

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1996

FILED
January 28, 1997
Cecil Crowson, Jr.
Appellate Court Clerk

CHARLES WEBB,

Appellee,

VS.

STATE OF TENNESSEE,

Appellant.

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C.C.A. NO. 03001-9606-CC-00211

MONROE COUNTY

**HON. R. STEVEN BEBB
JUDGE**

(Post-Conviction)

**ON APPEAL FROM THE JUDGMENT OF THE
CRIMINAL COURT OF MONROE COUNTY**

FOR THE APPELLANT:

A. THOMAS MONCERET
603 Main Avenue, Suite 704
Knoxville, TN 37902

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General and Reporter

ROBIN L. HARRIS
Assistant Attorney General
450 James Robertson Parkway
Nashville, TN 37243-0493

JERRY N. ESTES
District Attorney General

STEVE WARD
Assistant District Attorney General
P.O. Box 647
Athens, TN 37303

OPINION FILED _____

AFFIRMED

DAVID H. WELLES, JUDGE

OPINION

The Petitioner appeals as of right pursuant to Rule 3 of the Tennessee Rules of Appellate Procedure from the trial court's denial of his petition for post-conviction relief. On July 17, 1991, the Petitioner was found guilty by a Monroe County jury of rape. The trial court sentenced him to eight (8) years as a Range I Standard Offender. In his petition for post-conviction relief, the Petitioner argues that he was denied effective assistance of counsel at trial for five reasons:

- 1) his trial counsel failed to object to the introduction of a statement given by the Petitioner to a member of the District Attorney General's office without the presence of counsel;
- 2) his trial counsel failed to move for a mistrial when a member of the jury announced during trial that he was an employee of the Department of Human Services (DHS);
- 3) his trial counsel failed to seek a mental evaluation or, alternatively, the trial court erred by failing to order an evaluation sua sponte;
- 4) his trial counsel failed to object to an improper jury instruction; and,
- 5) his trial counsel failed to present evidence to impeach the victim's testimony in the form of a letter written by the victim to the Petitioner after the commission of the crime.

After conducting an evidentiary hearing, the trial court denied the petition, finding that the Petitioner's trial counsel had provided effective assistance. We affirm the judgment of the trial court.

In response to the Petitioner's first four allegations, the State argues that they were "previously determined" and, therefore, are outside the proper scope of the post-conviction petition. See Tenn. Code Ann. § 40-30-111 (1990). In order to address the State's argument, we must examine the procedural history

of the Petitioner's case. Conrad Finnell represented the Petitioner at trial and through the motion for new trial. Upon the denial of the motion for new trial, the Petitioner obtained new counsel, Thomas Monceret. Monceret filed a notice of appeal arguing, among other issues, that the trial court committed plain error by admitting the Petitioner's statement to a member of the District Attorney General's Office, by failing to declare a mistrial when a member of the jury announced during trial that he was an employee of DHS, by trying the Petitioner when he was incompetent to stand trial, and by giving an improper jury instruction regarding rape.

A panel of this Court affirmed the Petitioner's conviction and sentence upon direct appeal. See State v. Charlie Webb, C.C.A. No. 03C01-9203-CR-77, Monroe County (Tenn. Crim. App., Knoxville, March 2, 1993). In affirming, the panel first noted that the record on appeal was not properly certified and was not, therefore, an accurate representation of the proceedings below. Thus, the Court deemed the issues waived. In addition, the panel held all issues other than the competency issue to be waived because the Petitioner neither objected at trial nor included the issues in his motion for new trial. In spite of the waiver, the Court proceeded to consider the issues other than the competency issue and found that the trial court had not erred.

The Petitioner, through his attorney, Thomas Monceret, then filed for post-conviction relief, alleging ineffective assistance of counsel for five reasons. Four of those reasons mirror the issues presented to this Court on direct appeal. While it is true that those four issues presented in the petition for post-conviction relief revolve around the same alleged errors complained of upon direct appeal,

this petition places the issues in a significantly different posture from the direct appeal. The direct appeal complained of the trial court's failure to correct the alleged errors sua sponte. This post-conviction petition complains of trial counsel's failure to avoid or to rectify the alleged errors at trial. Certainly the trial court's duty to correct alleged errors sua sponte is different from trial counsel's duty to avoid or to rectify such errors, particularly when, as here, the alleged errors were not brought to the trial court's attention at trial. In essence, although a trial court may not have erred by failing to notice and to correct trial counsel's alleged errors, trial counsel may have provided ineffective assistance by failing to avoid the errors in the first place. Given the markedly different posture of the issues presented in the present case, we conclude that the Petitioner's first four issues have not been previously determined, and we will therefore address their merits.

To facilitate our discussion of the issues, we begin with a brief summary of the pertinent facts. The offense of which the Petitioner was convicted, the rape of his fifteen-year-old step-daughter, allegedly occurred in June of 1989.¹ In May of 1990, the Petitioner spoke with DHS officials and a member of the Monroe County Sheriff's Department. Their meeting arose from an incident in which the Petitioner disciplined his step-daughter because of her behavior. At that meeting, the Petitioner recounted what he remembered of the incident which eventually formed the basis for his prosecution for rape. The Petitioner was then indicted on September 6, 1990, and was tried on July 17, 1991.

¹ It is the policy of this Court not to identify by name any minor victim of offenses such as rape. The Petitioner's step-daughter will be referred to throughout this opinion only as "the victim."

At trial, the victim testified that on a day in June of 1989, she entered the Petitioner's bedroom at their house to take medication for a kidney infection. While she was in the bedroom, the Petitioner removed her shirt and began to rub baby oil on her back. She asked the Petitioner what he was doing but received no reply. The Petitioner then forced her down on a bed, held her down and digitally penetrated her vagina. She told the Petitioner to stop, at which point he penetrated her with his penis. At the Petitioner's insistence, the victim visited a doctor's office shortly after the incident for a pregnancy test, but did not report the assault to medical officials at that time.

In May of 1990, after the Petitioner disciplined the victim for her behavior, the victim revealed the June 1989 incident. This revelation led to the Petitioner's interview with DHS employees and a Monroe County Sheriff's Department officer. A DHS employee and the law enforcement officer testified at trial concerning the Petitioner's statements during the interview. At the interview, the Petitioner explained that he had rubbed baby oil on the victim's back because she had a bad sunburn. Their conversation turned to sex and the victim confided in the Petitioner that she might be pregnant. The Petitioner insisted that the victim see a doctor for a pregnancy test. The victim told the Petitioner that she intended to mislead the doctor about her sexual experience if asked, to which the Petitioner responded that the doctor would easily be able to determine if she were a virgin. The victim inquired as to how the doctor would be able to determine that fact. The Petitioner then inserted his finger into the victim's vagina, explaining that the depth of the penetration revealed that she was not a virgin. In May of 1990, the Petitioner also gave a statement detailing this series of events to a member of the

District Attorney General's office. The statement was introduced by the State at trial.

The Petitioner did not testify at his trial. One of the Petitioner's daughters testified for the defense. Her testimony contradicted some aspects of the victim's testimony regarding the events leading up to the disciplining incident in May of 1990. At the conclusion of the trial, the jury found the Petitioner guilty of rape as charged in the indictment. After his conviction was affirmed on direct appeal, the Petitioner filed the present petition for post-conviction relief, alleging ineffective assistance of counsel at trial.

In determining whether or not counsel provided effective assistance at trial, the court must decide whether or not counsel's performance was within the range of competence demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930 (Tenn. 1975). To succeed on a claim that his counsel was ineffective at trial, a petitioner bears the burden of showing that his counsel made errors so serious that he was not functioning as counsel as guaranteed under the Sixth Amendment and that the deficient representation prejudiced the petitioner resulting in a failure to produce a reliable result. Strickland v. Washington, 466 U.S. 668, 687, reh'g denied, 467 U.S. 1267 (1984); Cooper v. State, 849 S.W.2d 744, 747 (Tenn. 1993); Butler v. State, 789 S.W.2d 898, 899 (Tenn. 1990). To satisfy this second prong the petitioner must show a reasonable probability that, but for counsel's unreasonable error, the fact finder would have had reasonable doubt regarding petitioner's guilt. Strickland, 466 U.S. at 695. This reasonable probability must be "sufficient to undermine confidence in the outcome." Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994).

When reviewing trial counsel's actions, this court should not use the benefit of hindsight to second-guess trial strategy and criticize counsel's tactics. Hellard v. State, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel's alleged errors should be judged at the time it was made in light of all facts and circumstances. Strickland, 466 U.S. at 690; see Cooper 849 S.W.2d at 746.

In his first issue, the Petitioner argues that his trial counsel was ineffective for failing to object to the introduction of the statement he made to a member of the District Attorney General's office. More specifically, the Petitioner contends that he was represented by counsel at the time he gave the statement and that the Assistant District Attorney knew he was represented by counsel. As a result, the Petitioner claims that the Assistant District Attorney recorded the statement in violation of Tennessee Disciplinary Rule 7-104.

The record indicates that the Petitioner came to the District Attorney General's office several times around May of 1990. The Petitioner's motive for visiting the office was to explain the sequence of events leading up to his meeting with the DHS and law enforcement officials. He eventually spoke with an Assistant District Attorney who recorded their conversation. That recording was introduced as evidence at the Petitioner's trial.

The Petitioner's argument ignores that his own statement to the Assistant District Attorney reveals that he had not, in fact, retained counsel at the time of the conversation. At the post-conviction hearing, the Petitioner's trial counsel, Conrad Finnell, testified regarding his decision not to object to the introduction of the statement. Finnell stated that he viewed the statement as an opportunity to

present the Petitioner's version of what had transpired without subjecting him to cross-examination. The Petitioner maintained his account of the digital penetration throughout the proceeding and insisted that he had done nothing wrong. Finnell was in the awkward position of having to present the Petitioner's side of the story, but knew that the Petitioner's beliefs might result in seriously damaging admissions on cross-examination. Furthermore, as this Court noted on direct appeal, the violation of a disciplinary rule in taking a statement may result in sanctions for the violator but does not necessarily merit exclusion of the statement at trial. See State v. Charlie Webb, C.C.A. No. 03C01-9203-CR-77, Monroe County (Tenn. Crim. App., Knoxville, March 2, 1993).

Having reviewed the record, we conclude that the Petitioner has failed to carry his burden of demonstrating that trial counsel's failure to object to the introduction of his statement constituted deficient representation. In addition, given that the Petitioner made similar admissions to DHS and law enforcement officials, he has not established any prejudice flowing from trial counsel's alleged error. Thus, the Petitioner's first issue lacks merit.

In his second issue, the Petitioner argues that his trial counsel was ineffective for failing to move for a mistrial when a member of the jury announced during trial that he was a DHS employee. The Petitioner contends that the "continued presence of an individual on a jury who may have preconceived prejudices about a particular case, and also may possess 'inside' information about a particular case" prejudiced him to the point of producing an unreliable result at trial.

The record reveals that just prior to a break in the trial, one of the jurors openly stated that he was a DHS employee. Neither defense counsel nor counsel for the State said anything in response to the juror's revelation. The trial court told the juror that his employment was irrelevant at that point. It appears that the DHS employee remained a member of the jury.

The post-conviction record, however, lacks any proof that the juror complained of actually possessed "inside" information or had preconceived prejudices against the Petitioner. In fact, the testimony at the post-conviction hearing reveals that the juror at issue had no personal contact with the Petitioner's case at all. Furthermore, the Petitioner's trial counsel, Conrad Finnell, testified that the presence of the DHS employee on the jury was a calculated move. Finnell believed that the juror, in light of his experience as a DHS employee, would be more likely to view the eleven-month delay between the occurrence of the incident and its report by the victim as an indication of weakness in the victim's allegations.

After a review of the entire record, we can only conclude that the Petitioner failed to establish either deficient representation with regard to the juror who was a DHS employee or prejudice stemming from the allegedly ineffective representation. The Petitioner's second issue is therefore without merit.

In his third issue, the Petitioner argues that his trial counsel was ineffective for failing to seek a mental evaluation prior to trial.² Alternatively, he argues that

² The record indicates that trial counsel filed a motion for a mental evaluation after trial but prior to sentencing, presumably to explore sentencing considerations. The trial court denied the motion.

the trial court erred by failing to order an evaluation sua sponte. He contends that his trial counsel was aware of a letter from a psychological examiner which described his mental status in such a way as to warrant a mental examination. The letter to which the Petitioner refers was written by David Caye, a licensed psychological examiner in Tennessee. Caye evaluated the Petitioner to determine his general mental status and his ability to defend himself in March of 1988 at the request of an attorney associated with one of the Petitioner's civil lawsuits. It appears from the record that the Petitioner had been involved in litigation surrounding a house fire and had experienced difficulties in dealing with a number of attorneys. The Petitioner eventually represented himself but soon consulted another attorney, the one who requested Caye's examination.

Caye concluded, in a letter detailing the results of the examination, that the Petitioner would be unable to represent himself at court due to the Petitioner's inability to maintain his emotional equilibrium and mental stability for more than a few hours at a time. The letter explained that the Petitioner had completed three tours of duty in Vietnam in the late 1960s and then transferred to a relatively isolated post at the South Pole. In 1983, the Petitioner's house burned, killing his wife and three other family members. Caye's letter noted that the Petitioner had "difficulties with concentration, confusion in thinking, depression, forgetfulness and inefficiency." Caye also stated that the Petitioner "feels isolated, apathetic, ineffective and distant from others." In conclusion, Caye diagnosed the Petitioner as suffering from Post Traumatic Stress Syndrome "with symptoms approaching near psychotic proportions."

Upon cross-examination at the post-conviction hearing, however, Caye admitted that the type of examination which he performed on the Petitioner was different from the type of examination used to determine competency to stand trial or sanity in criminal cases. Caye's evaluation "had to do with whether he could cooperate with his attorney" in the civil litigation arising from the house fire which killed his wife.

At the post-conviction hearing, the Petitioner's trial counsel testified that he was aware of Caye's letter. In explaining why he did not pursue a mental evaluation of the Petitioner prior to trial, he stated the following:

Mr. Webb did not impress me as a man that was mentally incompetent or suffering from any mental defect or disorder. Mr. Webb always had one story to tell me, and that was "I had no sexual faults or intent in reference to my step-daughter." He never deviated from that, his story never changed, and the man in talking with him didn't indicate, I knew he had a long history of a lot of trauma and a lot of trouble in his life and a war history and all those things, and "Nam," but he never exhibited to me any outward indication that he was not fully aware of his situation, was not fully aware of the charges or that he was mentally unsound in anyway [sic].

Trial counsel testified further that, in hindsight, he would have discussed the possibility of a mental evaluation with the Petitioner and left the decision to the Petitioner.

From a review of the record, we conclude that the representation provided by the Petitioner's trial counsel fell within the range of competence for attorneys in criminal cases. See Barr v. State, 910 S.W.2d 462, 464-65 (Tenn. Crim. App. 1995); see also Billy Lewis Wright v. State, C.C.A. No. 03C01-9401-CR-00020, Hamblen County (Tenn. Crim. App., Knoxville, December 15, 1994); Paul J. Keener v. State, C.C.A. No. 03C01-9410-CR-00374, Knox County (Tenn. Crim.

App., Knoxville, June 7, 1995); Leonard Keasling v. State, C.C.A. No. 03C01-9107-CR-216, Cocke County (Tenn. Crim. App., Knoxville, February 11, 1992). Trial counsel was aware of the statements in David Caye's letter but testified that, in working with the Petitioner to prepare for trial, he found no reason to pursue a mental evaluation because the Petitioner's demeanor was ordinary. The Petitioner presented no evidence that his behavior at the time of the offense or the time of the trial was such that his trial counsel should have pursued a mental evaluation. The Petitioner has therefore failed to carry his burden of demonstrating that his trial counsel's performance was constitutionally deficient.

Even if we were to assume that trial counsel's failure to request a mental evaluation prior to trial constituted deficient representation, the Petitioner has failed to establish any prejudice to satisfy the second prong of the Strickland test. The only scientific evidence regarding the Petitioner's mental condition came from David Caye's letter. Yet Caye's examination of the Petitioner occurred in March of 1988, fifteen months before the commission of the offense and nearly three and a half years before trial. Moreover, as we noted above, Caye's examination of the Petitioner was different from the type of evaluation used to determine competency to stand trial or sanity in criminal cases. The Petitioner offered absolutely no scientific evidence purporting to show his mental condition at the time of the offense or the trial. In fact, at the post-conviction hearing, David Caye specifically stated that he could not "testify as to his [the Petitioner's] mental state or capacity, or competence or incompetence at the time of trial." In addition, the only evidence from lay witnesses concerning the Petitioner's mental condition at the time of trial came from the Petitioner's trial counsel, whose testimony certainly does not call the Petitioner's mental condition into question.

We find no evidence in the record which suggests that the Petitioner was insane at the time of the offense or incompetent to stand trial. Nor has the Petitioner offered any proof concerning what the results of a pre-trial mental evaluation would have been. Accordingly, we conclude that the Petitioner has failed to demonstrate sufficient prejudice stemming from his trial counsel's failure to request a mental evaluation prior to trial to satisfy the Strickland standard.

We note that the Petitioner has cited a number of cases, including several from other jurisdictions, to support his argument that trial counsel should have pursued a mental evaluation. The cases cited, however, differ greatly from the case sub judice. For instance, the Petitioner relies heavily upon Gaile K. Owens v. State, C.C.A. No. 02C01-9111-CR-00259, Shelby County (Tenn. Crim. App., Jackson, March 25, 1994), rev'd in part, Owens v. State, 908 S.W.2d 923 (Tenn. 1995) and Paul Gregory House v. State, C.C.A. No. 03C01-9110-CR-00326, Union County (Tenn. Crim. App., Knoxville, March 28, 1994), rev'd, House v. State, 911 S.W.2d 705 (Tenn. 1995). Leaving aside the narrowness of the issues presented in those cases and the implications of the reversals of the decisions upon which the Petitioner relies, both Owens and House generally involve capital sentencing issues. It is relatively well established that the issue of mental condition takes on an especially significant role for the penalty phase of capital cases, and there is a heightened need in such cases for trial counsel to investigate and to present evidence of the defendant's mental health and history, particularly in the form of expert testimony, even if that evidence does not render the defendant insane or incompetent to stand trial. See, e.g., Cooper v. State, 847 S.W.2d 521, 529-32 (Tenn. Crim. App. 1992). Of course, the case at bar is rather different from a capital sentencing proceeding.

In addition, several of the cases from other jurisdictions cited by the Petitioner involve defendants with more evident and pronounced mental condition issues. For example, in Beavers v. Balkcom, 636 F.2d 114 (5th Cir. 1981), the defendant had actually been confined at a state mental institution twice, once for four and a half months and a second time for nine and a half months. Beavers, 636 F.2d at 115. Medical records from the periods of confinement revealed significant information regarding the defendant's mental health as it related to his charged offense. Id. at 116. Although the defendant asserted an insanity defense, his attorneys failed to present any of the scientific evidence relating to the defendant's mental condition. Id. at 115. In the case at bar, however, the Petitioner was never confined to a mental institution, nor did he assert an insanity defense at trial. Furthermore, the scientific information regarding the Petitioner's mental status contained in David Caye's letter did not relate specifically to the issues of competency to stand trial or sanity. Beavers is factually distinct from the present case.

In United States v. Fessel, 531 F.2d 1275 (5th Cir. 1976), the defendant was committed to a mental hospital only three months prior to the commission of the offense. Fessel, 531 F.2d at 1276. In addition, the defendant was found incompetent to enter a guilty plea initially. Id. at 1277. The court noted that there was little doubt as to the appropriateness of an insanity defense, stating that the sanity of the defendant was the only issue for the jury to consider. Id. at 1279. The defendant's counsel, however, did not investigate or present the testimony of the various doctors who had examined the defendant, nor did he request a state-funded psychological expert to assist in the preparation of an insanity defense. Id. at 1278-79. The case at bar differs from Fessel in much the same

way as it differs from Beavers v. Balkcom. The Petitioner was never confined to a mental institution, nor was his sanity or competency clearly at issue. We therefore believe the cases cited by the Petitioner to support his argument are distinguishable from the present case.

As an alternative contention in his third issue on appeal, the Petitioner argues that the trial court erred by failing to order a competency evaluation sua sponte. We agree that when it is believed that an accused is incompetent to stand trial, it is the duty of the trial court, even in the absence of a motion, to conduct a hearing to determine the competence of the accused and to order a mental evaluation, if necessary, to accomplish that purpose. See, e.g., Berndt v. State, 733 S.W.2d 119, 122 (Tenn. Crim. App. 1987). Upon appeal, we review the trial court's actions to determine "[w]hether a reasonable judge, situated as was the trial court judge whose failure to conduct an evidentiary hearing is being reviewed, should have experienced doubt with respect to competency to stand trial." Berndt, 733 S.W.2d at 122 (citation omitted).

Applying that standard to the case sub judice, we believe that the trial court did not err by failing to order a competency evaluation sua sponte. As we stated above, the only scientific evidence regarding the Petitioner's mental condition came from David Caye's letter. Caye's examination of the Petitioner, however, occurred three and a half years prior to trial and was significantly different from a competency or sanity evaluation. Moreover, the record contains no statement or occurrence at trial which would have led a reasonable judge to believe that the Petitioner was suffering from a mental deficiency or might be incompetent to

stand trial. Accordingly, we conclude that the Petitioner's third issue lacks merit in all respects.

In his fourth issue, the Petitioner argues that his trial counsel was ineffective for failing to object to an improper jury instruction. The trial court instructed the jury that the definition of rape was sexual penetration accomplished by force, coercion or fraud. Drawing from the pattern jury instructions, the trial court further instructed the jury that coercion "means the threat of kidnapping, extortion, force or violence to be performed immediately or in the future or the use of parental, custodial, or official authority over a child less than fifteen (15) years of age" (emphasis added). The Petitioner asserts that the victim was actually fifteen years old and argues that the "coercion" instruction prejudiced him by misleading the jury into considering the issue of coercion by parental authority.

Initially, we note that the Petitioner has waived this issue. Regardless of whether the trial court's instruction was improper, "to allow every error committed by the trial court to be recast in a post-conviction petition as an ineffective assistance of counsel allegation would be to subvert the limited purposes of the post-conviction procedure." Overton v. State, 874 S.W.2d 6, 12 (Tenn. 1994). Even if we were to address the merits of the Petitioner's issue, however, it would provide no basis for relief.

From the trial record, it is quite clear that the victim was, in fact, fifteen years old at the time of the alleged offense. The issue of "coercion by parental authority" is therefore inapplicable to the present case. The jury, however, was presented proof regarding the victim's age, and the language of the jury

instruction is unambiguous. In the absence of proof to the contrary, we must presume that the jury followed the trial court's instructions. See State v. Locke, 771 S.W.2d 132, 138-39 (Tenn. Crim. App. 1988) (citing Ford v. State, 101 Tenn. 454, 458, 47 S.W. 703, 705 (1898)); Johnson v. State, 596 S.W.2d 97, 104 (Tenn. Crim. App. 1979).

Moreover, the proof presented to the jury indicated that the rape was accomplished by force, not by coercion. It would be unsubstantiated speculation for us to conclude that the jury convicted the Petitioner on the basis of "coercion by parental authority." We are satisfied that the inapplicable instruction concerning "coercion by parental authority" more probably than not had no effect on the outcome of the Petitioner's trial. Thus, the Petitioner has failed to demonstrate sufficient prejudice arising from his trial counsel's failure to object to the instruction. His fourth issue lacks merit.

In his fifth and final issue, the Petitioner argues that his trial counsel was ineffective for failing to present evidence to impeach the testimony of the victim. More specifically, the Petitioner refers to a letter written by the victim to the Petitioner dated January 7, 1991, a year and a half after the offense but six months prior to trial. The letter was in the possession of an attorney who had represented the Petitioner in a civil matter, Robert Edwards. At the post-conviction hearing, the State stipulated that Edwards had mailed a copy of the letter to the Petitioner's trial counsel. The Petitioner's trial counsel testified that he vaguely remembered discussing the letter with Edwards, but had no recollection of seeing the letter.

The Petitioner focuses his argument on two sections of the letter, one stating “I tryed [sic] for so long to hate you to whip you out of my head but it doesn’t work that way,” and the other stating “I have bulit [sic] up respect for you over the years.” He also points out that the victim signed the letter with “Love.” The Petitioner contends that these statements would have led the jury to question the victim’s credibility.

The Petitioner’s argument, however, ignores other sections of the letter which are rather critical of him. For instance, the victim wrote, “My mother has paid for her mistake. You haven’t. I hate it for you Charles Webb.” The victim goes on to state, “All I ever wanted was a family life you know the ones like on T.V. but never have you ever given that to me.” In addition, the victim signed the letter “Love Always” but crossed out the “Always.”

Furthermore, the Petitioner’s trial counsel testified at the post-conviction hearing that his cross-examination of the victim and the victim’s mother effectively called the victim’s credibility into question. Trial counsel also offered proof which contradicted aspects of the victim’s testimony. Given that trial counsel had no recollection of the letter, he was unable to offer a specific reason for not presenting it at trial. Upon seeing the letter at the post-conviction hearing, however, trial counsel did testify that he doubted the letter would have aided the Petitioner’s case. We agree. From a review of the entire record, we conclude that the Petitioner has failed to establish a reasonable probability that the admission of the letter at trial would have led the jury to have reasonable doubt regarding his guilt. This issue lacks merit because the Petitioner did not carry his

burden of showing sufficient prejudice flowing from his trial counsel's alleged error.

For the reasons set forth in the discussion above, we find that the Petitioner failed to demonstrate that he is entitled to relief based on ineffective assistance of counsel at trial. Therefore, we affirm the judgment of the trial court.

DAVID H. WELLES, JUDGE

CONCUR:

GARY R. WADE, JUDGE

JERRY L. SMITH, JUDGE