

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs December 6, 2022

FILED

02/22/2023

Clerk of the
Appellate Courts

KELVIN DEWAYNE GOLDEN v. STATE OF TENNESSEE

Appeal from the Circuit Court for Madison County
No. C-21-197 Roy B. Morgan, Jr., Judge

No. W2022-00388-CCA-R3-PC

The Petitioner, Kelvin Dewayne Golden, appeals the Madison County Circuit Court's denial of his petition for post-conviction relief from his conviction for rape of a child. On appeal, the Petitioner contends that the post-conviction court erred by denying relief on his claims alleging that he received the ineffective assistance of trial counsel. The Petitioner argues that counsel was ineffective by (1) failing to argue to the trial court that the indictment was inconsistent with the charged jury instructions, (2) failing to utilize impeachment evidence through the use of expert witnesses, (3) failing to properly investigate the case, (4) failing to hire a private investigator and medical expert to review physical or DNA evidence, and (5) failing to utilize the victim's psychological records to impeach the victim. After review, we affirm the judgment of the post-conviction court.

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

KYLE A. HIXSON, J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and JOHN W. CAMPBELL, SR., JJ., joined.

Joseph T. Howell, Jackson, Tennessee, for the appellant, Kelvin Dewayne Golden.

Herbert H. Slatery III, Attorney General and Reporter; Courtney N. Orr, Senior Assistant Attorney General; Jody S. Pickens, District Attorney General; and Al Earls, Assistant District Attorney, for the appellee, State of Tennessee.

OPINION

I. FACTUAL AND PROCEDURAL HISTORY

On May 14, 2019, a Madison County jury convicted the Petitioner of rape of a child, and he was sentenced to thirty years' incarceration at 100 percent service. *State v. Kelvin Dewayne Golden*, No. W2019-01418-CCA-R3-CD, 2020 WL 6256847, at *4-6 (Tenn.

Crim. App. Oct. 23, 2020). The Petitioner appealed, arguing that (1) the juvenile court erred by transferring him to criminal court, (2) the trial court erred by denying his motion to dismiss due to a delay in prosecuting the case, and (3) the evidence was insufficient to support his conviction. *Id.* at *1. This court affirmed the Petitioner’s conviction. *Id.*

A. Pretrial Proceedings

The Petitioner’s conviction arose from an incident in 2013 when the Petitioner sexually abused the victim, T.B.¹ *Id.* T.B. was age eight at the time of the abuse, and the Petitioner was age sixteen. *Id.* Though the victim did not initially report the abuse, the victim’s mother reported the abuse when it was discovered. *Id.* A delinquency petition was issued against the Petitioner on October 28, 2016, and the State filed a motion to transfer the Petitioner from juvenile court to criminal court. *Id.* A transfer hearing was held on November 8, 2016, and the victim testified to the facts of the sexual abuse, identifying the Petitioner as the perpetrator. *Id.* at *1-2. The juvenile court issued a written order on February 1, 2017, stating there were reasonable grounds to believe the Petitioner committed the offense, and the Petitioner was transferred to criminal court. *Id.*

Upon his transfer and indictment, the Petitioner filed a notice of alibi on March 27, 2018, stating that he was in the custody of Compass Intervention Center in June 2013, the month the indictment alleged the sexual abuse occurred. *Id.* at *3. The State dismissed the indictment, and the grand jury returned a new indictment alleging that the abuse occurred “on or about May of 2013.” *Id.* The Petitioner again filed a notice of alibi stating he was in the custody of Compass Intervention Center during that time. *Id.* The State again dismissed the indictment. On February 25, 2019, a grand jury returned the instant indictment alleging that the abuse occurred “on or about March 25 through April 1, 2013.” *Id.*

The Petitioner filed a motion to dismiss this third indictment on March 25, 2019, arguing violations of his constitutional rights to due process, to a speedy trial, and to a fair trial. *Id.* A hearing on the motion to dismiss was held on April 15, 2019, and the court issued a written order dismissing the motion. *Id.* at *3-4.

B. Trial Proceedings

A jury trial commenced on May 14, 2019. *Id.* at *4. The victim, who was fourteen years of age at that time, testified as to the facts of the abuse. *Id.* at *4-5. The victim stated that both he and the Petitioner were staying at the victim’s grandmother’s house while out of school. *Id.* at *4. The victim stated that during that time, the Petitioner came into the victim’s room and sexually assaulted him by holding the victim down and placing his

¹ It is this court’s policy to refer to minor victims by their initials.

“private part” in the victim’s anus. *Id.* The victim testified that the Petitioner did not ejaculate and that he did not suffer injury from the Petitioner’s behavior. *Id.*

On cross-examination, the victim indicated that the incident occurred during spring break. *Id.* The victim, however, acknowledged that he had previously testified at the transfer hearing that the abuse occurred during summertime and that he did not know the Petitioner prior to the summer of 2013. *Id.* The victim did not remember ever informing anyone that his rectum bled following the Petitioner’s actions, and he asserted that such did not happen, despite any recorded statement to the contrary. *Id.* at *5.

On redirect examination, the victim affirmed that he stayed at his grandmother’s house over spring break of that year and that the Petitioner was present. *Id.*

The Petitioner called Investigator Jay Stanfill of the Jackson Police Department to testify about his involvement in the case. *Id.* at *5. Investigator Stanfill stated that he was the second investigator on the case and that he took over in 2016, three years after the incident. *Id.* He stated that when he interviewed the victim, the victim could not remember the exact date of the sexual assault but that the victim remembered the Petitioner’s actions caused rectal bleeding for several days. *Id.*

Following the conclusion of proof, the jury found the Petitioner guilty of rape of a child. *Id.* at *6. On appeal, this court affirmed the Petitioner’s conviction. *Id.* at *16.

C. Post-Conviction Proceedings

The Petitioner filed a timely pro se petition for post-conviction relief alleging he received ineffective assistance of counsel at trial. The Petitioner was appointed post-conviction counsel. No amended petition was filed. A post-conviction hearing was held on March 24, 2022.

At the beginning of the hearing, the Petitioner’s post-conviction attorney requested a continuance on behalf of the Petitioner. The attorney explained that although the post-conviction court had entered an order in February 2022 denying the Petitioner’s request to use the victim’s psychological records at the post-conviction hearing, the Petitioner had not been provided a copy of the order. The attorney stated he met with the Petitioner the previous day and it was only then that the Petitioner learned of the order. The attorney stated he had “dropped the ball.” Having only learned the previous day that the victim’s psychological records were inadmissible, the Petitioner wanted more time to prepare his case. The post-conviction court explained to the Petitioner that it had reviewed the records in camera and found that they contained no exculpatory information. The post-conviction court stated that it had issued an order on February 22, 2022, denying the Petitioner’s motion to utilize these records. It noted that the order was approved by the State and the Petitioner’s post-conviction attorney. The post-conviction court denied the Petitioner’s

request for a continuance. The Petitioner and his attorney discussed withdrawing the petition in order to file a new one at a later date, but the State argued that any other post-conviction petitions would be barred by the statute of limitations. The Petitioner decided to proceed with the hearing.

At the post-conviction hearing, the Petitioner testified that trial counsel failed to discover an inconsistency between the indictment and the jury instructions. Specifically, the Petitioner explained that the indictment stated that the Petitioner engaged in sexual penetration “with” the victim while the jury instructions defined the charge as sexual penetration “of” the victim. He argued there was a difference between “with” and “of.” He argued that trial counsel failed to discover this “constructive amendment or . . . failed variance” and that he could not be legally convicted of an offense that was not charged in the indictment. This court’s opinion on direct appeal, the three indictments related to this case, and the written jury instructions from the trial were entered as exhibits.

The Petitioner further testified that trial counsel failed to seek admission of impeachment materials through the use of expert testimony. The Petitioner explained that trial counsel should have hired a private investigator and medical experts to “see where there[was] any . . . factual evidence, as in injuries or any DNA[.]” The Petitioner further explained that trial counsel should have called witnesses and should have argued that the State sought multiple indictments because he had alibis for the first two indictments issued. The Petitioner stated this “paperwork” proved his innocence. The Petitioner submitted that had this occurred, he believed his defense would have had a better outcome. The Petitioner acknowledged that the first two indictments were ultimately dismissed and that the third indictment contained his convicted charge and was the subject of his post-conviction petition.

The Petitioner testified that trial counsel failed to use the victim’s psychological records and evaluation for impeachment purposes at trial. The Petitioner acknowledged that the post-conviction court had ruled these records were inadmissible, but stated that he had not received the court’s order and that he was not prepared on this issue.

On cross-examination, the Petitioner acknowledged that he knew the crime he was accused of when the case originated in juvenile court. The Petitioner further acknowledged that trial counsel questioned Investigator Stanfill at trial and pointed out that the case was indicted multiple times. The Petitioner stated that trial counsel did not argue this point, but acknowledged that the jury heard that he was re-indicted multiple times after filing two notices of alibi. The Petitioner also acknowledged that trial counsel cross-examined the victim regarding an inconsistent statement given at the transfer hearing. The Petitioner agreed that the jury reached a guilty verdict after hearing the testimony of the victim and the evidence put forth by trial counsel.

Trial counsel testified that he had practiced criminal law since being licensed in 2004 and that he was currently the District Public Defender for the 26th Judicial District of Tennessee. He testified that he was appointed to represent the Petitioner when he was an Assistant Public Defender and that he had represented the Petitioner in two cases. Trial counsel testified that the District Attorney in that judicial district had an open file discovery policy and that, once a discovery motion was filed, the requesting party was granted access to that case file. Trial counsel affirmed that he had access to the file and utilized it. He further stated that he did not utilize his office's private investigator in this case because the information was already available to him through the discovery process and that any additional information was obtainable through Investigator Stanfill's testimony.

Trial counsel confirmed that this case was transferred from juvenile court and that he learned from the Petitioner that the Petitioner was in the custody of a children's facility on the dates alleged in the original indictment. He stated that he filed a notice of alibi and that the original indictment was dismissed. He stated that he filed a second notice of alibi when the second indictment was issued and that it was also dismissed because the Petitioner was also in custody on the dates alleged. Trial counsel stated that Petitioner was then re-indicted on the instant docket number and that he then filed a motion to dismiss the case based on due process violations. Following a hearing, the trial court denied the motion.

Trial counsel testified that on the final indictment, the Petitioner was charged with rape of a child in counts one and two and soliciting rape of a child in count three. Trial counsel stated that there was either a motion or an agreement to sever count one from counts two and three, that they proceeded to trial on count one, and that the State dismissed counts two and three after the trial concluded. Trial counsel testified that at trial, he called and questioned Investigator Stanfill about the different dates alleged in the multiple indictments. Trial counsel testified that he also cross-examined the victim about both inconsistencies in the victim's testimony at the transfer hearing and his testimony at trial and inconsistencies regarding physical injury. Trial counsel affirmed that he argued the inconsistencies to the jury and that he argued a lack of DNA evidence connecting the Petitioner to the crime, as that was his standard practice when there was a lack of DNA evidence.

Trial counsel stated that he handled the Petitioner's appeal and that the speedy trial issue and the inconsistencies in the testimony were both issues raised on appeal. Trial counsel testified that he could not think of anything else he could have done that would have made a difference in this case. He acknowledged that the case hinged on the victim's credibility.

On cross-examination, trial counsel testified that he "guessed" the only medical or physical evidence discussed at trial was when he questioned the victim, the victim's mother, and Investigator Stanfill about the victim's having a physical injury. Trial counsel

stated he did not recall reviewing a psychological evaluation of the victim, but that he reviewed all the juvenile records obtained from the juvenile court. Trial counsel reaffirmed that he argued to the jury that the Petitioner was indicted three times because the Petitioner had alibis on the dates alleged in the first two indictments. Trial counsel stated he did not recall if the indictments and nolle prosequi orders were made exhibits at trial.

At the conclusion of the hearing, the post-conviction court denied the petition and cited its findings on the record. The post-conviction court credited trial counsel's testimony. Concerning the inconsistency between the indictment and the jury instructions, the post-conviction court found that "the documents speak for themselves." It explained, "[T]he indictment speaks for itself, and the jury charge speaks for itself as to the elements of the crime charged. It's very clear through the testimony of [the] Petitioner he knew what he was accused of and way back."

Additionally, the post-conviction court credited trial counsel's testimony that he fully availed himself of the open file discovery policy. It found that the Petitioner had disclosed "nothing . . . as to what a private investigator would have offered to the case or how it would have made any difference in the case." The post-conviction court found that the case's history "was brought out and disclosed to the jury[.]" stating trial counsel had questioned Investigator Stanfill over the multiple dismissed indictments. Moreover, the post-conviction court found that trial counsel made the jury aware of the lack of physical evidence stating, "[I]t's clear that there was no DNA offered here[.]" It stated that the Petitioner had given no indication of "what expert should have been hired and what they would have offered to the case" and that a "better outcome [was] not good enough for post-conviction."

Lastly, the post-conviction court again addressed the issue of the victim's psychological records. It explained that because these were juvenile mental health records and that the State had cited Tennessee Code Annotated sections 33-03-105 and 33-03-111, an in camera review of the records was mandatory. It reiterated its findings that the records were in no way exculpatory.

On March 28, 2022, the post-conviction court entered a written order incorporating its oral findings and denying the Petitioner's request for relief. This timely appeal followed.

II. ANALYSIS

On appeal, the Petitioner contends that the post-conviction court erred by denying his claims of ineffective assistance of counsel. Specifically, the Petitioner argues that trial counsel was ineffective by (1) failing to argue to the trial court that the indictment was inconsistent with the charged jury instructions, (2) failing to utilize impeachment evidence through the use of expert witnesses, (3) failing to properly investigate the case, (4) failing

to hire a private investigator and medical expert to review physical or DNA evidence, and (5) failing to utilize the victim's psychological records to impeach the victim. The State contends that the post-conviction court did not err by denying the Petitioner relief. We agree with the State.

Post-conviction relief is available when a “conviction or sentence is void or voidable because of the abridgment of any right guaranteed by the Constitution of Tennessee or the Constitution of the United States.” Tenn. Code Ann. § 40-30-103. Criminal defendants are constitutionally guaranteed the right to effective assistance of counsel. U.S. Const. amend. VI; Tenn. Const. art. I, § 9; *see Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980); *Dellinger v. State*, 279 S.W.3d 282, 293 (Tenn. 2009). When a claim of ineffective assistance of counsel is made under the Sixth Amendment to the United States Constitution, 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). “Because a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim.” *Goad v. State*, 938 S.W.2d 363, 370 (Tenn. 1996). The *Strickland* standard has been applied to the right to counsel under article I, section 9 of the Tennessee Constitution. *State v. Melson*, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

Deficient performance requires a showing that “counsel's representation fell below an objective standard of reasonableness,” despite the fact that reviewing courts “must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 688-89. When a court reviews a lawyer's performance, it “must make every effort to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's conduct, and to evaluate the conduct from the perspective of counsel at that time.” *Howell v. State*, 185 S.W.3d 319, 326 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 689). We will not deem counsel to have been ineffective merely because a different strategy or procedure might have produced a more favorable result. *Rhoden v. State*, 816 S.W.2d 56, 60 (Tenn. Crim. App. 1991). We recognize, however, that “deference to tactical choices only applies if the choices are informed ones based upon adequate preparation.” *Cooper v. State*, 847 S.W.2d 521, 528 (Tenn. Crim. App. 1992) (citing *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982)).

As to the prejudice prong, the petitioner must establish “a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.” *Vaughn v. State*, 202 S.W.3d 106, 116 (Tenn. 2006) (citing *Strickland*, 466 U.S. at 694). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694. “That is, the petitioner must establish that his counsel's deficient performance was of such a degree that it deprived him of a fair trial and called into question the reliability of the outcome.” *Pylant v. State*, 263 S.W.3d 854, 869 (Tenn. 2008) (citing *State v. Burns*, 6 S.W.3d 453, 463 (Tenn. 1999)).

The burden in a post-conviction proceeding is on the petitioner to prove allegations of fact by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(1); *see Dellinger*, 279 S.W.3d at 293-94. “Questions concerning the credibility of 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 v. State*, 40 S.W.3d 450, 456 (Tenn. 2001). On appeal, we are bound by the post-conviction court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. *Id.* Because they relate to mixed questions of law and fact, we review the post-conviction court’s conclusions as to whether counsel’s performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. *Id.* at 457.

A. Failure to Argue Inconsistency

The Petitioner contends that trial counsel was ineffective by failing to argue to the trial court that an inconsistency existed between the indictment and jury instructions. The argument related to this claim in the Petitioner’s brief is limited to a single sentence: “Mr. Golden asserts that the allegations contained in Count 1 of the Indictment were not consistent with the jury instructions as he was convicted of an offense for which he was not charged. (II, 20-21, III[,] exhibits 2-3)[.]” (Citations to record in original). The State counters that the Petitioner’s claim is meritless because the indictment properly placed him on notice of the charge against him and because any variance between the indictment and the jury instructions in this instance was harmless.

Appellate review is generally limited to issues that have been properly preserved and presented for appeal in a manner prescribed by Tennessee Rule of Appellate Procedure 27. *State v. Bristol*, 654 S.W.3d 917, 923-25 (Tenn. 2022). Accordingly, an appellate court “may decline to consider issues that a party failed to raise properly.” *Id.* (quoting *State v. Harbison*, 539 S.W.3d 149, 165 (Tenn. 2018)). Tennessee Rule of Appellate Procedure 27(a)(7)(A) mandates that the appellant’s brief includes an argument setting forth the appellant’s contentions, a statement of why these contentions require relief, citations to legal authorities, and references to the record. “Issues which are not supported by argument, citation to authorities, or appropriate references to the record” frustrates appellate review and “will be treated as waived in this court.” Tenn. Ct. Crim. App. R. 10(b).

Here, the Petitioner does not provide legal authority or supporting argument for his contention under this claim. The Petitioner does not indicate how the jury instructions were inconsistent with the indictment, nor does he cite any authority that would demonstrate that he is entitled to relief. The Petitioner has failed to properly raise this issue for appeal. Therefore, we consider the issue waived. Tenn. Ct. Crim. App. R. 10(b). Waiver notwithstanding, we conclude that the Petitioner’s issue is meritless.

Though the Petitioner's brief does not provide specifics for his claim, his testimony at the post-conviction hearing revealed that he was aggrieved by the fact that the trial court defined rape of a child in its instructions as sexual penetration "of" the victim, while the indictment alleged sexual penetration "with" the victim. He argued that this constituted a "constructive amendment or a failed variance[.]" A variance will not qualify as fatal "if the indictment sufficiently informs the defendant of the charges against him so that he may prepare his defense and not be misled or surprised at trial" and "if the variance is not such that it will present a danger that the defendant may be prosecuted a second time for the same offense." *State v. Moss*, 662 S.W.2d 590, 592 (Tenn. 1984); *see also State v. Mayes*, 854 S.W.2d 638, 640 (Tenn. 1993).

This indictment clearly put the Petitioner on notice that he was accused of raping a child. The grand jury's characterization of the sexual penetration occurring "with" the victim, as opposed to penetration "of" the victim, does not alter this conclusion. Trial counsel cannot be faulted for failing to raise a meritless claim. Moreover, the Petitioner conceded at the post-conviction hearing that he understood the charge against him when the case originated in juvenile court. The record does not preponderate against the post-conviction court's findings that it was "very clear" through the testimony of the Petitioner that he "knew what he was accused of" and that both the indictment and the jury instructions "sp[oke] for themselves" "as to the elements of the crime charged." In the instant case, the Petitioner failed to show that he was not sufficiently informed of the charges against him or that he was prejudiced by the alleged variance, and as such, no fatal variance existed. *See, e.g., Kenneth Watts v. State*, No. E2015-01151-CCA-R3-PC, 2016 WL 3410385, at *5 (Tenn. Crim. App. Apr. 27, 2016) (addressing a similar issue and concluding same). The post-conviction court did not err in determining that the Petitioner failed to establish his ineffectiveness claim in this regard.

B. Failure to Utilize Impeachment Evidence, Investigate, and Present Witnesses

On appeal, the Petitioner contends that trial counsel was ineffective by failing "to utilize impeachment evidence through the use of expert testimony and properly investigate the case." He submits that trial counsel was deficient by failing to "retain[] a private investigator and a medical expert to review any physical or DNA evidence." For support, the Petitioner argues that trial counsel "acknowledged that his office ha[d] an investigator on staff but did not utilize his service on this particular case." He argues that trial counsel failed to protect his rights and that trial counsel's deficiency in "adequately investigat[ing] and prepar[ing] his case for trial" resulted in prejudice because, but for this deficiency, the "trial would have resulted in an acquittal." The State responds that the post-conviction court properly denied relief because the Petitioner failed to present any evidence of what further investigation would have revealed and failed to call any witnesses at the hearing in support of his claims.

A petitioner alleging that trial counsel failed to discover, interview, or present witnesses in support of the petitioner's defense should present these witnesses at the post-conviction hearing. *Black v. State*, 794 S.W.2d 752, 758 (Tenn. 1990). Moreover, when a petitioner alleges that trial counsel was ineffective for failing to investigate, the petitioner must state with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. *See Owens v. State*, 13 S.W.3d 742, 756 (Tenn. Crim. App. 1999).

At the post-conviction hearing, the Petitioner explained that trial counsel should have called witnesses and should have argued that the State sought multiple indictments because he had alibis for the first two indictments issued. The Petitioner, however, failed to present any witnesses at the post-conviction hearing in this regard. Further, the Petitioner conceded that trial counsel questioned Investigator Stanfill regarding the multiple dismissed indictments due to the Petitioner's alibi. Trial counsel also testified to these facts and his testimony was credited by the post-conviction court. The post-conviction court found that trial counsel properly cross-examined and impeached witnesses, stating the multiple indictments were "brought out and disclosed to the jury."

Relative to the Petitioner's allegation that trial counsel should have further investigated the case and hired a private investigator and medical experts to review physical or DNA evidence, the Petitioner, likewise, failed to present any experts at the post-conviction hearing or state what information further investigation would have revealed and how it would have altered the outcome of trial. The Petitioner conceded that trial counsel informed the jury that there was no DNA evidence connecting the Petitioner to the victim and that it reached its verdict with that information. He also conceded that trial counsel cross-examined the victim about inconsistent statements made at the transfer hearing and about discrepancies regarding physical injuries. Trial counsel also testified to these facts. Trial counsel further testified that the District Attorney's open file policy was sufficient for discovery purposes and that any additional information needed for the defense could be obtained through Investigator Stanfill's testimony. The post-conviction court credited trial counsel's testimony and found that the Petitioner had disclosed "nothing . . . as to what a private investigator would have offered to the case or how it would have made any difference in the case." It also stated that "it[was] clear that there was no DNA offered here" and found that the Petitioner had given no indication of "what expert should have been hired and what they would have offered to the case" and that merely "a better outcome [was] not good enough for post-conviction."

As noted, the post-conviction court credited the testimony of trial counsel, and we conclude the record does not preponderate against this finding. Moreover, the Petitioner failed to present any witnesses, experts, or evidence that trial counsel could have discovered or used and, therefore, cannot establish prejudice. *See Black*, 794 S.W.2d at 758. The Petitioner is not entitled to relief on this issue.

C. Failure to Utilize Victim’s Mental Health Records

The Petitioner contends that trial counsel was ineffective for failing to utilize the victim’s psychological records for impeachment purposes. The State cites to the post-conviction court’s determination that the records were not exculpatory and argues that trial counsel was, therefore, not deficient as there was “no way for [him] to use the records.”

When a person is accused of sexually abusing a “service recipient who is a child,” that person shall not have access to the service recipient’s records unless “a court orders access” under Tennessee Code Annotated section 33-3-105(3). Tenn. Code Ann. § 33-3-111(a)(1). Disclosure of these records is permitted “[a]s a court orders, after a hearing, upon its determination that disclosure is necessary for the conduct of proceedings before it and that failure to make the disclosure would be contrary to public interest or to the detriment of a party to the proceedings.” *Id.* § 33-3-105(3).

Pursuant to these statutes, the post-conviction court conducted an in camera review of the victim’s mental health records and found they contained no exculpatory information. However, the sealed records are not a part of the record on appeal. It is well-settled that when a party seeks appellate review, it has a duty to prepare a record which conveys a fair, accurate, and complete account of what transpired with respect to the issues forming the basis of the appeal. *See State v. Ballard*, 855 S.W.2d 557, 560 (Tenn. 1993). Accordingly, the ruling of the post-conviction court that the victim’s mental health records did not contain exculpatory information must be presumed correct. *See State v. Oody*, 823 S.W.2d 554, 559 (Tenn. Crim. App. 1991). Given that we must presume that the post-conviction court’s ruling is correct, the Petitioner has failed to prove that trial counsel’s representation was deficient or prejudicial.

III. CONCLUSION

In consideration of the foregoing and the record as a whole, we affirm the judgment of the post-conviction court.

KYLE A. HIXSON, JUDGE