

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Tuesday the 29th day of August, 2017.

Jackie Lee O'Neal, III, No. 1469209,

Petitioner,

against Record No. 161067

Director of the Department of Corrections,

Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the petition for a writ of habeas corpus filed July 19, 2016, the rule to show cause, and the respondent's motion to dismiss, the Court is of the opinion that the motion should be granted and the writ should not issue.

Petitioner was convicted in the Circuit Court of Spotsylvania County of possession of a Schedule I or II controlled substance, possession of controlled paraphernalia, and resisting arrest and was sentenced to seven years and twenty-one months' incarceration. Petitioner's appeals to the Court of Appeals of Virginia and to this Court were unsuccessful. He now challenges the legality of his confinement pursuant to these convictions.

In claim (a), petitioner contends he was denied the effective assistance of counsel because counsel permitted Deputy Brandon Baugh to deliver unsworn testimony during the Commonwealth's case-in-chief. Petitioner also contends counsel enabled Baugh to commit perjury by not objecting to the failure to subject the detective to the required oath or affirmation.

The Court holds claim (a) fails to satisfy the "prejudice" prong of the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Before testifying, every witness shall be required to declare that he or she will testify truthfully, by oath or affirmation administered in a form calculated to awaken the conscience and impress the mind of the witness with the duty to do so." Rule 2:603; see *United States v. Hawkins*, 76 F.3d 545, 551 (4th Cir. 1996) ("[T]estimony taken from a witness who has not given an oath or affirmation to testify truthfully is inadmissible."). The failure to administer the oath does not constitute structural error. *Peak v. Commonwealth*, 197 S.W.3d 536, 547 (Ky. 2006).

The record, including the trial transcript, demonstrates the trial court directed the parties to bring their witnesses to the front of the courtroom for the administration of the required oath

or affirmation. The prosecutor called the names of several witnesses, but not Deputy Baugh. It is unclear whether Baugh was in the courtroom at that time and was sworn notwithstanding the failure to mention his name. Later during the trial, when the prosecutor called upon Baugh to testify, the trial court asked whether the deputy was "previously sworn." Baugh responded, "No, ma'am. Yes, ma'am, I was." The court asked, "You were sworn earlier today?" Baugh replied, "Yes, ma'am." The court, without objection, permitted Baugh to testify. The transcript states Baugh testified after "first being duly sworn."

Baugh testified he responded to a report of an apparent drug overdose at a Dairy Queen restaurant. Paramedics were tending to petitioner in the men's room when Baugh arrived. Petitioner stood up, began walking out of the restroom, handed Baugh a spoon that had "tannish" or off-white residue on it, and ignored several of the deputy's commands to stop. When petitioner left the restaurant, Baugh tossed the spoon on the floor and chased after petitioner. Baugh eventually caught up with petitioner, brought him to the ground, and announced he was under arrest. Petitioner resisted being put in handcuffs and attempted to flee a second time. Baugh, with a paramedic's help, again brought petitioner to the ground, subdued him, and placed him in custody. Petitioner admitted to the deputy the spoon was his, he used heroin, and he had about seven needles which he thought were on the restroom floor. Baugh found one needle in a trash can in the men's room and other needles elsewhere. A paramedic gave Baugh a spoon that the paramedic had temporarily placed in a plastic bag. Baugh put the spoon in an evidence bag and submitted it for analysis. The Commonwealth's certificate of analysis, which was admitted during Baugh's testimony, established there was heroin residue on the spoon.

In addition, Tracey Bucher, a Dairy Queen employee, testified petitioner and a woman entered the restaurant late at night, shortly after Bucher had cleaned the restrooms and emptied the trash cans. The woman screamed for help, and Bucher found petitioner "slumped" on a toilet in the men's room. As she attempted to aid or revive petitioner, Bucher observed the woman get on the floor, feel inside petitioner's pockets, and flush the toilet. Bucher saw a piece of aluminum foil in the toilet. After petitioner fled and was apprehended, Bucher saw Baugh retrieve a needle from the men's room trash can. Tyler Butcher, a volunteer firefighter, testified he saw petitioner hand Baugh a spoon. Moments later, after petitioner fled and Baugh followed in pursuit, Butcher saw a spoon on the restaurant's floor. It looked "burnt" and did not appear to

belong to Dairy Queen. Butcher, who was wearing gloves, placed the spoon in a plastic biohazard bag. Butcher presented the item to Baugh after petitioner was apprehended. Baugh instructed Butcher to place the plastic bag containing the spoon in an evidence bag. Butcher observed Baugh seal the bag and put it in the police cruiser. David McDonald, a paramedic, testified he also saw petitioner hand Baugh the spoon. After petitioner fled the Dairy Queen, McDonald assisted Baugh in apprehending petitioner. Petitioner was “kicking,” “flailing about,” and “all over the place” before Baugh placed petitioner in handcuffs.

Assuming without deciding Deputy Baugh was mistaken and had not been sworn before he testified, any deficient performance on counsel’s part did not “prejudice[] the defense.” *Strickland*, 466 U.S. at 688. Absent lawful administration of the oath or affirmation, Baugh could not have committed perjury as a matter of law. *See* Code § 18.2-434 (perjured testimony cannot occur unless “an oath is lawfully administered”). To the extent petitioner asserts more generally that Baugh was permitted to testify untruthfully, he fails to explain how the result of the proceeding would have been different had Baugh been sworn. Petitioner contends, in essence, that counsel should have objected when the court permitted Baugh to testify because Baugh had not taken the required oath or affirmation that he would testify truthfully. To be timely, counsel needed to raise that objection when the court permitted Baugh to testify. *Kondaurov v. Kerdasha*, 271 Va. 646, 655, 629 S.E.2d 181, 185 (2006) (“An objection to the admissibility of evidence must be made when the evidence is presented.”). Had counsel raised a timely objection, however, this Court may presume the trial court would have required Baugh to give the oath or affirmation before testifying and would not have permitted Baugh to deliver unsworn testimony. *See Napert v. Napert*, 261 Va. 45, 47, 540 S.E.2d 882, 884 (2001) (explaining courts “are presumed to act in accordance with the law”). Moreover, petitioner fails to proffer what aspects of Baugh’s testimony, which was consistent with, and supported by, the testimony of the Commonwealth’s other witnesses, were false or in what respects Baugh’s testimony would have been different had the oath or affirmation been administered. Thus, petitioner has failed to demonstrate there is a reasonable probability that, but for counsel’s alleged errors, the result of the proceeding would have been different.

In claim (b), petitioner contends he was denied the effective assistance of counsel because counsel “informed [petitioner] he was wrong” and “made it clear he did not represent

[petitioner] 100 percent.” Petitioner adds counsel admitted he lacked focus due to an illness at the time of trial.

The Court holds claim (b) satisfies neither the “performance” nor the “prejudice” prong of the two-part test enunciated in *Strickland*. Petitioner does not explain in what respect counsel’s illness and lack of focus affected his ability to challenge the Commonwealth’s evidence or raise an effective defense to the charges. Furthermore, petitioner fails to articulate what additional evidence, objections, or arguments counsel should have presented but did not on account of his illness. Thus, petitioner has failed to demonstrate that counsel’s performance was deficient or that there is a reasonable probability that, but for counsel’s alleged errors, the result of the proceeding would have been different.

Upon consideration whereof, petitioner’s motion for the appointment of counsel is denied.

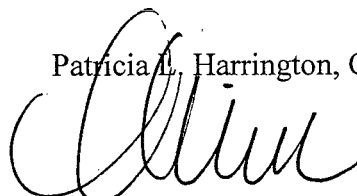
Accordingly, the petition is dismissed and the rule is discharged.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:



Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday the 20th day of November, 2017.

Jackie Lee O'Neal, III, No. 1469209,

Petitioner,

against Record No. 161067

Director of the Department of Corrections,

Respondent.

Upon a Petition for Rehearing

On consideration of the petition of the petitioner to set aside the judgment rendered herein on the 29th day of August, 2017 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By:



Deputy Clerk