Circuit Court for Baltimore City
Case No. 194266022

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 277

September Term, 2020

STATE OF MARYLAND

v.

MARCEL TERRY SMITH

Shaw Geter,
Gould,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Gould, J.

Filed: December 22, 2020

In 1995, a jury sitting in the Circuit Court for Baltimore City found Marcel Terry Smith, appellee, guilty of murder in the first-degree, use of a handgun in the commission of a felony or crime of violence, and wearing, carrying, and transporting a handgun on his person. The court sentenced Mr. Smith to life imprisonment for first-degree murder and a consecutive term of ten years' imprisonment for use of a handgun in the commission of a felony or crime of violence, merging the other handgun conviction for sentencing purposes. On direct appeal, we affirmed those judgments in an unreported opinion. *Smith v. State*, No. 1306, Sept. Term, 1995 (filed Jul. 16, 1996) (per curiam).[1]

In 2019, Mr. Smith filed a postconviction petition,[2] alleging, among other things, that his trial counsel had been ineffective in failing to request an alibi jury instruction even though alibi was the only defense presented at trial. The postconviction court granted the petition and awarded Mr. Smith a new trial. The State filed an application for leave to appeal, which we granted.

The State now raises the following questions before us:

[1] Presaging one of the ineffective assistance claims raised in Mr. Smith's postconviction petition, one of the claims he raised on direct appeal was that the trial court had committed plain error in failing, *sua sponte*, to intervene when a police detective testified, during both direct and cross-examination, that Mr. Smith, during police interrogation, had "requested an attorney" and that he had said, "I want a lawyer"; and when, during closing argument, the prosecutor once again told the jury that Mr. Smith had "asked for a lawyer" while being interrogated. At no time did trial counsel object. *Smith*, slip op. at 1. We declined to recognize plain error. *Id.* at 8-9.

[2] Mr. Smith's sentence was imposed prior to October 1, 1995, the effective date of the amendment to the Maryland Uniform Postconviction Procedure Act, establishing a ten-year time limit for filing a postconviction petition. By its terms, that amendment was prospective, and Mr. Smith's 1995 conviction therefore is not subject to that time limit. 1995 Md. Laws, ch. 258, § 2; *see also Grayson v. State*, 354 Md. 1, 15 (1999).

I. Did the circuit court err when it granted Mr. Smith postconviction relief based on Mr. Smith's trial counsel's failure to request an alibi instruction?

II. Regardless, is a remand necessary where the postconviction court erred as a matter of law when it did not consider or address Mr. Smith's seven other postconviction claims?

For the reasons that follow, we vacate and remand for the circuit court to address the remaining allegations in Mr. Smith's petition.

BACKGROUND

We quote our unreported opinion in Mr. Smith's direct appeal for background concerning the crimes:

> Shortly before midnight on July 23, 1994, Shannon Willis and her boyfriend, Morren Hayes, were sitting on the steps of her home . . . . The victim, Antoinette Wilson, was with them. Ms. Wilson left for about twenty minutes to do an errand. As she was returning, when Ms. Wilson was seventy to eighty feet away from the steps where she had been sitting, Ms. Willis saw [Mr. Smith] approach and hit Ms. Wilson. Ms. Wilson attempted to hit back and fell to the ground. [Mr. Smith] then pulled out a gun and shot Ms. Wilson twice. At that point, Ms. Wilson attempted to flee. Ms. Willis also fled, going into her apartment. The police arrived shortly thereafter, and took Ms. Wilson to the hospital where she was pronounced dead as the result of five gunshot wounds.

Smith, slip op. at 1-2.

Within several hours of the murder, homicide detectives interviewed three eyewitnesses: Shannon Willis, Morris (also known as "Morren" and "Poo") Hayes, and Aaron Willis (Shannon Willis's brother and the victim's boyfriend). Shannon Willis identified Mr. Smith from a photographic array as the shooter. An arrest warrant was issued, and, ultimately, on August 30, 1994, members of a joint federal and state task force

located Mr. Smith, placed him under arrest, and transferred him to the custody of the Baltimore City Police Department.

Mr. Smith was transported to the office of the Homicide Division. There, he was administered the *Miranda* advisements,[3] but agreed to talk to detectives. Mr. Smith's right hand was injured,[4] and he signed the advisement-of-rights form with his left hand, which clearly was not his favored hand.

When asked where he lived, Mr. Smith gave his father's address in Baltimore City. When asked where he was on the night of the murder, Mr. Smith at first claimed that he had been in Philadelphia and Chicago; but he then admitted that he had been untruthful and asked for an attorney, concluding the interrogation.[5] An indictment was returned by the Grand Jury for Baltimore City, charging Mr. Smith with murder in the first-degree, use of

[3] Named after the landmark decision, *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] A photograph of Mr. Smith, taken at the time of his arrest, depicted him with his right hand bandaged and his right arm in a sling.

[5] During opening statements at trial, the prosecutor declared, without objection, that Mr. Smith, while being interrogated by police detectives shortly after his arrest, had said, "I want a lawyer." During trial, Baltimore City Homicide Detective Albert Marcus testified, without objection, that Mr. Smith, during police interrogation, had "requested an attorney" and that he "want[ed] a lawyer." Trial counsel cross-examined Detective Marcus, who reiterated, on multiple occasions, that Mr. Smith had "requested an attorney" or that he had said, "I want an attorney." Finally, during closing argument, the prosecutor once again told the jury that Mr. Smith had "asked for a lawyer" while being interrogated, a point repeated by trial counsel in his own closing. Because trial counsel did not object to the admission of any of these statements, Mr. Smith's supplemental postconviction petition included a claim of ineffective assistance on that ground.

a handgun in the commission of a felony or crime of violence, and wearing, carrying, and transporting a handgun on his person.

Trial

The matter proceeded to a four-day jury trial in the Circuit Court for Baltimore City. Shannon Willis testified that she had observed Mr. Smith assault and repeatedly shoot the victim. The State also presented testimony of the first responding police officer, two homicide detectives who had interviewed Mr. Smith shortly after his arrest, an assistant medical examiner, a crime scene technician, and a firearms expert. Among the State's exhibits admitted into evidence was Mr. Smith's inculpatory statement to the homicide detectives.

The defense called three alibi witnesses:[6] Mr. Smith's mother, Teri Smith, and two of her friends and neighbors, Sharon Robinson and Doris Stewart. Ms. Smith, a licensed practical nurse, testified that her son lived with her at Ms. Stewart's residence[7] in Baltimore County and that, on the night of the murder, he was there the entire time. She further claimed that her son had broken his right hand and that she had set the break and bandaged his hand. Ms. Smith testified that she had given a pain reliver to Mr. Smith and that he was

[6] Trial counsel did not notify the State of its intention to call alibi witnesses until several days before trial, in violation of Maryland Rule 4-263. The prosecutor elected not to seek a continuance or seek to exclude the alibi testimony.

[7] Ms. Smith stated that she previously had her own apartment but "lost" it and moved to Ms. Stewart's townhouse, where she lived at the time of the murder, until she could save enough money to obtain her own apartment.

lying on a couch, in discomfort, the entire evening. She further testified that her friend, Ms. Robinson, had come over that evening to have her hair done.

Ms. Robinson testified that she was at Ms. Stewart's residence the entire night of the murder and that Ms. Smith "was going to do [her] hair." She further claimed that Mr. Smith was there the entire time, that his right hand was injured, and that he was lying on a couch. Ms. Stewart claimed that, at the time in question, Ms. Smith and her three children, including Marcel Smith, were living in her townhouse. Ms. Stewart also claimed that Mr. Smith was lying on a couch "the whole time" because he "didn't feel good" as a result of his hand injury.

The prosecutor aggressively cross-examined Mr. Smith's alibi witnesses, highlighting numerous incongruities in their testimonies. For example, Ms. Smith was unable to explain, when pressed, why Mr. Smith told police detectives that he lived at his father's address in Baltimore City rather than the Baltimore County townhouse where, she claimed, he lived.[8] She also was unable to explain why she set Mr. Smith's broken hand

[8] The prosecutor drew out an additional inconsistency between Ms. Smith's claim that her son lived with her at Ms. Stewart's townhouse, and information gathered previously during Mr. Smith's apparently extensive run-ins with police as a juvenile. (Mr. Smith was seventeen years old at the time of the murder. Attempting to avoid referring to that inadmissible fact, the prosecutor stated that Mr. Smith "has had a lot of occasions over the years, for one reason or another, and we're not going to get into the detail of what those reasons are, to give his address," to which Ms. Smith ultimately replied, "I'm sure he has." But she was unable to explain why, in the prosecutor's words, he had "never given" Ms. Stewart's address as his residence.

herself, given her knowledge that he could not have been turned away from a hospital emergency room.[9]

Ms. Robinson had difficulty explaining why she would have such a precise recollection of the night of the murder, given her testimony that she visited Ms. Stewart's townhouse on nearly a daily basis. Ms. Stewart had difficulty explaining why she would not have known whether Ms. Smith kept "a whole hospital of supplies" in her room. She could not explain why Mr. Smith, upon his arrest, told police officers that he lived at his father's residence instead of hers. Finally, the prosecutor's cross-examination drew a sharp contrast between Ms. Stewart's precise recollection of the evening of the murder and her inability to pinpoint, with any precision, when she learned of Mr. Smith's ensuing arrest.

Trial counsel did not request, nor did the trial court give, an alibi jury instruction. Thereafter, during closing argument, trial counsel sought to shift attention away from Mr. Smith's alibi by attacking the credibility of Shannon Willis, the State's sole eyewitness testifying to the killing. After deliberating for approximately one hour and fifteen minutes, the jury found Mr. Smith guilty of first-degree murder, use of a handgun in the commission

[9] The cross-examination of Ms. Smith took an unexpected turn when she was asked how and when she first became aware of details of the charges against her son, to which she replied that she had called a lawyer, whom she attempted, unsuccessfully, to retain for her son's case. Most of the ensuing cross-examination of Ms. Smith focused on her communications with that lawyer, especially her assertion that she had told him that her son was innocent and could not possibly have committed the murder. The parties ultimately stipulated that, had the attorney been called to testify, he would have had no recollection of such a conversation.

of a felony or crime of violence, and wearing, carrying, and transporting a handgun on his person.

Postconviction Proceedings

In 2019, Mr. Smith filed a pro se postconviction petition, which later was supplemented by a petition filed by appointed counsel. Among the claims raised were that trial counsel had been ineffective in failing to request an alibi jury instruction and in failing to object when the jury was told, repeatedly, that Mr. Smith, while being interrogated by police, had invoked his right to an attorney.[10]

The circuit court held a hearing on the petition. As the postconviction court acknowledged at the start of the hearing, postconviction counsel had moved to allow telephonic testimony by trial counsel, but, as the hearing progressed, the court declared that it did not "really need to hear from" trial counsel, and he therefore was never called. Postconviction counsel did not proffer what his testimony would have been. Thus, the only evidence admitted during the postconviction hearing was the trial and appellate record, including the transcripts.

The entire hearing focused on the claim based upon trial counsel's failure to request an alibi jury instruction. Seemingly placing the burden of persuasion on the State, the postconviction court declared that it wished to hear argument from the parties on that claim, which it found "to be significant and establish[ed] a really difficult mountain to climb for

[10] At the outset of the hearing, the postconviction court read aloud to Mr. Smith the allegations in his pro se petition but did not mention any of the allegations in the supplemental petition. We do not construe postconviction counsel's ensuing silence as an abandonment of any of the claims in the supplemental petition.

the State." The court continued, declaring that it was inclined, "as a matter of law," to grant Mr. Smith a new trial "unless [State's counsel could] convince [the court] why [postconviction counsel was] wrong on that." Moreover, the postconviction court appeared to apply a per se rule of prejudice, upon finding that trial counsel had performed deficiently.[11] The court concluded that "[b]y failing to request an instruction, . . . trial counsel's performance constituted prejudice, and there is a reasonable probability that but for counsel's unprofessional error, the result of the proceedings would have been different." Accordingly, it awarded Mr. Smith a new trial and declined to consider the remaining allegations in his petition. The following day, the postconviction court issued a memorandum opinion and order to the same effect. Postconviction Memorandum Opinion ("PC Op.").[12]

[11] For example, the court asked whether the failure to give an alibi jury instruction "as a matter of law creates an error from which the State cannot recover?"

[12] In its memorandum opinion, the postconviction court stated that, "based on trial counsel's failure to request an alibi jury instruction when it was warranted by the facts and circumstances of the case at bar," it found "that trial counsel's performance was deficient, and his deficient performance prejudiced [Mr. Smith] from receiving his constitutional right to a fair trial," and that, "[t]herefore, post conviction relief is warranted as a matter of law." P.C. Op. at 11. It further determined that it "need not consider or reach" the remaining allegations in Mr. Smith's postconviction petition. *Id.*

DISCUSSION

I.

STANDARD OF REVIEW

"The ultimate question of whether counsel was ineffective is a mixed question of law and fact." *State v. Thaniel*, 238 Md. App. 343, 359-60 (2018) (quotation omitted). We accept the factual findings of the postconviction court unless they are clearly erroneous, but we conduct an independent review of its ultimate legal conclusions, "re-weighing the facts in light of the law to determine whether a constitutional violation has occurred." *Id.* at 360 (cleaned up).

A.

LEGAL PRINCIPLES GOVERNING INEFFECTIVE ASSISTANCE CLAIMS

The right to the assistance of counsel is guaranteed by the Sixth Amendment to the United States Constitution and is applicable to the states through the Fourteenth Amendment.[13] *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963). Because the purpose of that right is "to ensure that [an accused's] trial is fair," the Supreme Court "has recognized that 'the right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

[13] Article 21 of the Maryland Declaration of Rights provides a substantially similar guarantee. That provision generally has been interpreted in *pari materia* with its Sixth Amendment counterpart. *See Grandison v. State*, 425 Md. 34, 56 (2012). Mr. Smith does not invoke Article 21, nor does he claim that it affords more generous protections than the Sixth Amendment, and we shall not address it in the remainder of this opinion.

A claimed violation of that right comprises two elements: deficient performance and prejudice. *Newton v. State*, 455 Md. 341, 355 (2017), *cert. denied*, 583 U.S. __, 138 S. Ct. 665 (2018) (citing *Strickland*, 466 U.S. at 687). A postconviction petitioner bears the burden of proof as to both elements. *Ramirez v. State*, 464 Md. 532, 539 (2019), *cert. denied*, ____ U.S. ___, 140 S. Ct. 1134 (2020) (citing *United States v. Cronic*, 466 U.S. 648, 658 (1984)).[14]

To establish deficient performance, a postconviction petitioner must show that "counsel's performance was objectively unreasonable 'under prevailing professional norms.'" *Thaniel*, 238 Md. App. at 360 (quoting *Strickland*, 466 U.S. at 688). "Judicial scrutiny of counsel's performance must be highly deferential," and we "strongly presum[e]" that counsel has "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689-90. To avoid "the distorting effects of hindsight," we must evaluate "the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.*

To establish prejudice, a postconviction petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.*

[14] Under narrow exceptions, none of which is applicable here, prejudice may be presumed, thereby relieving the petitioner of the burden of proving that element of his claim. *See Ramirez*, 464 Md. at 541.

B.

ANALYSIS

The State contends that the postconviction court erred in finding, "in the absence of any evidence," that trial counsel had performed deficiently. Although we disagree with that characterization of the record,[15] we agree that the postconviction court erred in its ultimate ruling.

The postconviction court noted that alibi "was presented at trial as the heart of" Mr. Smith's defense but that a "review of the record provided does not indicate a request for an alibi instruction by the trial counsel nor an objection from counsel regarding the omission of the alibi instruction by the trial court." From that premise, the postconviction court concluded that there was "no reasonable trial strategy for not requesting the alibi instruction[,]" and that, therefore, trial counsel had performed deficiently.

In reaching that conclusion, the postconviction court failed to account for critical evidence. First, Mr. Smith's statement to police detectives severely undermined his alibi because it plainly allowed the jury to infer that he was fabricating his version of events.[16]

[15] As Mr. Smith observes in his brief, the postconviction court declared that it had performed a "review of the record provided." Moreover, the postconviction court quoted the trial transcript in its memorandum opinion, and thus, obviously, examined the evidence before it. And finally, the postconviction court admitted the trial record into evidence.

[16] We are not considering, at this stage of the analysis, Mr. Smith's request for an attorney, which was inadmissible but was admitted without objection. That is the subject of one of the ineffective assistance claims on which the postconviction court did not rule.

Quite apart from the request for an attorney, Mr. Smith told detectives that he had gone to Philadelphia and then Chicago on the night of the murder, but then admitted that those assertions were false. Only after being caught in a series of lies did Mr. Smith

Second, the prosecutor effectively cross-examined each alibi witness, poking holes in their seemingly coordinated story. Finally, during closing argument, trial counsel sought to deflect the jury's attention away from Mr. Smith's alibi witnesses and, instead, attack the credibility of the only State's witness who placed him at the murder scene:

> [DEFENSE COUNSEL]: Now the State's Attorney went on and on about his mother and his mother hiring a lawyer and what his mother told the lawyer. Don't be led off into that wild goose chase. That's because the State has so little evidence they're hoping that you will seize on something that has nothing to do with the core of this case. The core is Shannon Willis. He'll do everything he can to lead you away from Shannon Willis because she's not reliable. **He'll want to get you off into alibi witnesses and was his hand this and was a splint used here, and what did she say to her attorney? All that is smoke screen, folks, smoke screen because he's only got one witness**, and when you go back and take these back—take the photographs back and you will realize the only witness they have you cannot base a verdict on. You cannot. It is not there. The evidence is not here.

(Emphasis added.)

We "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690. From our review of the record, it appears likely that defense counsel's failure to press the alibi defense was a strategic decision based on several factors. The State relied on the testimony of a single eyewitness. There was no forensic evidence linking Mr. Smith to the crime. Mr. Smith's statements to the police were inconsistent with his alibi defense. And

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acknowledge that he had been in Baltimore that night. Furthermore, Mr. Smith told detectives that he lived at his father's address, not his mother's, and said nothing about being at his mother's residence the night of the murder, an assertion which, if true, one would have expected him to make at the time of the interrogation (an incongruity which the prosecutor pointed out during closing argument).

the alibi witnesses did not hold up well on cross-examination. Applying the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[,]" *id.* at 689, we hold that Mr. Smith failed to rebut the presumption that trial counsel's mid-course correction was a legitimate trial tactic. *See Schmitt v. State*, 140 Md. App. 1, 34-35 (2001) (explaining that the decision whether to request an alibi jury instruction, even if generated by the evidence, may be a matter of trial tactics); *State v. Matthews*, 58 Md. App. 243, 245-48 (1984) (declining to find deficient performance where trial counsel faced a choice of "two plausible defense strategies," attacking a weak witness identification or asserting a facially implausible alibi, and choosing the former).[17]

Given our holding that Mr. Smith failed to carry his burden to show that counsel performed deficiently, we shall not reach the issue of prejudice. *See Strickland*, 466 U.S. at 697 (observing that "there is no reason for a court deciding an ineffective assistance claim . . . to address both components of the inquiry if the defendant makes an insufficient showing on one.").[18]

[17] In *Matthews*, we misstated one of the choices faced by trial counsel, characterizing it as follows: "The second strategy was to try to win an acquittal by proving alibi." 58 Md. App. at 245. Mr. Matthews, of course, did not have to prove anything. *See Pulley v. State*, 38 Md. App. 682, 690 (1978) (stating that, "once a defendant has offered proof that he was not present at the time and place that the crime was committed, then the Government must convince the jury beyond a reasonable doubt that the defendant's alibi is not true"). Nonetheless, Mr. Matthews's alibi would have been a hard sell; he claimed that he had been with a "girlfriend" whom he had dated several months but whose last name and address he did not know. *Matthews*, 58 Md. App. at 246.

[18] In passing, we note that it is far from clear, as the State asserts, that "even if trial counsel is deficient in failing to request an alibi instruction, a post-conviction petitioner whose jury is instructed on the legal principles of reasonable doubt and burden of proof

C.

THE POSTCONVICTION COURT'S FAILURE TO ADDRESS THE REMAINING ALLEGATIONS IN THE PETITION

The postconviction court declared that, given its ruling awarding Mr. Smith a new trial, it "need not consider or reach" the remaining allegations in his petition. Although we sympathize with the court's plight, it violated Maryland Rule 4-407 in declining to address those remaining allegations.[19] Given our holding, and Mr. Smith's entitlement to have the court address all allegations in an original postconviction petition, we remand so that the circuit court may do so.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS SO THAT THE COURT MAY ADDRESS THE REMAINING ALLEGATIONS IN APPELLEE'S POSTCONVICTION PETITION. COSTS TO BE PAID BY APPELLEE.

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will ordinarily not be able to prove *Strickland* prejudice." The State's assertion comes dangerously close to a per se rule of no prejudice; after all, juries are always instructed on reasonable doubt and the State's burden of proof. Indeed, we read *State v. Mann*, 466 Md. 473 (2019), as eschewing a per se rule in such a case. There, the Court of Appeals undertook "a fact-specific analysis" to determine whether prejudice had ensued from trial counsel's failure to request an alibi jury instruction. *Id.* at 500.

[19] Maryland Rule 4-407(a) provides:

> The judge shall prepare and file or dictate into the record a statement setting forth separately each ground upon which the petition is based, the federal and state rights involved, the court's ruling with respect to each ground, and the reasons for the action taken thereon. If dictated into the record, the statement shall be promptly transcribed.