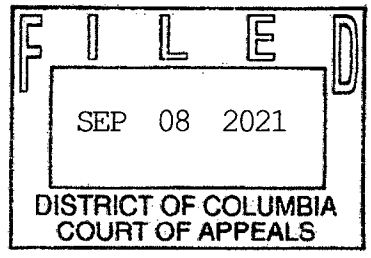
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 19-CO-679

EUGENE KEVIN PUGH, APPELLANT

v.

UNITED STATES, APPELLEE.



Appeal from the Superior Court
of the District of Columbia
(CF1-11370-07)

(Hon. Frederick H. Weisberg, Trial Judge)

(Submitted November 12, 2020 Decided September 8, 2021)

Before BLACKBURNE-RIGSBY, *Chief Judge*, THOMPSON, *Associate Judge*, and NEBEKER, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant Eugene Kevin Pugh appeals the trial court's denial of his post-conviction supplemental motion alleging ineffective assistance of trial counsel, D.C. Code § 23-110 (2012 Repl.), and pro se claims of ineffective assistance and actual innocence, D.C. Code § 22-4135 (2012 Repl. & 2021 Supp.). We affirm.

I.

On direct appeal, this court affirmed appellant's conviction of first-degree murder and other related offenses. *Pugh v. United States*, No. 09-CF-0869, Mem. Op. & J. at 1-2 (D.C. Apr. 22, 2011) (concluding there was no error in denying appellant's motion to suppress or reversible error in overruling objections raised during the prosecution's closing argument). After the direct appeal, appellant pursued post-conviction relief, filing a pro se motion asserting ineffective assistance of trial counsel and actual innocence. In support of his claim of actual innocence, appellant asserted that a pre-trial disclosure, a "crime stoppers tip," was "new

evidence" because he was unaware of it until after his direct appeal. Appellant then asserted that trial counsel provided ineffective assistance because he failed to investigate the crime stoppers tip. However, post-conviction counsel represented to the court that after investigating the pro se claims they would no longer be pursued; therefore, the trial court determined the claims were withdrawn.

Post-conviction counsel filed a supplemental motion for relief, asserting trial counsel was ineffective for failing to cross-examine Valarie Olds, a prosecution witness who identified appellant as the murderer, and for calling Thomas Duvall as a defense witness. With regard to Ms. Olds, appellant argued that trial counsel should have, on cross-examination, pressed Ms. Olds about her initial statement to the police, where she denied having any knowledge about the identity of the shooter. With respect to Mr. Duvall, appellant argued that calling Mr. Duvall corroborated Ms. Olds's testimony that appellant was at the scene; thereby inculpating him. Appellant also filed a motion requesting a hearing on his § 23-110 motion.

On July 30, 2019, the trial court denied appellant's § 23-110 motion without a hearing. As mentioned, the trial court determined appellant's initial pro se claims of ineffective assistance and actual innocence were withdrawn because post-conviction counsel represented, without explanation, that his investigation would not permit pursuing the claims. Counsel did not argue the pro se claims in the supplemental motion, and no evidence was presented to support them. The trial court then denied the arguments asserted in the supplemental motion as being procedurally barred as appellant failed to raise the claims on direct appeal. The trial court further denied the claims on the merits and determined that trial counsel was not deficient and that appellant did not suffer any prejudice. This appeal followed.

II.

On appeal appellant argues that (1) his § 23-110 supplemental motion was not procedurally barred; (2) trial counsel was ineffective for failing to press Ms. Olds on cross-examination and for presenting inculpatory testimony from Mr. Duvall; (3) the trial court improperly determined that he withdrew his pro se ineffective assistance of counsel claim — "crime stoppers tip" — and actual innocence claim; and (4) a hearing on his pro se claims was warranted. We affirm the denial of the supplemental § 23-110 motion, finding no prejudice, and affirm the trial court's determination that appellant's pro se claims of ineffective assistance and actual innocence were either withdrawn or abandoned.

Section 23-110(a) of the D.C. Code allows a defendant to move to set aside

or correct a sentence that was imposed in violation of statutory or constitutional provisions. (2012 Repl.). However, a § 23-110 motion is procedurally barred where appellant "did not raise a claim of ineffective assistance of counsel under that statute and he 'demonstrably knew or should have known of the grounds for' the claim on direct appeal." *St. John v. United States*, 227 A.3d 141, 144 (D.C. 2020) (quoting *Shepard v. United States*, 533 A.2d 1278, 1208 (D.C. 1987)). The procedural bar can be overcome if appellant is able to show "cause for failure to raise such claim in direct appeal and 'actual prejudice resulting from the errors of which [appellant] complains.'" *Id.* (quoting *United States v. Frady*, 456 U.S. 152, 167-68 (1982)). Our assessment of the procedural posture of ineffective counsel claims is "inextricably linked to the merits of ineffective assistance of counsel." *Id.* Nevertheless, "it is unnecessary to determine whether appellant has shown cause if this court finds no prejudice to appellant." *Id.* at 145 (citing *Frady*, 456 U.S. at 168) (internal brackets and quotation omitted).

For this court to find prejudice, appellant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *Strickland v. Washington*, 466 U.S. 668, 684 (D.C. 1984) – in other words, that "the likelihood of a different result [was] substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 112 (2011). There is a "critical difference between reasonable 'probability' and 'possibility' of a different outcome." *See, e.g.*, *Benton v. United States*, 815 A.2d 371, 374 (D.C. 2003) (citing *Strickler v. Greene*, 527 U.S. 263, 291 (1999)). A reasonable probability, while more than a mere possibility, does not require that counsel's conduct "more likely than not" altered the outcome. *Id.* (quoting *Strickland*, 466 U.S. at 693-94). Moreover, what constitutes a "reasonable probability" of a different outcome has to be measured by reference to "the purpose of the defense [which] is to raise a reasonable doubt in the jurors' minds." *Kigozi v. United States*, 55 A.3d 643, 658 n.16 (D.C. 2012) ("[T]he evidence need not itself establish a probability . . . [i]f the jury had a reasonable doubt, there could be no conviction."). Deficient performance may not always result in prejudice if the main thrust of counsel's argument is still presented to the jury and therefore any additional evidence would have been cumulative. *Wingate v. United States*, 669 A.2d 1275, 1278-79 (D.C. 1995); *see also Curry v. United States*, 498 A.2d 534, 543 (D.C. 1985) (finding no prejudice where "the main thrust" of any defense was presented through examination of witnesses).

"[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland*, 466 U.S. at 698. On appeal, "we accept the trial court's findings of fact unless they lack evidentiary

support in the record," and we "review the trial court's legal determinations de novo." *Cosio v. United States*, 927 A.2d 1106, 1123 (D.C. 2007) (en banc) (citation omitted). In general, "[w]e review with deference the trial court's rulings regarding claims of ineffective assistance of counsel." *Bouknight v. United States*, 867 A.2d 245, 251 (D.C. 2005).

III.

We decline to reach the issue of whether trial counsel was ineffective because we find there was no prejudice to appellant as a result of trial counsel's failure to cross-examine Ms. Olds and presentation of testimony from Mr. Duvall, as asserted in the supplemental § 23-110 motion. Ms. Olds served as a main eyewitness to the shooting, specifically identifying appellant as the shooter. Shortly after the shooting, when officers were investigating, however, she initially denied knowing anything about the events. On appeal, appellant asserts that trial counsel's failure to impeach Ms. Olds regarding her initial statement to police, in which she stated she had not seen anything, violated his right to effective counsel. However, the prosecution elicited from Ms. Olds her explanation as to why she denied knowing anything about the shooting to the responding officers: "[e]verybody in the neighborhood was standing around and they had already said for nobody to say anything to the police, and I couldn't say anything in front of the people in my neighborhood." Cross-examination of Ms. Olds on this point would have been cumulative because her inconsistent statement concerning not seeing who shot the deceased was already presented to the jury. *Wingate*, 669 A.2d at 1278-79.

With respect to Mr. Duvall, appellant argued that it was defective to call Mr. Duvall as a witness when his testimony placed appellant at the scene. We disagree. At trial, appellant proceeded under an innocent-presence defense. Mr. Duvall's testimony supported appellant's theory of defense, placing appellant at the scene as bystander. Moreover, Mr. Duvall's testimony regarding appellant's attire (Safeway uniform and dark or khaki pants) at the scene contradicted Ms. Olds's recollection of appellant's clothing (yellow or orange polo shirt with dark pants), which aided in discrediting Ms. Olds. Appellant was not prejudiced by Mr. Duvall's testimony because the theory of defense was innocent-presence and appellant benefitted from his testimony.

We review a trial court's denial to hold a § 23-110 motion hearing for abuse of discretion. *Meade v. United States*, 48 A.3d 761, 765 (D.C. 2012) (quoting *Webster v. United States*, 623 A.2d 1198, 1206 (D.C. 1993)). "Where the existing record provides an adequate basis for disposing of the motion, the trial court may

rule on the motion without holding an evidentiary hearing." *Meade*, 48 A.3d at 766; D.C. Code § 23-110(c) ("Unless the motion and files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting authority, grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto."). As we have determined, based upon the record, appellant was not prejudiced by trial counsel's failure to cross-examine Ms. Olds's or Mr. Duvall's testimony. The trial court did not abuse its discretion in denying a hearing as the record conclusively shows appellant is not entitled to relief.

Finally, there was no error in the trial court's determination that appellant's pro se claims of ineffective assistance and actual innocence no longer required a substantive resolution as they were withdrawn. Post-conviction counsel represented to the trial court that after investigating the pro se claims, pertaining to a "crime stoppers tip," they would no longer be pursued. Counsel also omitted the claims the from the supplemental motion.[1] Moreover, the pro se claims sought an alternative defense — third-party guilt — than the one presented at trial. Appellant abandoned the defense of third-party guilt prior to trial when he did not respond to the government's motion to exclude evidence that a third party committed the charged crimes. Appellant's trial counsel stated there would be no pursuit of a third-party guilt defense. The trial court granted the government's motion. In light of the withdrawal or abandonment, the trial court also properly exercised its discretion in not holding a hearing.

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[1] Appellant's claim of ineffective assistance regarding counsel representing him on direct appeal has also been abandoned because appellant did not timely move to recall the mandate. *Hardy v. United States*, 988 A.2d 950, 961 (D.C. 2010) ("If an appellant claims ineffectiveness of appellate counsel, that issue 'must be litigated as an independent claim, which requires a recall of the mandate of the direct appeal.'") (citing *Wu v. United States*, 798 A.2d 1083, 1091 (D.C. 2002)).

For the reasons explained, the judgment of the trial court is

Affirmed.

ENTERED BY THE DIRECTION OF THE COURT:

Julio A. Castillo

JULIO A. CASTILLO
Clerk of the Court

Copies to:

Honorable Frederick Weisberg

Director, Criminal Division

Copies e-served to:

Mindy A. Daniels, Esquire

Chrisellen R. Kolb, Esquire
Assistant United States Attorney

Additional material from this filing is available in the Clerk's Office.