Circuit Court for Montgomery County
Case No. 06-J-21-050205

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 556

September Term, 2022

IN RE: C.G.

Graeff,
Beachley,
McDonald, Robert N.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 14, 2023

*At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Following an adjudicatory hearing, the Circuit Court for Montgomery County, sitting as a juvenile court, found appellant, C.G., involved in attempted carjacking, conspiracy to commit carjacking, attempted robbery, conspiracy to commit robbery, second-degree assault, conspiracy to commit second-degree assault, attempted theft, and conspiracy to commit theft. The court found appellant to be delinquent and placed him on supervised probation.

On appeal, appellant raises the following question for this Court's review:

> Was appellant denied effective assistance of counsel when trial counsel failed to timely make a meritorious motion to suppress?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The Attempted Carjacking

On the morning of June 18, 2021, Judy Salmaron parked her car on the third floor of the Cameron Street Garage in Silver Spring. As she exited her car and walked around to the passenger side to retrieve her purse from the front seat, she was approached by two young men wearing masks. Ms. Salmaron testified that one of the individuals, who was wearing an ankle monitor, appeared to be 17 or 18 years old. The person with the ankle monitor wore a "white hoodie," and the other person wore a "black hoodie." The assailants demanded that Ms. Salmaron surrender her car keys, but she refused. The assailants struggled with Ms. Salmaron and pushed her into the car through the open passenger door. She "fell forward on top of [her] purse so they couldn't really get into" it. When Ms. Salmaron told them that she was pregnant, they "got off of" her and "backed off a little."

Ms. Salmaron's cell phone fell out of her pocket. The assailant in the black hoodie grabbed it. As the two assailants struggled with Ms. Salmaron, her coworker, Veronica Mancia, arrived in the garage. Ms. Salmaron told the assailants that people would be arriving for work, and they should leave. The assailant in the white hoodie told his compatriot to return Ms. Salmaron's phone to her, "and the one in the black hoodie" returned her phone. Then, "the guy in the white" apologized, "gave [Ms. Salmaron] a hug," and left.

After the assailants had fled the scene, Ms. Salmaron approached her coworker, entered her car, and "started screaming." The two women "drove off . . . to try to follow" the assailants. When they reached the first floor of the parking garage, Ms. Salmaron spotted the assailants, and she took a photograph of them with her cell phone.

Ms. Salmaron called 911 to report the attack. She gave the police descriptions of the assailants, including that one was wearing an ankle monitor.

Detective Charles Horwitz, a member of the Montgomery County Police Department, determined that James B. had been wearing an ankle monitor and was present at the Cameron Street Garage at the time of the assault. An arrest warrant was issued for James B. in the District of Columbia. When the police located and arrested James B., an iPhone was recovered from his person. Police detectives obtained a search warrant for the contents of the phone, leading to identification of the appellant as an additional suspect. Police executed a search warrant for appellant's home in the District of Columbia, and they recovered items of clothing matching the descriptions that had been provided by Ms.

Salmaron and Ms. Mancia, as well as a distinctive orange lighter. Appellant subsequently waived his *Miranda*[1] rights and made an inculpatory statement to police, acknowledging that he was the person depicted in screenshots of surveillance footage recovered near the scene of the attack on June 18, 2021.

Legal Proceedings

On October 19, 2021, a delinquency petition was filed in the Circuit Court for Montgomery County, sitting as a juvenile court. The petition alleged that, on June 18, 2021, appellant committed acts which, had they been committed by an adult, would constitute attempted carjacking, attempted robbery, assault in the second degree, attempted theft of property with a value between $1,500 and $25,000, and conspiracy to commit each substantive offense.

An adjudicatory hearing initially was scheduled for December 22, 2021. After an extension was granted, it was held on April 15, 2022. Ms. Salmaron, Ms. Mancia, and Detective Horwitz testified, consistent with the facts set forth, *supra*.

During Detective Horwitz's testimony, he explained that the police executed a search warrant at appellant's residence. When asked if clothing seen in the surveillance video was recovered, defense counsel argued that he "would be challenging the warrant and the warrant would need to be produced first in order to lay a foundation." The prosecutor stated that it was "an improper time to challenge the search warrant," arguing

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

that such a challenge should have been raised by preliminary motion.[2] The juvenile court asked defense counsel whether a motion had been "filed pre-adjudication to challenge the search warrant." Defense counsel stated: "No, Your Honor, in Juvenile Court that hasn't been the practice. It's been the practice to raise those issues during trial."

Counsel then explained his objection, stating that it was an evidentiary rule that the State had to produce the warrant in court if it was admitting evidence obtained through a warrant, and the defense challenged the warrant. The prosecutor said he would produce the warrant as an exhibit if the court wanted him to, but he had provided it to defense counsel in discovery. Defense counsel stated that, when there is a challenge to the constitutionality of a warrant, the best evidence rule required that the warrant be admitted into evidence. The court expressed its view that defense counsel was requesting a "*Franks* hearing," and it asked for authority that the issue should not be handled pretrial. Defense counsel responded: "I think the rules in Juvenile Court are silent on that. I am not aware of any statutory requirement that that issue be raised pretrial." The court ordered a brief recess so that it could consider the issue.

[2] The prosecutor stated that defense counsel had "filed in writing prior to the commencement of trial" a motion requesting a hearing under *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978), which held that, if a defendant proves by a preponderance of the evidence that a false statement was included in the warrant affidavit through perjury or in reckless disregard of the truth, and "the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Id.* at 156. There is, however, no written motion in the record.

After the court reconvened the hearing, the court discussed *Franks* and the procedural requirements regarding such a claim. The court then asked defense counsel whether he had "anything to show" or "allege that there's false statements that were knowingly [and] intentionally made in the [warrant] affidavit." Defense counsel replied: "No, I'm not alleging that there's anything false. I was just alleging that it was, the totality was insufficient." The court denied the motion to suppress.

At the conclusion of the adjudicatory hearing, the court found appellant involved in all charged offenses, stating:

> The allegation was that on June 18th, 2021, [appellant], in conjunction with Mr. James B., conspired together to take away from Judy Salmaron, who is the person identified as the victim in this case, her gray 2017 Honda Civic. On that date, early in the morning, Salmaron testified that she drove to work, was parking in a parking garage in downtown Silver Spring when two individuals came up to her.
>
> One was wearing a white hoodie. One was wearing a . . . gray or black hoodie. They demanded her car, her keys. She indicated she was not going to turn it over. They kept demanding. She kept saying no. Ultimately, there was a struggle. She fell, she landed on top of her purse in which her keys [are] in. Apparently, her phone was either in her hand or also in her purse, but it fell.
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> The person in the black hoodie picked it up. They continued the argument. Ms. Salmaron kept insisting that they leave her. She wasn't going to give up her car. Another car showed up. The person in the white hoodie told the person in the black hoodie to give the phone back, which he did, and then, the person in the white hoodie gave her a hug and then they fled the scene.
>
> The person who showed up happened to be somebody who knew Ms. Salmaron and that was one of the other State's witnesses. That was Ms. Veronica Mancia. Ms. Mancia testified that when she showed up, she saw Ms. Salmaron. Ms. Salmaron rushed to her car, got in the passenger side, was, I believe the phrase that she used was, in panic mode. That was the

phrase that was used. She was very upset and that she understood, finally learned that Ms. Salmaron had been the victim of an attempted carjacking.

They decided to leave the garage. They were on the third floor, so, as they were winding down to leave, the victim . . . says, there they are and she took a picture which is State's Exhibit No. 1, and it shows two people walking away from her. One is in that gray or white hoodie and one's in the dark hoodie.

The police are called. Descriptions are given. Police then open an investigation. [Ms. Salmaron] did indicate that the person in the light colored, white hoodie, had an ankle monitor on. The police were able to use that piece of evidence to do an electronic canvas of the area to see if anybody who had such a device was in the area at that time.

And through their research, they were able to identify . . . James B. Using that, they then tracked his movements that day, both before and after the incident, were able to show that he traveled on the Metro, getting on and off at various stations. They collected photographs. Started trying to determine who the other person could be. Through their research, they identified . . . [appellant].

They ultimately sought a search warrant from [appellant's] home in Washington, D.C. They effectuated the search warrant. [Appellant] was at home. He was taken into custody and the police were able to obtain a number of items, which, in essence, were mostly clothing, shoes and then the object, which appears to be a lighter on a holder that has like a carabiner on a belt loop clip, orange in color.

The clothing that they collect is consistent with the clothing worn by the person that was with Mr. B. throughout Metro Station. That person was also wearing on the front of his pants that orange lighter with its clip. As I indicated, the search warrant, when it was effectuated, also allowed the police to meet with [appellant], who then went, was Mirandized, and identified himself as the person in the photographs.

So, while the victim wasn't able to identify him because of the fact that he was wearing a face covering, which he has on these photographs down around his neck, and which is also, collected during the search warrant, he did identify himself after being properly Mirandized.

> Accordingly, the [c]ourt finds that the State did prove the elements to the attempted carjacking. Court's going to find that it was Mr. B. acting in concert with [appellant] in the garage, trying to take unauthorized possession, control of Ms. Judy Salmaron's Honda Civic. They conspire together Count 2. I am going to find they proved that beyond a reasonable doubt.

The court also found appellant to be involved regarding counts three through eight.

On May 13, 2022, the juvenile court held a disposition hearing and placed appellant on probation, with conditions. This timely appeal followed.

DISCUSSION

Appellant contends that he was denied effective assistance of counsel when defense counsel failed to timely make a meritorious motion to suppress evidence. He states that, although the general rule is that ineffective assistance of counsel claims should be raised in post-conviction proceedings, the record here permits this Court to address his claim on direct appeal.

The State contends that we should decline appellant's request to address his ineffective assistance claim on direct appeal, noting that a post-conviction proceeding ordinarily is the preferred vehicle for addressing such a claim. The State further asserts that, if considered, the claim fails because suppression of the evidence is not warranted. It argues that there was a substantial basis for the warrant-issuing judge to find that the affidavit was supported by probable cause, and even if not, the good faith exception would apply to support the search.

Before deciding whether to address appellant's claim of ineffective assistance of counsel, we address some preliminary issues. Initially, we note that "[i]t is the general rule

that a claim of ineffective assistance of counsel is raised most appropriately in a post-conviction proceeding." *In re Parris W.*, 363 Md. 717, 726 (2001). *Accord Bailey v. State*, 464 Md. 685, 703 (2019) (Maryland's appellate courts will "rarely consider ineffective assistance of counsel claims on direct appeal."). "The primary reason behind the rule is that, ordinarily, the trial record does not illuminate the basis for the challenged acts or omissions of counsel." *In re Parris W.*, 363 Md. at 726. *Accord Bailey*, 464 Md. at 704 ("[P]ost-conviction proceedings are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or omitted to act.") (quoting *Mosley v. State*, 378 Md. 548, 560 (2003)). There are, however, exceptions to the rule. As this Court has explained,

> [t]he rare instances in which we have permitted direct review are instructive, because they indicate our willingness to entertain such claims on direct review only when the facts in the trial record sufficiently illuminate the basis for the claim of ineffectiveness of counsel. As we explained in *In re Parris W.*, direct review is an exception that applies only when "the critical facts are not in dispute and the record is sufficiently developed to permit a fair evaluation of the claim."

Crippen v. State, 207 Md. App. 236, 251 (2012) (quoting *Tetso v. State*, 205 Md. App. 334, 378 (2012)). Therefore, unless the record before us provides a fair evaluation of the claims on appeal, a remand for a collateral fact-finding proceeding would ordinarily be necessary. *See In re Adoption/Guardianship of Chaden M.*, 189 Md. App. 411, 435 (2009), *aff'd*, 422 Md. 498 (2011).

We also note that this appeal involves a juvenile adjudication. Because the case did not result in a conviction, appellant's claim cannot be raised in a proceeding under the

Maryland Uniform Postconviction Procedure Act, which requires a person to be "*convicted* in any court in the State." Md. Code Ann., Crim. Proc. Art. ("CP"), § 7-101 (2018 Repl. Vol.) (emphasis added). It is clear, however, that "a juvenile's right to counsel in a delinquency proceeding is commensurate with the right to counsel in a criminal case," and "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution." *In re Christopher T.*, 129 Md. App. 28, 34 (1999). Accordingly, the Supreme Court of Maryland[3] has applied the general rule for post-conviction review of ineffective assistance of counsel claims to juvenile proceedings. *In re Parris W.*, 363 Md. at 726 ("It is the general rule that a claim of ineffective assistance of counsel is raised most appropriately in a post-conviction proceeding.").

The Supreme Court, in *In re Elrich S.*, 416 Md. 15, 32 (2010), explained the procedural avenue for review of a claim of ineffective assistance of counsel arising from a juvenile proceeding. It noted that, although the "Juvenile Causes article does not recognize what would typically be considered to be post-conviction relief," "[Maryland Rule 11-423] is the appropriate vehicle through which those determined to be delinquent can raise ineffective assistance of counsel claims." *Id.* at 32 n.9.[4]

[3] At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Appeals of Maryland to the Supreme Court of Maryland. The name change took effect on December 14, 2022.

[4] *In re Elrich S.*, 416 Md. 15, 32 n.9 (2010) cited to former Maryland Rule 11-116, which is now Rule 11-423. Former Rule 11-116(a) stated, in pertinent part: "Revisory

Maryland Rule 11-423(a) provides that the circuit court has revisory power in post-disposition hearings, stating that the court "may modify or vacate an order if the court finds that action to be in the best interest of the respondent or the public." Accordingly, appellant's ineffective assistance of counsel claim is subject to revisory review pursuant to Maryland Rule 11-423. The question here is whether the circumstances warrant this Court's review of appellant's claim, as opposed to addressing the issue in a revisory hearing, in the circuit court.

Before addressing that issue, we note that a claim of ineffective assistance of counsel consists of two elements: deficient attorney performance and prejudice. *State v. Syed*, 463 Md. 60, 75, *cert. denied*, 140 S. Ct. 562 (2019). The defendant bears the burden to prove both elements. *State v. Thaniel*, 238 Md. App. 343, 360, *cert. denied*, 462 Md. 93 (2018), *cert. denied*, 139 S. Ct. 2027 (2019).

To show that defense counsel performed deficiently, a "defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). "Judicial scrutiny of counsel's performance must be highly deferential," and that scrutiny begins with a "strong presumption" that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 689–90. Because it is "all too tempting for a

power. An order of the court may be modified or vacated if the court finds that action to be in the best interest of the child or the public." Rule 11-423(a) includes substantially similar language.

defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," we must make "every effort" to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. 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." *Id.* at 690.

To show prejudice, a "defendant 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.* "That standard is less demanding than proof by a preponderance of the evidence but requires more than merely showing 'that the errors had some conceivable effect on the outcome of the proceeding.'" *State v. Wallace*, 247 Md. App. 349, 359 (2020) (quoting *Strickland*, 466 U.S. at 694), *aff'd on other grounds*, 475 Md. 639 (2021).

Here, the State argues that the record is not sufficient to determine whether counsel's conduct was deficient. It asserts:

> Counsel should be called to testify at a post-conviction hearing and explain why he believed [making a motion during the hearing] was the practice, whether he had successfully relied on that practice in the past, and why he chose to follow that practice and challenge the search warrant during the adjudication hearing instead of via pretrial motion. Counsel should also

> identify his defense strategy, his precise theory for potentially challenging the search warrant, and how that challenge fit into the defense strategy.

We agree that this testimony is necessary to assess the first prong of an ineffective assistance of counsel claim.

At a hearing in the circuit court, counsel can explain why he did not raise the suppression motion prior to trial.[5] Counsel also can make clear the basis for his challenge to the search warrant. In the proceedings below, defense counsel argued that there was an evidentiary issue, pursuant to *Duggins v. State*, 7 Md. App. 486 (1969), requiring the State to produce the actual warrant in court. He stated that, when there is a challenge to the constitutionality of the warrant, the best evidence rule required the State to admit the warrant into evidence.[6] Defense counsel did not make clear the basis for his challenge to the warrant, other than stating that "the totality was insufficient."

Based on the facts here, appellant's claim of ineffective assistance of counsel is best heard within a post-conviction procedure. At a hearing in the circuit court, counsel can explain the theory for challenging the warrant, and the court can then consider whether the failure to do so prior to the hearing date was deficient conduct that prejudiced appellant.

[5] Although counsel below stated that they were not aware of a specific rule providing a deadline for filing a motion to suppress in a juvenile proceeding, we note that Maryland Rule 11-419(c) provides that such a motion shall be filed "no later than five business days before the first scheduled adjudicatory hearing, unless the court, for good cause shown, orders otherwise." This Rule became effective January 1, 2022, after the adjudicatory hearing first scheduled for December 22, 2021, but prior to the actual hearing on April 15, 2022.

[6] The State advised that the warrant had been produced in discovery.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.