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IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs May 9, 2023

**LADON ANTOINE DOAK V. STATE OF TENNESSEE**

**Appeal from the Criminal Court for Davidson County**
**No. 2013-A-891 Steve R. Dozier, Judge**

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**No. M2022-00727-CCA-R3-PC**

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Petitioner, Ladon Antoine Doak, appeals the denial of his post-conviction petition, arguing that the post-conviction court erred in finding that he received the effective assistance of counsel at trial. Following our review of the entire record and the briefs of the parties, we affirm the judgment of the post-conviction court.

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

JILL BARTEE AYERS, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and MATTHEW J. WILSON, JJ., joined.

S. Spencer Hall, Nashville, Tennessee, for the appellant, Ladon Antoine Doak.

Jonathan Skrmetti, Attorney General and Reporter; Benjamin A. Ball, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General; and J. Wesley King, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### Factual and Procedural Background

Petitioner and his Co-defendant, Robreka Sullivan, were indicted for the aggravated robbery of Ishabeka Williams, the aggravated burglary of Ms. Williams's home, and the aggravated assaults of Shanelle Jones and Charmaine Peters. The two were tried jointly. *State v. Doak*, No. M2015-01454-CCA-R3-CD, 2016 WL 4473118, at *1 (Tenn. Crim. App. Aug. 22, 2016). The facts of this case as set forth by this court on direct appeal are as follows:

At trial, Ishabeka Williams testified that in January 2013, she lived in an apartment on 11th Avenue North in Nashville and that Charmaine Peters lived in the apartment next door. On January 17, Shanelle Jones, who was a friend of Ms. Williams and Ms. Peters, came to Ms. Williams's apartment. The [Petitioner] was with Ms. Jones, and Ms. Jones claimed that the [Petitioner] was her brother. Ms. Williams said that she, Ms. Jones, and the [Petitioner] sat in her living room and talked and that the [Petitioner] asked her to "take him to rob his ... [girlfriend's] baby daddy." However, Ms. Williams "wasn't interested in doing that" and "changed the subject." Later that night, Ms. Jones and the [Petitioner] knocked on Ms. Williams's door, and Ms. Jones asked Ms. Williams to drive them to Dodge City. Ms. Williams had never met the [Petitioner] prior to January 17 and felt uncomfortable with the situation, so she asked her aunt to ride with her "to drop them off." Ms. Williams and her aunt drove Ms. Jones and the [Petitioner] to Dodge City about 11:00 p.m.

Ms. Williams testified that the next day, Ms. Jones came back to her apartment. Ms. Jones told Ms. Williams that Ms. Jones and the [Petitioner] "had had words the night before" and that the [Petitioner] was looking for Ms. Jones. Ms. Williams heard a knock on her front door and answered it. The [Petitioner] and Robreka Sullivan were at the door and wanted to know where Ms. Jones was located. Ms. Williams said she tried to "cover" for Ms. Jones and told them Ms. Jones was not there. Ms. Williams said Sullivan was "like clutching for a gun; like she kind of had her hand on it." Ms. Williams did not let them into her apartment and watched them walk down the street.

Ms. Williams testified that a few minutes later, Ms. Jones went to Ms. Williams's aunt's apartment to get something for Ms. Williams. When Ms. Jones returned, she did not lock the front door. Ms. Williams said that the door opened and that she saw Sullivan run into the hallway. Sullivan had a gun in her hand, and the [Petitioner] came in behind Sullivan. Ms. Williams tried to escape out the back door, but Sullivan hit her with the gun. Ms. Williams stated that Sullivan kept asking for money, guns, and "dope" and that she asked Sullivan, "[W]hat are you talking about?" Ms. Williams said the [Petitioner] went through the apartment, "looking for stuff." When he did not find any guns or drugs, he "just started picking up random stuff." The [Petitioner] took Ms. Williams's cellular telephone, televisions, and computers and told Ms. Jones and Ms. Peters to load all of the items into Ms. Williams's Ford Explorer. When the items

were in the vehicle, the [Petitioner] and Sullivan left in the Explorer.

Ms. Williams testified that she telephoned the police immediately and that the police found the [Petitioner] and Sullivan on the street in Dodge City where she had dropped them off the previous night. The police also found her Explorer. The police took Ms. Williams to the police department and showed the [Petitioner] and Sullivan to her, and she identified them as the robbers. She said that during the robbery, the [Petitioner] and Sullivan passed the gun to each other "I think twice." She described the gun as chrome with a wood handle and said the [Petitioner] pointed the gun at her a couple of times but never hit her with it. Sullivan, though, hit Ms. Williams with the gun five or six times, and Ms. Williams's head was "cut open." Sullivan told Ms. Williams that she should kill Ms. Williams. Ms. Williams said that she did not have a gun during the incident and that she was scared for her life. She identified photographs of her apartment taken after the robbery.[1]

On cross-examination, Ms. Williams testified that the [Petitioner] did not force Ms. Jones or Ms. Peters to put her property into the Explorer. After the [Petitioner] and Sullivan left in the vehicle, Ms. Jones "kind of met them at the corner." Ms. Williams did not know where Ms. Peters went. Ms. Williams later spoke with Ms. Peters, and Ms. Peters claimed she was innocent but knew the robbery was going to occur. Ms. Williams asked Ms. Peters why Ms. Peters did not warn her, and Ms. Peters said she was scared to tell Ms. Williams because Sullivan and the [Petitioner] "were already there."

Ms. Williams denied having a gun in her apartment at the time of the robbery or taking a gun out of her apartment after the robbery. She stated, "If [there] was a gun in my house, as much as he tore it up, they would've found it." She acknowledged that she may have stated at the defendants' preliminary hearing that the only items the [Petitioner] took were two flat screen televisions and an old cellular telephone. She said that she was "still kind of devastated and shocked about the whole situation" at the time of the hearing and that she "possibly [did] not put everything in." She also acknowledged that she did not tell the police that the [Petitioner] took computers. However, she did not know the [Petitioner] had taken the computers when she spoke with the police. Ms. Williams said she had prior convictions for theft, that she used to have a "theft problem," and that she was "getting help with it."

Officer Steven Weir of the Metropolitan Nashville Police Department (MNPD) testified that on the afternoon of January 18, 2013, he and Officer Edward Draves responded to a robbery on 11th Avenue North. The officers traveled toward Cumberland View and saw the [Petitioner] and Sullivan walking toward Clarksville Pike. They noticed that the [Petitioner] and Sullivan matched the descriptions of the two suspects, exited their police vehicle, and approached them. Officer Weir searched Sullivan and found Ms. Williams's wallet in one of Sullivan's sleeves. He also found a cellular telephone and a handgun on Sullivan. A magazine was in the gun. Officer Weir said that a lot of blood was on Sullivan's jacket and that he arrested her.

Officer Edward Draves testified that he and Officer Weir saw the [Petitioner] and Sullivan walking after the robbery call and approached them. Officer Draves patted down the [Petitioner] and heard Officer Weir say, "[G]un." Officer Draves immediately handcuffed the [Petitioner]. He said that Ms. Williams's car keys were in the [Petitioner]'s coat pocket and that a television remote control was in the [Petitioner]'s pants pocket, "which seemed odd." The officers transported Sullivan to the police department, and another officer transported the [Petitioner]. Officer Draves said that the gun found by Officer Weir was a nine-millimeter handgun.

On cross-examination, Officer Draves testified that the [Petitioner] and Sullivan were just one block from Ms. Williams's apartment when the officers spotted them. He said the gun was loaded with nine-millimeter bullets. He acknowledged that he said the bullets were .380 caliber in his report and stated that he "put in the wrong caliber when he typed up the report."

Officer Gary Shannon of the MNPD testified that on the afternoon of January 18, 2013, he "headed toward the Dodge City area of north Nashville." When he arrived at the scene, Officers Weir and Draves had already arrested the [Petitioner] and Sullivan. A gold Ford Explorer was parked in an alleyway, and electronics, including televisions and laptop computers, were in the vehicle.

Sharon Tilley, a crime scene technician with the MNPD, testified that she arrived at Ms. Williams's apartment about 5:10 p.m. on January 18, 2013. She photographed Ms. Williams and dusted items for fingerprints. Ms. Williams had a cut over her right eye, and areas of her apartment had been ransacked.

Sergeant George Ward of the MNPD testified that on January 18, 2013, he was dispatched to 23rd Avenue North. A vehicle was in an alley, and he photographed the vehicle and processed it for fingerprints. He also processed televisions and laptop computers in the vehicle for fingerprints.

Linda Wilson, a police identification analyst for the MNPD, testified as an expert in fingerprint analysis that she compared latent fingerprints collected by Ms. Tilley and Sergeant Ward to known fingerprints. Regarding the prints collected by Ms. Tilley, Ms. Wilson was unable to match them to anyone. As to the latent fingerprints collected by Sergeant Ward, Ms. Wilson found Williams's prints on the exterior of the Explorer's driver's door, a Sony television, a Philips television, and the rearview mirror. The [Petitioner]'s palm print was on a Sony television. On cross-examination, Ms. Wilson acknowledged that none of the prints collected by Ms. Tilley or Sergeant Ward matched Sullivan.

Shanelle Jones testified for the [Petitioner] that she put one television into the Explorer during the robbery. After the robbery, Ms. Williams took a gun out of a closet and walked behind her apartment with it. Ms. Jones left Ms. Williams's apartment, went to a bus stop, and did not know what Ms. Williams did with the gun. She acknowledged telling the police that Ms. Williams was a "booster."

On cross-examination by Sullivan's counsel, Ms. Jones testified that a "booster" was "[s]omeone who steals and sells whatever they steal." She said that she went to the bus stop after the robbery because she was scared and that she did not telephone the police because Ms. Williams had already called them. She acknowledged having a prior conviction for aggravated burglary.

On cross-examination by the State, Ms. Jones testified that on the night of January 17, 2013, the [Petitioner] and another man discussed committing a robbery. Ms. Williams was not present during the conversation, and it did not involve robbing a specific person. On the afternoon of January 18, Ms. Williams, Ms. Jones, and Ms. Peters were in Ms. Williams's kitchen when Sullivan and the [Petitioner] entered the apartment. The [Petitioner] and Sullivan came into the kitchen, and Ms. Williams tried to get out the back door. However, Sullivan caught up with Ms. Williams and attacked

> her. Ms. Jones said that she did not see Sullivan hit Ms. Williams with a gun but that she saw blood. She acknowledged that both of the defendants had a gun during the robbery, that Sullivan's gun was chrome, and that the [Petitioner]'s gun was black. She said that the [Petitioner] and Sullivan were asking Ms. Williams "about a gun, about money, and other things" and that the [Petitioner] told her to take a television outside. She said she did so because the [Petitioner] pointed his gun at her. Sullivan also threated Ms. Jones with a gun, and one of the robbers told Ms. Peters to take something outside. The [Petitioner] and Sullivan loaded items into the Explorer and drove away in the vehicle. The robbery lasted ten to twenty minutes.
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> Detective Andrew Davis of the MNPD testified for the [Petitioner] that he was the case officer for this case and that a check on the gun recovered by Officer Weir revealed the gun had been reported stolen in California. Defense counsel then called Charmaine Peters to the stand. Upon being questioned by counsel for Sullivan, Ms. Peters testified that she was from Los Angeles, California. She said that on the day of the robbery, the [Petitioner] and Sullivan entered Ms. Williams's apartment through the front door. She saw one gun, and it was chrome.
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> At the conclusion of the proof, the jury convicted the [Petitioner] and Sullivan of the aggravated robbery of Ms. Williams, a Class B felony, and aggravated burglary, a Class C felony. The jury acquitted them of the aggravated assaults of Ms. Jones and Ms. Peters. After a sentencing hearing, the trial court sentenced the [Petitioner] as a Range II offender to fifteen years to be served at eighty-five percent release eligibility for aggravated robbery and as a Range II, multiple offender to eight years for aggravated burglary. The court ordered that the sentences be served concurrently.

*Id.* at *1-4.

On October 26, 2017, Petitioner filed a *pro se* petition for post-conviction relief alleging the denial of effective assistance of trial counsel. Counsel was appointed, and an amended petition was filed alleging that trial counsel: (1) failed to call or otherwise investigate a potential alibi witness; (2) failed to request closed-circuit video surveillance footage from several locations the day before the alleged robbery and burglary, including Baptist Hospital Emergency Room, Kroger on 8th Avenue and Monroe Street, Home Depot at 100 Oaks, and Charlotte Auto Sales on Charlotte Pike; and (3) failed to subpoena cell phone records to show that Ms. Williams called and texted Petitioner numerous times on "both the day before and the day of the alleged robbery and burglary attempting to sell

the items that [Petitioner] is alleged to have stolen from her residence to [Petitioner]." A second-amended petition for post-conviction relief was filed alleging that trial counsel was ineffective for failing to file a motion to suppress Petitioner's out-of-court identification by Ms. Williams at the police precinct on the day of the robbery and burglary.

*Post-Conviction Hearing*

Petitioner testified he and Ishaveka[1] Williams entered into an agreement in which he and his now deceased cousin, Robert Harris, provided money to her in exchange for the delivery of certain stolen items to them. He explained that she was a "booster." Petitioner testified that Ms. Williams did not deliver the items after they had paid her, and he asked for the money to be returned. He said that Ms. Williams "was playing games and stuff, so that's when I kept call[ing] her." Petitioner asserted that his cell phone records were important to show that after he hung up on Ms. Williams, she repeatedly called him back.

Petitioner testified that Mr. Harris had a "trap house"[2] in "Dodge City," and Ms. Williams directed her friend, Shanelle Jones, to drive Ms. Williams's vehicle with stolen items to Mr. Harris' house. Petitioner explained that the items in Ms. Williams's vehicle were supposed to be new unopened items, but she brought used items to Mr. Harris' house, which Petitioner and Mr. Harris did not want. Petitioner testified that he was present when Ms. Jones brought the items to the house. He said that the police then showed up there. Petitioner testified that he was at Mr. Harris' house at the time of the offenses in this case, and Mr. Harris would have corroborated that he was there and did not drive the vehicle to the house with the stolen items. Petitioner said that he discussed this with trial counsel.

As for his cell phone records, Petitioner testified:

> The whole time all of this robbery was supposed to be taking place during, before and after, she's [Ms. Williams] blowing my phone up the whole time. You didn't have to do nothing but look at the cell towers to see where my phone was pinging from and see that she ke[pt] calling me from her cell phone repeatedly over and over.

Petitioner reiterated that Ms. Williams was "blowing his phone up" before, during, and after the time the robbery was taking place. He claimed that the phone was a large part of his defense. Petitioner testified that he discussed all of this with trial counsel, but counsel did not subpoena his phone records "because it would have been important for him to present that at trial and use it in my defense."

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[1] At the post-conviction hearing, Ms. Williams was referred to as Shamika, and in the direct appeal opinion she is referred to as Ishabeka. We will use her name as identified in the indictment.

[2] Petitioner explained that a "trap house" is a "house where people sell drugs out of."

Petitioner testified that there was video surveillance footage from Baptist Hospital, Kroger on 8th Avenue and Monroe Street, Home Depot at 100 Oaks, and Charlotte Auto Sales on Charlotte Pike showing him, Ms. Jones, and Ms. Williams together the day before the robbery and burglary. He said that this footage would have contradicted Ms. Williams's testimony that she had not gone to Home Depot, the Baptist Hospital Emergency Room, and Kroger with Petitioner. He testified that he asked trial counsel to obtain the video surveillance footage from detectives, but no one "followed up on it."

Petitioner testified that on the day of his arrest, he was transported to the police precinct in handcuffs in the back of a patrol car. He was directed to step out of the car in the parking lot. Ms. Williams was there, and he "guessed" that she identified him, but admitted that he did not know. Petitioner said that he was then placed back in the patrol car. He discussed the circumstances surrounding his identification by Ms. Williams with trial counsel but counsel did not object to anything.

On cross-examination, Petitioner testified that he did not know his Co-defendant, Robreka Sullivan. He said that she was friends with Ms. Jones, and he denied that he was walking with Ms. Sullivan at the time of his arrest. He claimed that she was following him, and he did not know that she had a gun, Ms. Williams's wallet or that she had blood on her clothing. He denied that he had been in Ms. Williams's home shortly before his arrest. Petitioner agreed that he had Ms. Williams's keys but claimed that Ms. Jones had thrown them to him when she brought the vehicle to Mr. Harris' house. He thought that everything was planned because the police immediately showed up when Ms. Jones left. Petitioner admitted that Ms. Williams's television remote was in his jacket pocket at the time of his arrest, but he claimed that Ms. Williams had been wearing his jacket the previous day.

At the time of the post-conviction hearing, trial counsel had been practicing criminal law for seventeen years. He hired a retired homicide detective to investigate Petitioner's case. Trial counsel also discussed trial strategy with trial counsel for Co-defendant Sullivan. He said that he had never heard of Mr. Harris until he read the post-conviction petition. Trial counsel testified that the trial strategy in Petitioner's case was to attempt to "mitigate charges during the trial. And theory of maybe a couple of the young ladies that were in the apartment being part of anything that happened and having a role in that." Trial counsel testified that Petitioner acknowledged to him that Petitioner was in Ms. Williams's apartment. He said that Petitioner's post-conviction testimony was inconsistent with what he told trial counsel at the time of trial.

Trial counsel agreed that Petitioner told him about video surveillance footage from various locations on the day prior to the offenses. Trial counsel attempted to obtain the videos, but they had "been written over, so we weren't able to get anything." He and Petitioner also discussed cell phone records. Trial counsel testified: "Obviously, based upon my discussions with [Petitioner], I did not feel like those would be in his favor to

have especially concerning his co-defendant." He agreed that the records may have tied Petitioner and his co-defendant closer together. As for the show-up identification of Petitioner by Ms. Williams, trial counsel testified that identity was not an issue in Petitioner's case.

On cross-examination, trial counsel testified that he attempted to interview Ms. Williams, Ms. Jones, and Ms. Peters but they refused to speak with him. He attempted to obtain the video surveillance footage shortly after Defendant' arraignment.[3] Trial counsel did not believe that the show-up identification of Petitioner at the police station was a problem because "everybody knew everybody in this case." He also noted that additional photo lineups were conducted. Trial counsel testified that it was his decision not to challenge the identification. When asked if challenging the identification would have given him opportunity to speak with Ms. Williams to get additional facts about the case, trial counsel replied, "Possibly." He also testified:

> I'm fairly certain that I would have been limited to the identification issue and not been able to go into the facts of the case or the trying of the case at that time. I've done one or two of these and I'm fairly certain they wouldn't have been able to.

Following the hearing, the post-conviction court made extensive findings of fact in its written order denying post-conviction relief concerning each claim raised by Petitioner. The post-conviction court ultimately resolved any credibility issues between Petitioner and trial counsel in favor of trial counsel, and found that Petitioner failed to prove ineffective assistance of counsel by failing to prove either deficient performance or prejudice. It is from this judgment that Petitioner now appeals.

## ANALYSIS

Petitioner contends that the post-conviction court erred in finding that he received the effective assistance of counsel when trial counsel: (1) failed to file a motion to suppress the identification of Petitioner by Ms. Williams at the police precinct; (2) failed to subpoena cell phone records to show that Ms. Williams called him numerous times during the robbery and burglary; and (3) failed to request video surveillance footage from several locations showing Ms. Williams and Petitioner together the day before the offenses. The State responds that the post-conviction court properly concluded that Petitioner failed to demonstrate that trial counsel was ineffective. We agree with the State.

The right to effective assistance of counsel is safeguarded by the Constitutions of both the United States and the State of Tennessee. U.S. Const. amend. VI; Tenn. Const.

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[3] Trial counsel noted that the records from Petitioner's case were destroyed by a tornado that struck Hermitage, except for some that had been digitalized.

art. I, § 9. When a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel's performance was deficient and (2) that the deficiency was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see Lockhart v. Fretwell*, 506 U.S. 364, 368-72 (1993). Failure to satisfy either prong results in the denial of relief. *Strickland*, 466 U.S. at 697. Accordingly, if we determine that either factor is not satisfied, there is no need to consider the other factor. *Finch v. State*, 226 S.W.3d 307, 316 (Tenn. 2007) (citing *Carpenter v. State*, 126 S.W.3d 879, 886 (Tenn. 2004)). The burden in a post-conviction proceeding is on the petitioner to prove his allegations of fact supporting his grounds for relief by clear and convincing evidence. T.C.A. § 40-30-110(f); *see Dellinger v. State*, 279 S.W.3d 282, 293-94 (Tenn. 2009). The factual findings of the post-conviction court are binding on an appellate court unless the evidence in the record preponderates against those findings. *Dellinger*, 279 S.W.3d at 294. The post-conviction court's application of law to its factual findings is reviewed de novo with no presumption of correctness. *Calvert v. State*, 342 S.W.3d 477, 485 (Tenn. 2011). A claim of ineffective assistance of counsel presents a mixed question of law and fact that is subject to de novo review with no presumption of correctness. *Id.*; *Dellinger*, 279 S.W.3d at 294; *Pylant v. State*, 263 S.W.3d 854, 867 (Tenn. 2008).

Review of counsel's performance "requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689; *see also Henley v. State*, 960 S.W.2d 572, 579 (Tenn. 1997). We will not second-guess a reasonable trial strategy, and we will not grant relief based on a sound, yet ultimately unsuccessful, tactical decision. *Granderson v. State*, 197 S.W.3d 782, 790 (Tenn. Crim. App. 2006). Deference to the tactical decisions of counsel applies only if counsel makes those decisions after adequate preparation for the case. *Cooper v. State,* 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992).

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland*, 466 U.S. at 688; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is satisfied by showing a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome" of the trial. *Id.* The stronger the proof of guilt presented at trial, the more difficult it is to prove the prejudice prong of *Strickland*. When proof of guilt is overwhelming, proving prejudice is exceedingly difficult. *See Proctor v. State*, 868 S.W.2d 669, 673 (Tenn. Crim. App. 1992); *Bray v. State*, No. M2011-00665-CCA-R3-PC, 2012 WL 1895948, at *6 (Tenn. Crim. App. May 23, 2012) (finding that, in light of overwhelming evidence, petitioner could not demonstrate prejudice); *McNeil v. State*, No. M2010-00671-CCA-R3-PC, 2011 WL 704452, at *6 (Tenn. Crim. App. Mar. 1,

2011) (finding that overwhelming evidence of guilt precluded showing of prejudice from admission of item of evidence at trial).

First, Petitioner contends that trial counsel rendered deficient performance by failing to challenge Ms. Williams's identification of him at the police precinct on the day of the offenses. Concerning this claim, the post-conviction court concluded:

> [A]n inadvertent or accidental meeting between a victim and a defendant involves no abuse of the identification process. *State v. Burns*, 777 S.W.2d 355, 358 (Tenn. Crim. App. 1989). [Petitioner] said in the instant hearing that he "guessed" the police showed him to Ms. Williams where he saw her by the precinct door. Petitioner even stated he "d[id]n't know" if she identified him in that capacity. While the Court harbors apprehension of a show-up conducted on a hand-cuffed suspect from a precinct parking lot, there is no clear indication that Petitioner was "presented" to the victim in a one-on-one show[-]up as averred in the written petition. Petitioner himself "guessed" and "didn't know" if an identification took place. Therefore, the Court does not find by clear and convincing evidence Petitioner's due process rights were abused in this capacity.
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> Even so, trial counsel was straightforward in his testimony that the identification of Petitioner was not an issue in the offenses charged. Petitioner advised the Court he had spent the entire previous day with Ms. Williams, into the evening, and she even took him to the house on 23rd Avenue late that night. While witnesses at trial offered different accounts than Petitioner regarding the day prior to and day of the robbery, he was not a person unknown to Ms. Williams, no matter how extensive the acquaintanceship was over the course of two days. The decision not to file for suppression was both tactical and ethical in [trial counsel's] belief, not deficient service.

The record does not preponderate against the post-conviction's court's findings as to this claim. Trial counsel did not believe that the identification of Petitioner at the police precinct was a problem because "everybody knew everybody in this case." He also noted that additional photo lineups were conducted, and Petitioner was identified. We also point out that Petitioner only "guessed" that Ms. Williams identified him the parking lot; he did not know for certain. Furthermore, trial counsel did not believe that challenging the identification would allow him to speak with Ms. Williams, who had previously refused to speak with him, for the purpose of gathering additional facts about Petitioner's case. Therefore, trial court's decision not to challenge Ms. Williams's identification was a strategic one that was made with adequate information as a result of trial preparation and

will not be second-guessed by this court. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982); *Granderson*, 197 S.W.3d at 790. Trial counsel's performance concerning this claim was not deficient nor has Petitioner shown that he was prejudiced by trial counsel's performance. Petitioner is not entitled to relief on this claim.

Next, Petitioner argues that trial counsel rendered deficient performance by failing to subpoena his cell phone records. Concerning this claim, the post-conviction court found:

> Petitioner avers that his cell phone records would have shown that his phone was not "pinging" at the location towers nearby Ms. Williams'[s] apartment. Also, had his cell phone been retrieved from the Property room, it could likewise have established messages between himself and Ms. Williams on the date of the robbery were largely him saying to "bring his money or bring his stuff." The Court finds Petitioner's testimony of pre-paying a known "booster" in anticipation of receiving stolen items from her later is incredible.
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> Trial counsel's statement that obtaining such cell phone location data would likely have been detrimental is a cogent explanation of strategy. Indeed this Court accredits trial counsel's testimony that such records would have presumptively tied Petitioner to co-defendant Sullivan, despite Petitioner's protestations that she was merely walking on the same stretch of roadway when police arrested them both. Petitioner has failed to establish by clear and convincing evidence that trial counsel's strategy to defend rather than potentially affirm the State's account was deficient or caused Petitioner prejudice. In his written petition, Petitioner also stated the only physical evidence tying him to the robbery was his partial palm print on one of the televisions in the back of Ms. Williams'[s] vehicle. However, the appellate record reflects he also had the remote to that television and the keys to that vehicle on his person when he was arrested, additionally tying him to the robbery.

The record does not preponderate against the post-conviction court's findings. Trial counsel testified that he and Petitioner discussed the cell phone records. Petitioner acknowledged to trial counsel that he was in Ms. Williams's apartment. Trial counsel said that Petitioner's post-conviction testimony was inconsistent with what he told trial counsel at the time of trial. Trial counsel testified: "Obviously, based upon my discussions with [Petitioner], I did not feel like those would be in his favor to have especially concerning his co-defendant." He also agreed that the phone records may have tied Petitioner and his co-defendant closer together.

Trial counsel's decision not to introduce Petitioner's cell phone records at trial was again a strategic one made with adequate information as a result of trial preparation and will not be second-guessed by this court. *Hellard*, 629 S.W.2d at 9-12; *Granderson*, 197 S.W.3d at 790. Furthermore, Petitioner did not present the cell phone records at the post-conviction hearing. "Failure to present the documents at the post-conviction hearing makes it nearly impossible for [a] [p]etitioner to show that trial counsel's deficient performance in failing to obtain or introduce the document at trial prejudiced the defense." *Pilate v. State*, No. W2017-02060-CCA-R3-PC, 2018 WL 3868484, at *5 (Tenn. Crim. App. Aug. 14, 2018); *Nicholson v. State*, No, M2020-01128-CCA-R3-PC, 2022 WL 1194639, at *8 (Tenn. Crim. App. April 22, 2022). The only evidence presented as to the cell phone records was Petitioner's testimony, which the post-conviction court found to be "incredible." We defer to the post-conviction court's findings regarding the credibility of witnesses. *Wiley v. State*, 183 S.W.3d 317, 325 (Tenn. 2006). Because Petitioner did not introduce the cell phone records at the post-conviction hearing, he has not established deficiency or prejudice and is not entitled to relief on this claim.

Finally, Petitioner contends that trial counsel was ineffective for failing to obtain video surveillance footage from various locations that he and Ms. Williams allegedly visited the day before the robbery and burglary. Concerning this claim, the post-conviction court found:

> Petitioner avers he was prejudiced by not having video footage from these locations to present an alternative theory of the case and place Ms. Williams'[s] testimony under scrutiny. The Court notes that Petitioner also states Ms. Williams "called and texted [him] numerous times on the day before and the day of the alleged robbery." The Court finds a paradox in these two averments where [Petitioner] states both that he spent the entire day prior to the robbery with Ms. Williams visiting the above locations before going to her apartment that evening, but also that he was receiving phone calls and texts for her [ ] throughout the same day. The Court finds this testimony incredible.
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> Trial counsel told the Court he attempted to locate the videos after Petitioner was arraigned on the offenses. However, video footage from these locations, which may or may not have existed in character or actuality as stated by Petitioner, were not locations involving the crime scene. There was no duty to obtain potential footage from every location Petitioner claimed to have visited the day prior to the robbery. While Petitioner believes himself prejudiced in this contention, his own testimony calls into question where he [was] with Ms. Williams throughout the day prior to the robbery or if she was elsewhere texting and calling him. The Court does not find by

> clear and convincing evidence trial counsel was deficient in this matter.

Again, the evidence does not preponderate against the trial court's findings concerning this claim. Trial counsel testified that he attempted to obtain the surveillance videos but they were no longer available because they had been recorded over. "Trial counsel cannot be said to be ineffective for failing to obtain evidence that does not exist." *Butler v. State*, No. W2013-01245-CCA-R3-PC, 2014 WL 1767104, at *7 (Tenn. Crim. App. Apr. 29, 2014). Although Petitioner complains that trial counsel waited until after arraignment to secure the video footage, he presented no evidence at the post-conviction hearing as to when the footage was recorded over. Additionally, as found by the post-conviction court, trial counsel had no duty to obtain potential video surveillance footage from every location Petitioner claimed to have visited the day before the robbery and burglary.

Moreover, Petitioner has not shown any prejudice by the failure to obtain the video surveillance footage. The trial court again found Petitioner's testimony concerning this claim not credible, and we defer to the post-conviction court's findings. *Wiley*, 183 S.W.3d at 325. The post-conviction court noted that Petitioner said Ms. Williams "called and texted [him] numerous times on the day before and the day of the alleged robbery." However, Petitioner claimed to have been with Ms. Williams the entire day prior to the robbery and burglary although he received calls and texts from her. Additionally, Petitioner has not demonstrated that this evidence would have affected the outcome of his case. As pointed out by the post-conviction court, the surveillance videos were not from the day of the offenses or from the crime scene. We conclude that this evidence would have had little exculpatory value. Petitioner is not entitled to relief on this claim.

## CONCLUSION

For the foregoing reasons, the judgment of the post-conviction court is affirmed.

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JILL BARTEE AYERS, JUDGE