

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
May 2, 2018 Session

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Appellate Courts

CLEO HENDERSON v. STATE OF TENNESSEE

Appeal from the Criminal Court for Shelby County
No. 10-07069 Paula L. Skahan, Judge

No. W2017-01570-CCA-R3-PC

The petitioner, Cleo Henderson, appeals the denial of his post-conviction petition, arguing the post-conviction court erred in finding he received effective assistance of counsel at trial. The petitioner also asserts the trial court erred in finding he waived his right to testify during trial. Following our review, we affirm the denial of the petition and conclude the petitioner affirmatively waived his right to testify at trial.

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

J. ROSS DYER, J., delivered the opinion of the court, in which ALAN E. GLENN and TIMOTHY L. EASTER, JJ., joined.

Kirk W. Stewart, Memphis, Tennessee, for the appellant, Cleo Henderson.

Herbert H. Slatery III, Attorney General and Reporter; David H. Findley, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Pam Stark, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTS

In 2010, the petitioner shot and killed Reubin Jefferson. Though he asserted self-defense at trial, a jury convicted the petitioner of second degree murder, and he received a forty-year sentence to be served at one hundred percent. The petitioner appealed challenging his sentence and the sufficiency of the evidence supporting his conviction. This Court summarized the underlying facts leading to the petitioner's conviction as follows:

This case concerns the January 2010 shooting death of Reubin Jefferson outside of Luster's Sundry, a grocery store and club, in Memphis, Tennessee. A Shelby County grand jury indicted [the petitioner] for first degree premeditated murder, and the State sought the death penalty. The parties presented the following proof at [the petitioner's] February 2012 trial:

Roney McNeal testified that he was the victim's son and that he had last seen the victim two days before his murder. He identified a picture of the victim, which was published to the jury. Earnest Wilbourn testified that he accompanied the victim to Luster's Sundry on January 15, 2010. He explained that he had known the victim for most of his life and that he had known [the petitioner] since the 1980s. That night, he saw [the petitioner] approach the victim in the club. The victim and [the petitioner] exited the club, and Mr. Wilbourn followed them outside. Mr. Wilbourn said that a crowd of people also followed them out. He testified that he observed [the petitioner] and the victim arguing. Mr. Wilbourn said that he stepped between them and tried to stop the argument. He recalled that [the petitioner] "made a gun play" by reaching behind his back. [The petitioner] told the victim "I'll kill you b* * * *," and the victim "took his shirt off." Mr. Wilbourn testified that the victim's removing his shirt indicated that he wanted to fight. According to Mr. Wilbourn, [the petitioner's] brother was present and was trying to hold [the petitioner] back. Mr. Wilbourn pushed the victim back and told him, "[L]et's go back in the club." Mr. Wilbourn said that he had already stepped through the club's door, believing that the victim was following him, when he heard a gunshot. He stepped back outside and saw the victim lying on the ground. He went to the victim and called 9-1-1. Mr. Wilbourn said that the victim had been shot in the head but that his leg was still moving at that point. Mr. Wilbourn testified that he followed the ambulance to the hospital and later spoke with the police. He further testified that he never saw the victim with a weapon that night and that the victim never indicated to him that he had a weapon.

On cross-examination, Mr. Wilbourn agreed that he told the police in his statement that [the petitioner] and the victim had argued about Sandra Brown, the woman whom [the petitioner] was dating. He disagreed that the victim had "pimped" Ms. Brown.

Ylonda Hymon testified that on January 15, 2010, she went to Luster's Sundry. She said that she saw [the petitioner] sitting with Sandra Brown and Constance Hymon-Brown. Ms. Hymon saw the victim and Mr.

Wilbourn arrive. Ms. Hymon said that she danced with the victim and that they sat down at a table. Ms. Hymon testified that [the petitioner] approached the victim and asked the victim “to let him holler at him.” The victim and [the petitioner] went outside, and several people followed. She went outside a few minutes later and heard the men arguing. Ms. Hymon testified, “I heard [the petitioner] say b* * * * [,] and then he shot him.” The victim fell when he was shot, and [the petitioner] ran to the victim and stood over him, “like if he was going to get up[,], he was going to shoot him again.” Ms. Hymon said that [the petitioner] then left and ran through an alley. On cross-examination, Ms. Hymon testified that she saw one of the men near [the petitioner] pass a gun to him.

Constance Hymon-Brown testified that she went to Luster’s Sundry on January 15, 2010. She recalled sitting at a table with her husband, [the petitioner], and Sandra Brown. Ms. Hymon-Brown testified that when the victim entered the club, [the petitioner] commented about the victim’s talking about [the petitioner] behind his back. [The petitioner] went over to the victim and told him, “[L]et me holler at [you].” The two men left, and Ms. Hymon-Brown followed them a minute later. When she went outside, she saw them arguing. She testified that [the petitioner] acted like he was going to walk away and that Mr. Wilbourn was trying to get the victim to return to the club. She said that Mr. Wilbourn and the victim were about to enter the club when [the petitioner] turned around and shot the victim.

Ms. Hymon-Brown testified that she never saw the victim with a weapon that night. She said that [the petitioner] also did not have a weapon, until a man handed him one just before he shot the victim. She agreed that the victim had taken off his shirt, but she said that Mr. Wilbourn “was getting him to go back in the building.”

Sandra Brown testified that she went to Luster’s Sundry on January 15, 2010, with her sister-in-law, Ms. Hymon-Brown. [The petitioner] sat at their table in the club. Ms. Brown recalled seeing the victim speaking with Ylonda Hymon. Ms. Brown testified that [the petitioner] “called [the victim] outside.” The men went outside, and she followed after several minutes. Ms. Brown said that the men were arguing and name-calling. She testified that “[o]ne thing led to another,” and [the petitioner] shot the victim. She recalled that [the petitioner’s] brother had been trying to hold him back and that Mr. Wilbourn had been with the victim. Ms. Brown said that she saw [the petitioner] reach behind him, to the back of his belt, for his gun. She did not see the victim with a weapon that night. Ms. Brown

testified that [the petitioner] ran away after he shot the victim and that she also ran away. She called [the petitioner] later, and he picked her up. She spent that night with him. The following day, she spoke with the police.

On cross-examination, Ms. Brown agreed that she had not known [the petitioner] long prior to January 2010 and that they had been dating for a few weeks at that point. She said that she had known the victim for sixteen years. Ms. Brown testified that she had dated the victim and that the victim “had pimped [her] out.” Ms. Brown said that the men were not angry when they were in the club. She agreed that when she saw them outside, the victim appeared angry and had taken off his shirt. She said that Mr. Wilbourn tried to stop the fight and that she did not see anyone hand a gun to [the petitioner].

On re-direct examination, Ms. Brown testified that prior to the confrontation between [the petitioner] and the victim, [the petitioner] had told her and Ms. Hymon-Brown that the victim “had said something about him.”

Sergeant Robert M. Edwards, a felony response officer with the Memphis Police Department, testified that he responded to a shooting call on January 15, 2010, at Luster’s Sundry. He said that twenty to thirty witnesses were detained at the scene. He and another officer gathered the witnesses’ contact information, but the witnesses were not cooperative, each of them saying that they did not see anything.

Dr. James Lewis Caruso testified that he performed the victim’s autopsy. He said that the bullet entered the left side of [the victim’s] face but did not exit his body. The bullet damaged the right side of the victim’s brain. The victim’s blood alcohol content was 135 milligrams per deciliter. The victim also had cannabinoids, the active ingredient in marijuana, in his blood stream. The cause of the victim’s death was a gunshot wound to the head, and the manner of death was homicide.

Sergeant Michael A. Brown from the Memphis Police Department’s homicide bureau testified that he investigated the victim’s homicide. He said that most of the witnesses from the club did not cooperate but that four to five witnesses gave statements. He spoke with [the petitioner] three and a half to four months after the shooting. Sergeant Brown testified that [the petitioner] had gone to Missouri but turned himself in to the police sometime after a warrant for his arrest was issued. In his April 9, 2010

statement, [the petitioner] told Sergeant Brown that he was responsible for the victim's death. [The petitioner] said that he asked the victim to step outside to talk because of something the victim had said the week before this incident. [The petitioner] told Sergeant Brown that the victim became outraged and that Mr. Wilbourn handed the victim a gun, which appeared to be a .38 or a 9mm silver handgun. [The petitioner] said that someone also gave him a gun and that he turned around and shot the victim. He said that he ran from the scene, dropping the gun in an alley. [The petitioner] told Sergeant Brown that he shot the victim because he believed the victim was going to shoot him. He also said that he had heard that Mr. Wilbourn had collected the gun from the victim after the shooting. [The petitioner] told Sergeant Brown that he fled to Missouri after the shooting and turned himself in later because he was tired of running. Following this testimony, the State rested its case[-]in-chief.

On behalf of [the petitioner], Matthew Goodman testified that he heard the victim "cussing [the petitioner] out" at the club on January 15, 2010. He said that [the petitioner] wanted to talk to the victim to "straighten this out." The men went outside, and ten to fifteen other people also went outside, including Mr. Goodman. Mr. Goodman said that the victim was "[c]onstantly trying to come towards" [the petitioner] and was calling [the petitioner] names. Mr. Goodman testified that the victim reached for something on his side but that he never saw the victim produce anything. Mr. Goodman stated that the victim told [the petitioner] that "he was going to blow his a* * off." Mr. Goodman testified that the bystanders tried to separate the men. At first they were successful at separating them, but the victim kept trying to cross over to [the petitioner]. [The petitioner] went around a corner, returned, and shot the victim. Mr. Goodman recalled seeing Mr. Wilbourn hugging the victim after the shooting and said that it "looked like he was trying to get something off of" the victim. Mr. Goodman testified that he never spoke with the police about the shooting but that he spoke with two private investigators at separate times.

On cross-examination, Mr. Goodman testified that he spoke with the first private investigator three to four days after the shooting and the second investigator one week after the shooting. Mr. Goodman testified that the victim never removed his shirt during the altercation. He also testified that [the petitioner] never approached the victim in the club and that [the petitioner] followed the victim outside to talk.

Following the close of proof and deliberations, the jury convicted [the petitioner] of second degree murder. The trial court held a sentencing hearing at which the only evidence presented was the presentence report. The trial court found [the petitioner] to be a Range II, multiple offender.

...

[The petitioner], through counsel, filed a motion for new trial alleging that the evidence was not sufficient to support the conviction. Following the trial court's denial of the motion, [the petitioner] requested that his counsel withdraw so that he could pursue a *pro se* appeal. The trial court granted [the petitioner's] request, and [the petitioner] filed a timely notice of appeal.

State v. Cleo Henderson, No. W2012-01480-CCA-R3-CD, 2013 WL 6157039, at *1-4 (Tenn. Crim. App. Nov. 21, 2013). After its review, this Court upheld the rulings of the trial court.

The petitioner filed a *pro se* petition for post-conviction relief. The petitioner alleged trial counsel was ineffective in that he failed to adequately investigate and prepare for trial, he failed to file appropriate pre-trial motions, and he “deliberately and knowingly misled the defendant concerning trial tactics and strategy, so that the [petitioner] could not seek preparations for a more viable trial defense.” The petitioner claimed trial counsel failed to effectively cross-examine the State's witnesses and “all of a sudden” objected to the petitioner testifying at trial “despite the fact that the [petitioner] was the only person that could provide testimony supporting a defense of self-defense.” The petitioner further alleged trial counsel failed to present mitigating evidence on his behalf at the sentencing hearing. Within his petition, the petitioner also attacked the sufficiency of the evidence produced at trial, alleged misconduct on the part of the district attorney in indicting him for first degree murder absent probable cause establishing the same, and accused the trial court of abuse and/or misconduct.

After the appointment of counsel, the petitioner filed an amended petition for post-conviction relief, alleging both the trial court and trial counsel violated his right to testify at trial. The petitioner argued the trial court violated his right to testify under both the United States and Tennessee Constitutions. Similarly, the petitioner alleged trial counsel was ineffective for failing to properly advise him of his right to testify and failing to conduct a proper *Momon* hearing. *Momon v. State*, 18 S.W.3d 152, 162 (Tenn. 1999). Moreover, the petitioner claimed trial counsel was ineffective for failing to raise the “*Momon* issue” in his motion for new trial and also for failing to withdraw prior to filing his motion for new trial “because [trial counsel] knew that the [petitioner] intended to

proceed on his appeal *pro se*.” As a result, the petitioner alleged several issues on direct appeal were waived because trial counsel “only argued sufficiency of the evidence [in the motion for new trial] despite understanding that [the] [p]etitioner wanted to present other issues.” The petitioner argued trial counsel failed to bolster his self-defense theory by failing to present key defense witnesses or properly elicit testimony from Matthew Goodman on his behalf. Finally, the petitioner claimed trial counsel did not meet with him enough or “keep him informed of trial strategy.” The post-conviction court held an evidentiary hearing on December 2, 2016, during which trial counsel and the petitioner testified.

Trial counsel, with the help of co-counsel, represented the petitioner in general sessions court and throughout trial. According to trial counsel, the petitioner “was very opinionated” and had many legal theories about his case. Trial counsel’s theory, however, was self-defense. He believed the State’s witnesses “showed that there was [a] flawed self-defense argument, but a self-defense theory nonetheless.” In support of the self-defense theory, Matthew Goodman testified on behalf of the petitioner in order to “get across the point that the shooting happened during an argument.” While trial counsel acknowledged none of the witnesses presented at trial saw the victim with a gun prior to the shooting, he still believed self-defense was a plausible theory, stating “had we not created the inference that there was a gun, Mr. Henderson would have been convicted of first degree murder and he wasn’t.”

Trial counsel then discussed the *Momon* colloquy and the petitioner’s decision not to testify at trial, explaining he discussed the petitioner’s options with him many times prior to trial. Trial counsel stated he “did not believe that [the petitioner] would make a very articulate witness,” in part because the petitioner “had a criminal history that was not good,” which included homicide and aggravated assault. Though the trial court ruled the petitioner’s criminal history could not be discussed unless the petitioner opened the door during his testimony, trial counsel felt the petitioner could have opened the door. Furthermore, trial counsel explained he “didn’t think [the petitioner] would [fare] well during cross examination.” For example, trial counsel recalled the petitioner and the victim were fighting over a prostitute prior to the victim’s death. Additionally, a few days before the petitioner shot the victim, the petitioner hit another man in the head with a gun during a dispute over a prostitute. Finally, trial counsel noted the petitioner fled Shelby County after killing the victim and did not turn himself in to the police for several months.

Trial counsel did not specifically remember the *Momon* hearing conducted at trial, but stated it “would not have surprised” him that the petitioner wanted to testify. He acknowledged the petitioner took control of the *Momon* hearing by asking the trial court about potential scenarios that could occur if he were to take the stand. The trial court

suspended the hearing to allow for further discussion between trial counsel and the petitioner. Trial counsel explained:

I vaguely remember meeting with him in the Division 10 lock-up area and telling him this was a death penalty case, but we had a strong argument for a lesser offense. In fact, he was convicted of a lesser offense and telling him that if he testified incorrectly, the jury would hear or the jury could hear, rather, his criminal history.

When the trial reconvened, the petitioner did not testify. Regarding the petitioner's waiver of his right to testify, trial counsel stated, "I don't believe [the petitioner] ever said yes or no. Rather, it was just a continuing banter with the [c]ourt." As to the petitioner's statement that he wanted to testify so the truth would come out, trial counsel stated, "I think if that's what the transcript shows, he clearly wanted to testify. And had he wanted to testify, then there was no stopping [the petitioner]." Regardless, trial counsel believed the trial court clearly determined the petitioner waived his right to testify on the record.

Throughout his representation, trial counsel knew the petitioner filed numerous *pro se* motions. Though trial counsel did not remember a specific motion filed by the petitioner in relation to the motion for new trial, he would not have been surprised if the petitioner wanted to include his own issues in the motion aside from those presented by trial counsel. Trial counsel affirmed he would have argued any of the petitioner's theories if they had a legal basis, but noted several of the petitioner's issues "did not make very much sense." Trial counsel believed the petitioner understood the issues not presented in his motion for new trial would be waived.

Trial counsel learned the petitioner wanted to proceed *pro se* on appeal after the sentencing hearing. He stated if the petitioner had made it clear he no longer wanted trial counsel to represent him for his motion for new trial, trial counsel would have informed the trial court. Similarly, trial counsel noted because the petitioner "is very opinionated," he was "certain [the petitioner] would have brought that to the [trial] [c]ourt's attention."

The petitioner then testified, stating he met with trial counsel three to four times prior to trial. The petitioner acknowledged they discussed his right to testify, but claimed they did not discuss the option of him *not* testifying until trial. The petitioner explained:

The only discussion we had about me not testifying was during trial, but before the trial every time that I did meet [trial counsel], he told me that my testimony would [be] the best testimony, I would be my best witness. So, the times I met him that I was looking forward to being the one to

testify as well. Never was anything said about me not testifying until during the trial.

The petitioner thought he “was supposed to be testifying” during the *Momon* colloquy, stating “[t]hat’s why I said what I said, you know, that I wanted to testify because the truth hasn’t been told.” Further, he stated trial counsel “didn’t have no conversation with me about not testifying at all,” but admitted trial counsel explained that his testimony could open the door to the State asking him about his prior criminal history. However, the petitioner felt his “life [was] on the line,” and he “just want[ed] the truth to come out.” He again stated, “I wanted to testify, especially when I saw that the witnesses that were being put against me were all telling lies.”

Regarding the victim’s death, the petitioner stated the victim had a silver gun and “went into a rage” prior to the shooting. As a result, the petitioner’s knees were shaking during his interaction with the victim and he thought the victim was going to shoot him. The petitioner claimed he and the victim did not argue, but believed if he “had said one word, [he] would have been shot.” The petitioner stated someone whispered in his ear that the victim had a gun, and “[t]hey put a gun in my hand and at that moment they put the gun in my hand, I just turned around, I ran towards [the victim], and I shot him.”

During cross-examination, the petitioner acknowledged no one saw the victim with a gun prior to the shooting. He claimed trial counsel failed to call his family members to testify on his behalf, but admitted he did not include this alleged failure in his petition for post-conviction relief. When asked if the jury learning of his prior conviction for second degree murder would have helped in his defense, the petitioner stated, “Oh, no. Most definitely not.”

Further, the petitioner stated he informed trial counsel of the issues he wished to present in his motion for new trial, but claimed trial counsel ignored his requests. As a result, the petitioner filed a *pro se* motion, “hoping [trial counsel] would endorse it, but he didn’t.” During the motion for new trial, the petitioner informed trial counsel that he wanted to represent himself on appeal.

The post-conviction court continued the hearing until March 9, 2017. At the subsequent hearing, the petitioner again testified along with his sister, Daisy Henderson, and his friend, Calvin Long. Prior to trial, Ms. Henderson met with trial counsel and prepared to testify on behalf of the petitioner, but ultimately, her “testimony wasn’t needed.” Ms. Henderson explained that on the night of the shooting, she walked outside of the club and heard the victim threatening someone. She saw the victim take off his shirt, heard a gunshot, and then saw the victim fall in the street. Ms. Henderson, however, did not witness the shooting. Rather, she explained she stood by the door of the

club throughout the exchange between the victim and the petitioner. Ms. Henderson believed the State's witnesses lied at trial, claiming the witnesses who testified the victim was walking back inside the door of the club prior to being shot were incorrect.

During cross-examination, Ms. Henderson admitted she had been drinking the night of the shooting, but stated she was not drunk. However, in her statement, which was entered into evidence during the post-conviction hearing, Ms. Henderson noted she "had too much to drink" before the shooting. Additionally, she stated she did not see the victim with a gun. After the shooting, Ms. Henderson began walking towards her apartment and someone told her "your brother just shot [the victim]." As Ms. Henderson approached her apartment, she saw the petitioner drive away in his truck. Ms. Henderson did not see the petitioner again until he turned himself in to the police months later.

Calvin Long testified the petitioner worked for him for ten to twelve years. Mr. Long hired a private investigator on behalf of the petitioner through trial counsel's office and provided the petitioner's "back story" to trial counsel. Mr. Long claimed the petitioner "worked too hard to be a pimp," but admitted the petitioner had an altercation with another man and the victim over a girl. Mr. Long explained had he been called to testify at the petitioner's sentencing hearing, he would have stated the petitioner worked for a living, the victim "was targeting" the petitioner, the petitioner "wanted to make peace" with the victim, and the petitioner had been rehabilitated after his prior second degree murder conviction.

The petitioner again testified. He pointed out the police diagram of the crime scene did not indicate blood by the door of the club despite all of the witness statements claiming the victim was shot "going in the door." As a result, the petitioner argued trial counsel failed to impeach the State's witnesses and asserted all of the State's witnesses lied.

After its review of the evidence presented, the post-conviction court found the petitioner failed to meet his burden of proof and denied relief. This timely appeal followed.

ANALYSIS

I. Momon Issues

On appeal, the petitioner asserts he was denied his constitutional right to testify at trial. The petitioner argues the trial court violated the safeguards imposed by *Momon v. State*, resulting in a denial of his Fifth and Fourteenth Amendment testimonial rights.

The State disagrees, asserting the petitioner waived his right to testify after a *Momon* hearing. Upon our review, we agree with the State.

a. Waiver

Every criminal defendant has the constitutional right to testify at trial on his own behalf. *Momon*, 18 S.W.3d at 157. “Since the right to testify at one’s own trial is a fundamental right, it follows that the right may only be waived personally by the defendant.” *Id.* at 161 (citations omitted). To ensure a defendant’s waiver, the safeguards imposed by *Momon* urge trial counsel to “request a hearing, out of the presence of the jury, to inquire of the defendant whether the defendant has made a knowing, voluntary, and intelligent waiver of the right to testify.” *Id.* at 162. In conducting a *Momon* hearing, our supreme court has further advised:

Defense counsel is not required to engage in any particular litany, but counsel must show at a minimum that the defendant knows and understands that:

- (1) the defendant has the right not to testify, and if the defendant does not testify, then the jury (or court) may not draw any inferences from the defendant’s failure to testify;
- (2) the defendant has the right to testify and that if the defendant wishes to exercise that right, no one can prevent the defendant from testifying;
- (3) the defendant has consulted with his or her counsel in making the decision whether or not to testify; that the defendant has been advised of the advantages and disadvantages of testifying; and that the defendant has voluntarily and personally waived the right to testify.

Id. “However, the mere failure to follow these guidelines will not in and of itself support a claim for deprivation of the constitutional right to testify if there is evidence in the record to establish that the right was otherwise personally waived by the defendant.” *Id.* at 163.

Here, the petitioner admits he was advised of “his right to not testify,” however, he claims the record does not establish he was “advised of his right to testify nor does it contain a personal waiver of that right.” We disagree. In reviewing the record as a whole, it is clear the petitioner was fully advised of his right to either testify or not testify, after which he made the decision not to testify.

In denying the petitioner's *Momon* claims, the post-conviction court stated:

Moreover, the trial would not have continued without [the] [p]etitioner's testimony if he had made it clear to his attorney and to the trial court that he wanted to testify. In [the] [p]etitioner's case, trial counsel questioned [the] [p]etitioner about waiving his right to testify and when [the] [p]etitioner indicated that he had additional questions, [the trial court] ended the hearing and allowed [the] [p]etitioner to leave to discuss those issues with trial counsel. At that time, [the] trial judge concluded that [the] [p]etitioner was aware of his rights. [Trial] [c]ounsel testified that [the] [p]etitioner was opinionated and would have presented any issues he had to the court. Therefore, as to the court's understanding and to trial counsel, [the] [p]etitioner chose not to testify. Furthermore, it is not trial counsel's decision to allow [the] [p]etitioner to testify; the right to testify is [the] [p]etitioner's choice to do so or not to. Trial counsel's only requirement is to ensure that [the] [p]etitioner understood the right to testify, not to testify, and the consequences of doing either, in which according to the trial court, counsel did confirm. Thus, this [c]ourt finds that [the] [p]etitioner has failed to show that the trial court did not ensure his understanding of the right to testify and its consequences or that [the] [p]etitioner did not waive this right voluntarily, knowingly, and intelligently.

Our review of the record mirrors that of the post-conviction court. As explained at the post-conviction hearing, after being advised of his rights, the petitioner asked numerous questions of the trial court during the *Momon* colloquy regarding how his testimony could play out during trial if he chose to testify. As a result, the trial court instructed the petitioner and trial counsel to further discuss his options and recessed the trial. During the discussion, trial counsel reiterated to the petitioner how his testimony could jeopardize his self-defense theory if he were to open the door and allow the State to ask him about his prior criminal record. When the trial reconvened, the petitioner did not testify and he did not object when trial counsel relayed the petitioner's decision to the trial court. The trial court then stated on the record he was satisfied the petitioner was aware of his rights, and the trial continued. Trial counsel explained, and it is evident in the record, the petitioner was opinionated throughout his representation and if the petitioner wanted to testify, "then there was no stopping [him]." The post-conviction court accredited trial counsel's testimony, and nothing in the record preponderates against its factual findings. *See Tidwell v. State*, 922 S.W.2d 497, 500 (Tenn. 1996). Therefore, in reviewing the record as a whole, it is clear the petitioner waived his right to testify after discussing his options with trial counsel. Further, the record indicates the petitioner engaged in a *Momon* hearing during which he affirmed he understood his options

regarding his right to testify and waived the same. *Momon*, 18 S.W.3d at 163. The petitioner is not entitled to relief.

b. Harmless Error

The State also claims any alleged *Momon* violation was harmless beyond a reasonable doubt, and we agree. If a defendant's constitutional right to testify is violated, "the burden is upon the State to prove that the constitutional right violation is harmless beyond a reasonable doubt." *Id.* at 167. Harmless error analysis, in this context, requires this Court to consider the following factors: "(1) the importance of the defendant's testimony to the defense case; (2) the cumulative nature of the testimony; (3) the presence or absence of evidence corroborating or contradicting the defendant on material points; (4) the overall strength of the prosecution's case." *Id.* at 168. "[T]he goal of harmless error analysis is to identify the actual basis on which the jury rested its verdict." *Id.*

As explained above, the record makes clear the petitioner waived his right to testify at trial. However, the record also shows any alleged error regarding the petitioner's right to testify was harmless. At the post-conviction hearing, the petitioner offered his version of the incident which he would have testified to at trial. Specifically, the petitioner suggested the victim had a gun and the petitioner believed the victim was going to shoot him. The petitioner's proposed testimony, however, was not corroborated by any witnesses at trial. Rather, all of the State's witnesses and the defense witness, Mr. Goodman, testified the victim did not have a gun, and the petitioner acknowledged the same during the post-conviction hearing. Furthermore, as noted by the State, the substance of the petitioner's proposed testimony was presented to the jury through his statement as described by Sergeant Brown. In his statement, the petitioner admitted he shot the victim, believing the victim had a gun, after he asked the victim to talk with him outside of the club. As such, the petitioner's trial testimony would have been cumulative in nature, and the proposed testimony would not have overcome the overwhelming amount of evidence presented by the State, including the petitioner's admission and the fact no witnesses testified the victim had a gun during the shooting. *Id.* at 168. The alleged *Momon* violation amounts to harmless error, and the petitioner is not entitled to relief.

Alternatively, the State argues the petitioner has waived his *Momon* issues for failing to raise them in his motion for new trial or on direct appeal. However, based upon our previous analysis, it is not necessary to address the State's waiver argument as the record indicates the trial court obtained a valid waiver of the petitioner's testimonial rights.

II. Ineffective Assistance of Counsel

Regarding his ineffective assistance of counsel claims, the petitioner argues trial counsel failed to ensure a proper waiver of his right to testify under *Momon* and failed to withdraw from his case prior to entering his motion for new trial. The State contends trial counsel provided effective assistance and further asserts no *Momon* issues exist because the petitioner waived his right to testify at trial. Following our review of the record, we affirm the judgment of the post-conviction court in finding trial counsel provided effective assistance of counsel.

The petitioner bears the burden of proving his post-conviction factual allegations by clear and convincing evidence. *See* Tenn. Code Ann. § 40-30-110(f). The findings of fact established at a post-conviction evidentiary hearing are conclusive on appeal unless the evidence preponderates against them. *See Tidwell*, 922 S.W.2d at 500. This Court will not reweigh or reevaluate evidence of purely factual issues. *See Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997). However, appellate review of a trial court's application of the law to the facts is *de novo*, with no presumption of correctness. *See Ruff v. State*, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel presents mixed questions of fact and law. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Thus, this Court reviews the petitioner's post-conviction allegations *de novo*, affording a presumption of correctness only to the post-conviction court's findings of fact. *See id.*; *Burns v. State*, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceedings. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that the standard for determining ineffective assistance of counsel applied in federal cases is also applied in Tennessee). The *Strickland* standard is a two-prong test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. In order for a post-conviction petitioner to succeed, both prongs of the *Strickland* test must be satisfied. *Id.* Thus, courts are not required to even "address both components of the inquiry if the defendant makes an insufficient showing on one." *Id.*; *see also Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996) (stating that "a failure to prove

either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim”).

A petitioner proves a deficiency by showing “counsel’s acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms.” *Goad*, 938 S.W.2d at 369 (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the *Strickland* test is satisfied when the petitioner shows there is a reasonable probability, or “a probability sufficient to undermine confidence in the outcome,” that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. However, “[b]ecause of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Id.* at 689 (quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955)). To succeed on an ineffective assistance of counsel claim on alleged *Momon* violations, the petitioner still must meet both prongs of the *Strickland* test. *Miqwon Deon Leach v. State*, No. W2004-01702-CCA-R3-PC, 2005 WL 1651654, at *8 (Tenn. Crim. App. July 14, 2005); *Strickland*, 466 U.S. at 693. Upon demonstrating trial counsel’s failure to conduct a proper *Momon* hearing amounted to deficient performance, “the petitioner must still show a reasonable probability that the oversight prejudiced the outcome of his trial.” *Mario Deangalo Thomas v. State*, No. W2004-01704-CCA-R3-PC, 2005 WL 1669898, at *4 (Tenn. Crim. App. July 18, 2005) (citing *Strickland*, 466 U.S. at 694).

First, the petitioner alleges trial counsel was ineffective in his handling of the petitioner’s *Momon* hearing at trial, asserting trial counsel failed to properly ensure the petitioner knew of his right to both testify and not testify and failed to elicit an explicit waiver of the same. The State asserts “the record shows that the [petitioner] was aware of his right to testify,” noting “the trial court accredited [trial] counsel’s testimony that counsel had discussed the right to testify numerous times with the [petitioner].” Upon our review of the record, we again agree with the State.

In denying relief, the post-conviction court stated:

[The] [p]etitioner argues that trial counsel was deficient because he failed to advise [the] [p]etitioner of his right to testify. [Trial] [c]ounsel advised [the] [p]etitioner of the right to testify and advised him of the advantages and disadvantages of doing so. [Trial] [c]ounsel informed [the] [p]etitioner that if he chose to testify that his past criminal conviction would possibly come out and the jury would hear it. [The] [p]etitioner also

testified that trial counsel advised him of this issue. As stated above, during the *[M]omon* hearing, the trial court allowed [the] [p]etitioner to return to the back to discuss many questions he had with trial counsel and at that time [the] [p]etitioner chose not to testify. Thus, [the] [p]etitioner has failed to plead any facts sufficient to support this claim.

As previously explained, the record indicates trial counsel conducted a *Momon* hearing prior to the close of proof during which he confirmed the petitioner understood his right to testify or not to testify on his own behalf. Both trial counsel and the petitioner testified they discussed the petitioner's options before and during trial, and the trial court ruled the petitioner was aware of his testimonial rights. Accordingly, the petitioner has not proven trial counsel was ineffective in his handling of the *Momon* hearing or in advising the petitioner regarding his testimonial rights, and the petitioner cannot show how the alleged deficiencies of counsel prejudiced his trial. The petitioner is not entitled to relief.

Secondly, the petitioner alleges trial counsel was ineffective in failing to withdraw from his case prior to filing a motion for new trial. The petitioner asserts because trial counsel failed to withdraw, he was unable to personally argue his motion for new trial, resulting in the waiver of several issues he wished to preserve on appeal. The State contends "nothing in the record of the [petitioner's] case undermines [trial] counsel's testimony that the [petitioner] never asked to proceed *pro se* on his motion for new trial."

At the post-conviction hearing, trial counsel testified he learned of the petitioner's desire to proceed *pro se* on appeal after sentencing. At the next opportunity, after the conclusion of the hearing on the motion for new trial, trial counsel informed the trial court the petitioner wished to proceed *pro se* on appeal. As a result, trial counsel was removed from the petitioner's case prior to the direct appeal. Trial counsel testified he would have informed the trial court of the petitioner's desire to handle his motion for new trial had he been aware of the same. As previously addressed, the post-conviction court accredited trial counsel's testimony, and nothing in the record preponderates against its factual findings. *See Tidwell*, 922 S.W.2d at 500.

Furthermore, both trial counsel and the petitioner testified the petitioner did not object to trial counsel handling his motion for new trial. As noted by this Court on direct appeal, "[f]ollowing the trial court's denial of the motion, [the petitioner] requested that his counsel withdraw so that he could pursue a *pro se* appeal." *Cleo Henderson*, 2013 WL 6157039, at *4. Therefore, the record indicates trial counsel knew the petitioner wished to handle his direct appeal *pro se*, and upon such knowledge, trial counsel informed the trial court of the petitioner's request at the conclusion of the motion for new trial. Nothing in the record suggests trial counsel was ineffective in handling the motion

for new trial or informing the trial court of the petitioner's desire to proceed *pro se* on appeal. As such, the petitioner has failed to overcome the presumption that trial counsel pursued "sound trial strategy" in relation to this issue. *Strickland*, 466 U.S. at 689 (internal quotations omitted). The petitioner is not entitled to relief.

In denying post-conviction relief, the post-conviction court stated, "[the] [p]etitioner has failed to prove by clear and convincing evidence that trial counsel's performance was unreasonably deficient, or that trial counsel's deficient performance prejudiced the outcome of [the] petitioner's case." We agree with the trial court's assessment of the petitioner's claims. No evidence exists in the record to support his attack on trial counsel's performance or how the alleged deficient performance affected the outcome of his trial. *See Strickland*, 466 U.S. at 687. The petitioner is not entitled to post-conviction relief for his claim of ineffective assistance of counsel.

CONCLUSION

Based upon the foregoing authorities and reasoning, the judgment of the post-conviction court is affirmed.

J. ROSS DYER, JUDGE