

Circuit Court for Montgomery County
Case No. 111360C

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 725

September Term, 2020

POST-CONVICTION

RICHARD M. MILLER

v.

STATE OF MARYLAND

Nazarian,
Leahy,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: March 1, 2021

The application of Richard M. Miller for leave to appeal from a denial of petition
for post-conviction relief, having been read and considered be, and is hereby, denied.

**APPLICATION FOR LEAVE TO
APPEAL DENIED.**

**ANY COSTS TO BE PAID BY
APPLICANT.**

APPENDIX

B

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

RICHARD MILLER,

Petitioner

v.

STATE OF MARYLAND

Respondent.

Case No. 111360-C

MEMORANDUM OPINION AND ORDER

Richard Miller (hereafter "Petitioner") filed a Bifurcated Petition for Post Conviction Relief and a Supplemental Petition for Post Conviction Relief in Case No. 111360-C (Docket Nos. 110 and 111) on June 26, 2019, pursuant to Md. Code Ann., §§ 7-101 *et seq.*, and Maryland Rule §§ 4-401 *et seq.* Petitioner was represented by D. Scott Whitney, Esq. of the Office of the Public Defender at oral argument, which occurred on October 4, 2019. The matter was taken under advisement.

BACKGROUND

On November 6, 2008, Petitioner was convicted of Attempted First-Degree Sex Offense, Attempted Kidnapping, and First-Degree Assault. At trial, Petitioner was represented by Richard Basile, Esq. On December 17, 2008, the Honorable Judge McGann imposed a sentence of Life for First Degree Sex Offense, 30 years for Attempted Kidnapping to run consecutively with Count 1, and 25 years for First Degree Assault, to run consecutively to Counts 1 and 2.

ENTERED

AUG 27 2020

Clerk of the Circuit Court
Montgomery County, Md.

I. Relevant Procedural History

In November 2008, Petitioner appeared before the Honorable Terrence McGann for trial. At trial, Petitioner was represented by Richard Basile, Esq. A jury found Petitioner guilty of Attempted First Degree Sex Offense, Attempted Kidnapping, and First Degree Assault. In December 2008, Judge McGann sentenced Petitioner.

On January 16, 2009, Mr. Basile filed Petitioner's Application for Sentence Review by a three-judge panel. On September 2, 2009, a three-judge panel affirmed Petitioner's sentence. In February of 2009, Mr. Basile filed Petitioner's Request for Sentence Reduction. In June of 2010, Petitioner filed a motion for leave to file a belated appeal, which had been denied.

On July 11, 2011, Petitioner, acting *pro se*, filed a petition pursuant to the Maryland Post Conviction Procedure Act, complaining that he was denied effective assistance of trial counsel, and that trial counsel rendered ineffective assistance by failing to file a notice of appeal. On June 18, 2012, Assistant Public Defender David Russel, Esq. entered his appearance on Petitioner's behalf.

On December 12, 2012 Petitioner, through counsel, filed a supplemental petition for post-conviction relief, addressing the claim that trial counsel failed to note an appeal. The State responded to this petition, stating that the evidence that would be presented at Petitioner's post-conviction hearing would not support Petitioner's claims of error. On March 18, 2013, Petitioner filed a motion to withdraw his post-conviction petition, which was granted by the Honorable Judge Robert Greenberg on March 21, 2013.

On October 26, 2015, Petitioner filed for post-conviction relief, again arguing on the claim that trial counsel failed to note an appeal. On April 1, 2016, a hearing was held

on the petition. On May 18, 2016, Judge Greenberg denied the motion for post-conviction relief and ruled that any subsequent motion should be filed by counsel, and should such a motion be filed by counsel, Judge Greenberg would be willing to reconsider his ruling. On August 9, 2016, Petitioner filed a motion to withdraw his petition, which was granted by the Court.

On October 26, 2016, Petitioner filed a conditional supplemental petition for post-conviction relief. On November 3, 2016, Petitioner filed a bifurcated petition for post-conviction relief. Both motions were denied without prejudice.

On December 13, 2018, Petitioner filed a petition for post-conviction relief alleging ineffective assistance of counsel. On June 26, 2019, Petitioner also filed a Bifurcated Petition for Post-Conviction Relief and Conditional Supplemental Petition for Post-Conviction Relief.

STANDARD OF REVIEW

The Maryland Uniform Post-Conviction Procedure Act ("UPPA") provides for an independent and collateral inquiry into the validity of a conviction and/or sentence. *See Mosley v. State*, 378 Md. 548, 559-60 (2003). In order to proceed on a collateral challenge to a sentence, a petitioner must allege that the sentence imposed violates the Constitution of the United States or the Constitution or laws of the State; the court lacked jurisdiction to impose the sentence; the sentence exceeds the maximum allowed by law; or the sentence is otherwise subject to collateral attack on a ground of alleged error that would otherwise be available under a writ of habeas corpus, writ of coram nobis, or other common law or statutory remedy. Md. Code, Crim Proc. 7-102. A sentence that is within the maximum allowed by law and not challenged as an allegation against the fairness of

the trial is generally not grounds for post-conviction relief. See *Austin v. Dir. Patuxent Inst.*, 237 Md. 314, 317 (1965); *Fisher v. Warden of Md. House of Correction*, 225 Md. 642, 643-44 (1961).

A petitioner seeking post-conviction relief contending that counsel's assistance was so defective as to invalidate his conviction or sentence must show two required elements. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed to the defendant by the Sixth Amendment. *Id.* Defendant must show that counsel's representation fell below an objective standard of reasonableness. *Id.* Judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689. Defense counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Id.* at 690. Defendant bears a heavy burden to establish deficient performance, and must overcome the presumption that, under the circumstances, the challenged action *might* be considered sound trial strategy. *Harris v. State*, 3030 Md. 685, 697 (1985).

The second element required to show a claim of ineffective assistance of counsel is that the attorney's deficient performance was prejudicial. *Strickland*, 466 U.S. at 690. This requires demonstrating that counsel's errors were so serious as to deprive defendant of a fair trial. *Id.* In order to establish prejudice, defendant must establish that there is a substantial possibility that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Oken v. State*, 343 Md. 256, 284 (1996). A proper analysis of prejudice, however, should not focus solely on outcome determination, but

should consider "whether the result of the proceeding was fundamentally unfair or unreliable." *Id.*

DISCUSSION

Was the Petitioner denied effective assistance of counsel under the Sixth Amendment of the U.S. Constitution and Article 21 of the Maryland Declaration of Rights?

In Petitioners' original Petition for Post Conviction Relief filed on his behalf through counsel, Petitioner raises five allegations of error that relate to perceived deficiencies of trial counsel throughout the course of the trial. Petitioner's allegations surround five areas: trial counsel failed to confer with Petitioner regarding withdrawing a NCR plea, trial counsel failed to hire an expert to render an opinion on PCP intoxication, trial counsel failed to obtain and introduce evidence of Petitioner's hospitalization for PCP intoxication, trial counsel failed to request lesser-included offenses, and trial counsel failed to object to the giving of a flight jury instruction.

After Petitioners' counsel filed the Petition for Post Conviction Relief, Petitioner filed a supplemental Petition that added additional claims of error to the original Petition. At the October 4, 2019 Hearing, these additional issues were narrowed down into the two issues: that trial counsel failed to note an Appeal even though Petitioner wanted an Appeal, and that trial counsel provided ineffective assistance of counsel by failing to object to two *voir dire* questions, which Petitioner believed allowed potential jurors to improperly exclude themselves from consideration for the jury panel.

The *Strickland* two-prong test, described above, applies to ineffective assistance of counsel claims. The burden of establishing deficient representation of counsel under

the first prong is a "heavy burden." *Harris v. State*, 303 Md. 685, 687 (1985). There is a "strong presumption" that trial counsel acted within the range of professional assistance, and the burden to overcome that presumption is placed squarely on the challenger. *Strickland*, 466 U.S. at 694-95. Petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment." *Harrington v. Richter*, 131 S.Ct. 770, 787 (2011). In addition to the burden of establishing deficient performance, the challenger must show that there was prejudice that resulted from such performance.

In Maryland, the establishment of the prejudice portion of the test requires that the petitioner demonstrate that there is a "substantial possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bowers v. State*, 320 Md. 416, 426 (1990). This requires establishing more than "some conceivable effect on the outcome of the proceeding." *Harris*, 303 Md. at 700. It must be demonstrated that the errors are "so serious as to deprive the defendant of a fair trial." *Harrington*, 131 S.Ct. 770 at 787-88. As will be discussed in more detail below, Petitioner has failed to carry the heavy burden imposed upon him to show that his trial counsel was ineffective under the first prong of the *Strickland* test.

a. Does the trial counsel's decision to withdraw NCR plea amount to an action so deficient as to constitute ineffective assistance of counsel?

Petitioner argues that trial counsel's decision to withdraw the not criminally responsible plea was against Petitioner's wishes, and therefore amounts to ineffective assistance of counsel that was prejudicial to Petitioner's defense. Petitioner argues that trial counsel did this without formally conferring with Petitioner. Petitioner alleges that

by doing this, trial counsel "took Petitioner's right to withdraw the plea from the Petitioner." According to Petitioner, he wanted to continue with the plea of not criminally responsible because he felt that his PCP intoxication on the day of the offense caused him to lack the ability to be able to conform his conduct to the requirements of the law.

At Petitioner's Post Conviction hearing, trial counsel testified that a formal evaluation of the Petitioner was conducted by four experts within the Department of Health and Mental Hygiene. According to the Report, Petitioner was deemed competent to stand trial. Furthermore, the Report concluded that at the time of the offense, Petitioner was competent and therefore criminally responsible. The Report did note Petitioner's history of PCP dependence.

Trial counsel testified that after receiving the Report, he had a very short timeframe in which to discuss the results with the Petitioner. Because of this, trial counsel recalled that very shortly after receiving the Report, he met with Petitioner where Petitioner was incarcerated and thoroughly went through the Report with his client (on direct examination, trial counsel recalled reading the Report to the Petitioner). After going through the results of the Report with his client, trial counsel testified that he told Petitioner that there was no evidence to support the NCR plea and that the plea should be withdrawn. Trial counsel stated that Petitioner understood this and agreed to withdraw the NCR plea and replace it with a plea of not guilty.

Furthermore, the transcript of the proceeding as well as testimony of trial counsel at the Post Conviction Hearing support the fact that the NCR plea was withdrawn in open court in the presence of the Petitioner. Trial counsel testified that at the time the NCR plea was withdrawn, Petitioner did not do anything that would indicate that he opposed

the decision. The transcript of this proceeding also indicate that Petitioner did not do anything to object the withdrawal of the NCR plea.

As stated before, under the *Strickland* test, there is a heavy burden placed upon those arguing ineffective assistance of counsel. In his Petitions, as well as at the Post Conviction Hearing, Petitioner merely alleges the following: that he did not remember having the conversation with his attorney about the competency report, that he never knew that the NCR plea was being withdrawn, and that he did not know that he was the one who could make the decision to withdraw the NCR plea. Petitioner argues that if he had known he could choose not to withdraw the NCR plea, he would not have done so as he believed that he was not competent at the time of the offense because he was so consumed by PCP.

Petitioner's arguments fail to meet the strict standard set forth by *Strickland*. In order to succeed under the first prong of the *Strickland* test, Petitioner must demonstrate that there is a "substantial possibility that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Bowers v. State*, 320 Md. 416, 426 (1990). Because four experts within the Department of Health and Mental Hygiene concluded that Petitioner was in fact criminally responsible, while noting Petitioner's dependency on PCP, Petitioner cannot demonstrate that the result of the proceeding would have been different. Further, the Court agrees with the State's argument that because there was no evidence to support the NCR plea, Petitioner has not suffered prejudice by this plea being withdrawn.

b. Does the trial counsel's decision to not hire an expert on PCP intoxication amount to an action so deficient as to constitute ineffective assistance of counsel?

During the trial, trial counsel made several attempts to interview Dr. Cerise Vablais, one of the doctors who evaluated Petitioner; but the trial court was not satisfied that Dr. Vablais could render an opinion on PCP intoxication since it was not her expertise. No expert on PCP intoxication was introduced during the trial. Petitioner argues that trial counsel's failure to hire an expert in the field of PCP Ingestion and PCP intoxication amounts to ineffective assistance of counsel, because had such an expert been employed, the jury would have heard evidence about the use and effects of PCP, which would have altered the outcome of the trial.

At the Post Conviction Hearing, trial counsel testified that he was unable to hire another expert to testify on this issue because he had no money to do so. Trial counsel explained that Petitioner's girlfriend was taking from her 401k to pay trial counsel, and there were not enough funds to hire an expert. In response to this, Petitioner claimed that there were many experts on PCP addiction that his attorney could have gone to, and that there was money to pay for such an expert. Petitioner alleges that the failure to hire an expert on PCP addiction severely prejudiced Petitioner's case because trial counsel was unable to provide adequate expert testimony to negate the specific intent of the crimes charged.

When examining this claim under the two-pronged test of *Strickland*, it is clear that Petitioner failed to satisfy either prong. Petitioner fails to persuasively argue that trial counsel's failure and inability to hire an expert on PCP addiction was so deficient as to amount to ineffective assistance of counsel. Additionally, Petitioner has failed to put forth any evidence that such expert testimony would have been helpful to his case, making it impossible to establish prejudice.

- c. Does trial counsel's decision to not obtain and introduce evidence of Petitioner's hospitalization for PCP intoxication amount to an action so deficient as to constitute ineffective assistance of counsel?**

Petitioner argues that trial counsel also rendered ineffective assistance of counsel by failing to obtain the medical records from Prince George's Hospital, which would have shown that Petitioner was transported and treated at that hospital for an "acute or extremely severe case of PCP intoxication." Petitioner argues that this information was crucial to the Voluntary Intoxication defense that Petitioner put on during trial. Petitioner further claims that had this evidence been introduced at trial, the jury would have been able to consider evidence that Petitioner had been treated for PCP intoxication, and would have supported the argument that Petitioner was under the influence of PCP at the time of the offense.

In his Petition, Petitioner concedes that this fact alone is not enough to render trial counsel ineffective but requested that this Court consider this in addition with the other claims of error in the Petition. As discussed previously, the standard of establishing ineffective assistance of counsel is that set forth in the *Strickland* case, and requires that the Petitioner show that the performance of counsel was deficient and that such deficiency prejudiced the Petitioner. Accordingly, the Court finds that the Petitioner failed to establish either prong with regard to trial counsel's failure to introduce evidence related to Petitioner's hospitalization for PCP addiction.

- d. Does trial counsel's decision not to request lesser included offenses amount to an action so deficient as to constitute ineffective assistance of counsel?**

Petitioner also claims that trial counsel's failure to request a lesser included instruction to all of the greater included instructions for all of the greater specific intent crimes amounts to ineffective assistance of counsel that entitles Petitioner to relief. Petitioner supports this claim by arguing that his voluntary intoxication, while not a defense to a criminal charge, may negate the requisite mental state required for a crime. Petitioner also argues that for the specific intent crimes with which he was charged (specific intent sex crimes, attempted kidnapping, first degree assault), voluntary intoxication "may negate guilt by mitigating the specific intent of the greater offense to the lesser included offenses." At the Post Conviction Hearing, trial counsel was unable to provide testimony on this claim as he could not recall being asked about this issue at trial and was not provided with a copy of the Petition before the Hearing.

The Court in *Strickland* held that "judicial scrutiny of counsel's performance must be highly deferential," finding that a "fair assessment of attorney 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 689-90. Here, the Court finds that Petitioner was unable to "overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.* at 690 (quoting *Michel v. Louisana*, 350 U.S. 91, 101 (1984)). At trial, Petitioner's defense was voluntary intoxication. If trial counsel had requested the lesser-included offenses, which are general intent crimes, that defense would not have applied, and Petitioner would still stand convicted of some charge. Therefore, Petitioner was not only unable to demonstrate that

the failure to request lesser-included offenses was unreasonable and deficient conduct, but he was also unable to demonstrate that he suffered prejudice because of this decision.

e. Does trial counsel's decision not to object to a flight jury instruction amount to an action so deficient as to constitute ineffective assistance of counsel?

At trial, the Court gave the jury a flight instruction, which stated that a person's flight after the commission of a crime may be considered as evidence of guilt. Petitioner argues that trial counsel did not even attempt to object to the giving of this instruction, either before or after it had been given. Petitioner argues that this has hurt his case because there was no evidence of flight. At the Post Conviction Hearing, Petitioner maintained that he merely left the scene "like a normal person would," and did not flee. Petitioner argues that his departure from the scene of the crime is not the same as flight and therefore the giving of this instruction was not supported by evidence. Petitioner also argues that this caused him prejudice because it allowed the State to indicate that Petitioner had fled the scene because of his consciousness of guilt at the time of the offense. At the Post Conviction Hearing, trial counsel testified that he could not recall a flight instruction being given at the trial.

Whether Petitioner left the scene based on consciousness of guilt or for an innocent reason is a question for the jury to decide. Therefore, the Court finds that trial counsel's decision not to object to this jury instruction falls within the wide range of discretion afforded to him. *Strickland*, 466 U.S. at 689. Petitioner has also failed to provide the Court with any argument as to why the failure to object to this jury instruction prejudiced Petitioner or how the outcome of the trial would have been different had trial counsel objected to this jury instruction.

f. Does trial counsel's failure to note an Appeal amount to an action so deficient to constitute ineffective assistance of counsel?

Petitioner argues that trial counsel was also ineffective for failing to note an appeal in the case. Petitioner states that at the conclusion of trial, he requested that trial counsel submit "all" of the post trial filings – including an appeal. Petitioner states that he never told his trial counsel that he did not want to file an appeal and was surprised to hear that an appeal had never been filed in this case. Petitioner argues that the failure to honor his request to note an appeal on his behalf violated his right to effective assistance of counsel, guaranteed by the Sixth and Fourteenth Amendments of the U.S. Constitution, and the Maryland Declaration of Rights.

At the Post Conviction Hearing, trial counsel testified that some time after sentencing, but within the 30-day timeframe to file an appeal, he met with Petitioner to go into detail about Petitioner's post-trial rights. Trial counsel testified that he recalls this conversation happening where the Petitioner was incarcerated, sometime after Petitioner was sentenced because this was a long conversation that would not have been able to occur in the courtroom directly after the sentencing hearing. Trial counsel testified that during this lengthy conversation, he told Petitioner that the real issue was the severity of the sentence rather than Petitioner's guilt. Trial counsel stated that based on the overwhelming evidence presented on Petitioner's guilt, it did not appear that there would be success if the case went to appeal. Because of this, trial counsel advised Petitioner that it would not be logical to file an appeal, and instead told Petitioner that he should pursue a three-judge review panel as it would more likely lead to a reduction of Petitioner's sentence.

According to trial counsel, at the conclusion of this conversation, Petitioner agreed that an appeal would not be successful and agreed that an appeal should not be filed. At the Post Conviction Hearing, Petitioner testified that he did not recall having this conversation with trial counsel. Petitioner could only vaguely remember meeting with trial counsel at the detention center, and states that everything that happened after sentencing is "just a blur."

Petitioner fails to provide the Court with adequate evidence that there was an understanding that trial counsel would file an appeal on his behalf. The Court finds trial counsel's testimony at the Post Conviction Hearing about the lengthy conversation he had with Petitioner on how an appeal would be futile convincing. Trial counsel also testified that the real issue after trial was the severity of Petitioner's sentence, and that he suggested to Petitioner that requesting a three-judge panel would be Petitioner's best chance of lowering that sentence. The Record supports trial counsel's testimony, showing that Petitioner filed an application for review of sentence by a three-judge panel on January 16, 2009 at Docket Entry No. 43. The hearing on this was held on September 2, 2009, and a three-judge panel affirmed Judge McGann's sentence on December 17, 2008 at Docket Entry No. 49.

g. Does trial counsel's failure to object to certain voir dire questions amount to an action so deficient to constitute ineffective assistance of counsel?

Lastly, Petitioner argues that trial counsel's failure to object to a two-part *voir dire* question during jury selection amounted to ineffective assistance of counsel, as these questions caused the Petitioner to suffer prejudice. Petitioner believes that the two questions, which related to potential juror's personal experiences with the criminal justice

prospective jurors were able to obey instructions given by the court in spite of their personal views.” *Id.* at 20 (citing *Witt*, 469 U.S. at 424).

In the instant case, there was no objection made to the *voir dire* question at issue. Further, in examining this claim under the first prong of the *Strickland* test, the Court cannot find that trial counsel’s failure to object to the *voir dire* question fell below an objective standard of reasonableness. As previously stated, Petitioner carries a heavy burden of proving that trial counsel did not act within the “wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. As Petitioner stated at the Post Conviction Hearing that he could not recall the allegations made regarding the *voir dire* question and requested that the Court rely on *Dingle* in making its decision, the Court finds that Petitioner failed to carry the heavy burden of showing that trial counsel was ineffective. Further, even if trial counsel was ineffective in respect to this claim, Petitioner has not put forth arguments that could show that trial counsel’s failure to object to the *voir dire* question prejudiced Petitioner’s case.

CONCLUSION

Petitioner is not entitled to modification or vacation of his sentence. Accordingly, the Petition for Post-Conviction Relief is hereby **DENIED**.

ORDER


Upon consideration of Petitioner Richard Miller’s Petition for Post-Conviction Relief, the State’s response thereto, a full hearing having been conducted and upon consideration of arguments presented, for the reasons set forth in the accompanying Opinion, it is this 24th day of **August 2020**, hereby

system, allowed the potential jurors to improperly exclude themselves from consideration, and that trial counsel should have objected to these questions. At the Post Conviction Hearing, both Petitioner and trial counsel could not recall the specific *voir dire* questions that Petitioner objected to. Petitioner relied on the case *Dingle v. State*, 361 Md. 1 (2000) in arguing that the *voir dire* questions were improper.

In *Dingle*, the Court of Appeals was faced with deciding whether a series of two-part questions relating to whether potential jurors (or their family members or close personal friends) had been victims of crime, and whether that experience would affect that potential juror's ability to be impartial during trial, was improper. The petitioner in *Dingle* had objected to the two-part format because it resulted in a "jury in which the venire persons themselves, by 'unilateral decision,' determined their fitness to serve on the jury." *Dingle*, 361 Md. at 1. The petitioner also argued that this type of question deprived him of information "relevant and critical to the exercise of his challenges for cause." *Id.*

In *Dingle*, defense counsel had objected to the two-part question that was presented to the prospective jury, but the objection was overruled. The Court of Appeals reversed this decision, holding that the trial court erred in overruling the objection. In so holding, the Court of Appeals found that when a prospective juror is challenged on the basis of his or her statement regarding partiality, "the court simply can not rely merely on what the venire person says. Moreover, the court is well equipped to make such factual determinations and, in fact is required to do so." *Id.* at 19 (citing *Wainwright v. Witt*, 469 U.S. 412, 428 (1985)). Further, the Court of Appeals held that the *voir dire* question at issue was "substantively and procedurally inadequate for failure to identify the state of mind necessary for striking a venire person for cause and to determine whether the

ORDERED, that the Petition for Post-Conviction Relief be, and the same hereby
is, DENIED.


RICHARD E. JORDAN, Judge
Circuit Court for Montgomery County, Maryland