juror. In other words, the petitioner wishes to explore the possibility of a *Batson* violation in the jury selection process. This court would be concerned if trial courts were erecting unnecessary barriers or engaging in routine denials of requests for transcripts of hearings. Petitioners would have great difficulty without transcripts in substantiating claims based upon a *Batson* challenge or otherwise. Here, the trial court (presumably in a cost-saving measure) required the petitioner's counsel to review an audiotape recording of the voir dire before it would order a transcription of the hearing. We cannot grant the petitioner relief on this issue when he failed to exercise due diligence and actually listen to a copy of the audiotape. In future cases, it would be beneficial for appellate review for the trial court to explain why they are denying a request for a transcript of a hearing. We recognize that attorneys are often on a fishing expedition to determine what valid issues should be pursued in post-conviction relief matters. We cannot, however, fault the trial court's attempt to provide counsel the opportunity to explore issues in a less costly fashion, rather than providing full transcripts of every hearing. Upon review of this record, we determine that the trial court did not err in requiring the petitioner's counsel to listen to an audio recording of the hearing before the trial court ordered the costly transcription of the proceeding.

Likewise, the petitioner has failed to establish that it was error to refuse to allow admission of the State's notes regarding the jury because it was in fact work product. As noted by the State, an attorney's work product consists of those internal reports, documents, memoranda, and other materials that the attorney has prepared or collected in anticipation of trial. *Wilson v. State*, 367 S.W.3d 229, 235 (Tenn. 2012) (citing *State v. Hunter*, 764 S.W.2d 769, 770 (Tenn. Crim. App. 1988)). An assistant district attorney's work product is in general not admissible evidence. *Id.* (citing *Mitchell v. Jennings*, 836 S.W.2d 575, 581 (Tenn. Crim. App. 1992)). The notes on the State's chart used during the selection of the jury squarely fall within that definition and are, thus, not admissible. As seen from the above recitation of his argument, the petitioner has failed to address this finding by the post-conviction court. There was no error in the post-conviction court's refusal to admit the evidence.

The petitioner was given the chance to cross-examine the prosecutor in the case. In fact, the petitioner was allowed to refresh the prosecutor's memory by having him review the chart in question. During questioning, the prosecutor stated that there were no

notations on the chart which related to the race or ethnicity of the potential jurors. He testified that the notations referred to the potential jurors' demeanor and the way in which they answered questions. Based upon that testimony, we cannot conclude that the admission of the chart would have in any way aided the petitioner. No relief is warranted on this issue.

III. Funding for Experts in Non-Capital Case

Lastly, the petitioner presents an argument that the current law should be changed to allow funding for experts in non-capital, post-conviction proceedings, specifically in his case, a mental health expert. He contends that the protections provided under the Due Process Clause should be extended to require the State to provide funding for an expert where no expert was consulted at the trial level and the petitioner is alleging trial counsel was ineffective for not consulting an expert at trial. He concluded that "doing so is in the spirit of the purpose of the Tennessee Post-Conviction Procedure Act."

The petitioner recognizes that the law in fact does not support his argument and cites to the relevant authority. *See* Tenn. Sup. Ct. R. 13 § 5(a)(2) (explicitly states that funding for an expert witness in non-capital post-conviction proceedings shall not be authorized or approved); *see also Kevin Jones v. State*, No. W2009-02051-CCA-R3-PC, 2010 WL 4812773, at *4 (Tenn. Crim. App. Nov. 19, 2010) (citations omitted) (holding that neither due process nor equal protection requires the state to provide expert services to indigent non-capital post-conviction petitioners). Despite this negative authority, the petitioner, nonetheless, asserts a good-faith argument that "to deny an expert witness to indigent petitioners is to provide a 'loophole' around Due Process and the spirit of the Tennessee Post-Conviction Procedure Act." He asserts that, as a result of the failure to provide such funding, indigent petitioners with no access to an expert will be unable to get relief under the Post-Conviction Act. The argument is that "at least a small portion" of people, including the petitioner, who have a valid claim of ineffective assistance based upon trial counsel's failure to contact an expert witness at trial, will be kept for presenting valid claims and obtaining relief.

While recognizing that the petitioner is asserting a good faith argument in favor of change, we are unable to grant him the requested relief, as this court is bound by the determinations made by the Tennessee Supreme Court. Again, our supreme court has clearly rejected the argument made by the petitioner. *Davis v. State*, 912 S.W.2d 689,

696 (Tenn. 1995); *see also Johnny Rutherford v. State*, No. E1999-00032-CCA-R3-PC, 2000 WL 246411, at *18 (Tenn. Crim. App. Mar. 6, 2000). As such, we are unable to conclude that the petitioner is entitled to relief.

CONCLUSION

Based upon the foregoing, the denial of post-conviction relief is affirmed.

_____

JOHN EVERETT WILLIAMS, JUDGE