SUPREME COURT OF GEORGIA
Case No. S24H0363

June 11, 2024

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

PRESTON M. YOUNG v. ERIC SELLERS, WARDEN et al.

Upon consideration of the application for certificate of probable cause to appeal the denial of habeas corpus, it is ordered that it be hereby denied.

All the Justices concur.

Trial Court Case No. 19SUCV49170

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Trina A Barnes, Clerk

IN THE SUPERIOR COURT OF BALDWIN COUNTY
STATE OF GEORGIA

PRESTON M. YOUNG, GDC #1095747,	*	CIVIL ACTION NO. 19SUCV49170
Petitioner,	*	
v.	*	HABEAS CORPUS
ERIC SELLERS, Warden, and TIMOTHY WARD, Commissioner,	*	
Respondents.	*	

FINAL ORDER

Petitioner Young filed this petition for a writ of habeas corpus challenging the validity of his November 2014 Henry County jury trial conviction for felony murder, which was affirmed on appeal in 2019. Upon a review of the record as established at the evidentiary hearing on February 15, 2023,[1] the Court denies relief.

I. PROCEDURAL HISTORY

Petitioner was indicted by a Henry County grand jury on November 17, 2011, for malice murder, felony murder, aggravated assault, and cruelty to children in the third degree. (HT 52-55). Following a November 2014 jury trial[2], Petitioner was found guilty of felony murder and aggravated assault,

[1] Citations to testimony and evidence adduced at the February 15, 2023, habeas corpus hearing are "HT" followed by the page number(s).
[2] Petitioner's first trial on these charges in June 2013 ended in a mistrial

and not guilty of malice murder. (HT 488). The charge of cruelty to children in the third degree was nolle prossed at the beginning of the second trial. (HT 489). Petitioner was sentenced to life for felony murder and 20 years for aggravated assault, with the sentences to run concurrently. (HT 486-87).

Petitioner changed counsel after trial and was represented by Dell Jackson on direct appeal. (HT 1488). Petitioner enumerated five errors on appeal:

> (1) The evidence was insufficient to support his convictions;
>
> (2) The trial court abused its discretion by (a) denying his motion in limine by admitting photographs of alleged scratches on his neck and shoulder when the State admitted there was no evidence to suggest that the scratches were inflicted by the victim, and (b) violating longstanding Georgia law by telling the jurors that they could vote their consciences during deliberations;
>
> (3) Trial counsel was ineffective for (a) allowing witness Pamela Bettis to continuously assault Petitioner's character by calling him a liar, and thief, and a deadbeat, (b) failing to object to Pamela Bettis's testimony that she could show the judge in Petitioner's divorce proceedings that Petitioner was not a truthful person because he had falsified rental property documents, and (c) failing to request an admonition or curative instructions from the trial court when Pamela Bettis continued to insult and attack Petitioner's character;
>
> (4) The State committed prosecutorial misconduct by giving a personal comment on what the evidence of the scratches on Petitioner showed, and trial counsel should have objected; and,
>
> (5) The indictment should have been quashed due to the unlawful means and guise under which it was obtained, the case should have

---

after the jury deadlocked. (HT 307).

been dismissed, and a *Franks*[3] hearing should have been held to address false statements given by the lead officer in the affidavit in order to obtain an arrest warrant.

(HT 1493-94).

The Supreme Court of Georgia issued its opinion on February 4, 2019, affirming Petitioner's conviction and sentence for felony murder after determining that the enumerations of error lacked merit, but vacating the conviction and sentence for aggravated assault on the basis that it should have been merged with felony murder. *Young v. State*, 305 Ga. 92, 823 S.E.2d 774 (2019).

Petitioner filed this habeas corpus petition pro se on February 21, 2019, in which he challenged his Henry County conviction and raised five grounds for relief. Petitioner filed an amended petition on April 22, 2019, modifying ground one. An attorney entered an appearance on behalf of Petitioner on August 12, 2019, but filed a motion to withdraw with Petitioner's consent on April 29, 2022. This Court entered an order granting the motion to withdraw on May 7, 2022. Petitioner filed a second amended petition on June 21, 2022, adding five grounds. At the February 2023 evidentiary hearing, trial counsel testified and was subjected to cross-examination, and documentary evidence was admitted. Petitioner stated at

[3] *Franks v. Delaware*, 438 U.S. 154 (1978).

the evidentiary hearing that he was only proceeding on the claims raised in the June 2022 amended petition. Accordingly, this Court deems the grounds raised in the original petition and the April 2019 amended petition to be abandoned and will not address them herein.

II. THE GROUNDS FOR RELIEF

A. GROUND 1 OF AMENDED PETITION

In ground 1 of the amended petition, Petitioner alleges that he received ineffective assistance of counsel in that trial counsel: (a) failed to file a general demurrer on the basis that the indictment was materially amended and must be declared void; (b) failed to file a general demurrer on the basis that the indictment was fatally defective because the State removed count four, cruelty to children in the third degree, without grand jury approval; and (c) failed to file a motion in arrest of judgment during the term in which the judgment was entered, when the substance and legitimacy of the indictment could be challenged. Petitioner also alleges that appellate counsel was ineffective for failing to raise these trial counsel ineffectiveness claims on direct appeal.

Findings of Fact and Conclusions of Law

Petitioner did not raise the trial counsel ineffectiveness claims post-trial and on direct appeal when he had new counsel and raised other claims of trial counsel ineffectiveness. Thus, the trial counsel claims are

procedurally defaulted under O.C.G.A. § 9-14-48(d).

O.C.G.A. § 9-14-48(d) provides:

> The court shall review the trial record and transcript of proceedings and consider whether the petitioner made timely motion or objection or otherwise complied with Georgia procedural rules at trial and on appeal and whether, in the event the petitioner had new counsel subsequent to trial, the petitioner raised any claim of ineffective assistance of trial counsel on appeal; and absent a showing of cause for noncompliance with such requirement, and of actual prejudice, habeas corpus relief shall not be granted.

This statute requires that a habeas corpus court consider whether a petitioner complied with procedural rules at the trial level and on appeal in order to preserve issues for merits review. *Chatman v. Mancill*, 278 Ga. 488, 489, 64 S.E.2d 154 (2004); *Black v. Hardin*, 255 Ga. 239, 336 S.E.2d 754 (1985). "Cause" to overcome a default may be constitutionally ineffective assistance of counsel under the standard of *Strickland v. Washington*, 466 U.S. 668 (1984). *Turpin v. Todd*, 268 Ga. 820, 826, 493 S.E.2d 900 (1997). "Actual prejudice" may be shown through satisfying the prejudice prong of *Strickland* or satisfying the actual prejudice test of *United States v. Frady*, 456 U.S. 152, 170 (1982), which requires "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Turpin*, 268 Ga. at 828-29.

Georgia law has long provided, "New counsel must raise claims of

ineffectiveness of previous counsel at the first possible stage of post-conviction review." *White v. Kelso*, 261 Ga. 32, 401 S.E.2d 733 (1991). *See also Thompson v. State*, 257 Ga. 386, 387, 359 S.E.2d 664 (1987) (the contention that trial counsel was ineffective "should be raised at the earliest practicable moment"). The default rule of the habeas statute, O.C.G.A. § 9-14-48(d), quoted above, was amended by Ga. L. 1995, p. 381, to codify this requirement.

Petitioner was indicted on November 17, 2011, for malice murder, felony murder, aggravated assault, and cruelty to children in the third degree. (HT 52-55). The aggravated assault count alleged that he unlawfully made an assault upon the victim with his hands and fists. (HT 54). The cruelty to children in the third degree count alleged that he committed the offense of aggravated assault against the victim while having knowledge that a child under the age of eighteen was present to see and hear the act that was alleged in the aggravated assault count. (HT 54). At the beginning of the second trial on October 28, 2014, the prosecutor stated that the State had decided not to go forward with the charge of cruelty to children in the third degree. (HT 560-61). The trial court entered an order nolle prossing that count on November 6, 2014. (HT 489).

Trial counsel was admitted to the Georgia Bar in 1991. (HT 29). Since being admitted, he has primarily practiced criminal defense. (HT 29). After

working briefly for a large firm and for a district attorney's office, he started his own practice in 1994 or 1995. (HT 29). In the course of preparing for trial, he met with Petitioner several times, reviewed the discovery with Petitioner, spoke with Petitioner's family, spoke with the lead detective, and investigated a potential alibi. (HT 30-32).

Trial counsel recalled the State choosing not to proceed on count four. (HT 11). He felt from a strategic standpoint that it would be good for Petitioner to not have a child take the witness stand and say that he killed the victim, which was probably why he did not argue for count four to be put back in the evidence. (HT 13-14). He acknowledged that at Petitioner's first trial, the child testified that she never saw anything, but he felt based on his experience that child witnesses can be unpredictable, and he was concerned that she would get on the stand at the second trial and start crying or say something completely different. (HT 14). He did not view the dismissal of one of the counts of the indictment to be a material alteration and felt that the State has the discretion to dismiss certain counts. (HT 16-17).

Trial counsel did not feel that count four was material to the viability of count three, because even if the child was not present, strangling the victim to death still substantiates malice murder, felony murder, and aggravated assault. (HT 22). The element of a child witnessing the aggravated assault is what gave rise to the charge in count four of cruelty to children in the third

degree. (HT 22-23).

Petitioner has failed to establish cause and actual prejudice to overcome the procedural default of the trial counsel ineffectiveness claims. It is true that "[a]n indictment cannot be materially amended after the grand jury has returned the indictment into court" and that "any subsequent amendment by the trial court or prosecution that materially affects the indictment is void and cannot serve as the basis for a conviction." *Driggers v. State*, 295 Ga. App. 711, 717-18, 673 S.E.2d 95 (2009). However,

> In the district attorney's role as an administrator of justice, he or she has broad discretion in making decisions prior to trial about who to prosecute, what charges to bring, and which sentence to seek.

State v. Wooten, 273 Ga. 529, 530, 543 S.E.2d 721 (2001) (internal citations omitted). This includes the discretion to dismiss charges in an indictment with the consent of the trial court prior to the submission of the case to the jury. *Buice v. State*, 272 Ga. 323, 324, 528 S.E.2d 788 (2000) (citing O.C.G.A. § 17-8-3).

O.C.G.A. § 17-8-3 provides:

> After an examination of the case in open court and before it has been submitted to a jury, the prosecuting attorney may enter a nolle prosequi with the consent of the court. After the case has been submitted to a jury, a nolle prosequi shall not be entered except by the consent of the defendant. The prosecuting attorney shall notify the defendant and the defendant's attorney of record within 30 days of the entry of a nolle prosequi either personally or in writing; such written notice shall be sent by regular mail to

the defendant at the defendant's last known address and to the defendant's attorney of record.

Accordingly, it was within the discretion of the prosecutor to nolle pros the count of cruelty to children in the third degree at the beginning of Petitioner's second trial. Thus, in addition to trial counsel having strategic reasons for not wanting to object to the State's dismissal of the cruelty to children charge, any objection by the defense to entry of the nolle prosequi at the beginning of trial would have been meritless, and the failure to make a meritless objection does not constitute deficient performance. *Ward v. State*, 313 Ga. 265, 273, 869 S.E.2d 470 (2022).

With regard to the question of whether count four was material to count three, O.C.G.A. § 16-5-70(d)(2) provides that, "Any person commits the offense of cruelty to children in the third degree when: Such person, who is the primary aggressor, having knowledge that a child under the age of 18 is present and sees or hears the act, commits a forcible felony, battery, or family violence battery." As stated above, the crime which count four alleged that the child saw was aggravated assault, as charged in count three. Accordingly, count four was based on an aggravated assault being committed with the added element that a child either saw or heard the aggravated assault. Because the charge of aggravated assault did not require proof that a child witnessed the incident, count four was not material to the viability of count

three.

Petitioner failed to question trial counsel regarding his failure to file a motion in arrest of judgment. "In the absence of testimony to the contrary, counsel's actions are presumed to be strategic." *Crider v. State*, 246 Ga. App. 765, 769, 542 S.E.2d 163 (2000).

With regard to the appellate counsel ineffectiveness claim, Petitioner has not shown that appellate counsel's performance was deficient and that he was prejudiced by the alleged error of appellate counsel in order to satisfy the standard of *Strickland v. Washington*, 466 U.S. 688 (1984). A petitioner must satisfy both prongs of this test in order to obtain relief. *Id.* at 687. However, a reviewing court does not have to approach this test "in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one," as, "The object of an ineffectiveness claim is not to grade counsel's performance." *Id.* at 697. "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

The Georgia Supreme Court has adopted *Strickland* for analyzing an appellate attorney's performance. *Shorter v. Waters*, 275 Ga. 581, 571 S.E.2d 373 (2002). When the claim is that appellate counsel was ineffective for not raising a particular issue on appeal, a petitioner must overcome the "strong presumption" that appellate counsel's actions fell within the range of

reasonable professional conduct and affirmatively show that appellate counsel's decision not to raise the issue "was an unreasonable one which only an incompetent attorney would have made." *Griffin v. Terry*, 291 Ga. 326, 337, 729 S.E.2d 334 (2012) (citations omitted). To establish prejudice, a petitioner must show that, but for counsel's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. *Griffin v. Terry*, 291 Ga. at 329.

An indigent defendant does not have a right to compel appointed counsel to argue non-frivolous points if counsel decides, as a matter of professional judgment, that those issues should not be raised. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

Where a claim of appellate counsel ineffectiveness is based on a failure to have raised claims of ineffective assistance of trial counsel, "two layers of fact and law are involved" in the analysis of the claim. *Gramiak v. Beasley*, 305 Ga. 512, 513, 820 S.E.2d 50 (2018). A reviewing court must determine that appellate counsel's failure to raise the issue was "deficient professional conduct." *Id.* To establish prejudice, a petitioner must establish a reasonable probability that the result of the appeal would have been different had appellate counsel raised the claim, and this requires a petitioner to show both that trial counsel's performance was deficient and that he was prejudiced by the error(s) of trial counsel. *Id.* at 513-14.

Because trial counsel had strategic reasons for not wanting to bring count four back into the indictment, and because the State had the discretion to dismiss that count at the beginning of trial such that any objection thereto by trial counsel would have been meritless, a claim on direct appeal that trial counsel was ineffective for failing to challenge the State nolle prossing count four would have been without merit. Petitioner thus cannot show that there is a reasonable probability that the outcome of the direct appeal would have been different had appellate counsel raised such an issue.

Accordingly, ground 1 of the amended petition provides no basis for relief.

B. GROUNDS 2 AND 3 OF AMENDED PETITION

In ground 2 of the amended petition, Petitioner alleges that his indictment is void because it originally consisted of four counts, his first trial ended in a mistrial, and prior to the second trial, count four, cruelty to children in the third degree, was removed from the indictment by the State.

In ground 3 of the amended petition, Petitioner alleges that his indictment is void because it was materially amended when the State removed count four, cruelty to children in the third degree from the indictment without grand jury approval, and alleges that count four added to the material allegations of count three, aggravated assault, and thus when count four was removed, material allegations relating to count three were

also removed, thereby materially affecting count three.

Findings of Fact and Conclusions of Law

Petitioner did not raise these claims at trial and on direct appeal. Thus, they are procedurally defaulted. *Black v. Hardin*. Based on the analysis in part A above, Petitioner has failed to establish cause and actual prejudice to overcome the default of these claims.

Accordingly, grounds 2 and 3 of the amended petition provide no basis for relief.

C. GROUND 4 OF AMENDED PETITION

In ground 4 of the amended petition, Petitioner alleges that he received ineffective assistance of counsel in that both trial counsel and appellate counsel unreasonably failed to investigate, research, present, and effectively argue the multitude of legal errors that occurred in this case.

Findings of Fact and Conclusions of Law

Petitioner did not raise the trial counsel ineffectiveness claim post-trial and on direct appeal. Thus, this claim is procedurally defaulted under O.C.G.A. § 9-14-48(d). At the evidentiary hearing, Petitioner stated that the trial counsel ineffectiveness claim he is advancing in this action is that trial counsel failed to challenge the dismissal of count four. (HT 36). Based on the analysis in part A above, Petitioner has failed to establish cause and actual prejudice to overcome the procedural default of the trial counsel

ineffectiveness claim.

Petitioner also stated at the evidentiary hearing that the appellate counsel ineffectiveness claim he is advancing is that appellate counsel failed to raise a claim that trial counsel was ineffective for failing to challenge the dismissal of count four. (HT 36). Based on the analysis in part A above, Petitioner has also failed to show that appellate counsel rendered ineffective assistance in failing to raise this trial counsel ineffectiveness claim.

Accordingly, ground 4 of the amended petition provides no basis for relief.

D. GROUND 5 OF AMENDED PETITION

In ground 5 of the amended petition, Petitioner alleges that he received ineffective assistance of counsel in that appellate counsel unreasonably failed to adequately cite all relevant facts and raise all relevant arguments in support of the issues she raised.

Findings of Fact and Conclusions of Law

Petitioner failed to identify in his amended petition the specific facts and relevant legal arguments that appellate counsel allegedly failed to include in the direct appeal brief. He has also failed to present any evidence that appellate counsel was ineffective for failing to cite all relevant facts and raise all relevant legal arguments in the direct appeal brief. Lastly, as stated above, Petitioner stated at the evidentiary hearing that the appellate counsel

ineffectiveness claim he is advancing is that appellate counsel failed to raise a claim that trial counsel was ineffective for failing to challenge the dismissal of count four.

Accordingly, ground 5 of the amended petition provides no basis for relief.

CONCLUSION

Wherefore, the petition is denied.

If Petitioner Young desires to appeal this order, Petitioner must file an application for a certificate of probable cause to appeal with the Clerk of the Supreme Court of Georgia within thirty (30) days from the date of the filing of this order. Petitioner must also file a notice of appeal with the Clerk of the Superior Court of Baldwin County within the same thirty (30) day period.

The Clerk of the Superior Court is hereby DIRECTED to provide a copy of this order to Petitioner, Respondents, and the office of the Attorney General.

SO ORDERED, this 18th day of October, 2023.

TERRY N. MASSEY, Judge
Ocmulgee Judicial Circuit

Prepared by:
Matthew B. Crowder
Assistant Attorney General
Georgia Department of Law
40 Capitol Square, SW
Atlanta, Georgia 30334-1300
(404) 458-3269

CERTIFICATE OF SERVICE

This is to certify that I, Jessica Whitehead, Judicial Assistant to Judge Terry N. Massey, have served the foregoing order via electronic service through PeachCourt or by United States Mail, with sufficient postage affixed thereto as follows:

Clint Malcolm
cmalcolm@law.ga.gov

Meagan Hill
mhill@law.ga.gov

Preston M. Young
GDC# 1095747
Riverbend Correctional Facility
196 Laying Farm Road
Milledgeville, GA 31061

Original filed with clerk.

This 19th day of October, 2023

Jessica Whitehead
Judicial Assistant for Terry N. Massey
Post Office Box 1050
Milledgeville, Georgia 31059
(478) 445-4270

CERTIFICATE OF SERVICE

This is to certify that I have this day served all parties with the **Final Order** by hand-delivery, electronic transmission, facsimile and/or by depositing same in the United States Mail, with sufficient postage affixed thereto as follows:

Preston M. Young
GDC #1095747
Riverbend Correctional Facility
196 Laying Farm Road
Milledgeville, GA 31061

Angela Phams
Riverbend Correctional Facility
196 Laying Farm Road
Milledgeville, GA 31061

Matthew Crowder
Assistant Attorney General
Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, Ga 30334-1300

Tyrone Oliver
Commissioner DOC
300 Patrol Road
Forsyth, GA 31029

Original Filed with Clerk's Office

This 24th day of October, 2023

Clerk of Superior Court Baldwin County
Ocmulgee Judicial Circuit

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