

APPENDIX

(a). SIXTH CIRCUIT COURT OF APPEALS OPINION

KENNETH BROWN, Petitioner-Appellant, v. JERRY WARDLOW, Warden, Respondent-Appellee.

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

2024 U.S. App. LEXIS 12197

No. 23-5966

May 20, 2024, Filed

Editorial Information: Prior History

Brown v. Fitz, 2023 U.S. Dist. LEXIS 170692, 2023 WL 6217761 (W.D. Tenn., Sept. 25, 2023)

Counsel {2024 U.S. App. LEXIS 1} KENNETH BROWN, Petitioner - Appellant, Pro se, Whiteville, TN.

For JERRY WARDLOW, Warden, Respondent - Appellee: Sarah J. Stone, Office of the Attorney General of Tennessee, Nashville, TN.

Judges: Before: **GRIFFIN**, Circuit Judge.

Opinion

ORDER

Kenneth Brown, a Tennessee prisoner proceeding pro se, appeals the district court's judgment denying his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254. Brown moves this court for a certificate of appealability and for leave to proceed in forma pauperis on appeal. See Fed. R. App. P. 22(b), 24(a)(5). Brown has also filed a motion to remand, which we construe as a motion for a certificate of appealability as to the district court's denial of his post-judgment motion.

In 2012, a jury in the Shelby County Criminal Court convicted Brown of one count each of first-degree murder, employment of a firearm during a dangerous felony, and reckless endangerment by use of a deadly weapon along with 12 counts each of attempted first-degree murder and aggravated assault. The evidence presented at trial showed that Brown and two others fired weapons at a large gathering of people on Northmeade Avenue in Memphis, killing Kimberly Jamerson. After

merging the convictions for attempted murder and aggravated assault,{2024 U.S. App. LEXIS 2} the trial court sentenced Brown to life imprisonment for the murder conviction plus 308 years of imprisonment for the other convictions. The Tennessee Court of Criminal Appeals affirmed. *State v. Brown*, No. W2013-00329-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 945, 2014 WL 5092906 (Tenn. Crim. App. Oct. 9, 2014), perm. app. denied 2015 Tenn. LEXIS 120 (Tenn. Feb. 13, 2015).

Brown then filed a pro se petition for post-conviction relief. The post-conviction court appointed counsel, who filed an amended petition asserting ineffective assistance of trial counsel. After an evidentiary hearing, the post-conviction court denied Brown's petition. The Tennessee Court of Criminal Appeals affirmed. *Brown v. State*, No. W2017-01755-CCA-R3-PC, 2019 Tenn. Crim. App. LEXIS 121, 2019 WL 931735 (Tenn Crim. App. Feb. 22, 2019), perm. app. denied 2019 Tenn. LEXIS 341 (Tenn. July 25, 2019).

Through counsel, Brown filed a \pm 2254 habeas petition raising the following grounds for relief: (1) the trial and post-conviction courts violated his right to compulsory process by refusing to compel the production of Beatrice Vaultx to testify on his behalf, and his trial and post-conviction counsel provided ineffective assistance in failing to secure her testimony; (2) the trial court violated his right against self-incrimination by admitting his involuntary confession; and (3) his trial counsel provided ineffective assistance in failing to seek a jury instruction on the proximate cause of death. The district{2024 U.S. App. LEXIS 3} court dismissed Brown's habeas petition without prejudice for failure to prosecute but later granted his motion for relief from judgment and reinstated the case.

After briefing by the parties, Brown's second retained attorney filed a motion to withdraw, which the district court granted. Proceeding pro se, Brown filed a first

amended habeas petition and a motion for leave to file a second amended habeas petition. The district court denied Brown leave to amend. Brown filed a motion for relief from the district court's order denying him leave to amend as well as additional motions for leave to amend and proposed amendments. Brown also moved the district court to hold the habeas proceeding in abeyance to allow him to exhaust additional claims, asserting that he had filed in the state court a hybrid petition for DNA and fingerprint analysis and for a writ of error coram nobis along with a motion for a new trial. The district court denied Brown's motions.

The district court ultimately denied Brown's habeas petition as initially filed, concluding that the claims raised in his first habeas petition lacked merit or were procedurally defaulted, and declined to issue a certificate of appealability.{2024 U.S. App. LEXIS 4} Brown filed a notice of appeal and a motion for relief from the district court's order denying his request to hold the habeas proceeding in abeyance. The district court denied Brown's post-judgment motion.

Brown now moves this court for a certificate of appealability as to the district court's denial of his request to hold the habeas proceeding in abeyance and its denial of his ineffective-assistance claim related to his trial counsel's failure to request a proximate-cause instruction. See Fed. R. App. P. 22(b). By failing to address his other habeas claims in his motion for a certificate of appealability, Brown has forfeited review of those claims by this court. See *Jackson v. United States*, 45 F. App'x 382, 385 (6th Cir. 2002) (per curiam); *Elzy v. United States*, 205 F.3d 882, 886 (6th Cir. 2000).

To obtain a certificate of appealability, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that

jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). Where the district court dismisses a claim on procedural grounds, a certificate of appealability should issue if the petitioner{2024 U.S. App. LEXIS 5} "shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

No reasonable jurist could conclude that the district court abused its discretion in denying Brown's request to hold the habeas proceeding in abeyance to allow him to exhaust additional claims. Brown asserted that he had filed a hybrid petition for DNA and fingerprint analysis and for a writ of error coram nobis along with a motion for a new trial in the state court. Brown sought testing of 7.62x39 mm shell casings recovered near Kimberly Jamerson's body, arguing that DNA or fingerprint evidence left on the casings could link her shooting to a person attending the party at the Northmeade location. Brown asked the district court to hold the habeas proceeding in abeyance while he exhausted his constitutional claims related to this "newly available forensic evidence" in the state courts.

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a district court may not grant habeas relief unless the petitioner has exhausted{2024 U.S. App. LEXIS 6} his claims in the state courts. 28 U.S.C. § 2254(b)(1)(A). A district court has discretion to grant a stay and abeyance, allowing "the petitioner to return to state court to fully litigate his unexhausted claims while the district court holds his exhausted claims in abeyance." *McBride v. Skipper*, 76 F.4th 509, 513 (6th Cir. 2023) (citing *Rhines v. Weber*, 544 U.S. 269, 275-76, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005)). But "a stay and abeyance has the potential to 'undermine [AEDPA's]

twin purposes' of exhaustion and finality, and so 'should be available only in limited circumstances.'" *Id.* (quoting *Rhines*, 544 U.S. at 277). A district court should grant a stay and abeyance only "if the petitioner had good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics." *Rhines*, 544 U.S. at 278.

As the district court pointed out in denying an abeyance, Brown failed to provide a reasonable explanation for why he waited until July 2023 to exhaust his additional claims. Brown first raised a claim with respect to analysis of the shell casings recovered near Kimberly Jamerson's body in his pro se petition for post-conviction relief filed in May 2015; his post-conviction counsel did not pursue that claim. Furthermore, the premise of Brown's unexhausted claims was plainly{2024 U.S. App. LEXIS 7} meritless. Tennessee Bureau of Investigation (TBI) Special Agent Forensic Scientist Steve Scott testified at Brown's trial that the bullet fragments removed from Kimberly Jamerson's head matched a .30 carbine caliber bullet and that those fragments were not consistent with the 7.62 cartridge cases. See *Brown*, 2014 Tenn.Crim. App. LEXIS 945, 2014 WL 5092906, at *9.

In his motion for a certificate of appealability, Brown argues that reasonable jurists could debate the correctness of the district court's denial of an abeyance because he "is putting forth material evidence in state court of his actual innocence of the murder of Kimberly Jamerson." But Brown has yet to obtain that "material evidence." At this time, Brown's claims about DNA or fingerprint evidence purportedly left on the 7.62x39 mm shell casings are based on speculation. Under these circumstances, no reasonable jurist could conclude that the district court abused its discretion in denying an abeyance.

Nor could reasonable jurists debate the district court's rejection of Brown's

ineffective-assistance claim related to his trial counsel's failure to request a proximate-cause instruction. The Tennessee Court of Criminal Appeals reviewed Brown's ineffective-assistance claim under the two-part{2024 U.S. App. LEXIS 8} standard set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), requiring him to demonstrate (1) "that counsel's performance was deficient" and (2) that counsel's "deficient performance prejudiced the defense." To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The prejudice prong requires the defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. On habeas review under 28 U.S.C. § 2254(d), review of Brown's ineffective-assistance claim is "doubly" deferential: "The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

The Tennessee Court of Criminal Appeals noted that "the proximate cause of death instruction is given when there is evidence that the victim's death was caused by an independent, intervening act or omission that the defendant could not reasonably have anticipated." Brown, 2019 Tenn. Crim. App. LEXIS 121, 2019 WL 931735, at *10. The Tennessee appellate court continued: "Here, the proof showed that either [Brown] or his co-defendants fired the fatal bullet or someone from the Northmeade location fired the fatal bullet, but there was no evidence{2024 U.S. App. LEXIS 9} that Kimberly Jamerson's death was caused by an independent, intervening act or omission that the responsible party could not reasonably have anticipated." 2019 Tenn. Crim. App. LEXIS 121, [WL] at *11. The trial evidence showed that Brown and his co-defendants arrived at the Northmeade scene and fired at the Northmeade group first and that members of that group returned fire, an act that could easily have been anticipated. 2019 Tenn. Crim. App. LEXIS 121,

[WL] at *1-2. Because the proximate-cause instruction did not apply based on the evidence presented at trial, the Tennessee Court of Criminal Appeals concluded, Brown had failed to show that his trial counsel was deficient in failing to request the instruction or that the instruction would have changed the outcome of his trial.

In his motion for a certificate of appealability, Brown contends that, if a person attending the party at the Northmeade location had discharged the round that killed Kimberly Jamerson, that would have been "an independent, intervening act or omission that [he] could not reasonably have anticipated." But in concluding that a proximate-cause instruction would not have been warranted, the Tennessee Court of Criminal Appeals considered the possibility that someone from the Northmeade location had fired{2024 U.S. App. LEXIS 10} the fatal shot. Brown and his co-defendants could reasonably have anticipated that persons attending the party at the Northmeade location would return fire.

To the extent that Brown challenges the Tennessee appellate court's interpretation of state law on proximate cause, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). And because the Tennessee Court of Criminal Appeals reasonably applied *Strickland* in analyzing Brown's ineffective-assistance claim, reasonable jurists would agree that he was not entitled to habeas relief on this claim.

Brown also moves this court to remand to the district court "for correction and modification of the record." Because Brown contends that the district court failed to review his post-judgment motion under the appropriate standard, we construe his motion as seeking a certificate of appealability with respect to the district court's denial of his post-judgment motion.

Citing Federal Rule of Civil Procedure 60(b)(1), Brown moved for relief from the district court's order denying his request to hold the habeas proceeding in abeyance. The district court therefore construed Brown's motion as seeking relief under Rule 60(b)(1), which authorizes the district{2024 U.S. App. LEXIS 11} court to relieve a party from an order for "mistake, inadvertence, surprise, or excusable neglect." Brown now argues that the district court erred in treating his motion as filed under Rule 60(b) rather than Rule 59(e) because he mailed it within 28 days of the district court's judgment. Brown certified that he mailed his motion on September 26, 2023, the same day that the district court entered its judgment, but the motion was not received by the district court until October 30, 2023. A district court "may grant a Rule 59(e) motion to alter or amend if there is: (1) a clear error of law; (2) newly discovered evidence; (3) an intervening change in controlling law; or (4) a need to prevent manifest injustice." *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005). Regardless of the standard of review, no reasonable jurist could conclude that the issues raised in Brown's post-judgment motion deserve encouragement to proceed further.

Brown argues that the district court ignored his newly discovery evidence that TBI Special Agent Scott's ballistics analysis lacked sufficient indicia of reliability because it was not subject to a blind peer review as required by law. Brown relied on a letter from the Shelby County District Attorney General about another forensic scientist{2024 U.S. App. LEXIS 12} employed by the TBI who was disciplined for discrepancies involving travel reimbursements and overtime claims. The letter stated: "In the Firearms Unit, all cases requiring microscopic comparison must be verified by a second examiner. The second examiner handles the same evidence and must reach the same conclusion before a report is issued." But Brown failed to present any newly discovered evidence that TBI Special Agent Scott himself was involved in any misconduct or failed to follow the proper procedures in Brown's case.

Brown also challenges the district court's statement that "[i]t is extremely unlikely that DNA will be found on a spent shell casing, both because of the small size of the casing and the fact 'that the act of firing a shell destroys the DNA so that the chance of it being on the fired shell is slim to none.'" Brown attaches articles to his motion to remand indicating that fingerprints and DNA can be recovered from shell casings. Regardless, at this time, whether any DNA or fingerprint evidence would be recovered from the 7.62x39 mm shell casings found near Kimberly Jamerson's body remains speculative.

For these reasons, we DENY Brown's motion for a certificate of appealability{2024 U.S. App. LEXIS 13} and his motion to remand and DENY AS MOOT his motion for leave to proceed in forma pauperis.

APPENDIX

(b). U.S. DISTRICT COURT OPINION

KENNETH BROWN, Petitioner, v. JOHNNY FITZ, Respondent.
UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE,
WESTERN DIVISION
2023 U.S. Dist. LEXIS 170692
Case No. 2:20-cv-02315-SHL-atc
September 25, 2023, Decided
September 25, 2023, Filed
Editorial Information: Subsequent History

Writ of habeas corpus denied, Dismissed by, Certificate of appealability denied Brown v. Fitz, 2023 U.S. Dist. LEXIS 171928, 2023 WL 6279523 (W.D. Tenn., Sept. 26, 2023)

Editorial Information: Prior History

State v. Brown, 2014 Tenn. Crim. App. LEXIS 871 (Tenn. Crim. App., Sept. 5, 2014)

Counsel {2023 U.S. Dist. LEXIS 1} Kenneth Brown, Petitioner, Pro se, Whiteville, TN.

For Johnny Fitz, Respondent: Sarah J. Stone, LEAD ATTORNEY, TENNESSEE ATTORNEY GENERAL'S OFFICE, Federal Habeas Corpus Division, Nashville, TN; Zachary Lewis Barker, OFFICE OF THE TENNESSEE ATTORNEY GENERAL AND REPORTER, Nashville, TN.

Judges: SHERYL H. LIPMAN, CHIEF UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: SHERYL H. LIPMAN

Opinion

ORDER DENYING PENDING MOTIONS

(ECF Nos. 63, 65, 68, 71, 72)

Before the Court are the following motions and documents filed by Petitioner, Kenneth Brown: (i) an Amended Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody ("Sixth Amended § 2254 Petition"), (ECF No. 62); (ii) a Motion for Relief from Court's Order In-Part Denying Amendments and In-Part Directing Compliance with Court's Requisites for

Amendments ("Motion for Reconsideration"), (ECF No. 63); (iii) a Motion for Leave to Amend or Supplement Original Inadequate Petition Filed by First Former Habeas Counsel Robert Golder ("Motion to Amend or Supplement \square 2254 Petition"), (ECF No. 65); (iv) a Motion Showing Cause and Prejudice to Overcome Default of Claims 4-8 of First Amended 2254 Petition (Amended version) ("Motion Showing Cause and Prejudice"), (ECF No. 68); (v) a document{2023 U.S. Dist. LEXIS 2} titled First Amended 28 U.S.C. 2254 Petition for Writ of Habeas Corpus ("Seventh Amended \square 2254 Petition"), (ECF No. 69); (vi) a Motion to Hold the Instant Habeas Corpus Proceedings in Abeyance in Order to Allow Petitioner to Exhaust Other Viable and Unadjudicated Federal Constitutional Claims in His Pending State Court Collateral Attack Proceedings ("First Motion to Hold in Abeyance"), (ECF No. 71); and (vii) another Motion to Hold the Instant Habeas Corpus Proceedings in Abeyance in Order to Allow Petitioner to Exhaust Other Viable and Unadjudicated Federal Constitutional Claims in His Pending State Court Collateral Attack Proceeding ("Second Motion to Hold in Abeyance"), (ECF No. 72). For the reasons stated below, the Court DENIES the pending motions with prejudice.

I. PROCEDURAL HISTORY

Brown was convicted in the Criminal Court for Shelby County, Tennessee of the first degree murder of Kimberly Jamerson and of, inter alia, twelve counts of attempted first degree murder. He was sentenced to life imprisonment for the murder and to a consecutive sentence of 308 years for the other offenses. The Tennessee Court of Criminal Appeals ("TCCA") affirmed. State v. Brown, No. W2013-00329-CCA-R3-CD, 2014 WL 5092906, at *18, 2014 Tenn. Crim. App. LEXIS 945 (Tenn. Crim. App. Oct. 9, 2014) ("Brown I"). Later, the TCCA affirmed

the denial of the{2023 U.S. Dist. LEXIS 3} post-conviction petition and further held that Brown was not entitled to a second post-conviction hearing. *Brown v. State*, No. W2017-01755-CCA-R3-PC, 2019 Tenn. Crim. App. LEXIS 121, 2019 WL 931735, at *14 (Tenn. Crim. App. Feb. 22, 2019) ("Brown II").

On April 27, 2020, Brown, through counsel, Robert Harris Golder, filed a Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254 ("§ 2254 Petition"). The petition presents the following claims:

1. Denial of right to compulsory process due to the trial court's failure to compel the production of Beatrice Vaultx or, alternatively, due to the ineffective assistance of trial counsel in failing to subpoena Vaultx or demand a material witness warrant, (ECF No. 1 at PageID 4-7);
2. Admission of involuntary confession, (*id.* at PageID 7-9); and
3. Omission of jury instruction on proximate cause of death, including that counsel was ineffective in failing to request such an instruction, (*id.* at PageID 9-12).

The case was dismissed without prejudice on September 3, 2020, after counsel failed to file an in forma pauperis affidavit or to pay the filing fee. (ECF Nos. 6, 7.) On September 22, 2022, the Court granted Brown's motion for relief from judgment, pursuant to Federal Rule of Civil Procedure 60(b)(6), because of egregious attorney misconduct and directed the Warden, Johnny Fitz, to file the state court record and a response to the{2023 U.S. Dist. LEXIS 4} § 2254 Petition. (ECF No. 38.) Fitz filed the record on November 17, 2022, and his Answer to Petition for Writ of Habeas Corpus ("Answer") on November 21, 2022. (ECF Nos. 42, 43.) Brown, through his second retained counsel, Luke Evans, filed a Reply to

Answer to Petition for Writ of Habeas Corpus ("Reply") on January 19, 2023. (ECF No. 46.) Then, on February 16, 2023, the Warden filed his Sur-Reply, for which he had received leave of Court. (ECF No. 49.)

On February 17, 2023, Brown filed his Motion to Withdraw Current Former Counsel Luke Evans; to Grant Pro Se Petitioner Leave to Amend or Supplement Original Inadequate Petition Filed by First Former Habeas Counsel Robert Golder; and to Direct Respondent to Address All Claims and Arguments of New Amended Petition in Her Now Pending Sur-Reply ("Motion for Counsel to Withdraw and Third Motion for Leave to Amend") and his Motion to Compel Court Clerks Office to File All of Petitioner's Pro Se Pleadings and Motion to Compel Court to Modify the Docket to Reflect that Petitioner Is Proceeding Pro Se ("Motion to Compel Clerk and to Modify the Docket"). (ECF Nos. 50, 51.) On February 22, 2023, Evans filed a Motion to Withdraw. (ECF No. 52.) Also on {2023 U.S. Dist. LEXIS 5} February 22, 2023, Brown filed his Notice to Court that Petitioner Preserves His Right and Ability to Reply and Motion to Supplement/Amend Reply and for Leave to Amend 2254 Petition ("Motion to Supplement or Amend Reply"). (ECF No. 53.)

On March 6, 2023, Brown filed his proposed Amended 28 U.S.C. 2254 Petition for Writ of Habeas Corpus, the fourth such filing ("Fourth Amended \square 2254 Petition"). (ECF No. 54). On March 9, 2023, the Court granted Evans's Motion to Withdraw. (ECF No. 55.) On March 29, 2023, Brown filed a Motion for Leave to File Second [sic] Amended 28 U.S.C. 2254 Petition for Writ of Habeas Corpus, Including Five (5) Substantial IATC Claims; Defaulted but Excusable: Memorandum of Law ("Motion for Leave to File Fifth Amended \square 2254 Petition"). (ECF No. 57.)

On May 17, 2023, the Court denied each of the pending motions ("May 17 Order").

(ECF No. 60.) In doing so, the Court noted that Brown had failed to comply with the instruction that he submit a single list of the claims that he intends to pursue. (Id. at PageID 3866-67.) The Court also concluded that the claims presented in Brown's various amendments are not legally viable. (Id. at PageID 3857, 3869-73, 3875-80.) As the Court stated, "Brown has been given an opportunity to amend, and every proposed new claim is either factually or legally insufficient." (Id. at PageID 3880.)

Undaunted, Brown has continued to file both motions and proposed amendments. On May 30, 2023, Brown filed his proposed Sixth Amended ¶ 2254 Petition, which presents the following claims:

1. "STATE COURT'S OPINION THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THAT COUNSEL FAILED TO REQUEST INSTRUCTION ON CAUSATION WAS (1) CONTRARY TO AND INVOLVED AN UNREASONABLE APPLICATION OF STRICKLAND v WASHINGTON and BRECHT v ABRAHAMSON; and (2) WAS BASED UPON AN UNREASONABLE DETERMINATION OF THE FACTS IN LIGHT OF THE EVIDENCE PRESENTED IN STATE COURT," (ECF No. 62 at PageID 3890);
2. "PETITIONER'S FIRST DEGREE MURDER CONVICTIONS [sic] IS BASED ON INSUFFICIENT EVIDENCE AND VIOLATE DUE PROCESS OF LAW; AND THE STATE COURT'S OPINION AFFIRMING IS BASED ON UNREASONABLE DETERMINATION CONTRARY TO AND UNREASONABLE APPLICATION OF JACKSON V VIRGINIA," (id. at PageID 3891);
3. "TRIAL COUNSEL IS INEFFECTIVE FOR FAILING TO SUBPOENA TBI AGENT RUSSELL DAVIS AND THE GSRK [GUNSHOT RESIDUE TEST]

RESULTS IN SUPPORT OF BROWN'S DEFENSE; AND THE STATE COURT'S DETERMINATION WAS OBJECTIVELY UNREASONABLE,"{2023 U.S. Dist. LEXIS 7} (id. at PageID 3893);

4. "PETITIONER SUFFERED INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL WHEN APPELLATE COUNSEL JUNI GANGULI []DEVIATED FROM THE CLAIMS RAISED ON MOTION FOR NEW TRIAL; AND []OVERRODE THE TRIAL DEFENSE AND FACTS ADDUCED AT TRIAL," (id. at PageID 3896);

5. "PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO INVESTIGATE AND SEEK PRODUCTION OF MATERIAL FINGERPRINT EVIDENCE FROM THE RIFLE CASINGS RECOVERED NEAR KIMBERLY JAMERSON'S BODY," (id. at PageID 3897);

6. "PETITIONER WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL IN THAT TRIAL COUNSEL FAILED TO INVESTIGATE AND REQUEST VICTIM'S GUNSHOT-RESIDUE TEST RESULT WHICH IS MATERIAL AND MAY HAVE BEEN FAVORABLE TO THE DEFENSE," (id. at PageID 3899);

7. "TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOTION FOR NEW TRIAL OR ACQUITTAL BASED ON PREJUDICIAL PHOTO LINEUP IDENTIFYING KENNETH AS KILLER OF KIMBERLY JAMERSON; AND FOR FAILURE TO CONTEMPORANEOUSLY MOTION PRETRIAL TO SUPPRESS AS IRREPARABLE MISIDENTIFICATION EVIDENCE," (id. at PageID 3901);
and

8. "POST-CONVICTION COUNSEL FAILED TO ALLEGE AND ARGUE THAT TRIAL COU NSEL [sic] WAS INEFFECTIVE FOR FAILING TO ARGUE THAT THE DETECTIVES FAILED{2023 U.S. Dist. LEXIS 8} TO 'SCRUPULOUSLY HONOR' PETITIONER'S RIGHT TO REMAIN SILENT," (id. at PageID 3903).ECF No. 62 did not supply facts supporting any of these claims. The Sixth Amended ¶ 2254 Petition refers to an attachment, but no attachment was submitted.

Also on May 30, 2023, Brown filed his Motion for Reconsideration and his Motion to Amend or Supplement ¶ 2254 Petition, each of which is accompanied by a legal memorandum. (ECF Nos. 63, 64, 65, 66.) He also filed his own factual affidavit that day, along with his Motion Showing Cause and Prejudice, and his proposed Seventh Amended ¶ 2254 Petition, which, despite the title, appears to constitute the factual support for the Sixth Amended ¶ 2254 Petition. (ECF Nos. 67, 68, 69.)

On July 31, 2023, Brown filed his First Motion to Hold in Abeyance. (ECF No. 71.) Lastly, on August 16, 2023, Brown filed his Second Motion to Hold in Abeyance. (ECF No. 72.)

II. PENDING MOTIONS AND FILINGS

Brown has filed numerous, confusing, and repetitive motions, and has disregarded Local Rule 7.2(e), which limits the length of legal memoranda to twenty (20) pages, excluding the caption and signature block, without leave of Court. To expedite this matter, the Court will accept Brown's filings in this instance only. The{2023 U.S. Dist. LEXIS 9} Court will first address whether Brown is entitled to amend his

petition to raise the eight claims presented in the Sixth Amended \bar{c} 2254 Petition, followed by consideration of his remaining motions.

A. Motion for Leave to Amend (ECF No. 65)

As previously stated, Brown seeks leave to file his Sixth Amended \bar{c} 2254 Petition, as supplemented by his Seventh Amended \bar{c} 2254 Petition. (ECF Nos. 62, 69.) Those petitions present eight claims, see *supra* pp. 4-5, some of which were included in the proposed Fifth Amended \bar{c} 2254 Petition, which the Court previously rejected as deficient. Although Brown has refiled some of the claims that were previously presented, he has failed to overcome the deficiencies in those claims.

Claim 1 argues that trial counsel rendered ineffective assistance by failing to request a jury instruction on the proximate cause of death. Brown exhausted Claim 1 during the post-conviction proceeding. The TCCA denied relief on the merits. *Brown II*, 2019 Tenn. Crim. App. LEXIS 121, 2019 WL 931735, at *1, 9-11. Claim 1 was included in Brown's original \bar{c} 2254 Petition as Claim 3. No amendment is required to present this claim.

Claim 2 argues that there is insufficient evidence to support Brown's conviction for first degree murder. Specifically, Brown argues that (1) "the evidence{2023 U.S. Dist. LEXIS 10} adduced at trial failed to prove beyond a reasonable doubt that [Kimberly Jamerson] was not shot from her own location at Northmeade" and (2) "the structure of the trial process was so fundamentally flawed that it is legally impossible to arrive at the point where the facts meet the essential elements of the charging instruments [charged offenses]". (ECF No. 69 at PageID 3999 (emphasis

omitted).) On direct appeal, Brown exhausted a claim that the evidence was insufficient to support his conviction for first degree murder because (1) there was no evidence that Brown intended to kill Jamerson and (2) Jamerson may have been killed by one of the Chambers brothers, who admitted to firing at the attackers. (ECF No. 42-28 at PageID 2998, 3000-02.) Even if it is assumed that Brown's Claim 2 is identical to the claim he exhausted in state court, that claim was not included in his original ¶ 2254 Petition or in any amendment filed during the limitations period. The claim was presented in the proposed Fourth Amended ¶ 2254 Petition. (ECF No. 54 at PageID 3660.) In the May 17 Order, the Court held that that proposed amendment was time barred. (ECF No. 60 at PageID 3878-79.)¹

Brown also argues, relying on {2023 U.S. Dist. LEXIS 11} *Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010), that he is entitled to equitable tolling due to the misconduct of his two retained attorneys. (ECF No. 66 at PageID 3937-45.) However, this case differs from *Holland* in important respects. Golder, Brown's first attorney, committed misconduct by failing to pay the habeas filing fee. Unlike the attorney in *Holland*, however, he did not abandon Brown. He filed a timely ¶ 2254 Petition that contained claims that had been exhausted in state court. He also attempted to cure his deficiency by filing a new habeas action, Case Number 20-2817, and paying the filing fee.

Golder and Evans did not commit misconduct by failing to assert all the claims urged by Brown. A client is "accountable for the acts and omissions of [his] chosen counsel." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 397, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). This rule applies in the habeas context, even to capital cases. See *Coleman v. Thompson*, 501 U.S. 722, 753-54, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991). Because there was no abandonment, Brown

is not entitled to litigate the claims that Golder and Evans did not assert. "The ultimate decision about what claims to raise lies with counsel, and the failure to raise even a colorable claim, while perhaps amounting to ineffective assistance, cannot sever the attorney-client relationship." *Young v. Westbrooks*, 702 F. App'x 255, 266 (6th Cir. 2017) (citation omitted). Leave to amend to assert Claim 2 is DENIED.

Claim 3 argues{2023 U.S. Dist. LEXIS 12} that trial counsel rendered ineffective assistance by failing to subpoena TBI Agent Russell Davis to testify and to subpoena the gunshot residue test results on Felix Williams. (ECF No. 69 at PageID 4020.) In the post-conviction proceeding, Brown exhausted a claim that trial counsel was ineffective in failing to call Agent Davis to testify at trial about gunshot residue tests conducted on Mark Chambers, Nakia Greer, and Felix Williams. The TCCA denied relief on the merits. *Brown II*, 2019 Tenn. Crim. App. LEXIS 121, 2019 WL 931735, at *6-7. However, Brown did not present this claim in his ¶ 2254 Petition or in any amendment filed during the limitations period. Because Brown did not previously raise this claim and the limitations period has now expired, Claim 3 is time barred, and so leave to amend to present that claim is DENIED.

Claim 4 argues that Brown's attorney on direct appeal rendered ineffective assistance by failing to raise every issue presented in the motion for a new trial. Claim 4 is untimely because it was not presented in the original ¶ 2254 Petition or in any proposed amendment filed during the limitations period. The claim also does not relate back to any claim presented in the ¶ 2254 Petition, none of which challenges the conduct of appellate counsel.{2023 U.S. Dist. LEXIS 13}

Claim 4, which was included in Brown's Motion for Leave to File Fifth Amended ¶

2254 Petition, also was not exhausted in state court. Although Brown raised the issue in his motion seeking a second post-conviction hearing, see *Brown II*, 2019 Tenn. Crim. App. LEXIS 121, 2019 WL 931735, at *11 n.4, that is insufficient to properly exhaust the claim. (See ECF No. 60 at PageID 3874-75.) The Supreme Court's decision in *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), is inapplicable to claims of ineffective assistance of appellate counsel. *Davila v. Davis*, 582 U.S. 521, 524-25, 137 S. Ct. 2058, 198 L. Ed. 2d 603 (2017). Leave to amend to assert Claim 4 is DENIED.

Claim 5 complains that trial counsel rendered ineffective assistance by failing to investigate and seek production of fingerprint evidence from the rifle casings found near Kimberly Jamerson's body. This claim relates to the 7.62x39 shell casings found at the scene. Claim 5 was presented in the Third Motion for Leave to Amend, (ECF No. 50), and the Motion for Leave to File Fifth Amended \square 2254 Petition, (ECF No. 57). In its May 17 Order, the Court concluded that Brown cannot overcome his procedural default under *Martinez* because he failed to develop the factual basis for this claim in state court. (ECF No. 60 at PageID 3872-73, 3875.) The bullet casings were not tested for fingerprints at the time, and cannot be tested now to show prejudice. {2023 U.S. Dist. LEXIS 14} See *Shinn v. Ramirez*, 142 S. Ct. 1718, 1728, 1734, 212 L. Ed. 2d 713 (2022). Brown therefore cannot establish that his post-conviction counsel and his trial counsel were ineffective.

In addition, **Claim 5** appears to be plainly meritless. TBI Special Agent Steve Scott testified at trial that the bullet fragments removed from Kimberly Jamerson's head match a .30 carbine caliber bullet. (ECF No. 42-22 at PageID 2467, 2476, 2510.) Scott testified that those bullet fragments are not consistent with the 7.62 cartridge cases. (Id. at PageID 2468.) The TCCA summarized Scott's testimony

about the 7.62x39 shell casings:

Special Agent Scott opined that while the 7.62x.39 cartridges are a .30 caliber class bullet, the .30 caliber class bullet fragment was not consistent with the 7.62x.39 casing. He said that it would be very rare to see a 7.62x.39 cartridge loaded with the type of .30 caliber bullet found at Northmeade. He stated that the .30 caliber bullet fragment was "much more common to something like a .30 carbine, which is the name of a cartridge that's typically fired ... in a military M 1 rifle." Special Agent Scott also examined the bullet fragments recovered during Kimberly Jamerson's autopsy. He determined that the autopsy bullet fragments matched the .30{2023 U.S. Dist. LEXIS 15} carbine caliber bullet fragments found at Northmeade and that the autopsy fragments and the Northmeade fragments were fired from the same firearm. *Brown I*, 2014 Tenn. Crim. App. LEXIS 945, 2014 WL 5092906, at *9.

Leave to amend to assert Claim 5 is DENIED.

Claim 6 argues that trial counsel rendered ineffective assistance by failing to investigate and request the results of Kimberly Jamerson's gunshot residue test. The theory of Claim 6 appears to be that Jamerson might have accidentally shot herself. This claim was first presented as Claim 6 of the Fifth Amended τ 2254 Petition. It has been procedurally defaulted and is substantively meritless for the reasons stated in the May 17 Order. (ECF No. 60 at PageID 3876.)

Claim 7 argues that trial counsel was ineffective in failing to move for a new trial due to a prejudicial lineup. Claim 7 was not properly exhausted in state court. It is also meritless for the reasons stated in the May 17 Order. (Id. at PageID 3876.)

Claim 8 argues that trial counsel was ineffective in failing to argue that the detectives who took Brown's statement failed to honor his invocation of his right to remain silent. It is also without merit for the reasons stated in the May 17 Order. (Id. at PageID 3877.)

For the foregoing reasons, leave{2023 U.S. Dist. LEXIS 16} to amend is DENIED. This Order is final and will not be reconsidered.

B. Motion for Reconsideration (ECF No. 63)

ECF Nos. 63 and 64 consist of a Motion for Reconsideration and supporting memorandum. That filing asks the Court to revisit its May 17 Order. Although the motion purports to be brought pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, that rule does not apply because no final judgment has been entered. A motion for reconsideration of a nonfinal order is governed by Rule 54(b) of the Federal Rules of Civil Procedure, which provides, in pertinent part, that "any order . . . that adjudicates fewer than all the claims . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Rule 7.3 of this Court's local rules limits the ability of parties to file motions for revision of interlocutory orders. See LR 7.3. The only such motions permitted are those that comply with Local Rule 7.3(b). See id. at 7.3(a)-(b). That rule provides as follows:

(b) Form and Content of Motion to Revise. A motion for revision must specifically show: (1) a material difference in fact or law from that which was presented to the Court before entry of the interlocutory order for which revision is sought, and that

in the exercise of reasonable diligence the{2023 U.S. Dist. LEXIS 17} party applying for revision did not know such fact or law at the time of the interlocutory order; or (2) the occurrence of new material facts or a change of law occurring after the time of such order; or (3) a manifest failure by the Court to consider material facts or dispositive legal arguments that were presented to the Court before such interlocutory order.Id. at 7.3(b). Rule 7.3(d) also prohibits the moving party from repeating the arguments previously made.

Brown's Motion for Reconsideration does not comply with Local Rule 7.3(b) and (d). The substance of the Motion is largely incomprehensible except insofar as Brown complains that the Court failed to acknowledge a document, titled Second Amended 28 U.S.C. 2254 Petition for Writ of Habeas Corpus, Supplemented Grounds Four Through Eight [4-8], (ECF No. 59), which was received on May 16, 2023, and docketed on May 17, 2023, shortly before entry of the Court's May 17 Order. This filing was apparently meant to supplement and clarify the Fifth Amended τ 2254 Petition, (ECF No. 57), which had been submitted two months earlier.

It is unnecessary to address the substance of the Motion for Reconsideration because it does not argue that the Court's order was incorrect based on the record{2023 U.S. Dist. LEXIS 18} at the time. In addition, Brown has abandoned his Fifth Amended τ 2254 Petition, having chosen instead to file a new proposed amendment on the official form, his Sixth Amended τ 2254 Petition. (ECF No. 62.) Therefore, the Motion for Reconsideration is DENIED.

C. Motion Showing Cause and Prejudice (ECF No. 68)

The gist of this motion is that Claims 4 through 8 in the proposed Fifth Amended ¶ 2254 Petition (which are reasserted in the Sixth Amended ¶ 2254 Petition) are not barred by procedural default. Some of these claims are included in Brown's prose post-conviction petition (ECF No. 42-34 at PageID 3139-40, 3142-43, 3143-44, 3151), but those claims were not pursued at the post-conviction hearing. At the conclusion of Brown's testimony, counsel asked Brown if there were any other issues he wanted to raise. (ECF No. 42-35 at PageID 3337.) Brown did not mention Claims 4 through 8 at that time. (See *id.* at PageID 3337-45.) Instead, his post-conviction appellate counsel attempted to resurrect those claims in his brief to the TCCA on the post-conviction appeal, in which he asked for a second post-conviction hearing. (ECF No. 42-38 at PageID 3401, 3442-57.)²

The post-conviction court denied relief and the TCCA affirmed, {2023 U.S. Dist. LEXIS 19} holding that the new claims were waived. *Brown II*, 2019 Tenn. Crim. App. LEXIS 121, 2019 WL 931735, at *11-14. The TCCA relied on Tennessee Code Annotated ¶ 40-30-106(g), which provides, with limited exceptions not applicable here, that "[a] ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been waived." 2019 Tenn. Crim. App. LEXIS 121, [WL] at *13-14. Tennessee's waiver rule is a firmly established and regularly enforced state procedural rule that bars federal habeas review. See, e.g., *Hutchison v. Bell*, 303 F.3d 720, 738 (6th Cir. 2002) (collecting cases); *Curtis v. Boyd*, No. 3:20-cv-00559, 2023 U.S. Dist. LEXIS 53835, 2023 WL 2699973, at *43 (M.D. Tenn. Mar. 29, 2023), appeal filed (6th Cir. Apr. 26, 2023).

The Motion Showing Cause and Prejudice is DENIED.

D. Motions to Hold in Abeyance (ECF Nos. 71, 72)

Brown filed two motions to have this matter held in abeyance while he attempts to exhaust some of his claims that the 7.62x39 shell casings should have been tested for fingerprints and DNA. (See ECF No. 72-1 at PageID 4311-12.) Specifically, Brown contends that he filed in the Shelby County Criminal Court a document, titled Petition for DNA Post-Conviction Relief[,] Petition for Post Conviction Finger Print Analysis [, and] Petition for Writ of Error Coram Nobis in the Shelby County Criminal Court, (ECF No. 72-2), and another, titled Motion{2023 U.S. Dist. LEXIS 20} to Take Judicial Notice of the Fact that Neither of the Original Judgments Contain the Statutorily Mandated "File Stamp" and Therefore Have Never Been Lawfully Filed Pursuant [to] *Graham v. State*, 90 S.W.3d 687, 690 (Tenn. 2002)[,] Motion to Initiate Post-Judgment Proceedings Pursuant to *State v. Bobby Lee Robinette*, 2015 Tenn. Crim. App. LEXIS 648, 2015 WL 4745065, After the Clerk Affixes the Mandatory "File Stamp" Upon the Judgments[, and] Motion for New Trial Pursuant to Newly Entered Judgments Which Bear the Statutorily Mandated File Stamp of the Court Clerk, (ECF No. 72-3). The mere act of initiating these tardy state court criminal filings, however, does not meet the threshold for abeyance.

In *Rhines v. Weber*, 544 U.S. 269, 125 S. Ct. 1528, 161 L. Ed. 2d 440 (2005), the Supreme Court held that a district court has discretion to stay a habeas petition containing exhausted and unexhausted claims to permit the petitioner to return to state court to exhaust the remainder of his claims. However, stay and abeyance is not available as a matter of right. The Supreme Court explained:

[S]tay and abeyance should be available only in limited circumstances. Because

granting a stay effectively excuses a petitioner's failure to present his claims first to the state courts, stay and abeyance is only appropriate when the district court determines there was good cause for the petitioner's failure to exhaust his claims first in state court. Moreover, even if a petitioner had good cause for that failure, the district court would abuse its discretion if it were to grant him a stay when his unexhausted claims are plainly meritless. Cf. 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State").*Id.* at 277.

Brown has not satisfied these standards. First, he has not provided a reasonable explanation for why he waited until July 2023 to file these state-court documents. The TCCA's decision in Brown II, which held that Brown did not have a right to another post-conviction hearing, was issued in February 2019—more than four years before these most recent filings. The Court has held that the purported misconduct of Brown's two habeas attorneys, Golder and Evans, does not excuse his failure to properly exhaust these claims in state court. See *supra* p. 8. The Court also held that the claim about the 7.62x39 rifle casings is plainly meritless. See *supra* p. 14. The Motions to Hold in Abeyance are DENIED.

III. CONCLUSION

For the reasons stated in this Order and the May 17 Order, the Court DENIES leave to amend with prejudice. This decision is final and will not be reconsidered. The only claims before the Court are those presented in the original § 2254 Petition. (ECF No. 1.)

IT IS SO ORDERED, this 25th day of September, 2023.

/s/ Sheryl H. Lipman

SHERYL H. LIPMAN

CHIEF UNITED STATES DISTRICT JUDGE

Footnotes

1

Brown's argument to the contrary about relation back is not persuasive. (See ECF No. 66 at PageID 3932-34.)

2

The May 17 Order incorrectly stated that Brown filed a motion seeking a second post-conviction hearing. (ECF No. 60 at PageID 3874-75.) In fact, Brown did not do so. Instead, after deliberately choosing not to introduce evidence on these claims, Brown sought to resurrect them in his brief to the TCCA on the post-conviction appeal. This approach is not an adequate way to fairly present Claims 4-8 to the state courts. *Castille v. Peoples*, 489 U.S. 346, 351, 109 S. Ct. 1056, 103 L. Ed. 2d 380 (1989).

APPENDIX

(c). APPEAL OPINION: TCCA COLLATERAL REVIEW(2019)

KENNETH BROWN v. STATE OF TENNESSEE
COURT OF CRIMINAL APPEALS OF TENNESSEE, AT JACKSON
2019 Tenn. Crim. App. LEXIS 121
No. W2017-01755-CCA-R3-PC
January 9, 2019, Session
February 22, 2019, Filed
Editorial Information: Subsequent History

Appeal denied by Brown v. State, 2019 Tenn. LEXIS 341 (Tenn., July 25, 2019)

Editorial Information: Prior History

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed. Appeal from the Criminal Court for Shelby County. Nos. 11-02623, 11-07432. Lee V. Coffee, Judge.State v. Brown, 2014 Tenn. Crim. App. LEXIS 945 (Tenn. Crim. App., Oct. 9, 2014)

Disposition:

Judgment of the Criminal Court Affirmed.

Counsel Lance R. Chism, Memphis, Tennessee, for the Petitioner, Kenneth Brown.

Herbert H. Slatery III, Attorney General and Reporter; Ronald L. Coleman, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Alanda Dwyer, Assistant District Attorney General, for the Appellee, State of Tennessee.

Judges: CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS, P.J., and J. ROSS DYER, J., joined.

CASE SUMMARY: Petitioner failed to show that trial counsel was ineffective for failing to present an agent at trial to testify about the results of the gunshot residue tests performed on three individuals because the agent specifically testified that the presence of gunshot residue on someone else's hands would not have exonerated petitioner.

OVERVIEW: HOLDINGS: [1]-Petitioner failed to show that trial counsel was ineffective for failing to present an agent at trial to testify about the results of the gunshot residue tests performed on three individuals, and therefore he was properly denied postconviction relief, because neither the tests nor the agent's testimony would have assisted the jury in determining who was responsible for the victim's killing, as the agent specifically testified that the presence of gunshot residue on someone else's hands would not have exonerated petitioner; [2]-Petitioner failed to show that trial counsel was ineffective for failing to present a witness's testimony he never presented her testimony at the postconviction hearing.

OUTCOME: Judgment affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Habeas Corpus > Appeals > Standards of Review > De Novo Review

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof

Post-conviction relief is only warranted when a petitioner establishes that his or her conviction or sentence is void or voidable because of an abridgement of a constitutional right. Tenn. Code Ann. c 40-30-103. The Tennessee Supreme Court has held that a post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. When reviewing factual issues, the appellate court will not re-weigh or re-evaluate the evidence; moreover, factual questions involving the credibility of witnesses or the weight of their testimony are matters for the trial court to resolve. The appellate court's review of a legal issue, or of a mixed question of law or fact such as a claim of ineffective assistance of counsel, is de novo with no presumption of correctness.

Criminal Law & Procedure > Habeas Corpus > Review > Burdens of Proof Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof

A post-conviction petitioner has the burden of proving the factual allegations by clear and convincing evidence. Tenn. Code Ann. c 40-30-110(f); Tenn. Sup. Ct. R. 28, c 8(D)(1). Evidence is considered clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from it.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

In order to prevail on an ineffective assistance of counsel claim, the petitioner must establish that (1) his lawyer's performance was deficient and (2) the deficient performance prejudiced the defense. A petitioner successfully demonstrates deficient performance when the petitioner establishes that his attorney's conduct fell below an objective standard of reasonableness under prevailing professional norms. Prejudice arising therefrom is demonstrated once the petitioner establishes a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.

Criminal Law & Procedure > Counsel > Effective Assistance > Trials Criminal Law & Procedure > Witnesses > Presentation

When a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing. The presentation of the witness at the post-conviction hearing is typically the only way for the petitioner to establish: (a) a material witness existed and the witness could have been discovered but for

counsel's neglect in his investigation of the case, (b) a known witness was not interviewed, (c) the failure to discover or interview a witness inured to his prejudice, or (d) the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner. Neither the post-conviction court nor an appellate court may speculate on what a witness's testimony might have been if introduced by defense counsel.

Criminal Law & Procedure > Habeas Corpus > Review

An issue is reviewable on its merits when the petitioner raised the issue at the post-conviction hearing and the State failed to object that the issue was waived on the basis it had not been included in the proposed or amended petition.

Criminal Law & Procedure > Jury Instructions > Particular Instructions > Theory of Defense

The proximate cause of death instruction is given when there is evidence that the victim's death was caused by an independent, intervening act or omission that the defendant could not reasonably have anticipated.

Criminal Law & Procedure > Habeas Corpus > Successive Petitions

Petitioners are not entitled to effective post-conviction representation and a post-conviction counsel's failure to follow the guidelines in Tenn. Sup. Ct. R. 28 does not warrant a second post-conviction petition.

Criminal Law & Procedure > Habeas Corpus > Review

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

A petitioner is only entitled to limited due process rights in the post-conviction setting. The United States Supreme Court has held that the protections inherent in the Due Process Clause are less stringent in a state post-conviction proceeding than they are at trial or on direct review. Similarly, the Tennessee Supreme Court held that the opportunity to collaterally attack constitutional violations occurring during the conviction process is not a fundamental right entitled to heightened due process protection. All that due process requires in the post-conviction setting is that the defendant have 'the opportunity to be heard at a meaningful time and in a meaningful manner. In other words, a full and fair hearing merely requires the opportunity to present proof and argument on the petition for post-conviction relief.

There is no constitutional right to effective assistance of counsel in a post-conviction proceeding. There is a statutory right to post-conviction counsel. Tenn. Code Ann. c 40-30-107(b)(1). The rationale for this statutory right is to afford a petitioner the full and fair consideration of all possible grounds for relief. This statutory right does not, however, serve as a basis for relief on a claim of ineffective

assistance of counsel in a post-conviction proceeding and does not include the full panoply of procedural protection that the Constitution requires be given to defendants who are in a fundamentally different position-at trial and on first appeal as of right.

Criminal Law & Procedure > Habeas Corpus > Procedure > Appointment of Counsel

Tenn. Sup. Ct. R. 28 outlines the obligations and responsibilities of post-conviction counsel. Specifically, post-conviction counsel shall be required to review the pro se petition, file an amended petition asserting other claims which petitioner arguably has or a written notice that no amended petition will be filed, interview relevant witnesses, including petitioner and prior counsel, and diligently investigate and present all reasonable claims. Tenn. Sup. Ct. R. 28, ¶ 6(C)(2). In addition, post-conviction counsel must file a certificate of counsel certifying that he or she has thoroughly investigated the possible constitutional violations alleged by petitioner and any other ground that petitioner may have for relief, has discussed other possible constitutional grounds with petitioner, has raised all non-frivolous constitutional grounds warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law which petitioner has, is aware that any ground not raised shall be forever barred and has explained this to petitioner. Rule 28, ¶ 6(C)(3), app. C. While these rules do establish a minimum standard of service to which post-conviction counsel are held, they do not provide a basis for relief from a conviction or sentence.

Criminal Law & Procedure > Habeas Corpus > Successive Petitions

A post-conviction counsel's Tenn. Sup. Ct. R. 28 violations do not warrant a second post-conviction hearing.

Criminal Law & Procedure > Habeas Corpus > Appeals

Waiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney.

Criminal Law & Procedure > Habeas Corpus > Review Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

All that due process requires in the post-conviction setting is that the defendant have the opportunity to be heard at a meaningful time and in a meaningful manner.

Opinion

Opinion by: CAMILLE R. MCMULLEN

Opinion

The Petitioner, Kenneth Brown, appeals from the Shelby County Criminal Court's denial of his petition for post-conviction relief, arguing (1) that trial counsel provided ineffective assistance in failing to present Agent James Davis and Beatrice Vaulx¹ as witnesses at trial and in failing to request an instruction on proximate cause of death; and (2) that he is entitled to a second post-conviction hearing based on post-conviction counsel's ineffectiveness. We affirm the judgment of the post-conviction court.

OPINION

Factual Background. This case concerns the July 3, 2010 shooting of individuals outside a home on Northmeade Avenue in Memphis, Tennessee. Following this incident, the Petitioner was indicted for first degree premeditated murder, thirteen counts of attempted first degree murder, thirteen counts of aggravated assault, one count of reckless endangerment, and one count of employment of firearm during a dangerous felony. *State v. Kenneth Brown*, No. W2013-00329-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 945, 2014 WL 5092906, at *1 (Tenn. Crim. App. Oct. 9, 2014), perm. app. denied (Tenn. Feb. 13, 2015). Prior to trial, one count of attempted first degree murder and one count of aggravated assault were dismissed. *Id.*

The facts presented at trial showed that on July 3, 2010, the Petitioner and two co-defendants, all of whom were armed, opened fire on a large group of people attending a party outside a home on Northmeade Avenue. 2014 Tenn. Crim. App. LEXIS 945, [WL] at *8. As a result of this shooting, one victim, Kimberly Jamerson, died of a single gunshot wound and a second victim, Lamarcus Moore, received a gunshot wound to his leg. 2014 Tenn. Crim. App. LEXIS 945, [WL] at *2-4, *6. Though no other victims sustained injuries during the shooting, numerous individuals were outside the home and could have been shot. 2014 Tenn. Crim. App. LEXIS 945, [WL] at *1.

The shooting incident occurred because of an earlier dispute between the Petitioner and his two co-defendants and several individuals at the home on Northmeade Avenue. 2014 Tenn. Crim. App. LEXIS 945, [WL] at *1-3, *5-6, *8. Several witnesses² testified at trial that someone from the victims' group at the Northmeade home "flagged down" the Petitioner and one codefendant, who had been driving by the house, for the purpose of purchasing some marijuana. 2014 Tenn. Crim. App. LEXIS 945, [WL] at *2-3, *5. After this drug deal allegedly took place, the Petitioner and the co-defendant drove away but returned shortly thereafter, claiming they were owed \$5. 2014 Tenn. Crim. App. LEXIS 945, [WL] at *1-3, *5, *8. After receiving assurances by Felix Williams, one of the home's residents, that he would look into the issue regarding the owed money, the Petitioner and the co-defendant drove away but returned several minutes later with a third man, also a co-defendant. 2014 Tenn. Crim. App. LEXIS 945, [WL] at *1-3, *5. At that point, Felix Williams gave the Petitioner and his two co-defendants \$5 to cover the debt for the marijuana. 2014 Tenn. Crim. App. LEXIS 945, [WL] at *1-3, *5, *8. After receiving this money, the Petitioner's group started to drive away and nearly ran over someone from the victims' group, who then threw a beer can inside the car the Petitioner's group was in. 2014 Tenn. Crim. App. LEXIS 945, [WL] at *2-3, *5, *8. When this occurred, the Petitioner's group stopped, got out of their vehicle, and engaged in a "fist fight" with several people from the victims' group. *Id.* After this fight, the Petitioner's group made statements indicating that they would be back. 2014 Tenn. Crim. App. LEXIS 945, [WL] at *2-3, *6.

The Petitioner, following his arrest, told police that after the fight, he and the co-defendants returned home, where "guns started coming out" and one of his co-defendants began "talking about going back around there." 2014 Tenn. Crim. App. LEXIS 945, [WL] at *8. The Petitioner then drove with his two co-defendants to a location on Helmwood Street. Id. The Petitioner's group jumped out of their car and fired their guns for a period of time before returning to the car and driving away. Id. The Petitioner stated that he fired "six to eight shots" into the air from his "Glock .45" during the incident. He said that one co-defendant fired two shots from his shotgun and that while he was unsure what firearm the other co-defendant was shooting, that the co-defendant fired shots for a longer period of time than the other two men. Id.

From the Northmeade location, where Kimberly Jamerson was shot, officers collected 9mm cartridge cases and 7.62x39mm cartridge cases. 2014 Tenn. Crim. App. LEXIS 945, [WL] at *9. At the Helmwood location, where the Petitioner and his co-defendants fired their guns, officers collected .30 carbine cartridge cases, .45 auto cartridge cases, .223 Remington caliber cartridge cases, and .20 gauge shot shell cases. Id. Special Agent Steve Scott, a forensic scientist with the Tennessee Bureau of Investigation, opined that while the 7.62x39mm cartridges are a .30 caliber class bullet, the .30 caliber class bullet fragments recovered from the Northmeade area were not consistent with the 7.62x39mm casings. Id. He also said it would be very rare to see a 7.62x39mm cartridge loaded with the type of .30 caliber bullet found at the Northmeade location. Id. Agent Scott also opined that the .30 carbine cartridge cases were all fired from the same gun and that they were typically loaded with the type of bullet collected during Jamerson's autopsy. Id.

Following a jury trial, the Petitioner was convicted of one count of first degree premeditated murder, twelve counts of attempted first degree murder, twelve counts of aggravated assault, one count of reckless endangerment, and one count of employment of a firearm during a dangerous felony. 2014 Tenn. Crim. App. LEXIS 945, [WL] at *10. At sentencing, the trial court merged the aggravated assault convictions with the attempted murder convictions and imposed a sentence of life imprisonment plus 308 years. Id.

On direct appeal, the Petitioner argued that the evidence was insufficient to sustain his murder and attempted murder convictions and that the trial court erred in failing to suppress his confession. 2014 Tenn. Crim. App. LEXIS 945, [WL] at *1. Thereafter, this court affirmed the trial court's judgments, and the Tennessee Supreme Court denied the Petitioner's application for permission to appeal. 2014 Tenn. Crim. App. LEXIS 945, [WL] at *18.

Post-Conviction. On May 14, 2014, the Petitioner filed a pro se petition for post-conviction relief, alleging twenty-one ineffective assistance of counsel claims, six trial court errors, and one claim of ineffective assistance of appellate counsel. As relevant to the issues raised on appeal, the Petitioner specifically alleged in his pro se petition that trial counsel provided ineffective assistance in failing to present a forensic expert to introduce evidence of the gunshot residue tests and in failing to request a continuance to ensure that Beatrice Vaultx testified at trial. Following the appointment of post-conviction counsel, the Petitioner filed an amended petition, this time alleging, in pertinent part, that trial counsel was ineffective in failing to investigate, interview and subpoena material witnesses, including Beatrice Vaultx, to testify at trial and in failing to subpoena or present testimony from Agent James Davis about the results from the gunshot residue tests. Neither the pro se petition nor the amended petition explicitly included an issue regarding trial counsel's ineffectiveness in failing to request a proximate cause of death jury instruction.

At the July 7, 2017 post-conviction hearing, post-conviction counsel asserted that she had "issued multiple subpoenas for Beatrice Vaulx." She and the court then had the following discussion regarding her extensive attempts to locate Beatrice Vaulx:

[Post-Conviction Counsel]: [Beatrice Vaulx] is not to be found. I have sent . . . her several letters, both of which were returned to me. I attempted to have her subpoenaed. They [came back that she was] not to be found. Additionally, I tried to add her on Facebook. It was a last resort, but I did find her on Facebook. She would not accept my friend request. I don't know if it is because I've already sent her all these letters, and she is not wanting to be involved, and I believe that that was the problem [trial counsel] had, as well. But, if I can't get her served, I can't get her here. And, if she is evading service, I don't know. . . .

....

The Court: For the record, Beatrice [V]aulx, that [the Petitioner] continues to complain about, . . . , that [the Petitioner] says, "I want to see," has been subpoenaed at least twice by [post-conviction counsel at] an address on Ladue [On] July 7, 2017, Shelby County Sheriff's office indicated that, after diligent search and inquiry, she is not to be found in Shelby County, Tennessee. [The deputy a]ctually spoke to a person [who] lives at that address [who s]aid she didn't live there, and had no idea as to where [Beatrice Vaulx] lived.

That is not the first time a subpoena has been issued for Ms. [V]aulx. A subpoena was also issued for the setting on November 10, 2016. And, after diligent search and inquiry, she is not to be found. [The deputy s]poke to a person who identified herself as Ms. [V]aulx's mother. . . . [She] says that [Ms. Vaulx] is out of the state due to a sickness of a relative, and did not know how to get in contact with Ms. [V]aulx.

[Post-conviction counsel] has subpoenaed [Ms. Vaulx] at least twice. [The] Shelby County Sheriff's office cannot locate her. Following this discussion, the Petitioner presented testimony from Agent James Davis and trial counsel and testified in his own behalf.

Agent James Davis, a forensic scientist with the Tennessee Bureau of Investigation, testified that prior to the Petitioner's trial, he received and tested gunshot residue tests from four different individuals- Cleotha Norwood, Mark Chambers, Nakia Greer, and Felix Williams. For the tests from Norwood and Chambers, Agent Davis found that although the "[e]lements indicative of gunshot residue were absent," the results could not eliminate the possibility that Norwood and Chambers could have fired, handled, or were near a gun when it fired. For the test from Greer, Agent Davis found that "[e]lements indicative of gunshot residue were inconclusive," which meant that the results could not eliminate the possibility that Greer could have fired, handled, or was near a gun when it fired. Finally, for the test from Williams, Agent Davis found that "[e]lements indicative of gunshot residue were present," which meant that the results indicated that Williams could have fired, handled, or was near a gun when it fired. Agent Davis explained that washing hands with soap and water, the passage of time, and certain other activities affected the presence of gunshot residue on an individual's hands. He confirmed that the post-conviction hearing was his first appearance in this case and that he had never been subpoenaed by either party to testify at trial.

Agent Davis clarified that if gunshot residue was absent or if the gunshot residue test was inconclusive,

this did not mean that the individual did not fire a gun. He also said that regardless of whether Norwood, Chambers, Greer, or Williams had gunshot residue on their hands, this evidence did not tell him whether the Petitioner was guilty of the crimes charged. Agent Davis acknowledged that he did not conduct any gunshot residue tests on the Petitioner.

Trial counsel testified that he received a report from Officer Merritt indicating that he had talked with Beatrice Vaultx, who said that on July 4, 2010, she heard several shots being fired and when she looked outside her window, she saw an unidentified African-American man being helped into a red vehicle parked in front of her residence. Vaultx said that she observed this man placing a sawed-off shotgun into the backseat of the red vehicle; however, she asserted that she would not be able to identify this man because it was dark and she did not know him. Trial counsel said that after receiving this information, he attempted to interview Beatrice Vaultx but was unable to find her. He said that he was never able to locate Vaultx, even though he hired private investigators to find and talk to her. He also said that he subpoenaed Vaultx for trial, but she failed to appear. Trial counsel acknowledged that Vaultx's testimony could have been beneficial to the Petitioner at trial because it placed other shooters at the scene, which corroborated evidence that there were two groups of shooters the night of the incident. He said his defense theory at trial was that someone else fired the bullet that killed Kimberly Jamerson.

Trial counsel said he attempted to get the results from the gunshot residue tests introduced at trial through a witness other than Agent James Davis; however, the State objected, and this objection was sustained. Trial counsel acknowledged that it would have been a good idea to subpoena Agent Davis because it would have shed light on whether the bullet that killed Kimberly Jamerson came from the Petitioner and his codefendants or Mark Chambers and his group. Trial counsel said that it was a difficult job defending the Petitioner because the evidence in this case included the Petitioner's confession to police and the cartridge casings that were collected from the Helmwood location, where the Petitioner and his co-defendants fired their guns.

Trial counsel said that while admitting the gunshot residue report would have been helpful to the Petitioner's defense, which is what he tried unsuccessfully to do at trial, Agent Davis's testimony about his gunshot residue report would not have been helpful. He explained that Agent Davis's testimony would not have benefitted the Petitioner because Agent Davis would have stated, as he did at the post-conviction hearing, that a person could fire a gun and not have the presence of gunshot residue and that a person could have the presence of gunshot residue and never have fired a gun. Trial counsel said that although he was aware, through discovery, of a phone conversation between Officer Merritt and Beatrice Vaultx, he never received a statement from Vaultx herself because the police were unsuccessful in obtaining such a statement.

At the conclusion of trial counsel's testimony, the post-conviction court noted that trial counsel had filed a motion to suppress, arguing that the police had illegally held the Petitioner for forty-eight hours without probable cause. The court noted that trial counsel had vigorously contested the admission of the Petitioner's statement but that the court ultimately denied the motion to suppress. The court also noted that when the Petitioner's statement acknowledging that he fired shots into the air was admitted, the State proceeded under a theory of criminal responsibility.

The Petitioner testified that trial counsel erred in failing to call Beatrice Vaultx. He also maintained that trial counsel failed to do everything he could have done to show that Kimberly Jamerson was killed by friendly fire from the victims' group during the shootout. In addition, the Petitioner claimed that trial

counsel pursued a self-defense theory and requested a self-defense instruction at trial, even though he had instructed him not to pursue this defense. He asserted, "[T]his is not a self-defense case. This is a case where the proximate cause of death was in question." At that point, the post-conviction court stated for the record that it did not charge self-defense at the Petitioner's trial because it was not raised by the proof. When questioned about whether self-defense was an appropriate defense in his case, the Petitioner replied:

By [trial counsel] alleging self-defense, it took my gun out of a direction in which I [shot it]-I said I shot it into the air, but [the self-defense theory] indicated to the jury-self-defense is constructively saying, "Hey, I killed this person, but it was in self-defense," which this is not one of those cases. This is a case when no one could honestly say-neither expert witness or anything could honestly say which direction this bullet came from that killed this victim. No one is saying that they had this weapon, so they don't know which way it came from.

So we're, like, what's the proximate cause of death? And I felt like the perfect defense could have been requesting proximate cause of death jury instruction rather than self-defense.

At the conclusion of the post-conviction hearing, the court made several oral findings. Regarding trial counsel's failure to call Agent Davis, the court noted that Agent Davis's testimony "would not have made any difference at all" in the outcome of the Petitioner's trial because the gunshot residue tests "d[id] not indicate whether or not a person fired a gun." As to trial counsel's failure to call Beatrice Vault, the court recognized that although trial counsel subpoenaed Vault and requested that the Petitioner's trial be delayed so that Vault could testify after concluding her sleep study, Vault never appeared at trial. The court also noted that despite post-conviction counsel's efforts to find Vault and subpoena her to testify at the post-conviction hearing, the Petitioner had been unable to present Vault's testimony at the post-conviction hearing. The post-conviction court stated that "[t]here [was] absolutely nothing that is before the Court that would indicate that [trial counsel] erred" or that trial counsel's performance "prejudic[ed]" the outcome of the Petitioner's case.

On August 4, 2017, the post-conviction court entered its written order denying relief. In it, the court determined that the Petitioner's testimony at the hearing was not credible. It noted that because the Petitioner had failed to present Beatrice Vault at the post-conviction hearing, the Petitioner was asking the court "to engage in rank speculation as to how any additional witnesses could have made a difference in the outcome of this trial," which it declined to do. The court held that Agent Davis's testimony about the results from the gunshot residue tests "would not have made a difference in the outcome of the [p]etitioner's trial" and that trial counsel had "made a well-informed tactical decision not to present such useless testimony at trial." In addition, the court held that the issue regarding the proximate cause of death instruction was waived because the Petitioner had failed to request this instruction at trial and that, in any case, the Petitioner had "wholly failed to prove how he was prejudiced by the Court's properly instructing the jury on the law." Ultimately, the post-conviction court concluded that trial counsel "was not deficient in his performance" and that the Petitioner had "failed to prove prejudice." Following entry of this order, the Petitioner filed a timely notice of appeal.³

ANALYSIS

I. Ineffective Assistance of Counsel. The Petitioner contends that trial counsel provided ineffective

assistance in failing to present Agent James Davis at trial, in failing to present Beatrice Vault at trial, and in failing to request a jury instruction on proximate cause of death. We conclude that the Petitioner is not entitled to relief on these claims.

Post-conviction relief is only warranted when a petitioner establishes that his or her conviction or sentence is void or voidable because of an abridgement of a constitutional right. T.C.A. c. 40-30-103. The Tennessee Supreme Court has held:

A post-conviction court's findings of fact are conclusive on appeal unless the evidence preponderates otherwise. When reviewing factual issues, the appellate court will not re-weigh or re-evaluate the evidence; moreover, factual questions involving the credibility of witnesses or the weight of their testimony are matters for the trial court to resolve. The appellate court's review of a legal issue, or of a mixed question of law or fact such as a claim of ineffective assistance of counsel, is de novo with no presumption of correctness. *Vaughn v. State*, 202 S.W.3d 106, 115 (Tenn. 2006) (internal citations and quotation marks omitted); see *Felts v. State*, 354 S.W.3d 266, 276 (Tenn. 2011); *Frazier v. State*, 303 S.W.3d 674, 679 (Tenn. 2010). A post-conviction petitioner has the burden of proving the factual allegations by clear and convincing evidence. T.C.A. c. 40-30-110(f); Tenn. Sup. Ct. R. 28, c. 8(D)(1); *Dellinger v. State*, 279 S.W.3d 282, 293-94 (Tenn. 2009). Evidence is considered clear and convincing when there is no serious or substantial doubt about the accuracy of the conclusions drawn from it. *Lane v. State*, 316 S.W.3d 555, 562 (Tenn. 2010); *Grindstaff v. State*, 297 S.W.3d 208, 216 (Tenn. 2009); *Hicks v. State*, 983 S.W.2d 240, 245 (Tenn. Crim. App. 1998).

In order to prevail on an ineffective assistance of counsel claim, the petitioner must establish that (1) his lawyer's performance was deficient and (2) the deficient performance prejudiced the defense. *Vaughn*, 202 S.W.3d at 116 (citing *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). A petitioner successfully demonstrates deficient performance when the petitioner establishes that his attorney's conduct fell "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*, 523 S.W.2d at 936). Prejudice arising therefrom is demonstrated once the petitioner establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 370 (quoting *Strickland*, 466 U.S. at 694). "Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim." *Id.*

A. Failure to Present Agent Davis. The Petitioner argues that trial counsel was ineffective in failing to present Agent Davis at trial to testify about the results of the gunshot residue tests performed on Mark Chambers, Nakia Greer, and Felix Williams. He claims that because the jury heard evidence that several 7.62x39mm casings were found at the Northmeade location and because Agent Scott at trial could not rule out the possibility that the victim had been killed from a bullet from one of these 7.62x39mm casings, trial counsel should have presented Agent Davis to testify about the gunshot residue tests because this evidence would have supported the defense theory that someone else was responsible for killing Kimberly Jamerson. The State counters that the post-conviction court properly denied relief on the basis that this evidence was "useless" and "would not have made any difference at all." Because trial counsel's failure to present Agent James Davis and the gunshot residue tests was

neither deficient nor prejudicial, the Petitioner is not entitled to relief on this issue.

At trial, the State pursued a theory of criminal responsibility, and the Petitioner suggested that either Mark Chambers or Steven Chambers, who returned fire from the Northmeade location, was responsible for killing Kimberly Jamerson. We agree with the State that neither the gunshot residue tests nor the Agent Davis's testimony about these tests would have helped the Petitioner's case because this evidence would not have assisted the jury in determining who was responsible for killing Jamerson. Although the jury heard substantial proof that Mark and Steven Chambers returned fire, it nevertheless found that the Petitioner was responsible for Jamerson's death, either because of his own actions or because he was criminally responsible for the actions of his co-defendants. As to the Petitioner's claim that trial counsel was ineffective in failing "to present as much physical evidence as possible supporting the theory that someone from the Northmeade location fired the fatal shot," we note that the jury heard evidence about the 7.62x39mm casings found at the Northmeade location and still chose to convict the Petitioner of first degree premeditated murder. Agent Davis specifically testified that the presence of gunshot residue on someone else's hands would not have exonerated the Petitioner. We agree with the State that neither the test results nor Agent Davis's testimony would have shown that Chambers, Greer, or Williams was responsible for killing Jamerson. Because trial counsel's failure to present Agent James Davis and the gunshot residue tests was neither deficient nor prejudicial, the Petitioner is not entitled to relief on this claim.

B. Failure to Present Beatrice Vault. The Petitioner also asserts that trial counsel provided ineffective assistance in failing to present testimony from Beatrice Vault at trial. He claims that Vault would have testified that an unidentified person was in possession of an assault rifle, not just a shotgun, and that this unidentified person had fired the 7.62x39mm casings found at the Northmeade location and was responsible for killing Kimberly Jamerson. The State counters that the Petitioner cannot establish prejudice because he failed to present Beatrice Vault at the post-conviction hearing and that, regardless of his failure to present her, the Petitioner has not shown how trial counsel's failure to present Vault at trial was deficient or prejudicial. We agree with the State.

At the post-conviction hearing, trial counsel stated that after receiving Officer Merritt's report showing that he had talked to Beatrice Vault, he hired an investigator and attempted to interview Vault about what she observed the night of the shooting, but he was unable to find her. In addition, he said that although he subpoenaed Vault for trial, she failed to appear. Trial counsel opined that Vault's testimony could have been beneficial to the Petitioner at trial because it placed another shooter at the scene and suggested that someone, other than the Petitioner and his co-defendants, was responsible for firing the bullet that killed Kimberly Jamerson.

During the post-conviction hearing, the court recalled trial counsel's extensive efforts to present Vault at trial:

[Trial counsel] did try to locate Ms. [V]ault. Had an investigator on the case. Did all he [could] in order to have her in court. Issued a subpoena for her. She was not present. Could not be located by an investigator. Did continue the case so they could try to locate this person overnight, also. Could not get Ms. [V]ault in court as Ms. [V]ault . . . was out of the state, and apparently [wa]s being evasive as to where she [wa]s, and the Shelby County Sheriff's office some . . . five years later still can't locate Ms. [V]ault."The post-conviction court also noted, "[I]f [Ms. Vault] is not present in court under oath, the truthfulness, or the validity, or the strength, or the worth of that testimony, case law would indicate that

I can't speculate as to what benefit it would have done, because she still, some six years later, is not present in court."

Later, the post-conviction court noted that during the Petitioner's trial, the Petitioner's other trial attorney sent an email, essentially asking the trial court to delay the start of the trial so that the defense could get Beatrice Vault in court to testify. The email stated that the defense's investigator had informed them that Beatrice Vault was in a sleep study and that she would be in court once she was released from the hospital. It also said that Vault was a material witness to the Petitioner's defense. The court explained that after receiving this email, it held the Petitioner's trial until approximately 10:30 a.m. in the hope that Vault would appear, though she never did. This email was admitted as an exhibit to the post-conviction hearing. Still later, the post-conviction court noted that trial counsel made an offer of proof at trial regarding Beatrice Vault's purported testimony by using Officer's Merritt's report about his phone conversation with Vault.

Although the Petitioner asserts that trial counsel's failure to present Vault's testimony at trial was ineffective, the Petitioner never presented Vault's testimony at the post-conviction hearing. This court has concluded that "[w]hen a petitioner contends that trial counsel failed to discover, interview, or present witnesses in support of his defense, these witnesses should be presented by the petitioner at the evidentiary hearing." *Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). The presentation of the witness at the post-conviction hearing is typically the only way for the petitioner to establish:

(a) a material witness existed and the witness could have been discovered but for counsel's neglect in his investigation of the case, (b) a known witness was not interviewed, (c) the failure to discover or interview a witness inured to his prejudice, or (d) the failure to have a known witness present or call the witness to the stand resulted in the denial of critical evidence which inured to the prejudice of the petitioner. *Id.* Neither the post-conviction court nor this court may speculate on "what a witness's testimony might have been if introduced by defense counsel." *Id.*

While the Petitioner acknowledges that Vault did not testify at the post-conviction hearing, he cites *Tavarus U. Williams v. State*, No. 02C01-9711-CR00423, 1998 Tenn. Crim. App. LEXIS 1099, 1998 WL 742348, at *7 (Tenn. Crim. App. Oct. 23, 1998), for the proposition that this court has, on occasion, made an exception to the general rule that witnesses must be presented at the post-conviction hearing. The Petitioner asserts that Officer Merritt's report shows that Vault provided information about the unidentified shooter, that both trial counsel and post-conviction counsel summarized the substance of Vault's statement to police, and that post-conviction counsel made several attempts to secure Vault's presence at the hearing. Consequently, the Petitioner urges this court to excuse his failure to present Vault at the post-conviction hearing.

In *Tavarus U. Williams*, the Petitioner appealed the denial of post-conviction relief, asserting that trial counsel failed to adequately investigate and assess his case and failed to effectively present proof at trial. 1998 Tenn. Crim. App. LEXIS 1099, [WL] at *1. At the post-conviction hearing, the defense investigator testified that she found a key witness prior to trial that supported the Petitioner's claim of self-defense. 1998 Tenn. Crim. App. LEXIS 1099, [WL] at *3. The morning of the Petitioner's trial, the investigator placed the name of this key witness and a summary of this witness's testimony in trial counsel's box at the public defender's office. *Id.* The investigator said that this particular witness attended the Petitioner's trial and was available to testify on the Petitioner's behalf, but trial counsel never called him to testify. *Id.* The investigator did not recall the name of the key witness and did not

have a copy of the summary of this witness's statement. *Id.* Trial counsel testified at the post-conviction hearing that he was unaware of this witness. *Id.* This court concluded that trial counsel was ineffective in failing to present this key witness at trial, stating:

We recognize that this witness' proposed testimony should have been produced at the post-conviction hearing under the general rule announced in *Black v. State*, 794 S.W.2d 752, 757-58 (Tenn. Crim. App. 1990). However, we think it is fundamentally unfair to hold this failure of proof against the appellant and, therefore, find the *Black* rule inapplicable under the facts of this case. To hold otherwise puts the appellant in a double bind from which he cannot escape: his lawyer's ineffectiveness condemns him not only at trial but prevents him from later proving that ineffectiveness at his post-conviction hearing.

The best evidence that the appellant had of the crucial testimony was [the investigator], and he did produce that proof at the hearing. Accordingly, because he produced independent proof of vital testimony that would have been available at the hearing but for his trial lawyer's ineffectiveness (in never discovering the witness, not calling him and losing all record of him), we hold that the appellant has established both prongs of the Strickland test. 1998 Tenn. Crim. App. LEXIS 1099, [WL] at *7.

We find Tavarus U. Williams distinguishable from the instant case. Unlike trial counsel's complete failure to pursue the key witness in that case, trial counsel in Petitioner's case made extensive efforts to ensure that Vaultx testified at trial. Trial counsel hired an investigator to locate her, subpoenaed her for trial, and successfully obtained a continuance during the Petitioner's trial in an attempt to secure her testimony. Unfortunately, despite all these efforts, trial counsel was unable to present Vaultx's testimony at trial. In light of trial counsel's conscientious and repeated efforts to obtain Vaultx's testimony, the Petitioner has failed to prove that trial counsel was deficient in not presenting Vaultx's testimony at trial.

In addition, the Petitioner has not shown that trial counsel's failure to present Vaultx prejudiced the outcome of his case. Vaultx's statement to police shows that her testimony would not have changed the outcome of the Petitioner's trial. Vaultx told police that after being awakened by the gunshots, she looked out her window and observed an unidentified African-American man, whom she did not know and could not identify, placing a sawed off shotgun in the backseat of a red vehicle. While Vaultx's statement might support the fact that there was another shooter the night of the incident, it does not show that the unidentified man she observed fired the fatal shot at Kimberly Jamerson. At trial, the jury heard substantial evidence suggesting that the shooters at the Northmeade location, who were returning fire from the shots fired by the Petitioner and his co-defendants, were responsible for Jamerson's death. Because the jury heard evidence suggesting that there were other shooters at the scene and because Vaultx never saw the man responsible for killing Kimberly Jamerson, we conclude that Vaultx's testimony would not have changed the outcome of the Petitioner's trial. Because trial counsel's failure to present Vaultx at trial was neither deficient nor prejudicial, the Petitioner is not entitled to relief on this issue.

C. Failure to Request an Instruction on Proximate Cause of Death. The Petitioner also asserts that trial counsel provided ineffective assistance in failing to request an instruction on proximate cause of death. See 7 Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim. 42.14. He asserts that trial counsel's failure to request this instruction was both deficient and prejudicial because had it been given, the jury would have had reasonable doubt as to whether someone other than the Petitioner or his co-defendants caused Kimberly Jamerson's death, especially given that 7.62x39mm casings were found near the victim and that Agent Scott could not rule out the possibility that the fatal bullet came from one of these casings. While

acknowledging that he failed to raise this issue in his pro se or amended post-conviction petition and that post-conviction counsel never questioned trial counsel about this issue at the post-conviction hearing, the Petitioner nevertheless asserts that he testified, without objection from the State, that trial counsel should have requested an instruction on proximate cause of death and that the post-conviction court ruled on this particular issue. Accordingly, the Petitioner claims that he properly preserved this issue for appellate review. See *Marlon Yarbrow v. State*, No. W2017-00125-CCA-R3-PC, 2018 Tenn. Crim. App. LEXIS 704, 2018 WL 4441364, at *7 (Tenn. Crim. App. Sept. 17, 2018) (concluding that the State waived its claim of procedural default when it failed to object to an issue raised by the petitioner at the post-conviction hearing that was not explicitly included in his petition for post-conviction relief). The State responds that the Petitioner has waived this issue by failing to raise it in his petition or amended petition and that waiver notwithstanding, the post-conviction court properly denied relief because trial counsel was not ineffective in failing to request this instruction. See T.C.A. § 40-30-104(d), (e), -106(d); Tenn. Sup. Ct. R. 28, c 8(D)(4). We conclude that although this issue is reviewable on its merits, the Petitioner is not entitled to post-conviction relief.

While the Petitioner admits that he did not explicitly include in his post-conviction petitions a claim of ineffective assistance of counsel based upon trial counsel's failure to request the proximate cause of death instruction, we note that the Petitioner did generally claim that he received ineffective assistance of trial counsel. See *Marlon Yarbrow*, 2018 Tenn. Crim. App. LEXIS 704, 2018 WL 4441364, at *6. At the post-conviction hearing, the Petitioner asserted, "[T]his is not a self-defense case. This is a case where the proximate cause of death was in question." Then, when questioned about whether self-defense was an appropriate defense in his case, the Petitioner replied:

By [trial counsel] alleging self-defense, it took my gun out of a direction in which I [shot it]-I said I shot it into the air, but [the self-defense theory] indicated to the jury-self-defense is constructively saying, "Hey, I killed this person, but it was in self-defense," which this is not one of those cases. This is a case when no one could honestly say-neither expert witness or anything could honestly say which direction this bullet came from that killed this victim. No one is saying that they had this weapon, so they don't know which way it came from.

So we're, like, what's the proximate cause of death? And I felt like the perfect defense could have been requesting proximate cause of death jury instruction rather than self-defense. The record shows that neither post-conviction counsel nor the State asked the Petitioner or trial counsel any specific questions about trial counsel's failure to request the proximate cause of death instruction. However, when the Petitioner raised this issue during his testimony at the post-conviction hearing, the State never objected on the basis that the Petitioner failed to include this issue in any of his post-conviction petitions. See *Walsh v. State*, 166 S.W.3d 641, 645 (Tenn. 2005) ("Issues not addressed in the post-conviction court will generally not be addressed on appeal."); *Cauthern v. State*, 145 S.W.3d 571, 599 (Tenn. Crim. App. 2004) ("[A]n issue raised for the first time on appeal is waived."); see also *Steven Tyler Nabi v. State*, No. M2017-00041-CCA-R3-PC, 2018 Tenn. Crim. App. LEXIS 270, 2018 WL 1721869, at *2 (Tenn. Crim. App. Apr. 9, 2018) (concluding that an issue was reviewable on its merits when the Petitioner raised the issue at the post-conviction hearing and the State failed to object that the issue was waived on the basis it had not been included in the pro se or amended petition). Had the State objected, the Petitioner could have amended his petition, which the Post-Conviction Procedure Act clearly contemplates and generously allows. See Tenn. Sup. Ct. R. 28, c 8(D)(5). For all these reasons, we

conclude that the Petitioner did not waive his issue regarding trial counsel's failure to request the proximate cause of death jury instruction.

Although this issue is reviewable on its merits, we nevertheless conclude that the Petitioner has failed to establish that trial counsel was ineffective in failing to request this instruction. We note that the proximate cause of death instruction is given when there is evidence that the victim's death was caused by an independent, intervening act or omission that the defendant could not reasonably have anticipated. The "cause of death" instruction at issue states, in pertinent part, the following:

Before the defendant can be convicted of any degree of homicide, the State must have proven beyond a reasonable doubt that the death of the deceased was proximately caused by the criminal conduct of the defendant [, by the conduct of another for whom the defendant is criminally responsible, or both]. The proximate cause of a death is that cause which, in natural and continuous sequence, unbroken by any independent intervening cause, produces the death and without which the death would not have occurred.

The defendant's conduct need not be the sole or immediate cause of death. The acts [or omissions] of two or more persons may work concurrently to proximately cause the death, and in such a case, each of the participating acts [or omissions] is regarded as a proximate cause. It is not a defense that the negligent conduct of the deceased may also have been a proximate cause of the death.

However, it is a defense to homicide if the proof shows that the death was caused by an independent intervening act [or omission] of the deceased or another which the defendant, in the exercise of ordinary care, could not reasonably have anticipated as likely to happen. However, if, in the exercise of ordinary care, the defendant should reasonably have anticipated the intervening cause, that cause does not supersede the defendant's original conduct, and the defendant's conduct is considered the proximate cause of death. It is not necessary that the sequence of events or the particular injury be foreseeable. It is only necessary that the death fall within the general field of danger which the defendant should have reasonably anticipated.

....

If you find that the defendant's acts, if any, did not unlawfully cause or contribute to the death of the deceased, or if you have a reasonable doubt as to this proposition, then you must find [him][her] not guilty.⁷ Tenn. Prac. Pattern Jury Instr. T.P.I.-Crim. 42.14 (footnotes omitted).

Here, the proof showed that either the Petitioner or his co-defendants fired the fatal bullet or someone from the Northmeade location fired the fatal bullet, but there was no evidence that Kimberly Jamerson's death was caused by an independent, intervening act or omission that the responsible party could not reasonably have anticipated. Because pattern jury instruction 42.14 was clearly inapplicable to the evidence presented at the Petitioner's trial, we conclude that the Petitioner has failed to show that trial counsel was deficient in failing to request this instruction or that such an instruction would have changed the outcome of the Petitioner's trial. Accordingly, the Petitioner is not entitled to relief on this issue.

II. Second Post-Conviction Hearing. Lastly, the Petitioner asserts that even if this court determines that trial counsel did not provide ineffective assistance at trial, he is nevertheless entitled to a second post-conviction hearing based upon post-conviction counsel's ineffectiveness. He claims that post-

conviction counsel failed to adequately present numerous claims at the post-conviction hearing⁴ and failed to allege in the amended petition that trial counsel was ineffective in not arguing that the police did not "scrupulously honor" the Petitioner's invocation of his right to remain silent during his interview. While acknowledging that petitioners are not entitled to effective post-conviction representation and that a post-conviction counsel's failure to follow the guidelines in Supreme Court Rule 28 does not warrant a second post-conviction petition, he claims that he is entitled to a second post-conviction hearing pursuant to footnote 10 in *Thaddeus Johnson* because post-conviction counsel failed to "provide him with the limited amount of due process that is required[.]" See *Thaddeus Johnson v. State*, No. W2014-00053-CCA-R3-PC, 2014 Tenn. Crim. App. LEXIS 1160, 2014 WL 7401989, at *9 n.10 (Tenn. Crim. App. Dec. 29, 2014), perm. app. denied (Tenn. May 18, 2015). The State counters that the Petitioner is not entitled to a second post-conviction hearing because post-conviction counsel followed the requirements of Tennessee Supreme Court Rule 28. We conclude that because post-conviction counsel complied with the requirements of Rule 28 and because any issues not raised at the initial post-conviction hearing are waived, the Petitioner is not entitled to relief.

In considering this issue, we recognize that a petitioner is only entitled to limited due process rights in the post-conviction setting. The United States Supreme Court has held that the protections inherent in the Due Process Clause are less stringent in a state post-conviction proceeding than they are at trial or on direct review. *Pennsylvania v. Finley*, 481 U.S. 551, 555-57, 107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987). Similarly, the Tennessee Supreme Court held that "the opportunity to collaterally attack constitutional violations occurring during the conviction process is not a fundamental right entitled to heightened due process protection." *Burford v. State*, 845 S.W.2d 204, 207 (Tenn. 1992). "All that due process requires in the post-conviction setting is that the defendant have 'the opportunity to be heard at a meaningful time and in a meaningful manner.'" *Stokes v. State*, 146 S.W.3d 56, 61 (Tenn. 2004) (quoting *House v. State*, 911 S.W.2d 705, 711 (Tenn. 1995)). In other words, a "full and fair hearing" merely requires "the opportunity to present proof and argument on the petition for post-conviction relief." *House*, 911 S.W.2d at 714.

As acknowledged by the Petitioner, there is no constitutional right to effective assistance of counsel in a post-conviction proceeding. *Frazier*, 303 S.W.3d at 680; *Stokes*, 146 S.W.3d at 60; *House*, 911 S.W.2d at 712. There is a statutory right to post-conviction counsel. T.C.A. § 40-30-107(b)(1); *Frazier*, 303 S.W.3d at 680. The rationale for this statutory right "is to afford a petitioner the full and fair consideration of all possible grounds for relief." *Frazier*, 303 S.W.3d at 680. "This statutory right does not, however, serve as a basis for relief on a claim of ineffective assistance of counsel in a post-conviction proceeding and does not include 'the full panoply of procedural protection that the Constitution requires be given to defendants who are in a fundamentally different position-at trial and on first appeal as of right.'" *Id.* (quoting *House*, 911 S.W.2d at 712).

Tennessee Supreme Court Rule 28 outlines the obligations and responsibilities of post-conviction counsel. Specifically, post-conviction counsel "shall be required to review the pro se petition, file an amended petition asserting other claims which petitioner arguably has or a written notice that no amended petition will be filed, interview relevant witnesses, including petitioner and prior counsel, and diligently investigate and present all reasonable claims." Tenn. Sup. Ct. R. 28, § 6(C)(2). In addition, post-conviction counsel must file a certificate of counsel certifying that he or she has "thoroughly investigated the possible constitutional violations alleged by petitioner . . . and any other ground that

petitioner may have for relief," has "discussed other possible constitutional grounds with petitioner," has "raised all non-frivolous constitutional grounds warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law which petitioner has," is "aware that any ground not raised shall be forever barred . . . and ha[s] explained this to petitioner." Tenn. Sup. Ct. R. 28 c 6(C)(3), app. C. While these rules do establish a minimum standard of service to which post-conviction counsel are held, they do not provide a basis for relief from a conviction or sentence. Frazier, 303 S.W.3d at 681; David E. Breezee v. State, No. W2015-02251-CCA-R3-PC, 2017 Tenn. Crim. App. LEXIS 357, 2017 WL 1907738, at *7 (Tenn. Crim. App. May 9, 2017), perm. app. denied (Tenn. Sept. 22, 2017); Charles Edgar Ledford v. State, No. E2016-00208-CCA-R3-PC, 2017 Tenn. Crim. App. LEXIS 156, 2017 WL 837705, at *6 (Tenn. Crim. App. Mar. 3, 2017), perm. app. denied (Tenn. June 7, 2017); David Edward Niles v. State, No. M2014-00147-CCA-R3-PC, 2015 Tenn. Crim. App. LEXIS 421, 2015 WL 3453946, at *7 (Tenn. Crim. App. June 1, 2015), perm. app. denied (Tenn. Sept. 17, 2015); Thaddeus Johnson, 2014 Tenn. Crim. App. LEXIS 1160, 2014 WL 7401989, at *9.

Moreover, even if we were inclined to agree with the Petitioner, a post-conviction counsel's Rule 28 violations do not warrant a second post-conviction hearing. David E. Breezee, 2017 Tenn. Crim. App. LEXIS 357, 2017 WL 1907738, at *7 ("[T]his court has repeatedly held that post-conviction counsel's Rule 28 violations do not warrant a second post-conviction hearing."); Charles Edgar Ledford, 2017 Tenn. Crim. App. LEXIS 156, 2017 WL 837705, at *7 ("This Court has repeatedly held that violations of Rule 28 by post-conviction counsel alone do not warrant a second post-conviction hearing."); Demarcus Keyon Cole v. State, No. W2015-01901-CCA-R3-PC, 2016 Tenn. Crim. App. LEXIS 355, 2016 WL 2859196, at *11 (Tenn. Crim. App. May 11, 2016) ("This court has repeatedly held that violations of Rule 28 by post-conviction counsel do not afford the remedial right of a second post-conviction hearing."), perm. app. denied (Tenn. Sept. 26, 2016); David Edward Niles, 2015 Tenn. Crim. App. LEXIS 421, 2015 WL 3453946, at *7 ("[T]his Court has repeatedly held that violations of Rule 28 by post-conviction counsel do not warrant a second post-conviction hearing."); Thaddeus Johnson, 2014 Tenn. Crim. App. LEXIS 1160, 2014 WL 7401989, at *9 ("[T]his Court has repeatedly held that violations of Rule 28 by post-conviction counsel do not warrant a second post-conviction hearing.").

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

We . . . acknowledge that there could conceivably be a situation where counsel's egregious violation(s) of Rule 28 might impermissibly violate the limited due process requirements for post-conviction proceedings so as to warrant a second post-conviction hearing; however, we reaffirm that there is no legal authority for the proposition that a Rule 28 violation, in itself, justifies another bite at the post-conviction apple. 2014 Tenn. Crim. App. LEXIS 1160, [WL] at *9 n.10 (citation omitted). Although he relies on Thaddeus Johnson, the Petitioner fails to explain with any particularity how post-conviction counsel failed to follow the guidelines of Rule 28, choosing instead to claim that counsel failed to adequately present a laundry list of post-conviction claims. Additionally and most importantly, the Petitioner has failed to show how post-conviction counsel committed "egregious violation(s) of Rule 28." Id.

In this case, the Petitioner filed his pro se petition, and post-conviction counsel was appointed.

Thereafter, the record shows that post-conviction counsel reviewed the pro se petition, diligently investigated the Petitioner's case, interviewed the relevant witnesses who could be found after an exhaustive search, filed an amended petition in which she developed several of the claims outlined in the Petitioner's pro se petition and incorporated the claims raised in the pro se petition, and then competently presented all reasonable claims at the post-conviction hearing. See Tenn. Sup.Ct. R. 28, c 6(C)(2). Post-conviction counsel also filed a certificate of counsel, certifying that she had "thoroughly investigated the possible constitutional violations," "raised all non-frivolous constitutional grounds," and made the Petitioner "aware that any ground not raised shall be forever barred." See Tenn. Sup.Ct. R. 28 c 6(C)(3), app. C. At the post-conviction hearing, post-conviction counsel presented testimony from Agent James Davis, trial counsel, and the Petitioner. While post-conviction counsel did not address every one of the Petitioner's claims, the transcript from the post-conviction hearing shows that she addressed the overwhelming majority of issues raised in his pro se petition. Moreover, the record is clear that during his post-conviction hearing, the Petitioner "was afforded every opportunity to present evidence and argument" on all of his post-conviction claims. See House, 911 S.W.2d at 711.

Notwithstanding the fact that he received a full and fair hearing, the Petitioner claims that he is entitled to the appointment of new post-conviction counsel, the opportunity to amend his post-conviction petition, and the chance to have a second post-conviction hearing on these additional grounds. However, the Petitioner fails to recognize that any issues not raised at his initial post-conviction hearing are waived. As Tennessee Code Annotated section 40-30-106(g) explains,

A ground for relief is waived if the petitioner personally or through an attorney failed to present it for determination in any proceeding before a court of competent jurisdiction in which the ground could have been presented unless:

- (1) The claim for relief is based upon a constitutional right not recognized as existing at the time of trial if either the federal or state constitution requires retroactive application of that right; or
- (2) The failure to present the ground was the result of state action in violation of the federal or state constitution. Additionally, Code section 40-30-110(f) provides, "There is a rebuttable presumption that a ground for relief not raised before a court of competent jurisdiction in which the ground could have been presented is waived."

Because there is no constitutional or statutory right to effective assistance of counsel in post-conviction proceedings, the Petitioner's claim that counsel was ineffective at a prior post-conviction proceeding is insufficient to rebut the presumption of waiver. House, 911 S.W.2d at 706, 712. In other words, the Petitioner's claim of ineffective assistance of post-conviction counsel "does not establish a legal excuse for failure to raise the issues in the initial proceeding." Id. at 712. Even if we were to appoint new post-conviction counsel and allow the Petitioner to have a second post-conviction hearing, the Petitioner has waived any claims not presented at the initial post-conviction hearing. This is because "[w]aiver in the post-conviction context is to be determined by an objective standard under which a petitioner is bound by the action or inaction of his attorney." Id. at 714 (footnote omitted).

We conclude that the Petitioner has failed to show that he is entitled to a second post-conviction hearing based on any deprivation of his due process rights. We reiterate that "[a]ll that due process requires in the post-conviction setting is that the defendant have 'the opportunity to be heard at a

meaningful time and in a meaningful manner." Stokes, 146 S.W.3d at 61 (quoting House, 911 S.W.2d at 711). Because the Petitioner received a full and fair hearing on his post-conviction petition with the assistance of post-conviction counsel, which is all that the law requires, he is not entitled to relief. See Charles Edgar Ledford, 2017 Tenn. Crim. App. LEXIS 156, 2017 WL 837705, at *7.

CONCLUSION

Based upon the aforementioned authorities and reasoning, we affirm the judgment of the post-conviction court.

CAMILLE R. MCMULLEN, JUDGE

Footnotes

1

Although the transcript from the post-conviction hearing identifies this individual as "Beatrice Baulx," an exhibit to the post-conviction hearing shows that this individual's name is actually "Beatrice Vaultx."

2

We acknowledge that we do not use titles when referring to every witness. We intend no disrespect in doing so. Presiding Judge John Everett Williams believes that referring to witnesses without proper titles is disrespectful even though none is intended. He would prefer that every adult witness be referred to as Mr. and Mrs. or by his or her proper title.

3

Following entry of the order denying post-conviction relief, the court appointed a different attorney to represent the Petitioner on appeal. However, after both parties filed appellate briefs, this court struck the Petitioner's brief, removed appellate post-conviction counsel, and appointed a new attorney, referenced above, to file a supplemental brief in this case and to represent the Petitioner on appeal.

4

Specifically, the Petitioner claims that post-conviction counsel failed to question trial counsel about the following claims he raised in his pro se petition:

(1) Trial counsel was ineffective for failing to request that fingerprint testing be conducted on the 7.62x.39 casings found near the victim's body at 2706 Northmeade.

(2) Trial counsel was ineffective for failing to retain an independent ballistics expert to assist the defense.

(3) Trial counsel was ineffective for failing to investigate and request the results of the victim's gunshot residue tests.

(4) Trial counsel was ineffective for failing to interview Kristie Norman in preparation for trial.

(5) Trial counsel was ineffective for failing to call Nakia Greer as a witness at trial.

(6) Trial counsel was ineffective for failing to call Lt. McCollum as a witness at trial.

(7) Trial counsel was ineffective for failing to request a continuance when key witness Beatrice [V]aulx did not show up at trial.

(8) Trial counsel was ineffective for failing to retain an expert in the area of bullet trajectory. The Petitioner also asserts that post-conviction counsel failed to "personally knock on doors in an effort to find Ms. [V]aulx, failed to "ask[] trial counsel why he did not request a jury instruction on proximate cause of death," "failed to present Kristie Norman, Nakia Greer, and Lieutenant McCollum as witnesses at the post-conviction hearing," and "failed to make a closing argument at the close of proof at the post-conviction hearing." Lastly, the Petitioner criticizes post-conviction counsel's failure to call appellate counsel at the post-conviction hearing so she could question him about his ineffectiveness in "failing to raise 'essential issues' that were raised in the motion for new trial" and in "arguing on appeal that Petitioner was acting in self-defense at the time he fired his shots."

APPENDIX

(d). OPINION: TCCA DIRECT APPEAL(2014)

STATE OF TENNESSEE v. KENNETH BROWN
COURT OF CRIMINAL APPEALS OF TENNESSEE, AT JACKSON
2014 Tenn. Crim. App. LEXIS 945
No. W2013-00329-CCA-R3-CD
June 3, 2014, Assigned on Briefs
October 9, 2014, Filed
Editorial Information: Subsequent History

Appeal denied by State v. Brown, 2015 Tenn. LEXIS 120 (Tenn., Feb. 13, 2015) Post-conviction relief denied at, Decision reached on appeal by Brown v. State, 2019 Tenn. Crim. App. LEXIS 121 (Tenn. Crim. App., Feb. 22, 2019)

Editorial Information: Prior History

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed. Appeal from the Criminal Court for Shelby County. Nos. 11-002623 & 11-007432. Lee V. Coffee, Judge. State v. Brown, 2014 Tenn. Crim. App. LEXIS 871 (Tenn. Crim. App., Sept. 5, 2014)

Disposition:
Judgments of the Criminal Court Affirmed.

Counsel Juni S. Ganguli (on appeal), and Errol Harmon and Rhonda Hooks (at trial), Memphis, Tennessee, for the appellant, Kenneth Brown.

Robert E. Cooper, Jr., Attorney General and Reporter; Rachel Harmon, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Theresa McCusker and Alycia Carter, Assistant District Attorneys General, for the appellee, State of Tennessee.

Judges: ROGER A. PAGE, J., delivered the opinion of the court, in which ALAN E. GLEN and CAMILLE R. MCMULLEN, JJ., joined.

CASE SUMMARY Sufficient evidence supported defendant's Tenn. Code Ann. § 39-13-202(a) first degree murder conviction because it showed he shared the intent required for premeditated murder with his accomplices and actively promoted the crime by procuring weapons, finding a place where the victims could not see them, and using the weapons to fire into a crowd.

OVERVIEW: HOLDINGS: [1]-Sufficient evidence supported defendant's Tenn. Code Ann. § 39-13-202(a) first degree murder conviction because he shared the required intent with accomplices and

promoted the crime by procuring guns, finding a place where victims could not see them, and firing into a crowd, he confessed, and he or an accomplice fired the fatal shots; [2]-His motion to suppress his confession was properly denied because police had probable cause to arrest him, as they knew he fought with the victims, witnesses identified his car and an accomplice, his accomplice inculpated himself and defendant, further evidence connected them, and the accomplice's statement was sufficiently corroborated; [3]-Suppression was unwarranted for a Gerstein violation because he was brought before a magistrate within 48 hours of arrest, and there was no delay to find evidence, due to ill will, or for delay's sake.

OUTCOME: Judgment affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Appeals > Reviewability > Notice of Appeal

The purpose of a notice of appeal is simply to declare in a formal way an intention to appeal. As long as this purpose is met, it is irrelevant that a paper filed is deficient in some other respect.

Evidence > Relevance > Circumstantial & Direct Evidence

The standard for appellate review of a claim of insufficiency of the State's evidence to support a criminal conviction is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e). To obtain relief on a claim of insufficient evidence, a defendant must demonstrate that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. This standard of review is identical whether the conviction is predicated on direct or circumstantial evidence, or a combination of both.

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Credibility of Witnesses

Criminal Law & Procedure > Juries & Jurors > Province of Court & Jury > Weight of the Evidence

Criminal Law & Procedure > Appeals > Deferential Review > Credibility & Demeanor Determinations

On appellate review, when the sufficiency of the evidence to support a criminal conviction is contested, an appellate court affords the prosecution the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom. In a jury trial, questions involving the credibility of witnesses and the weight and value to be given the evidence, as well as all factual disputes raised by the evidence, are resolved by the jury as trier of fact. An appellate court presumes that the jury has afforded the State all reasonable inferences from the evidence and resolved all

conflicts in the testimony in favor of the State; as such, the court will not substitute its own inferences drawn from the evidence for those drawn by the jury, nor will the court re-weigh or re-evaluate the evidence. Because a jury conviction removes the presumption of innocence that a defendant enjoys at trial and replaces it with one of guilt at the appellate level, the burden of proof shifts from the State to the convicted defendant, who must demonstrate to the appellate court that the evidence is insufficient to support the jury's findings.

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > First-Degree Murder > Elements

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > Definitions > Deliberation & Premeditation

Tenn. Code Ann. § 39-13-202(a) defines premeditated first degree murder as a premeditated and intentional killing of another.

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > Definitions > Deliberation & Premeditation

See Tenn. Code Ann. § 39-13-202(d).

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > Definitions > Deliberation & Premeditation

Evidence > Inferences & Presumptions > Inferences

Evidence > Procedural Considerations > Circumstantial & Direct Evidence

In reviewing the sufficiency of the evidence to support a conviction of premeditated first-degree murder, an appellate court must determine whether the State established the element of premeditation beyond a reasonable doubt. The presence of premeditation is a question of fact for the jury, and the jury may infer premeditation from the circumstances surrounding the killing.

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > Definitions > Deliberation & Premeditation

Evidence > Procedural Considerations > Circumstantial & Direct Evidence

Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > First-Degree Murder > Elements

A defendant's state of mind is crucial to the establishment of the elements of the offense of premeditated first-degree murder, thus, the State may prove premeditation by circumstantial evidence. Several factors support the existence of premeditation including: the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime, and calmness immediately after the killing.

Criminal Law & Procedure > Scienter > General Overview

See Tenn. Code Ann. § 39-11-401(a).

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Solicitation > General Overview

Criminal Law & Procedure > Accessories > Aiding & Abetting

Evidence > Procedural Considerations > Circumstantial & Direct Evidence

Evidence > Inferences & Presumptions > Inferences

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense. Tenn. Code Ann. § 39-11-402(2). While not a separate crime, criminal responsibility is a theory by which the State may alternatively establish guilt based on the conduct of another. No specific act or deed needs to be demonstrated by the State, and furthermore, the presence and companionship of an accused with the offender before and after the offense are circumstances from which participation in the crime may be inferred. However, to be convicted, the evidence must establish that the defendant in some way knowingly and voluntarily shared in the criminal intent of the crime and promoted its commission.

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review > Motions to Suppress

Criminal Law & Procedure > Appeals > Deferential Review > Credibility & Demeanor Determinations

Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence

In reviewing a trial court's decision on a motion to suppress, an appellate court reviews the trial court's legal conclusions de novo. In doing so, it gives deference to the trial judge's findings of fact unless the evidence preponderates otherwise. Credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. In reviewing the findings of fact, evidence presented at trial may be considered by an appellate court in deciding the propriety of the trial court's ruling on the motion to suppress. The prevailing party on the motion to suppress is afforded the strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection

Criminal Law & Procedure > Arrests > Probable Cause

Criminal Law & Procedure > Search & Seizure > Warrantless Searches > Stop & Frisk > Reasonable Suspicion

Both the Tennessee and federal Constitutions protect against unreasonable searches and seizures; the general rule is that a warrantless search or seizure is presumed unreasonable and any evidence discovered is subject to suppression. There are three categories of police interactions with private citizens: (1) a full-scale arrest, which requires probable cause; (2) a brief investigatory detention, requiring reasonable suspicion of wrongdoing; and (3) a brief police-citizen encounter, requiring no objective justification. While arrests and investigatory stops are seizures implicating constitutional protections, consensual encounters are not.

Criminal Law & Procedure > Arrests > Probable Cause

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Probable Cause

An arrest supported by probable cause is an exception to the warrant requirement. Probable cause exists if, at the time of the arrest, the facts and circumstances within the knowledge of the officers, and of which they had reasonably trustworthy information, are sufficient to warrant a prudent person in believing that a defendant had committed or was committing an offense. Probable cause must be more than a mere suspicion. However, probable cause deals with probabilities, not technicalities, the factual and practical considerations of everyday life on which reasonable and prudent persons act. Moreover, a determination of probable cause encompasses the accumulation of information known to law enforcement collectively if a sufficient nexus of communication exists between the arresting officer and a fellow officer with pertinent knowledge.

Criminal Law & Procedure > Arrests > Probable Cause

If arresting officers rely in part on information from an informant from the criminal milieu, they must be able to demonstrate that the informant (1) has a basis of knowledge and (2) is credible or his or her information is reliable. The same test is applied when determining whether the self-inculpatory statement of one suspect may give police probable cause to arrest a person the suspect identifies as his or her accomplice. Independent corroboration of an informant's statement may buttress the credibility of the information, but it is not necessary to corroborate every detail of the informant's information or to directly link the suspect to the commission of the crime.

Criminal Law & Procedure > Arrests > Probable Cause

Corroboration of only innocent aspects of an accomplice's story may suffice to provide probable cause for a defendant's arrest.

Criminal Law & Procedure > Arrests > Probable Cause

Criminal Law & Procedure > Arrests > Warrantless Arrest

Criminal Law & Procedure > Preliminary Proceedings > Initial Appearances > Procedure & Scope

The law requires that when a person is arrested without a warrant, he or she must be brought before a magistrate to seek a prompt judicial determination of probable cause.

Criminal Law & Procedure > Preliminary Proceedings > Initial Appearances > Procedure & Scope

See Tenn. R. Crim. P. 5(a)(1).

Criminal Law & Procedure > Preliminary Proceedings > Initial Appearances > Procedure & Scope

Criminal Law & Procedure > Preliminary Proceedings > Initial Appearances > Delays

A delay of less than 48 hours in bringing an arrestee before a magistrate is presumptively reasonable, and when the delay exceeds 48 hours, the State must show that a bona fide emergency or other extraordinary circumstance caused the delay. Nonetheless, even a delay of less than 48 hours may be unreasonable if the delay is for the purpose of gathering additional evidence to justify the arrest or if the delay is motivated by ill will against the arrested individual, or delay for delay's sake.

Criminal Law & Procedure > Preliminary Proceedings > Initial Appearances > Delays

Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Rule Application & Interpretation

Criminal Law & Procedure > Arrests > Probable Cause

Criminal Law & Procedure > Pretrial Motions > Suppression of Evidence

The remedy for failing to bring an arrestee before a magistrate without unnecessary delay is exclusion of any evidence obtained by virtue of a suspect's unlawful detention, unless an exception to the exclusionary rule applies. However, when a suspect is arrested based on probable cause, the ensuing detention is typically not illegal until it "ripens" into a Gerstein violation. Obviously, if an arrestee's statement is given prior to the time the detention ripened into a constitutional violation, it is not the product of the illegality and should not be suppressed.

Opinion

Opinion by: ROGER A. PAGE

Opinion

Appellant, Kenneth Brown, was convicted of one count of first degree premeditated murder, twelve counts of criminal attempt to commit first degree murder, twelve counts of aggravated assault, one count of employment of a firearm during a dangerous felony, and one count of reckless endangerment. The trial court merged the attempted murder and aggravated assault convictions. He was sentenced to life imprisonment plus 308 years. On appeal, appellant challenges the sufficiency of the evidence

supporting his murder and attempted murder convictions and argues that the trial court erred by denying his motion to suppress his confession. Following our careful review of the record, the applicable law, and the briefs of the parties, we affirm the judgments of the trial court.

OPINION

I. Facts

This case concerns a July 3, 2010 shooting on Northmeade in Memphis, Tennessee, at the house of Sonja Watkins and Felix Williams. One victim, Kimberly Jamerson, died, and another victim, Lamarcus Moore, was shot in the leg but survived. Eleven others were named as victims of attempted murder and aggravated assault; another six people were named in one count as victims of reckless endangerment. Appellant, Devon Brown, and David Richardson were indicted in case number 11-007432 for first degree premeditated murder and in case number 11-002623 for thirteen counts of attempted first degree murder, thirteen counts of aggravated assault, reckless endangerment, and employment of a firearm during a dangerous felony. Count thirteen (attempted murder) and count twenty-six (aggravated assault) were dismissed prior to trial. Appellant was tried separately from his co-defendants, and his case proceeded to trial in October 2012.

At trial, Kimberly Jamerson's mother, Willie Brooks-Howze, testified that Ms. Jamerson was twenty-four years old when she died. Ms. Jamerson had been visiting her aunt, Sonja Watkins, when she was shot.

Robrecus Braxton, Sonja Watkins' son, testified that in July 2010 he lived at the house on Northmeade along with his mother, stepfather Felix Williams, two brothers, and two sisters. Robrecus Braxton said that there were several people at his house on July 3, 2010, preparing for the Fourth of July holiday. He specifically named Bianca Nevels, Lashanna Jones, Deangelo Smith, Kenneth Baker, Rodney Davenport, Mark Chambers, Steven Chambers, Felix Williams, Christopher Braxton, and Nakia Greer. On the evening of July 3, he was standing on the sidewalk outside of his house talking with Felix Williams and Nakia Greer when a green Chevrolet Lumina stopped nearby. Two men exited the car and approached them. One of the men told Mr. Greer, "You owe me." Robrecus Braxton testified that he was confused about what was happening, and the man told him that someone had taken "weed" from him. Felix Williams told the man that he would look into the situation. The two men returned to the Lumina and drove away. They returned to Northmeade with a third person ten to fifteen minutes later. The three men approached again, and one of them began "talking reckless[ly]," demanding payment. Robrecus Braxton testified that Felix Williams gave the man \$5. Robrecus Braxton identified appellant in the courtroom as the man to whom Felix Williams gave the money.

Robrecus Braxton testified that the three men returned to the Lumina. He said that the Lumina almost "clipped" him as it was driving away. He explained that the Lumina would have hit him if he had not reacted to get away. In response, he threw a beer can into the open passenger window of the Lumina. The Lumina stopped, and the three men returned. Robrecus Braxton testified that he, Christopher Braxton, and Kenneth Baker fought with the three men from the Lumina. He said that none of the six participants in the fight had weapons and that it was a "fist fight." When the fight broke up (Robrecus

Braxton did not explain how the fight was broken up), the three men returned to the Lumina. As they left, they said, "All right, that's what up." Robrecus Braxton said that he understood the men to mean, "We'll be back," but he admitted that they did not actually use that phrase.

Robrecus Braxton further testified that after the men left in the green Lumina, he and his friends and family continued to "hang[] out." He said that he was under the carport when he thought he saw and heard fireworks. He then heard what he believed to be gunshots. He ran to the backyard because he "was scared." Robrecus Braxton said that he heard one of his friends yell, "Kim's been shot." He explained that "Kim" was his cousin, Kimberly Jamerson. Robrecus Braxton said that he continued to hear gunshots and that he saw Mark Chambers shooting back. Robrecus Braxton believed that Mark Chambers' action in firing back "made them stop shooting."

Robrecus Braxton said that once the gunfire ended, he went to the front of the house. He saw Lamarcus Moore being carried to a car, and he saw Kimberly Jamerson lying on the sidewalk. Robrecus Braxton heard someone say that Ms. Jamerson had been shot in the head. He said that he left the house in a car and drove until he saw "undercover police." He told the police officers that his cousin had been shot, and the police went to his house. Robrecus Braxton estimated that he heard at least sixty shots and said that the gunfire hit houses and cars in the area. He believed that the gunfire occurred two to three hours after the fist fight. Robrecus Braxton testified that he identified appellant in a photographic lineup the following day.

On cross-examination, Robrecus Braxton testified that the can he threw into appellant's passenger window was full. He said that ten or eleven other people were in the yard during the fist fight. He recalled seeing the green Lumina once after the fight, driving on a nearby road. Robrecus Braxton said that he knew the men in the Lumina lived in the neighborhood but did not know their addresses. Robrecus Braxton agreed that he saw Mark Chambers shooting and stated that Mark Chambers was known to carry two guns. He did not recall seeing Steven Chambers with a gun.

Felix Williams testified that on July 3, 2010, while his family was making preparations for a Fourth of July celebration, his sister-in-law, Dena Watkins, tried to purchase a \$5 bag of marijuana. Nakia Greer flagged down appellant, who was driving by in a Lumina, to inquire about purchasing marijuana. Appellant drove away and then returned. When appellant returned, he and Dena Watkins stepped away for a few minutes. Then, appellant drove away, and Ms. Watkins left separately to go to a store. Fifteen to twenty minutes later, appellant returned and confronted Mr. Greer with an accusation that Ms. Watkins had taken some of appellant's marijuana without paying for it. Mr. Williams testified that appellant said his "half-ounce [was] a gram short" and that he wanted Mr. Greer to pay for the missing marijuana. Mr. Williams told appellant to come back later. Mr. Williams testified that he intended to find out what happened to the marijuana when Ms. Watkins returned. According to Mr. Williams, Ms. Watkins denied having taken the marijuana. Mr. Williams said that when appellant returned, he gave appellant \$5 and asked him to leave. Appellant and his two co-defendants returned to their car and began driving away. However, in the process of driving away, appellant "almost pinned Robrecus Braxton in between" appellant's car and the car beside which Mr. Braxton was standing. Mr. Williams recalled seeing Mr. Braxton throw a beer into appellant's car. Appellant stopped his vehicle, and he and the two men with him approached Mr. Braxton. They began fighting, and Mr. Williams and Mr. Greer tried to break up the fight. Eventually, the men stopped fighting, and appellant and his co-defendants left. Mr. Williams testified that one of the men said, "We'll be back." Mr. Williams also recalled "hearing a window bust." Mr. Williams said that he saw appellant's car again later but did not "think

anything of it because [they] all stay in the same neighborhood."

Mr. Williams testified that some time later, he was walking his niece, Kimberly Jamerson, to her car when someone shot bottle rockets at him. He said that one bottle rocket "flew in front of" him and one hit him in the arm. Mr. Williams stated that the gunshots began approximately thirty seconds later. He went to the backyard and then into his house. He saw a blood trail inside and learned that Lamarcus Moore had been shot. He testified that he was scared during the gunfire. Mr. Williams said that he called 9-1-1 from a neighbor's house. The following day, he identified appellant in a photographic lineup, noting on the lineup form, "Killed my niece. He is the driver."

On cross-examination, Mr. Williams said he did not know from what direction the gunshots came. He said that he heard assault rifles, a handgun, and a shotgun. He testified that he did not see who shot Kimberly Jamerson.

Kenneth Baker testified that he was at the house on Northmeade on July 3, 2010, and participated in the fist fight. He recalled seeing appellant and appellant's brother, Devon Brown, outside during what he believed was the attempted sale of marijuana to Dena Watkins. He saw appellant and Devon Brown again later, with a third man. Mr. Baker said that the men accused his aunt of stealing some of their marijuana. Mr. Baker heard Felix Williams offer to "pay them some money to leave, to keep the commotion down." He said that one of his cousins heard one of the individuals with appellant say, "These p***y a** n***** don't want it." Mr. Baker said that he and his cousins then began fighting the three men, "three on three." He further said that Felix Williams tried to break up the fight. Mr. Baker testified that the fight ended "[w]ith them saying they'll be back. And they came back over for the shooting." Mr. Baker said that later that night, he was in the front yard when he saw "infrared lights on [his] shirt, green and red lights on [his] shirt." He described the lights as being "[l]ike what's on a gun, what you aim it with, to hit your target with." He did not think anything of the lights until he heard gunshots. Mr. Baker said that he heard fireworks first and then gunshots. He ran under the carport when the gunfire began. He testified that he was "scared [and] [i]n fear for [his] life." After the gunfire ended, he found Kimberly Jamerson lying on the concrete.

On cross-examination, Mr. Baker testified that there were approximately thirty people at the Northmeade house on July 3. He agreed that some of the people were drinking alcohol and some, including himself, were smoking marijuana. Mr. Baker said that the comment, "These p***y a** n***** don't want it," was said by appellant as he was leaving in his car before the fight and that after the comment was made, Robrecus Braxton threw a beer can into appellant's car. Mr. Baker testified that the driver stopped the vehicle and was the first to exit the car but that he could not recall whether appellant was the driver. He agreed that there were many people in the yard during the fight but could only recall two others besides himself actually fighting. He further agreed that his group "got the best of" appellant's group during the fight. When shown a picture of appellant taken by the police on July 6, 2010, Mr. Baker identified appellant as "[t]he enemy," pointed him out in the courtroom, and agreed that the picture represented appellant's appearance after the fight. He testified that he knew the back window of appellant's car was broken after the fight but that he did not know how it was broken. Mr. Baker said that he saw the lights on his shirt fifteen to thirty minutes after the fight. He agreed that he made the assumption that appellant fired on his family because of the fight. Mr. Baker also identified photographs of Steven Chambers and Mark Chambers. He explained that the police showed him their photographs when he was giving his statement. During the police interview, he wrote on the bottom of the photograph of Steven Chambers "fired back" and on the bottom of Mark Chambers' photograph,

"returned fire back." Mr. Baker testified that the Chambers were the only people at the Northmeade house whom he saw with guns.

Mark Chambers testified that he visited the Northmeade house on July 3, 2010. His nephew, Lamarcus Moore, accompanied him, and his brother, Steven Chambers, arrived later. He said that after dark, he was eating under the carport when he heard fireworks and saw people running. At first, he believed that they were "playing," but someone told him that Mr. Moore had been shot. He ran to the front yard to look for Mr. Moore, but when he realized bullets were hitting the house and vehicles parked outside, he "ran back behind the wall." He returned to the front yard to again look for Mr. Moore, but this time, he began firing both of his guns - a .9mm Smith and Wesson and a .9mm Ruger - in the direction from which the gunfire came. Mark Chambers testified that the gunfire was coming from a hill several houses down the street from the Northmeade house and that he could see light flashing from the gunfire. He heard more than fifty gunshots and said that the gunfire lasted six or seven minutes. He said that he fired seven to ten times from each of his guns and that he then ran all around the Northmeade house. He found Mr. Moore inside the house and took him to a hospital. Mark Chambers said that he knew his brother had one of his guns at some point but that both guns "ended up" in Mark Chambers' car, a maroon Buick Roadmaster. Both of his guns were entered as exhibits to the trial. During cross-examination, when asked whether a truck next door was in his line of sight while he was shooting, Mark Chambers agreed that he saw a truck next door but never confirmed that it was in his line of sight while shooting.

Steven Chambers testified that he arrived at the Northmeade house during the afternoon of July 3, 2010. He recalled that after dark, he was standing around with several other guests behind a truck parked in the driveway when he heard what he thought were firecrackers. He realized that he was hearing gunshots when he saw bullets striking the truck. He and the other guests ran to the backyard. When he was in the backyard, he heard that Kimberly Jamerson had been shot. Steven Chambers testified that he had seen her walking to her vehicle before the gunfire began. Steven Chambers said that while the gunfire continued, he went into the Northmeade house and found his nephew, Lamarcus Moore, lying in the floor and learned that Mr. Moore had been shot. When his brother, Mark Chambers, entered the house, Mark Chambers and "Cleotha" began helping Mr. Moore to Mark Chambers' car. Steven Chambers testified that Mark Chambers dropped one of his guns, so he picked it up and fired a couple of shots to cover Mark Chambers, Cleotha, and Mr. Moore as they moved across the yard. Once they all got in Mark Chambers' car, Steven Chambers drove them to the Regional Medical Center because Mark Chambers did not know the way. He returned his brother's gun to him while they were in the car. Steven Chambers estimated that he heard approximately fifty rounds being fired that evening and agreed that he had been afraid for his life.

Memphis Police Sergeant Kevin Lundy testified that he participated in the investigation of the shooting at the Northmeade house. He was responsible for collecting two guns from a maroon Buick Roadmaster and transporting the guns to the police department's property room.

On cross-examination, Sergeant Lundy agreed that Mark Chambers had been originally charged with Kimberly Jamerson's murder but was later cleared. He testified that Mark Chambers gave him a statement in which he said that he "was looking at a truck at the house next-door and their car down the street on the hill towards Rangeline" when he fired his weapon.

Memphis Police Sergeant Marlon Wright testified that he was a crime scene investigator at the time of

the incident in question and responded to the crime scene the night of July 3, 2010. He said that the police discovered sixty-one shell casings fired from a high-powered rifle in the yard of a house on the corner of Helmwood and Northmeade (hereinafter "Helmwood"), which was over 233 feet from the crime scene. He explained that the Helmwood location was on a steep hill overlooking Northmeade, and he testified that from Helmwood, a person could see all of Northmeade. Conversely, a person at the Northmeade crime scene would not have been able to see anyone at the Helmwood location due to the angle of incline and the trees in the yard at Helmwood. Sergeant Wright further testified that the police found "fifteen or so" casings at the Northmeade crime scene. The Northmeade house, mailbox, and vehicles parked outside had all been struck by bullets.

On cross-examination, Sergeant Wright agreed that a truck parked at the Northmeade crime scene obstructed the view of the Helmwood location from the crime scene.

Inga Yancey testified that she lived at the house at the Helmwood location. She was at home but asleep the night of July 3, 2010. Ms. Yancey testified that she was awakened shortly after midnight by what she believed were firecrackers. She checked on her dog in the backyard and returned to sleep. Ms. Yancey said that she did not see anything in her yard that night. She testified that when she did yard work earlier that week, she did not see shell casings in her yard.

Dena Watkins testified that she visited her sister's family at the house on Northmeade July 3, 2010, to prepare for the Fourth of July. She arrived at 10:30 a.m., and the other people at the house at that time were Sonja Watkins, Felix Williams, Christopher Braxton, Robrecus Braxton, Angel Henderson, Veronique Watkins, and Lantrivia Watkins. Later that day, after dark, she asked Felix Williams' friend, who went by the nickname "Face," whether he knew anyone who could sell her marijuana. "Face" flagged down a green Lumina and asked the driver for marijuana. Dena Watkins testified that there were two men in the Lumina. The two men returned with marijuana for her, but she decided not to accept it after she inspected the bag. She said that she held up the bag to look at the marijuana, that she never opened the bag, and that another person told her that he could find better marijuana for her. She said that she returned the bag to the men from the Lumina and left in search of better marijuana. Dena Watkins testified that when she returned, she learned that the men from the Lumina had accused her of stealing a gram of marijuana. She said that she had not but offered to give them \$5 anyway. She waited for the men to return but left after having waited thirty minutes. When she returned, Felix Williams told her that the men had come back and that he had given them \$5. Dena Watkins said that some time after that, she saw the Lumina return. She testified that the Lumina drove very close to some men standing on the street, "almost like they [ran] over their feet." The Lumina stopped, and three men exited the car and began fighting the Northmeade group. Felix Williams broke up the fight, and the men from the Lumina left. Dena Watkins said that she could not identify any of the men from the Lumina because it was dark. She testified that she was not at the Northmeade house when the shooting occurred but arrived immediately after learning that Kimberly Jamerson had been shot.

On cross-examination, Dena Watkins identified several cars that were on the street and in the driveway at the Northmeade house. In particular, she identified Jalon Baker's car, Sonja Watkins' car, a vehicle on which Felix Williams was working, and Travis Britton's truck. She recalled that Travis Britton was at the Northmeade house before the fight occurred.

Sonja Watkins testified that she was inside her house when the fight began but went outside to yell for the fight to stop. She said that she recognized appellant from the neighborhood and identified him in

the courtroom. She said that when appellant and his friends left, one of them said, "Don't worry about it. We'll be back." Later that evening, she heard what she thought were fireworks, but she soon realized that the noise did not sound like fireworks. She went through the house and checked on the six children in a bedroom. She said that she put the children under a table and went back to the hallway. She recalled that the children were scared and screaming. She saw one of the young men in the hallway, and he asked whether he had been shot. Sonja Watkins testified that blood was pouring from his pants leg. She further testified that it "sounded like a war zone" outside. One of her nieces told her that another niece had been shot. Sonja Watkins went to where Ms. Jamerson was lying on the sidewalk. Ms. Jamerson was still alive at that point. Sonja Watkins said that she felt helpless and afraid during the incident. She testified that the following people were at her home that night: Robrecus Braxton, Christopher Braxton, Felix Williams, Chymia Baker, Jalon Baker, Lashanna Jones, Bianca Nevels, Rodney Davenport, Nakia Greer, Cleotha Norwood, Mark Chambers, Steven Chambers, Portia Williams, Terriance Webb, and several children.

On cross-examination, Sonja Watkins testified that Felix Williams drove a green Cadillac. She said that she saw Robrecus Braxton, Christopher Braxton, and Kenneth Baker fighting appellant. She said that eleven to fifteen other people were in the yard. Sonja Watkins estimated that the gunfire happened six hours after the fight. She agreed that people were drinking alcohol that evening, but she said that she had no knowledge of anyone smoking marijuana. She further agreed that she did not know exactly who was outside during the shooting. She said that she did not see anyone with guns at her house but that she heard gunfire close to the house at one point.

Lamarcus Moore testified that he went to the party at the Northmeade house with his uncles, Steven Chambers and Mark Chambers. He heard about the fight but was not there when it happened. He testified that when the shooting began, he first saw firecrackers or bottle rockets then began hearing gunfire. He said that he was shot and began to run. Mr. Moore said that he was hit in the main artery in his left leg. He recalled Cleotha Norwood and his uncles taking them to Mark Chambers' car and then to the Regional Medical Center. He testified that he had two surgeries but that the doctors were not able to remove the bullet. On cross-examination, Mr. Moore said that his uncles fired back in retaliation.

Dr. James Lewis Caruso testified that he performed Kimberly Jamerson's autopsy. She had two gunshot wounds to her head, one an entrance wound and the other an exit wound. There was no stippling around the wounds, indicating that she was not shot at close range. The bullet entered the right side of her head and traveled almost straight back. Despite the fact that the bullet exited Ms. Jamerson's head, it left projectile fragments behind, which Dr. Caruso collected during the autopsy. He explained that he could not recover all of the fragments but collected the larger pieces. Two pieces were from the bullet's copper jacket, and two were from the bullet's core. Dr. Caruso sealed the pieces and gave them to law enforcement agents. Dr. Caruso testified that the bullet was a "reasonably high velocity projectile" and caused so much damage to Ms. Jamerson's brain that it was "pulpified," which he explained meant "complete interruption of the integrity of the tissue along the wound path." He said that "her chances of surviving an injury like that [were] vanishingly small to none."

Memphis Police Officer Demar Wells testified that he was one of the crime scene investigators assigned to this incident. He said that he collected a total of sixty-eight casings at the Helmwood location. Of the sixty-eight, there were thirty-two .30 carbine casings, eight .45 caliber casings, twenty-five LC05 casings, and three .20 gauge casings. At the Northmeade location, he found five 7.62x.39

casings and nine .9mm casings. In addition, he found two bullet fragments at the Northmeade location. The Northmeade house, vehicles in the immediate area, and a mailbox in the immediate area sustained damage from bullets, which Officer Wells documented in photographs. He also placed a flag through the holes in the mailbox to estimate the trajectory of the bullet that hit the mailbox. Officer Wells opined that the bullet that struck the mailbox came from west of the box and traveled east, toward the Helmwood location. On cross-examination, Officer Wells agreed that the 7.62x.39 casings were from a high-powered rifle.

Memphis Police Officer Jeffrey Garey testified that he recovered two .9mm handguns from a Buick Roadmaster. One was a Smith and Wesson, which was found under the front passenger seat, and the other was a Ruger found in the trunk of the vehicle. Officer Garey also processed casings recovered from the Helmwood location for fingerprints but was unsuccessful.

Memphis Police Sergeant William Merritt testified that he was the case coordinator in charge of the investigation into the incident at Northmeade. He said that the investigation led to the arrest of appellant on July 4, 2010. Sergeant Merritt interviewed appellant on July 4 and July 6. In appellant's July 4 interview, he admitted his involvement in the fist fight but denied participating in the shooting. On July 6, however, appellant gave a written statement in which he confessed his part in the shooting.

Appellant's statement to Sergeant Merritt was read aloud to the jury. In the statement, appellant explained his version of the fist fight. He said that after the bag of marijuana came up a gram short of the original amount, he returned to the Northmeade address with David Richardson. When the woman to whom he had tried to sell the marijuana was not at the house, he told the people there, "I ain't going to disrespect your house. I just want to get this stuff straight 'cause she did me wrong." He drove away and returned several minutes later. A man gave him \$5, and appellant told him that he appreciated him and apologized for the way he approached them. Appellant told Sergeant Merritt that he began to drive away but that because another vehicle was on the street, he had to drive away slowly. He said that the people at Northmeade began "talking violent" and that one of them threw a beer can into his car, hitting him. He and David Richardson got out of the car and began fighting. He said, "They was standing out there at least eight deep, so they had jumped on me and Lil Dave." They made it back to his car, but as he was driving away, someone broke his car window. He returned home, and his family was angry about what happened.

Appellant then told Sergeant Merritt about the shooting:

Without warning or no say or nothing, guns started coming out 'cause we saw them riding around the house in a green Cadillac. Lil Dave was talking about going back around there. I really wasn't too agreeable with him, but since my brother was going, I had to go with him. I felt like that since they had given me my \$5 that everything was okay.

I decided to drive, so I drove and parked on Helmwood. Then we jumped out. All three of us [David Richardson, Devon Brown, and appellant] then went down there. I went down there with no intent to shoot anybody. I shot straight but upward, and I didn't pay no attention to nobody else, and when I got through shooting mine, I ran back to the car.

My brother hopped in second, and Dave hopped in last. He stayed back so long that we thought he had

got shot or something, but he was still back there shooting. Then we pulled off, I ditched my gun, and I guess Lil Dave ditched his, and we left.

Sergeant Merritt asked appellant why they fired shots at the Northmeade group, and he responded that "we were really just in fear. They just didn't want to fight, and they had no reason to be circling the block around my house." Appellant told Sergeant Merritt that he had a Glock .45 and fired six to eight shots. His brother had a shotgun and fired two shots. He did not know what kind of gun David Richardson had. Sergeant Merritt testified that the police never found appellant's gun or David Richardson's gun. Appellant's Chevy Lumina was impounded.

On cross-examination, Sergeant Merritt agreed that a photograph of the Northmeade location showed a green Cadillac parked near the house. He further agreed that a photograph of a blood stain on the sidewalk in front of the Northmeade house was most likely where Kimberly Jamerson fell. The blood stain was by a truck. Sergeant Merritt testified that the casings found at Northmeade were in the front yard but that he did not "know if they were leading towards the body or not." Sergeant Merritt said that he had gunshot residue kits collected from four to five people, including the two Chambers brothers and possibly Felix Williams. He said that while he was not a ballistics expert, he knew that a .9mm handgun would not fire 7.62x.39 bullets. Sergeant Merritt testified that he saw injuries on appellant on July 4 but did not take pictures of the injuries until July 6. He said that appellant never asked for medical attention.

Tennessee Bureau of Investigation Special Agent Forensic Scientist Steve Scott testified as an expert in firearms identification. He analyzed evidence associated with the shooting at Northmeade, including evidence that was recovered from Kimberly Jamerson's autopsy and that was found at Helmwood. From Northmeade, he was given two .9mm firearms, nine .9mm cartridge casings, six 7.62x.39 cartridge cases, and bullet fragments. He testified that six of the .9mm cartridge cases were fired from the Smith and Wesson .9mm handgun and that three of the .9mm cartridge cases were fired from the Ruger .9mm handgun. The 7.62x.39 cartridges were all fired from the same firearm. Special Agent Scott testified that some of the bullet fragments were from a .30 caliber class bullet and some were .22 caliber that came from "something like a .223 Remington caliber firearm, such as an AR-15, or a military type style rifle." He could not determine whether the .22 caliber bullets were fired from the same weapon, but he said that the .30 caliber bullets were fired from the same weapon.

Special Agent Scott opined that while the 7.62x.39 cartridges are a .30 caliber class bullet, the .30 caliber class bullet fragment was not consistent with the 7.62x.39 casing. He said that it would be very rare to see a 7.62x.39 cartridge loaded with the type of .30 caliber bullet found at Northmeade. He stated that the .30 caliber bullet fragment was "much more common to something like a .30 carbine, which is the name of a cartridge that's typically fired . . . in a military M1 rifle." Special Agent Scott also examined the bullet fragments recovered during Kimberly Jamerson's autopsy. He determined that the autopsy bullet fragments matched the .30 carbine caliber bullet fragments found at Northmeade and that the autopsy fragments and the Northmeade fragments were fired from the same firearm.

From the Helmwood location, Special Agent Scott analyzed thirty-two .30 carbine cartridge cases, eight .45 auto cartridge cases, twenty-five .223 Remington caliber cartridge cases, and three .20 gauge shot shell cases. He opined that the .30 carbine cartridge cases were all fired from the same firearm and that they were typically loaded with the type of bullet recovered from Kimberly Jamerson's autopsy. He

further opined that the .45 auto cartridge cases were fired from the same weapon. Special Agent Scott said that the .223 Remington caliber cartridge cases were consistent with being fired from the same firearm and consistent with the .22 bullet fragment from Northmeade. He stated that the .20 gauge shot shells had been loaded with rifle slugs and had been fired from the same weapon. Special Agent Scott testified that laser sights on weapons came in both green and red and that of the weapons used at the Helmwood location, the weapons firing the .30 carbine cartridges and the .223 Remington caliber cartridges were the most likely to have laser sights.

Special Agent Scott opined that based on the location of the .30 carbine cartridges, it was likely that the shooter had been moving, but he conditioned his opinion by saying that the cartridges would have to have been ejected consistently and not have bounced when they landed. He further opined that if four weapons were used by three people, then it was likely that the person with the pistol also had one of the other guns because it would have been difficult for one person to use two of the long guns. Special Agent Scott confirmed that the casings ejected at Helmwood could not have landed at Northmeade.

On cross-examination, Special Agent Scott agreed that common firearms that fire .30 caliber bullets included the 30-06 Springfield, 30-30 Winchester, .308 Winchester/ 7.62x.51mm Nato. He said that he generated that list based on the FBI's rifling profile database. He agreed that other firearms could fire .30 caliber bullets, but he did not believe an AK-47 or SKS could be modified to fire .30 caliber bullets.

The State rested its case, and appellant moved for a judgment of acquittal. After his motion was denied, appellant called one witness on his behalf. Memphis Police Officer Hope Smith testified that she processed a blue-green Chevy Lumina in connection with this case. The Lumina had a broken rear windshield. On cross-examination, Officer Smith testified that she found paperwork with appellant's name in the Lumina's glovebox.

Following deliberations, the jury convicted appellant of one count of first degree premeditated murder, twelve counts of attempted first degree murder, twelve counts of aggravated assault, one count of employment of a firearm during a dangerous felony, and one count of reckless endangerment. The trial court merged the attempted murder and aggravated assault convictions. Appellant received an effective sentence of life plus 308 years.

II. Analysis

A. Sufficiency of the Evidence

Appellant contends that the evidence was not sufficient to support his convictions for first degree murder and criminal attempt to commit first degree murder. In his brief, he states, "Appellant does not contest firing his weapon but maintains that he had no intent to kill." He also claims that he fired in self-defense and suggests that one of the Chambers brothers might have been responsible for killing Ms. Jamerson.¹

The standard for appellate review of a claim of insufficiency of the State's evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (emphasis in original) (citing *Johnson v. Louisiana*,

406 U.S. 356, 362, 92 S. Ct. 1620, 32 L. Ed. 2d 152 (1972)); see Tenn. R. App. P. 13(e); *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011). To obtain relief on a claim of insufficient evidence, appellant must demonstrate that no reasonable trier of fact could have found the essential elements of the offense beyond a reasonable doubt. See *Jackson*, 443 U.S. at 319. This standard of review is identical whether the conviction is predicated on direct or circumstantial evidence, or a combination of both. *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011); *State v. Brown*, 551 S.W.2d 329, 331 (Tenn. 1977).

On appellate review, "we afford the prosecution the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom." *Davis*, 354 S.W.3d at 729 (quoting *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010)); *State v. Williams*, 657 S.W.2d 405, 410 (Tenn. 1983); *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). In a jury trial, questions involving the credibility of witnesses and the weight and value to be given the evidence, as well as all factual disputes raised by the evidence, are resolved by the jury as trier of fact. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *State v. Pruett*, 788 S.W.2d 559, 561 (Tenn. 1990). This court presumes that the jury has afforded the State all reasonable inferences from the evidence and resolved all conflicts in the testimony in favor of the State; as such, we will not substitute our own inferences drawn from the evidence for those drawn by the jury, nor will we re-weigh or re-evaluate the evidence. *Dorantes*, 331 S.W.3d at 379; *Cabbage*, 571 S.W.2d at 835; see *State v. Sheffield*, 676 S.W.2d 542, 547 (Tenn. 1984). Because a jury conviction removes the presumption of innocence that appellant enjoyed at trial and replaces it with one of guilt at the appellate level, the burden of proof shifts from the State to the convicted appellant, who must demonstrate to this court that the evidence is insufficient to support the jury's findings. *Davis*, 354 S.W.3d at 729; *State v. Sisk*, 343 S.W.3d 60, 65 (Tenn. 2011) (quoting *State v. Hanson*, 279 S.W.3d 265, 275 (Tenn. 2009)).

The jury convicted appellant of premeditated murder and attempted premeditated murder. Tennessee Code Annotated section 39-13-202(a) defines this category of first degree murder as "[a] premeditated and intentional killing of another."

"[P]remeditation" is an act done after the exercise of reflection and judgment. "Premeditation" means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation. *Id.* at c 39-13-202(d). In reviewing the sufficiency of the evidence, we must determine whether the State established the element of premeditation beyond a reasonable doubt. See *State v. Sims*, 45 S.W.3d 1, 7 (Tenn. 2001); *State v. Hall*, 8 S.W.3d 593, 599 (Tenn. 1999). The presence of premeditation is a question of fact for the jury, and the jury may infer premeditation from the circumstances surrounding the killing. *State v. Young*, 196 S.W.3d 85, 108 (Tenn. 2006); see *State v. Suttles*, 30 S.W.3d 252, 261 (Tenn. 2000); *State v. Pike*, 978 S.W.2d 904, 914 (Tenn. 1998).

A defendant's "state of mind is crucial to the establishment of the elements of the offense," thus, the State may prove premeditation by circumstantial evidence. *State v. Brown*, 836 S.W.2d 530, 541 (Tenn. 1992). Several factors support the existence of premeditation including: "the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime, and calmness immediately after the killing." *Bland*, 958 S.W.2d at 660 (citing *Brown*, 836 S.W.2d at 541-42; *State v. West*, 844 S.W.2d 144, 148 (Tenn. 1992)).

The State pursued a theory of criminal responsibility in this case. "A person is criminally responsible as a party to an offense if the offense is committed by the person's own conduct, by the conduct of another for which the person is criminally responsible, or by both." Tenn. Code Ann. c 39-11-401(a). Further, a person is criminally responsible for an offense committed by the conduct of another, if "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]" Id. c 39-11-402(2). While not a separate crime, criminal responsibility is a theory by which the State may alternatively establish guilt based on the conduct of another. *Dorantes*, 331 S.W.3d at 386 (citing *State v. Lemacks*, 996 S.W.2d 166, 170 (Tenn. 1999)). No specific act or deed needs to be demonstrated by the State, and furthermore, the presence and companionship of an accused with the offender before and after the offense are circumstances from which participation in the crime may be inferred. *State v. Ball*, 973 S.W.2d 288, 293 (Tenn. Crim. App. 1998). However, to be convicted, "the evidence must establish that the defendant in some way knowingly and voluntarily shared in the criminal intent of the crime and promoted its commission." *Dorantes*, 331 S.W.3d at 386 (citing *State v. Maxey*, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994)); *State v. Foster*, 755 S.W.2d 846, 848 (Tenn. Crim. App. 1988)).

Viewed in the light most favorable to the State, the evidence at trial showed that appellant and two others fired weapons at a large gathering of people on Northmeade, killing one and wounding one. Appellant was on the losing end of a fist fight after he accused Dena Watkins of stealing \$5 worth of marijuana from him. His car was damaged in the aftermath of the fight. Later, appellant, David Richardson, and Devon Brown gathered firearms, and appellant drove them to the Helmwood location. The forensics revealed that four weapons were fired from that location, and the police collected thirty-two .30 carbine cartridge cases, eight .45 auto cartridge cases, twenty-five .223 Remington caliber cartridge cases, and three .20 gauge shot shell cases. The men disposed of the weapons after the shooting, and the weapons were never found. TBI Special Agent Scott testified that the bullet that killed Kimberly Jamerson was consistent with a .30 carbine.

Appellant confessed his involvement in the shooting but claims on appeal that he "had no intent to kill." However, it is clear that either appellant or one of the men with him fired the shots that killed Ms. Jamerson and wounded Mr. Moore. Because it is unknown which of the men fired the murder weapon, it is appropriate to apply a criminal responsibility theory to determine appellant's guilt. See *State v. Dickson*, 413 S.W.3d 735, 744-48 (Tenn. 2013) (concluding that evidence of the shooter's premeditation was sufficient to support defendant's conviction for attempted premeditated murder when defendant solicited the aid of the shooter and when the shooting was a natural and probable consequence of the defendant's actions). In this case, the State sufficiently showed that appellant shared the intent required for premeditated murder with his accomplices and that he actively promoted the commission of the crime. Appellant and his accomplices procured weapons before the crime, set up at a location where the victims would be unable to see them, and used deadly weapons on unsuspecting, unarmed victims. The killing of Ms. Jamerson and the wounding of Mr. Moore were the natural and probable consequences of firing upon a crowd of people. Thus, appellant was criminally responsible for Ms. Jamerson's murder and the attempted murders of Mr. Moore and the other named victims. We conclude that this evidence was sufficient for any rational jury to find appellant guilty beyond a reasonable doubt of first degree premeditated murder and attempted premeditated murder.

B. Motion to Suppress

Appellant argues that the trial court erred by denying his motion to suppress his July 6 confession to police. As grounds for suppression, he contends that he was arrested without probable cause when the only connection between him and the offenses was the uncorroborated statement of an accomplice. He further argues that his being placed on a forty-eight-hour hold was proof that the police did not have probable cause to arrest him until after his admission.²

1. Suppression Hearing

Memphis Police Sergeant William Merritt testified that he had worked for the police department for twenty-seven years and twelve years with the homicide bureau. He was the case coordinator for the incident in question. He said that the police learned from witnesses to the shooting that the shooting stemmed from a July 3 dispute over a marijuana purchase. The witnesses identified appellant as being involved in that dispute. On July 4, Robrecus Braxton identified appellant in a photographic array as one of the individuals with whom he had fought on July 3. Mr. Braxton told police that appellant left the scene of the fight in a green Chevrolet Lumina. Police "learned that a greenish-colored Chevy Lumina was at the scene of the shooting maybe thirty to forty-five minutes after the fight occurred."

The police matched the Lumina to a car owned by appellant's mother. The Lumina was found at the home of a relative of David Richardson. Because David Richardson had also been identified as being involved in the earlier fight, the police questioned him on the afternoon of July 4 at the criminal justice center. Richardson "implicated himself as being one of the shooters that fired shots at the Northmeade address, and he implicated [appellant] as one of the individuals that participated in the shooting with him." Appellant was brought to the criminal justice center at 7:45 p.m. on July 4. Sergeant Merritt began interviewing him at 8:30 p.m.

Sergeant Merritt testified that appellant had visible bruises at the time but never requested medical attention. Appellant did not appear to be under the influence of marijuana, and Sergeant Merritt did not smell marijuana on appellant. Appellant told Sergeant Merritt that he could read and write and that he had completed the tenth grade. Sergeant Merritt had appellant read a portion of the advice of rights form to verify appellant's reading ability, and appellant "was able to read the form . . . without any problem." Subsequently, Sergeant Merritt read the whole form to appellant, and appellant indicated that he understood his rights and agreed to speak with the police.

In his first interview, appellant admitted his involvement with the fight but denied involvement in the shooting. Appellant said that he went to the Northmeade house alone. He also said that his mother could provide him an alibi for the evening. Sergeant Merritt called appellant's mother, and she told the police that she had not seen appellant at all on July 4. Appellant also told Sergeant Merritt that he did not know David Richardson and continued denying that he knew Richardson even after Sergeant Merritt told him that the police found appellant's mother's telephone number saved in Richardson's telephone. Sergeant Merritt testified that he stopped the interview and took appellant into custody at that point.

Sergeant Merritt testified that he believed the police had probable cause to arrest appellant after the first

interview. He stated the following factors for the basis for probable cause:

The fact that we had at least two witnesses who identified [appellant] as being involved in the fight before the shooting. They identified him in a photospread. The fact that [appellant] left the scene of that fight in a green-colored Chevrolet Lumina. Witnesses described seeing a vehicle that fit that description at the top of the hill where the gunfire started. We were able to learn that [appellant's] mother was the owner of a green Chevy Lumina. We located that vehicle at the Co-Defendant's family member's home.

...

We had the statement of . . . the Co-Defendant that implicated [appellant] as being involved in the incident. And the fact that [appellant] denied knowing the Co-Defendant, the fact that we were able to discredit his alibi with his mother, we told him about that, and the fact that . . . [appellant's] mother's telephone [number] was found in the Co-Defendant's phone.

Sergeant Merritt testified that Sergeants Brown and Moses interviewed appellant on July 5. He interviewed appellant himself again on July 6. Sergeant Merritt explained that Devon Brown, appellant's brother, had given a statement implicating himself, appellant, and Richardson. Sergeant Merritt wanted to confront appellant with his brother's statement "to see if we could get [appellant] to give us a statement about the case." He contrived for appellant to see his brother in the homicide bureau office and had Devon Brown admit that he had given an inculpatory statement to the police. Thereafter, appellant admitted his involvement in the shooting. Appellant's statement was typewritten, and appellant reviewed the written statement and made some edits to it after reading it.

Sergeant Merritt said that appellant's injuries, which he had first noticed on July 4, had worsened by July 6. He photographed the injuries. Sergeant Merritt testified that arrestees receive medical attention if needed during the booking process. He testified that booking officers "would not take him into the jail" if they noticed anything out of the ordinary.

Regarding the forty-eight-hour hold placed on appellant, Sergeant Merritt testified that its purpose was to allow the District Attorney General's office time to review the case "so we could get some direction on what charges were going to be placed." He agreed that he had "gotten all the information that [he] needed . . . to place [appellant] under arrest prior to that hold."

On cross-examination, Sergeant Merritt testified that appellant was in custody during his first interview and that he was not free to leave at that point. He said that the forty-eighthour hold was placed on appellant because he was in custody and not because he wanted more time to investigate. Sergeant Merritt agreed that the affidavit of complaint and arrest warrant were filed on July 6 at 3:23 p.m. Appellant had given his admission earlier that morning.

Melynda Harriss testified that she transcribed appellant's July 6 statement. She said that she would not take the statement of any witness or suspect who appeared to be under the influence. Ms. Harriss said that she did not notice anything unusual about appellant, that his physical condition was "fine," and that he did not appear to be under the influence of marijuana or any other narcotic.

Memphis Police Sergeant Michael Brown testified that he interviewed appellant on July 5. Appellant was advised of his Miranda rights and agreed to waive those rights. At that time, appellant was adamant that he was not present when the shooting occurred. When asked to give a written statement about his

version of the events, appellant stated that he did not want any information written down. He told Sergeant Brown that he did not want to say where he was when the shooting occurred, so Sergeant Brown stopped the interview. Sergeant Brown testified that appellant did not request medical attention and did not appear to be under the influence of marijuana.

Memphis Police Sergeant Kevin Lundy testified that he interviewed witnesses to the shooting on July 4. Nakia Greer and Felix Williams both identified appellant in a photographic array. Felix Williams wrote on the form, "He killed my niece. He is the driver."

On cross-examination, Sergeant Lundy agreed that none of the witnesses actually saw the shooters. Sergeant Lundy agreed that he obtained a forty-eight-hour hold from a judicial commissioner and agreed that defense counsel properly summarized the procedure for obtaining a hold as follows:

[Y]ou draft an affidavit, go see one of the commissioners, explain to the commissioner what you feel the probable cause is, the commissioner then . . . swears you or by your attestation on the form, makes a determination and issues that hold. The forty-eight-hour hold order was entered as an exhibit to the hearing. As stated on the order, the reason for requesting the hold order was the following:

On July 3, 2010, Kimberly Jamerson was shot to death at . . . Northmeade. Multiple rounds of gunfire were discharged at the time Ms. Jamerson was shot to death. The [appellant] was implicated by an accomplice as being present and firing shots in the direction of Kimberly Jamerson at the time Ms. Jamerson was shot and killed. Additional time is needed [f]or the case to be reviewed by the AG's office. The hold order further stated that the judicial commission reviewed the facts and determined that there was probable cause to believe that appellant committed first degree murder. Sergeant Lundy agreed that he obtained a search warrant related to this case on July 5. He further agreed that the investigation was still ongoing after appellant's arrest.

Following the presentation of proof and arguments of counsel, the trial court denied appellant's motion to suppress. The trial court ruled that the police had probable cause to arrest appellant on the evening of July 4. In support of its ruling, the trial court stated that the police had statements from witnesses about appellant's involvement in the fight and David Richardson's statement inculcating appellant in the shooting. The police also connected appellant's car to both the fight and the shooting and connected appellant to Richardson through Richardson's telephone and appellant's car, which was found at the residence of a relative of Richardson. The trial court stated that the information available to the police provided a basis for probable cause independent of Richardson's statement but that Richardson's statement was also sufficiently corroborated. The trial court also accredited the police officers' testimonies that the forty-eight-hour hold was not sought to give the police more time to develop probable cause. Finally, the trial court ruled that appellant's admission was voluntarily given, accrediting the testimony that appellant did not appear to be under the influence of marijuana or to be in need of medical attention.

2. Standard of Review

In reviewing the trial court's decision on a motion to suppress, we review the trial court's legal conclusions *de novo*. *State v. Northern*, 262 S.W.3d 741, 747 (Tenn. 2008). In doing so, we give deference to the trial judge's findings of fact unless the evidence preponderates otherwise. *Id.*; see *State*

v. Ross, 49 S.W.3d 833, 839 (Tenn. 2001); State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). "[C]redibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." Northern, 262 S.W.3d at 747-48 (quoting Odom, 928 S.W.2d at 23). In reviewing the findings of fact, evidence presented at trial may "be considered by an appellate court in deciding the propriety of the trial court's ruling on the motion to suppress." State v. Garcia, 123 S.W.3d 335, 343 (Tenn. 2003) (quoting State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001)). The prevailing party on the motion to suppress is afforded the "strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence." Northern, 262 S.W.3d at 748 (quoting State v. Keith, 978 S.W.2d 861, 864 (Tenn. 1998)); see State v. Daniel, 12 S.W.3d 420, 423 (Tenn. 2000); Odom, 928 S.W.2d at 23.

3. Probable Cause to Arrest

Appellant contends that the trial court should have suppressed his July 6 statement to the police because the police did not have probable cause to arrest him on July 4. He claims that the police had only the uncorroborated statement of another suspect to connect appellant to the shooting, which was insufficient to support a finding of probable cause to arrest appellant.

We begin with the proposition that "[b]oth the state and federal constitutions protect against unreasonable searches and seizures; the general rule is that a warrantless search or seizure is presumed unreasonable and any evidence discovered is subject to suppression." State v. Echols, 382 S.W.3d 266, 277 (Tenn. 2012). Our supreme court has recognized three categories of police interactions with private citizens: "(1) a full-scale arrest, which requires probable cause; (2) a brief investigatory detention, requiring reasonable suspicion of wrongdoing; and (3) a brief police-citizen encounter, requiring no objective justification." Id. (citing State v. Daniel, 12 S.W.3d 420, 424 (Tenn. 2000)). "While arrests and investigatory stops are seizures implicating constitutional protections, consensual encounters are not." Id. (quoting State v. Nicholson, 188 S.W.3d 649, 656 (Tenn. 2006)).

An arrest supported by probable cause is an exception to the warrant requirement. Id. (citing State v. Hanning, 296 S.W.3d 44, 48 (Tenn. 2009)); see Brown v. Illinois, 422 U.S. 590, 598, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). "Probable cause . . . exists if, at the time of the arrest, the facts and circumstances within the knowledge of the officers, and of which they had reasonably trustworthy information, are 'sufficient to warrant a prudent [person] in believing that the [defendant] had committed or was committing an offense.'" Echols, 382 S.W.3d at 277-78 (quoting State v. Bridges, 963 S.W.2d 487, 491 (Tenn. 1997)); see Beck v. Ohio, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). "Probable cause must be more than a mere suspicion." Echols, 382 S.W.3d at 278 (quoting State v. Lawrence, 154 S.W.3d 71, 76 (Tenn. 2005)). However, probable cause "deal[s] with probabilities[,] . . . not technical[ities], . . . the factual and practical considerations of everyday life on which reasonable and prudent [persons] . . . act." Id. (quoting State v. Day, 263 S.W.3d 891, 902 (Tenn. 2008)); see Brinegar v. United States, 338 U.S. 160, 175, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949). Moreover, a determination of probable cause encompasses the accumulation of information known to law enforcement collectively if a sufficient nexus of communication exists between the arresting officer and a fellow officer with pertinent knowledge. Echols, 382 S.W.3d at 278 (citation omitted).

"If the arresting officers rely in part on information from an informant from the criminal milieu, they must be able to demonstrate that the informant (1) has a basis of knowledge and (2) is credible or his

information is reliable." *State v. Lewis*, 36 S.W.3d 88, 98 (Tenn. Crim. App. 2000); see also *State v. Bishop*, 431 S.W.3d 22, 38 (Tenn. 2014). The same test is applied when "determining whether the self-inculpatory statement of one suspect may give police probable cause to arrest a person the suspect identifies as his or her accomplice." *Bishop*, 431 S.W.3d at 40. Independent corroboration of an informant's statement may buttress the credibility of the information, but "it is not necessary to corroborate every detail of the informant's information . . . or to directly link the suspect to the commission of the crime." *Id.* at 38 (internal citations and quotation marks omitted).

In this case, the police knew from eyewitness accounts that appellant had been involved in an altercation with the victims earlier in the day. The witnesses identified the vehicle driven by appellant to and from that altercation as a green Chevrolet Lumina. Witnesses also identified David Richardson as being involved in the fist fight. Sergeant Merritt testified that "[w]itnesses described seeing a vehicle that fit [the description of appellant's Lumina] at the top of the hill where the gunfire started." The Lumina was found outside the residence of a relative of David Richardson, and the police learned that the vehicle was owned by appellant's mother. When David Richardson was arrested, he inculpated himself and appellant in the shooting. Further connecting David Richardson and appellant, the police found the telephone number of appellant's mother saved in David Richardson's telephone. David Richardson obviously had a strong basis of knowledge of appellant's involvement as he was admittedly at the scene of the shooting. Regarding David Richardson's credibility, in our view, there was sufficient corroboration. Our supreme court has stated that "corroboration of 'only innocent aspects of the story' may suffice." *Bishop*, 431 S.W.3d at 38 (quoting *State v. Melson*, 638 S.W.2d 342, 355 (Tenn. 1982)). Here, police knew that appellant had a motive to retaliate against the victims after being on the losing end of the altercation, and they knew that David Richardson was involved in the fight, also. Appellant was already a prime suspect based on the statements of the witnesses; David Richardson merely connected the dots for them. Thus, we conclude that all of the information available to the police at the time of appellant's arrest was sufficient to establish probable cause. Therefore, appellant's arrest was legal and does not provide a basis for suppression of his statement.

4. Forty-Eight-Hour Hold

Appellant argues, as a corollary to his probable cause argument, that the placement of a forty-eight-hour hold on appellant and his not being brought before a magistrate within forty-eight hours of his arrest signaled that the police did not have probable cause to arrest appellant, an issue with which we have already disagreed. He further argues that his statement should have been suppressed based on a Gerstein violation.

The law requires that when a person is arrested without a warrant, he or she must be brought "before a magistrate to 'seek a prompt judicial determination of probable cause.'" *Bishop*, 431 S.W.3d at 42 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 125, 95 S. Ct. 854, 43 L. Ed. 2d 54 (1975) (holding that "the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention")); see also *State v. Huddleston*, 924 S.W.2d 666, 672 n.2 (Tenn. 1996). Tennessee Rule of Criminal Procedure 5(a)(1) provides that "[a]ny person arrested - except upon a capias pursuant to an indictment or presentment - shall be taken without unnecessary delay before the nearest appropriate magistrate." The Tennessee Supreme Court has recently stated that "a delay of less than forty-eight hours is presumptively reasonable" and that when the delay exceeds forty-eight hours, the State must

show that "'a bona fide emergency or other extraordinary circumstance' caused the delay." Bishop, 431 S.W.3d at 42 (quoting County of Riverside v. McLaughlin, 500 U.S. 44, 56, 111 S. Ct. 1661, 114 L. Ed. 2d 49 (1991)). Nonetheless, even a delay of less than forty-eight hours may be unreasonable "if the delay is 'for the purpose of gathering additional evidence to justify the arrest' or if the delay is 'motivated by ill will against the arrested individual, or delay for delay's sake.'" Id. (quoting McLaughlin, 500 U.S. at 56).

The remedy for failing to bring an arrestee before a magistrate without unnecessary delay is exclusion of "any evidence obtained by virtue of a suspect's unlawful detention," unless an exception to the exclusionary rule applies. Id. (citing Huddleston, 924 S.W.2d at 673-75). However, "when a suspect is arrested based on probable cause, the ensuing detention is typically not illegal until it 'ripens' into a Gerstein violation." Id. (citing Huddleston, 924 S.W.2d at 675). "Obviously, if [an arrestee's] statement was given prior to the time the detention ripened into a constitutional violation, it is not the product of the illegality and should not be suppressed." Huddleston, 924 S.W.2d at 675.

In this case, contrary to appellant's assertions on appeal, he was brought before a magistrate within forty-eight hours of his arrest. He was arrested the evening of July 4 at approximately 7:40 p.m. and was formally charged the afternoon of July 6, at 3:23 p.m. Thus, for there to be a Gerstein violation, the delay had to have been for purposes of gathering evidence to justify the arrest, have been motivated by ill will, or have been delay for delay's sake. None of those reasons applied in this case. Therefore, appellant is without relief as to this argument.³

CONCLUSION

Based on our review of the record, the applicable law, and the parties' briefs, we affirm the judgments of the trial court.

ROGER A. PAGE, JUDGE

Footnotes

1

The State argues that appellant's appeal of his convictions from case number 11-002623 should be dismissed for failure to file a notice of appeal. The two cases were consolidated for trial, and nothing in the record indicates that the cases were not consolidated for appeal. The record shows that only case number 11-007432 was listed on the notice of appeal, but the body of the notice refers to the trial court's denial of a motion for new trial in which the trial court was ruling on the consolidated case. "The purpose of the notice of appeal is simply to declare in a formal way an intention to appeal. As long as this purpose is met, it is irrelevant that the paper filed is deficient in some other respect." Tenn. R. App. P. 3, Advisory Comm'n Cmts. There is no question in this case that appellant intended to appeal the entirety of his case, both case number 11-007432 and number 11-002623. Therefore, we will not dismiss the appeal on this basis.

2

The State contends that appellant waived this argument for failure to timely file a motion for new trial.

After carefully reviewing the record, we cannot agree with the State. The judgments in question were not file-stamped; therefore, "there is nothing in the record to conclusively state what day the judgment was filed with the trial court clerk." *State v. Martin Boyce*, No. W2012-00887-CCA-R3-CD, 2013 Tenn. Crim. App. LEXIS 672, 2013 WL 4027244, at *9 (Tenn. Crim. App. Aug. 6, 2013). Without this information, we cannot rule that appellant's motion for new trial was untimely.

3

We note that this court recently reached the same conclusion when Devon Brown, appellant's codefendant, raised similar arguments on appeal. *State v. Devon Brown*, No. W2013-00182-CCA-R3-CD, 2014 Tenn. Crim. App. LEXIS 871, 2014 WL 4384954, at *10-16 (Tenn. Crim. App. Sept. 5, 2014).