Circuit Court for Baltimore City
Case No. 120174041

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 292

September Term, 2023

ARTHUR HOLT

v.

STATE OF MARYLAND

Berger,
Ripken,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Ripken, J.

Filed: May 7, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

In July of 2023, a jury sitting in the Circuit Court for Baltimore City found Arthur Holt ("Appellant") guilty of multiple charges, including first-degree murder. The court sentenced Appellant to an aggregate period of incarceration of life plus 20-years consecutive. During opening statement, Appellant's counsel ("defense counsel") referenced Appellant's desire to "be able to say to a jury" that Appellant was not guilty of the offenses charged. Appellant did not put on a defense case or call witnesses. Appellant presents the following issue for review: Whether defense counsel's opening statement constituted ineffective assistance of counsel.[1] For the reasons to follow, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was charged with four offenses arising from the fatal shooting of Dontrell Toliver. The shooting was captured by security camera video, which shows two men, including an individual identified by the State as Appellant, physically striking as well as firing a handgun at the victim. Other videos from the area show that same individual identified by the State as Appellant wearing the same clothing and carrying a handgun around the time and vicinity of the shooting. The primary issue at trial concerned the identity of the shooter.

In opening statement, defense counsel stated the following:

> Arthur Holt has been waiting since he was charged with this case to be able to talk [sic] into a courtroom and say, "I'm not guilty of these charges." So this occurred in April of 2020. My client was charged at that time. And so he's waited over two years to be able to say to a jury, "I'm not guilty of these charges."

[1] Condensed and rephrased from: "Does trial counsel's unexplained broken promise to the jury in opening statement that Mr. Holt would testify create sufficient prejudice to support a claim of ineffective assistance of counsel?"

* * *

> What it's going [to] come down to is you all are gonna have to look at these videos, look at the still shots and independently make a decision can we identify the person in the green jacket. And the answer is no. And what I can tell you is it's not my client. But he's been waiting for over two years to be able to say, "That's not me."

Following the presentation of the State's case, both attorneys and Appellant approached the bench. Defense counsel made a motion for judgment of acquittal, which the court denied. Subsequently, defense counsel apprised Appellant of his trial rights, including the right to testify, the right to remain silent, as well as the right not to put on a defense. Defense counsel noted that if he elected to testify, Appellant could be cross-examined by the State, including about his prior convictions for burglary and manslaughter. After so advising Appellant, the following interaction occurred:

> [DEFENSE COUNSEL]: And have you made a decision about whether or not you want to testify or remain silent, or do you need to think about that, or do you want to talk to me about it?
>
> [APPELLANT]: [I] want to think about it.
>
> [DEFENSE COUNSEL]: Well, do you want -- do you have any questions for me?
>
> THE COURT: Well, I didn't hear the answer.
>
> [DEFENSE COUNSEL]: I think he said he didn't want to testify. Is that correct?
>
> [APPELLANT]: I do want to testify.
>
> [DEFENSE COUNSEL]: You do want to testify. Okay. So if I could have a moment?

Subsequently, the court took a lunchtime break, and defense counsel informed the court of her intent to speak with Appellant during the recess.

When the court reconvened, Appellant confirmed on the record that defense counsel had visited him during the break, that he had reconsidered his prior statement, and no longer wished to testify. The defense rested without submitting evidence or testimony. The court then provided instructions to the jury, including an instruction that Appellant's exercise of his constitutional right not to testify could not be held against him. During her closing argument, defense counsel reiterated that Appellant had been "waiting month, after month, after year, after year to be able to finally come in here and say, 'I didn't do this.'" After deliberation, the jury returned a verdict of guilty on all counts. Appellant noted this timely appeal.

Additional facts will be included as they become relevant to the issue.

DISCUSSION

I. WE DECLINE TO REVIEW APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM ON DIRECT APPEAL.

A. Ineffective Assistance of Counsel

In *Strickland v. Washington*, the Supreme Court of the United States established that a defendant's constitutional right to counsel is violated when counsel's performance is ineffective. *See generally*, 466 U.S. 668 (1984). Ineffective assistance of counsel occurs when counsel's performance is (1) deficient and (2) prejudicial to the defense. *Id.* at 687; *Newton v. State*, 455 Md. 341, 355 (2017). Counsel's performance is deficient when it fails to "meet an objective standard of reasonableness," based on "prevailing professional norms." *Mosley v. State*, 378 Md. 548, 557 (2003). However, decisions by counsel that result from a considered trial strategy do not constitute deficient representation. *See*

Coleman v. State, 434 Md. 320, 338 (2013). A strategic trial decision is one that is founded "upon adequate investigation and preparation." *State v. Borchardt*, 396 Md. 586, 604 (2007). To demonstrate prejudice arising from an attorney's alleged error, a defendant must show "'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Newton*, 455 Md. at 355 (quoting *Coleman*, 434 Md. at 340–41 (citation omitted)). Except for the circumstance where there is an actual conflict of interest, a reviewing court does not presume that deficient performance inherently resulted in prejudice to a defendant. *See Harris v. State*, 303 Md. 685, 699 (1985).

The most appropriate means of presenting an ineffective assistance of counsel claim is generally through a post-conviction proceeding pursuant to the Maryland Uniform Postconviction Act. *See Mosley*, 378 Md. at 558–59; *see generally* Md. Code, Criminal Procedure Article §§ 7-101 to 109. Post-conviction proceedings are strongly favored over direct appeals, as "the trial record rarely reveals why counsel acted or omitted to act," whereas a post-conviction proceeding permits "fact-finding and the introduction of testimony and evidence directly related to [the] allegations of counsel's ineffectiveness." *Id.* at 560. The expanded scope of evidence afforded by a post-conviction hearing, and particularly the ability to question trial counsel directly, is generally necessary to properly resolve an ineffective assistance of counsel claim. *Crippen v. State*, 207 Md. App. 236, 251 (2012). This is because the contents of a trial record alone are normally inadequate to overcome the strong presumption "that counsel rendered reasonable assistance and made all significant decisions in the exercise of reasonable professional judgment." *In re Parris*

W., 363 Md. 171, 725 (2001).

Therefore, we review a claim for ineffective assistance of counsel on direct appeal only in "extremely rare situations," *Crippen*, 207 Md. App. at 251, where the record itself is sufficient to demonstrate that counsel's performance was not only ineffective, but that the ineffectiveness was "blatant and egregious." *Mosley*, 378 Md. at 562 (internal quotation marks omitted). Review on direct appeal is only appropriate when "the critical facts are not in dispute" and the trial record is "sufficiently developed to permit a fair evaluation of the claim." *In re Parris W.*, 363 Md. at 726.

B. Parties' Contentions

On direct appeal, Appellant argues that defense counsel's remarks during opening statement that Appellant had been waiting to "say" to a jury that he was innocent constituted ineffective assistance of counsel. Appellant asserts that because he did not ultimately testify, defense counsel's comments constituted an "unexplained broken promise to the jury[.]" Appellant presents federal caselaw supporting his premise that under certain circumstances, the breach of a promise to the jury during opening statement that certain testimony or evidence will be presented can constitute deficient performance. Appellant argues that defense counsel's "promise" that he would testify, and subsequent failure to deliver his testimony, amounted to a constitutionally deficient performance and prejudiced Appellant's case.

The State urges us not to address the merits of Appellant's contention and asserts that the trial record is not sufficient to determine whether defense counsel rendered ineffective assistance of counsel. Although the State accepts that a trial attorney's broken

promise to present evidence could, under certain circumstances, constitute deficient performance, the State notes that such an inquiry is fact specific. In the State's view, the trial record in this case is insufficient to overcome the presumption that defense counsel's action was the result of a considered trial strategy.

In the alternative, the State asserts that should we address the merits of Appellant's contention, defense counsel's opening statement, which referenced Appellant's desire to "say" to the jury that he was innocent, did not constitute a "promise" that he would testify. The State contends that defense counsel's opening statement did not claim that Appellant would "testify[,]" refer to him as a "witness[,]" or reference any specific alibi or other information he would "tell" the jury beyond a general claim that he was not guilty of the crimes charged. Rather, the State posits that defense counsel's statement merely alluded to Appellant's general intent to assert, through his counsel's advocacy, that Appellant was innocent of the charges against him. Because defense counsel did not make a promise that Appellant would testify, the State argues, it follows that counsel's failure to present his testimony was not deficient performance. Nor, in the State's view, has Appellant demonstrated prejudice, particularly in light of the strength of the video evidence linking Appellant to the crime.

C. Review of Ineffective Assistance of Counsel on Direct Appeal is Rarely Appropriate.

Appellant argues that no reasonably competent counsel would have promised in opening statement that Appellant would testify in his own defense, but then later fail to present such testimony. In order to succeed in proving that his counsel's assistance was

constitutionally ineffective, Appellant is required to overcome the "strong presumption" that counsel provided reasonable assistance, and that defense counsel's action was the result of "sound trial strategy." *Ramirez v. State*, 464 Md. 532, 561 (2019) (quoting *Strickland*, 466 U.S. at 689). Even were this Court to conclude that defense counsel's statement constituted a promise, which we do not decide, the record is not developed to a degree which would allow us to evaluate Appellant's claim.

The record in this case demonstrates that trial counsel and Appellant had at least one off-the-record conversation concerning Appellant's desire to testify, after which he changed his mind, and declined to testify in his own defense. The record is silent regarding defense counsel's reasons for declining to present Appellant's testimony. Nor is it clear from the record whether defense counsel planned from the start of the trial to present Appellant's testimony, or if counsel's plan was altered by events or other testimony at trial. *See Walker v. State*, 391 Md. 233, 256 (2006) (determining that trial counsel's "strategic calculation in an unusual situation" where his client unexpectedly did not appear for trial was not ineffective assistance of counsel). It is, likewise, unclear whether defense counsel's words in opening statement were intended as a promise of testimony by the defendant as opposed to his appearance in court with counsel maintaining on his behalf that it was not he who committed the act and that he was thereby not guilty.[2]

[2] Moreover, we note that it is plausible that defense counsel's statement that Appellant had been waiting to "talk into a courtroom and say [that he was innocent]" was the result of a transcription error or verbal slip, and counsel's statement was or was intended to be that Appellant would *walk* into a courtroom and assert his innocence.

In determining if defense counsel's assistance was ineffective, we must evaluate defense counsel's actions "from counsel's perspective at the time[;]" however the record in this case is insufficiently developed to allow us to do so. *Strickland*, 466 U.S. at 689. In contrast to the direct appeal in *In re Parris W.*, where the undisputed facts in the record established that a defense attorney's failure to subpoena witnesses for the correct trial date was (1) a mistake unrelated to trial strategy, and (2) the sole reason for the witnesses' failure to appear, here, the record provides essentially no insight into defense counsel's decision-making process or possible trial tactics. 363 Md. at 727–28. As Appellant himself notes, defense counsel's rationale for declining to present his testimony is "unexplained" by the record. Accordingly, we decline to speculate whether defense counsel's performance was either the result of a considered trial strategy or was objectively unreasonable under the circumstances.

The record in this case is not sufficiently developed to allow this Court to determine defense counsel's reasons for the word choice in opening statement or for the decision not to call Appellant to testify during his trial. Appellant's claim is therefore best evaluated within a post-conviction proceeding. At a hearing in the circuit court, additional testimony might shed further light on the reasoning behind defense counsel's actions, the court may consider the validity thereof, and, if required, determine if prejudice resulted to Appellant's case. On direct appeal, the record available to this Court is insufficient to answer those same questions, and consequently we decline to address Appellant's claim of ineffective assistance of counsel.

JUDGMENTS OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

The correction notice(s) for this opinion(s) can be found here:

https://mdcourts.gov/sites/default/files/import/appellate/correctionnotices/cosa/unreported/0292s23cn.pdf