

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 27, 2023

FILED 08/15/2023 Clerk of the Appellate Courts
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DONALD RAY PENNINGTON, JR.¹ v. STATE OF TENNESSEE

Appeal from the Criminal Court for Bradley County
No. 21-CR-354 Sandra Donaghy, Judge

No. E2022-01133-CCA-R3-PC

Petitioner, Donald Ray Pennington, Jr., appeals as of right from the Bradley County Criminal Court’s denial of his petition for post-conviction relief, wherein he challenged his convictions for rape of a child and aggravated sexual battery for which he received an effective forty-year sentence. On appeal, Petitioner asserts that he received ineffective assistance of counsel based upon trial counsel’s failure to (1) provide Petitioner with the discovery materials until after trial; (2) investigate the victim’s school records; and (3) call two witnesses to impeach the credibility of the victim’s mother. Following our review, we affirm.

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

ROBERT L. HOLLOWAY, JR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and ROBERT H. MONTGOMERY, JR., JJ., joined.

Todd W. Gee, Cleveland, Tennessee, for the appellant, Donald Ray Pennington, Jr.

Jonathan Skrmetti, Attorney General and Reporter; Abigail H. Rinard, Assistant Attorney General; Stephen Crump, District Attorney General; and Krista R. Cochran, Assistant District Attorney General, for the appellee, State of Tennessee.

¹ The post-conviction record refers to Petitioner as Donald Ray Pennington; however, the trial record, indictment, and judgments refer to Petitioner as Donald Ray Pennington, Jr. We will refer to Petitioner as he is named in the indictment.

OPINION

Petitioner was convicted after a jury trial of rape of a child and aggravated sexual battery. *State v. Pennington*, No. E2020-00415-CCA-R3-CD, 2021 WL 2172189, at *1 (Tenn. Crim. App. May 27, 2021), *no perm. app. filed*. In Petitioner’s direct appeal, this court summarized the proof adduced at trial as follows:

At trial, R.R.² testified that, on June 10, 2017, when she was eleven years old, she lived in Cleveland in a double-wide trailer with her mother, her siblings, and her stepfather, [Petitioner]. R.R. recalled that, when she woke up that morning, she wanted to go swimming in their backyard pool. She went into the bedroom that [Petitioner] shared with her mother where [Petitioner] and R.R.’s two sisters were watching television. R.R. said that her sisters were sitting on the floor at the end of the bed and that [Petitioner] was sitting on the bed near the headboard. R.R. recalled that her sisters were about eight and “six or seven” years old at the time. R.R. testified that she asked [Petitioner] if she could go outside, but he responded, “[W]ell, let’s watch a movie.” R.R. stated that, as she began watching the movie, [Petitioner] told her two sisters to leave the room. R.R. recalled that she had on a blue two-piece swimming suit and water shoes and that [Petitioner] had on camouflage pajama pants and camouflage boxers. She said that, when her sisters left the room, they closed the door, and [Petitioner] locked it. R.R. was sitting up on the bed watching the movie, and [Petitioner] told her to “come here” and to lie down on the bed. R.R. stated that she crawled up the bed and laid down beside [Petitioner]. R.R. explained that she was lying on her back and that [Petitioner] was lying on his side.

R.R. stated that [Petitioner] turned off the movie and began touching her. The following exchange then occurred between the prosecutor and R.R.:

[THE STATE]: Okay. Tell me about that?

[R.R.]: He decided to move my bathing suit bottom to the right, and he decided to touch me with his hand.

[THE STATE]: I know this is difficult, but I have to ask you details about it. You said he’s touching you with his hand. Where on your body is he touching you with his hand?

² It is the policy of this court to identify minors by their initials only. No disrespect is intended.

[R.R.]: On my private.

[THE STATE]: Your private. Okay. Front or the back?

[R.R.]: Front.

[THE STATE]: And when you say he's touching you, how is he touching you? What motion? Is he making a motion or just?

[R.R.]: He was moving up and down.

[THE STATE]: With his hand?

[R.R.]: Yes.

[THE STATE]: Okay. When he was moving up and down, did he stay on top of your privates? Or did he go in between, or inside of you?

[R.R.]: In between.

R.R. recalled that [Petitioner] then got on top of her. She said, "[Petitioner] pulled out his private[,] and he put it inside of mine." She said that [Petitioner's] "private" felt "soft" and "slimy." She said that she felt pain and that "[i]t burned, and then it started tingling." R.R. continued, "And then . . . he handed me a phone for a little bit, but I can't remember the rest. But suddenly when I start to remember, I have to use the bathroom." She said that she left his bedroom and went to the bathroom. She then climbed out of her bedroom window. R.R. said that she did not see anything come out of [Petitioner's] "private."

R.R. testified that, at the time of the incident, [Petitioner] had been her stepfather for about two years. She said that their relationship was not a good one, but she denied that she wanted [Petitioner] "out of [her] life." She said that she did not like [Petitioner] because he would punish her. She stated, however, that she did not want [Petitioner] to leave their family because her mother loved him. R.R. stated that her mother was at work at the time of the incident and that she did not tell her mother what happened when she returned home that night because she was scared. R.R. testified that she told

her mother the next day. R.R. denied that she made up the incident to get [Petitioner] out of her life or out of the home.

On cross-examination, R.R. denied that her mother and [Petitioner] were arguing before she told her mother about what [Petitioner] did to her. She stated, "They weren't arguing until after I told her." She recalled that, when she told her mother about the incident, she first asked her mother what the word "rape" meant and that her mother told her. R.R. denied hearing about rape from a friend at school. She agreed that she met with Mattie Torbett for an interview on June 12, 2017, and after refreshing her recollection with a transcript of the interview, she agreed that she told Ms. Torbett that a friend's dad had to go to jail because "someone thought he had raped their daughter when he was baby sitting[.]" R.R. stated that [Petitioner] never put his fingers "inside" her vagina. She agreed that she told Ms. Torbett that [Petitioner] put his penis inside her and that he "went up and down, up and down." She further agreed that she told Ms. Torbett that she felt a "sharp pain" in her hip area. R.R. stated that, when she left [Petitioner's] bedroom, her siblings were playing in the living room with blocks and that she had to console her sister, D.R., because the other children would not let D.R. play with the blocks. She agreed that she did not tell Ms. Torbett that she climbed out of her bedroom window following the incident.

On redirect examination, R.R. agreed that she told Ms. Torbett that [Petitioner] attempted to put his finger "inside" her vagina and that [Petitioner] got on top of her and "put his penis inside of [her]."

The victim's mother testified that she married Defendant on April 23, 2016, and that they were still married on June 10, 2017. The victim's mother explained that they lived with her four children from a previous relationship and [Petitioner's] son. She recalled that, on June 10, 2017, she left the house around 8:00 a.m. to go to work and that [Petitioner] watched the children while she was gone. She said that she worked until about 8:00 p.m. and that, when she returned home, the children were in bed. The victim's mother stated that, the following day, [Petitioner] was out in a storage building on their property, and the children were outside playing. She recalled that R.R., who was eleven years old, came into the bedroom and wanted to talk to her. R.R. closed the door and then told her what [Petitioner] had done the previous day. The victim's mother testified that she called her children into the house, locked the doors, and told them not to open them. The victim's mother confronted [Petitioner], and they began arguing. She asked [Petitioner] if he would "like to tell [her] what happened yesterday." The victim's mother

explained that she did not tell [Petitioner] which child talked to her but that [Petitioner] responded, “[W]hatever that little ‘B’ said is a lie.” The victim’s mother testified that, after confronting [Petitioner], she loaded her children into the car, called the police, and drove to the hospital.

The victim’s mother stated that R.R. had a “normal stepdad, stepdaughter relationship.” She said that there was occasional arguing but that R.R. “eventually called him dad. So she liked him.” The victim’s mother explained that she and her children moved out and into a domestic violence shelter because she lost her job. She said that she had no plans to leave [Petitioner] prior to the offense and stated that she had “loved [Petitioner] more than anything.”

On cross-examination, the victim’s mother agreed that R.R. asked her what the word “rape” meant when R.R. approached her on the morning of June 11. The victim’s mother said that she did not tell R.R. what it meant and, instead, asked R.R. what R.R. thought rape was. The victim’s mother agreed that she took R.R. to the Children’s Advocacy Center in Athens to speak to Ms. Torbett on June 12, but she denied telling her other daughter, D.R., about the abuse R.R. disclosed.

Kelly Dockery testified that she was a registered nurse who worked as a Sexual Assault Nurse Examiner at the Children’s Advocacy Center in Athens. Nurse Dockery said that she examined R.R. on June 11, 2017. She recalled that R.R. was friendly but shy and nervous. Nurse Dockery first conducted a physical exam, which she explained was similar to a “well child check” at a doctor’s office. She also examined R.R.’s genitals and conducted a rape kit on R.R., which she provided to the investigating officer. Nurse Dockery stated that she found no trauma or injury to R.R.’s vaginal area, but she opined that such a finding was not abnormal in child sexual assault cases. She said that “[n]inety-five percent of the time you won’t find any injuries.” She explained:

Children have different meanings for penetration. Are they meaning that penetration went directly through the vaginal canal? Or are they talking penetration -- just went through the -- it’s called labia majora, which are the outer lips of the vagina. Did it just cross that?

Different -- depending on what kind of force was used, usually I won’t find trauma if there wasn’t a lot of force. And

also the nature of the penetration. Was it an erect penis? Was it not an erect penis? Was it soft tissue trying to pass through their vagina? So those . . . are some of the reasons why I won't find injuries.

When asked about why R.R. would have reported pain when Nurse Dockery could see no injury, Nurse Dockery responded, "Well, if the hymen is not estrogenized, it's very painful for the hymen to be touched for a pediatric female." She agreed that, based on her findings, she could not confirm or deny that a sexual assault took place.

Special Agent Kim Lowe testified that she was employed by the Tennessee Bureau of Investigation in the Forensic Biology Division of the Knoxville Crime Laboratory. Agent Lowe stated that she analyzed specimens from the rape kit conducted on R.R., looking for the presence of semen and skin cells containing male DNA. She said that she was unable to locate semen or skin cells containing male DNA in the specimens. She explained that skin cells "don't last as long . . . depending on what the person had done, showered, etcetera, they can be gone pretty quickly a couple of hours afterwards." Agent Lowe said that foreign skin cells could also be removed if a victim "[u]rinate[d] and wipe[d] pretty frequently[.]" Agent Lowe agreed that she was not provided with any clothing or bedding associated with the case for testing.

Ten-year-old D.R. testified that she was R.R.'s sister. She recalled that, on June 10, 2017, she had lived in Cleveland with her mother, siblings, and [Petitioner], whom she had referred to as "Dad." About that day, D.R. testified that she and her younger sister woke up and went into the bedroom shared by her mother and [Petitioner] to watch television. She recalled that [Petitioner] was in the bedroom sitting on the bed and that she and her younger sister sat in the floor. D.R. said that her mother was at work. D.R. said that R.R. came into the bedroom and asked if they could go outside and that [Petitioner] told R.R. that they could if R.R. first lay down beside him on the bed. D.R. said that [Petitioner] told her and her younger sister to leave the bedroom and close the door behind them. She recalled that, as she left the room, she saw R.R. crawling on [Petitioner's] bed. D.R. stated that she went into the living room and sat behind a couch waiting for R.R. to come out of the bedroom. D.R. recalled that, while R.R. was in [Petitioner's] bedroom, D.R. tried to open the bedroom door but found it locked. She knocked on the door, but no one answered it. She said that, after a "long time[.]" R.R. ran out of [Petitioner's] bedroom crying with her hands over

her face. R.R. ran into her bedroom, closed and locked the door, and would not open the door for D.R.

On cross-examination, D.R. recalled being interviewed by Ms. Torbett at the Children's Advocacy Center. She recalled telling Ms. Torbett that [Petitioner] called R.R. into the bedroom and told her to do laundry. She acknowledged that she told Ms. Torbett that R.R. came into the bedroom and that [Petitioner] "shanked" R.R., meaning that he pulled down her pants and underwear as a practical joke. She agreed that she told Ms. Torbett that she saw R.R. lying on [Petitioner's] bed and that R.R. appeared to be "blacked out." D.R. also recalled telling Ms. Torbett that, when R.R. came out of [Petitioner's] bedroom, R.R. was wearing different underwear than what she had on when she entered the room. D.R. said that she later asked R.R. what had happened and that R.R. replied, "[L]eave me alone."

Id. at *1-3. The jury convicted Petitioner of rape of a child and aggravated sexual battery as a lesser-included offense of rape of a child, and the trial court imposed an effective forty-year sentence to be served at one hundred percent. *Id.* at *4-5.

On direct appeal, Petitioner contested the sufficiency of the evidence for rape of a child, argued that the prosecutor committed misconduct during the direct examination of the DNA expert and during closing arguments, and challenged the trial court's imposition of consecutive sentencing. *Id.* at *5-11. This court affirmed. *Id.*

Petitioner subsequently filed a timely pro se petition for post-conviction relief alleging that he received ineffective assistance of counsel. The post-conviction court entered an order directing Petitioner to amend the petition to include the factual basis upon which Petitioner received ineffective assistance. Petitioner's amended pro se petition included, in relevant part, that he requested discovery multiple times from trial counsel but did not receive it until after the trial; that he asked trial counsel to speak with R.R.'s school, "after school," and "Camelot coun[s]elor" and that "[a]ll of them could have proved many things in [his] case"; and that Petitioner "had [four] witness[es] on [his] side that [trial counsel] for some reason wouldn't use."

The post-conviction court appointed counsel, who filed a "notice of no amended petition for post-conviction relief," in which counsel stated that he and Petitioner had "come to the conclusion that all legally-justifiable claims have been raised in Petitioner's prior pleadings . . . and that no amended petition is necessary."

At the post-conviction hearing, Petitioner testified that he was thirty-six years old and that trial counsel, an Assistant Public Defender, represented him at trial. He met with

trial counsel between three and five times at the jail and at his court dates. Petitioner estimated that the jail visits were about thirty minutes long. He did not recall trial counsel's visiting him after trial. Petitioner agreed that trial counsel discussed the State's evidence and that there was "a lot of" written discovery materials.

Petitioner testified that, when he was twelve years old, he contracted encephalitis, which caused a coma and long-term effects like memory loss, learning disabilities, and Attention Deficit Disorder. Petitioner stated that he had difficulty reading quickly and that he asked trial counsel to leave a copy of the discovery materials with him at the jail so that he could review them outside of their brief meetings. Petitioner averred that trial counsel did not leave the discovery materials with him until after the trial. Petitioner stated that he did not feel prepared going into the trial because he "didn't get to read any of the stuff against [him], and [he] didn't even know what a 'testimony' was." He said that he thought "giving a testimony" meant admitting guilt and that, because he was innocent, he did not want to testify. He agreed that he wanted to invoke his right to remain silent.

Petitioner testified that he wanted trial counsel to hire an investigator to "prove that the witnesses were not credible." He noted that the victim's mother lied "several times" about her job and that he wanted the investigator to speak to R.R.'s school and a counselor she saw. Petitioner agreed that he lived in the victim's mother's household for a "considerable amount of time" after they married. He said that R.R. got into trouble at school "constantly" for "lying, stealing, and fighting." Petitioner said that trial counsel hired an investigator, "but as far as [Petitioner] kn[ew], he never used the investigator." However, when asked whether a defense investigator was present at trial, Petitioner responded, "I think he was there, but he didn't say anything, or he was just sitting in there."

Petitioner testified that he asked trial counsel to call his cousin Yvonne Parsons as a witness. Petitioner stated that he spoke with Ms. Parsons about the victim's mother and "the things that she was doing to [him] and the children." He noted that he was trying to discern if the victim's mother was abusive, and Ms. Parsons told Petitioner that she was. He agreed that Ms. Parsons knew potential reasons the State's witnesses might have to lie.

Petitioner testified that he also asked trial counsel to call Amanda Forbes as a witness to impeach the victim's mother's credibility. He said that he gave trial counsel Ms. Parsons' and Ms. Forbes' contact information. Neither woman testified at Petitioner's trial.

At this point in the hearing, post-conviction counsel identified a written statement from Ms. Forbes and a notarized statement from Ms. Parsons, respectively, containing the information to which they would have testified; the State objected to the entry of the statements, arguing that they were not properly authenticated and that Ms. Forbes and Ms.

Parsons were not present. Post-conviction counsel stated Petitioner had provided him with the statements that day, that counsel was not previously aware of their existence, and that he did not know where Ms. Forbes and Ms. Parsons were. Post-conviction counsel stated that the statements were a “proffer” while acknowledging for the post-conviction court that they were inadmissible hearsay. The post-conviction court marked the statements for identification only.

On cross-examination, Petitioner acknowledged the possibility that his estimate on how long the jail visits lasted was incorrect because of his memory problem. He stated that he “[v]ery briefly” saw the discovery materials. When asked whether he refused a copy of the discovery materials because he “didn’t want anyone in the jail to know what [his] charges were,” Petitioner responded, “When he first mentioned there’s discovery, I did [want a copy], but then not long after I told him I didn’t want it. And my [m]om contacted him three times, and told him that I was needing the discovery.” Petitioner denied asking trial counsel to give the discovery materials to his mother instead of him.

Petitioner agreed that his trial was originally set in April 2018, that trial counsel announced that they were ready to proceed, and that Petitioner was ready to go to trial at that time. He further agreed that the trial was reset to September 2018, and that trial counsel again announced that they were ready to proceed. When asked whether he announced that he was ready for trial without having seen the evidence against him, Petitioner responded that he had briefly seen it.

Petitioner acknowledged that the Public Defender’s Office had an investigator, but he maintained that trial counsel did not use him. He recalled the investigator’s sitting “back there somewhere” in the courtroom during the trial but did not think he sat at the defense table. Petitioner agreed that the investigator was present for the trial, as well as another assistant public defender.

When asked whether trial counsel filed a motion to have records from the Department of Children’s Services (DCS) reviewed by the trial court to determine if they contained anything helpful to the defense, Petitioner stated, “I don’t know. I guess.” Petitioner agreed that such information would have been helpful. Relative to the victim’s mother, Petitioner agreed that she was not present during the incident, that R.R. and two other children testified about the incident, and that the victim’s mother confirmed that he was alone with the children at that time. Petitioner noted that he wondered why “the boys” were never investigated or interviewed. Petitioner testified that he did not know why trial counsel did not call Ms. Forbes or Ms. Parsons as witnesses but said trial counsel told him that he lost Ms. Forbes’ contact information.

Petitioner testified that trial counsel filed the motion for new trial and that he did not raise trial counsel's ineffectiveness in the motion. He stated that another Assistant Public Defender represented him as appellate counsel in the direct appeal and that he discussed trial counsel's ineffectiveness with her but that she told him "that would be for the post-conviction."

On redirect examination, Petitioner testified that, before trial, no one in the courtroom personally asked him if he was ready to proceed and that trial counsel made that announcement.

Trial counsel testified that he had worked for the Public Defender's Office for fifteen years and that, according to his file notes, he met with Petitioner outside of court ten times. Counsel stated that his office's practice was to make two copies of the discovery materials, generate a receipt, and have clients sign it when they received their copy. Counsel stated that he was prepared to give Petitioner his copy of the discovery materials on October 5, 2017, but that Petitioner did not want it because he "did not want to get that paperwork back in the jail." Counsel noted that this was "not unheard of" for clients with similar allegations against them. Counsel said that he kept the copy and later gave it to Petitioner's mother on February 5, 2018, at a court date. Counsel averred that Petitioner did not make further requests relative to the discovery materials. Counsel affirmed that he reviewed discovery with Petitioner.

Trial counsel testified that the defense investigator met with Petitioner, reviewed discovery with counsel, worked to obtain the Children's Advocacy Center video and played it for Petitioner. Counsel stated that he discussed Ms. Forbes and Ms. Parsons with the investigator and that the women had sent letters to counsel. Counsel said that he spoke to both of them personally and that Ms. Forbes conveyed that she knew nothing of the allegations but that the victim's mother abused Petitioner and her children. Ms. Parsons told counsel that she also knew nothing of the allegations but said that the victim's mother abused Petitioner and that, having known Petitioner since he was ten years old, he could not be guilty. When asked why he did not call the women as witnesses, counsel stated that he discussed with Petitioner that counsel was concerned about calling character witnesses because he did not want to open the door to testimony about a previous allegation made by another one of Petitioner's stepdaughters.

Trial counsel testified that he obtained a subpoena for DCS records related to Petitioner's stepchildren, that the trial court performed an in-camera review, and that he used some "exculpatory stuff" the court provided him as a result of that review. Counsel denied that Petitioner ever indicated to him that he did not feel ready to go to trial. Counsel stated that he reviewed with Petitioner the questions he would ask if Petitioner chose to

testify and the questions the State might ask on cross-examination. He stated that he and Petitioner discussed “how to testify, what not to say, what to say.”

On cross-examination, trial counsel testified that the discovery receipt Petitioner’s mother signed was in the case file. Counsel denied that Petitioner’s mother was supposed to give the discovery materials to Petitioner. Counsel noted that Petitioner was present when he gave Petitioner’s mother the discovery materials, but he did not know what Petitioner saw on that occasion.

The post-conviction court announced oral findings of fact. The court generally accredited trial counsel’s testimony and discredited Petitioner, noting that Petitioner had memory problems and that trial counsel had written notes documenting his visits with Petitioner. The court noted its file documentation that Petitioner had six court dates prior to trial. The court’s file also reflected that it had performed an in-camera review of DCS and medical records related to the case, and the court composed a “lengthy” report documenting its findings. The court found that Petitioner’s post-conviction testimony did not agree with that of trial counsel, that trial counsel’s testimony was credible, and that Petitioner had forgotten or “minimized” the meetings they had.

Relative to the discovery materials, the post-conviction court found that Petitioner refused a copy of the discovery materials and that trial counsel had Petitioner’s mother sign a receipt in February 2018, when she received them. The court noted that “nobody asked for the receipt. So [the court] can only conclude that everybody believed [trial counsel] when he said . . . [Petitioner’s] [m]other signed that receipt in court and the discovery was given to [her].” The court found that “it was [Petitioner’s] own choice that prevented him from having that paperwork in the jail.”

Relative to Ms. Forbes and Ms. Parsons, the post-conviction court found that trial counsel received letters from them and determined that they would be character witnesses only. The court found that trial counsel made a strategic decision not to call them “because they were aware of this other allegation” and wanted to avoid prejudicing the jury with uncharged conduct. The court noted that, to the extent other issues were raised in the post-conviction petition, they had been waived. The court concluded that Petitioner had not shown that trial counsel was deficient or that he was prejudiced.

The post-conviction court subsequently issued a written order denying relief, in which it found that Petitioner’s testimony was internally inconsistent and not credible. Relative to R.R.’s school records, the court found that Petitioner had presented no evidence and had abandoned the claim. Relative to Ms. Forbes and Ms. Parsons, the court noted that neither of them had testified and that their written statements were not received as evidence. The court found that trial counsel had interviewed them, that neither of them witnessed the

charged conduct, and that one or both of them knew of a prior allegation against Petitioner. The court concluded that the decision not to call them as witnesses was tactical. The court denied relief, and Petitioner timely appealed.

Analysis

On appeal, Petitioner asserts that he received ineffective assistance of counsel because trial counsel failed to (1) provide Petitioner with the discovery materials until after trial; (2) investigate the victim's school records; and (3) call two witnesses to impeach the credibility of the victim's mother. The State responds that Petitioner has not proven that trial counsel's performance was deficient or that he was prejudiced.

In order to prevail on a petition for post-conviction relief, a petitioner must prove all factual allegations by clear and convincing evidence. *Jaco v. State*, 120 S.W.3d 828, 830 (Tenn. 2003). Post-conviction relief cases often present mixed questions of law and fact. *See Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001). Appellate courts are bound by the post-conviction court's factual findings unless the evidence preponderates against such findings. *Kendrick v. State*, 454 S.W.3d 450, 457 (Tenn. 2015). When reviewing the post-conviction court's factual findings, this court does not reweigh the evidence or substitute its own inferences for those drawn by the post-conviction court. *Id.*; *Fields*, 40 S.W.3d at 456 (citing *Henley v. State*, 960 S.W.2d 572, 578 (Tenn. 1997)). Additionally, "questions concerning the credibility of the witnesses, the weight and value to be given their testimony, and the factual issues raised by the evidence are to be resolved by the [post-conviction court]." *Fields*, 40 S.W.3d at 456 (citing *Henley*, 960 S.W.2d at 579); *see Kendrick*, 454 S.W.3d at 457. The post-conviction court's conclusions of law and application of the law to factual findings are reviewed de novo with no presumption of correctness. *Kendrick*, 454 S.W.3d at 457.

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. art. I, § 9. In order to receive post-conviction relief for ineffective assistance of counsel, a petitioner must prove: (1) that counsel's performance was deficient; and (2) that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see State v. Taylor*, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (stating that the same standard for ineffective assistance of counsel applies in both federal and Tennessee cases). Both factors must be proven for the court to grant post-conviction relief. *Strickland*, 466 U.S. at 687; *Henley*, 960 S.W.2d at 580; *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). 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)). Additionally, 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 *Henley*, 960 S.W.2d at 579. 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).

As to the first prong of the *Strickland* analysis, "counsel's performance is effective if the advice given or the services rendered are within the range of competence demanded of attorneys in criminal cases." *Henley*, 960 S.W.2d at 579 (citing *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)); see *Goad*, 938 S.W.2d at 369. In order to prove that counsel was deficient, the petitioner must demonstrate "that 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); see also *Baxter*, 523 S.W.2d at 936.

Even if counsel's performance is deficient, the deficiency must have resulted in prejudice to the defense. *Goad*, 938 S.W.2d at 370. Therefore, under the second prong of the *Strickland* analysis, the petitioner "must show that there is 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.* (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

We agree with the post-conviction court that Petitioner has not proven the factual basis of his claims by clear and convincing evidence. First, we defer to the post-conviction court's determination that Petitioner was not a reliable witness and its accrediting trial counsel's recollection, which was assisted by his written file notes. See *Fields*, 40 S.W.3d at 456. Relative to the discovery materials, trial counsel testified, and Petitioner confirmed to some degree, that Petitioner refused a copy of discovery because he was concerned about having documentation of his charges in the jail. However, trial counsel reviewed the discovery materials with Petitioner during their ten jail visits, prepared him for trial, and provided Petitioner's mother with the materials. Petitioner has not proven that trial counsel was deficient in this regard.

Relative to R.R.'s school and counseling records, Petitioner provided no proof of the records' contents other than his unsupported assertion that R.R. got into trouble at school for lying, stealing, and fighting. We note that the post-conviction court discredited Petitioner's testimony. Petitioner did not establish by clear and convincing evidence that the school and counseling records contained any helpful information or that trial counsel was deficient in his investigation. He is not entitled to relief on this basis.

Relative to Ms. Parsons and Ms. Forbes, generally, if a post-conviction petitioner alleges that trial counsel should have called certain witnesses, he should have the witnesses testify at the post-conviction hearing. *See Black v. State*, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Petitioner did not authenticate the two written witness statements such that the post-conviction court could consider them; we note that, even if the statements had been introduced, the State would have been entitled to cross-examine the witnesses, either by testimony or deposition. *See* Tenn. Sup. Ct. R. 28 §8(c)(2), (d)(2).

Regardless, trial counsel testified that the decision not to call Ms. Parsons and Ms. Forbes as witnesses was tactical; although we do not read the testimony to support the post-conviction court's finding that Ms. Parsons or Ms. Forbes personally knew of the previous allegations against Petitioner, it was clear that trial counsel was concerned about opening the door to evidence of the allegations if he introduced character evidence against the victim's mother. Petitioner has not proven that trial counsel's representation was deficient, and he is not entitled to relief on this basis.

Conclusion

Based on the foregoing and the record as a whole, the judgment of the post-conviction court is affirmed.

ROBERT L. HOLLOWAY, JR., JUDGE