Circuit Court for Dorchester County
Case No. 09-K-11-014527

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 631

September Term, 2016

KEVIN DENNIS GEORGE, SR.

v.

STATE OF MARYLAND

Wright,
Graeff,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: May 3, 2018

Kevin George appeals the denial of his petition for post-conviction relief in the Circuit Court for Dorchester County. He raises the following question for our review:

> "Did the post-conviction court err in concluding that defense counsel did not render ineffective assistance by failing to present mitigation evidence at sentencing?"

We shall hold that the post-conviction court erred in concluding that defense counsel rendered effective assistance. Accordingly, we shall reverse.

I.

The Grand Jury for Dorchester County indicted appellant with twenty-one crimes related to appellant's flight from police officers on November 7, 2011. In a bench trial, the court convicted appellant of two counts of assault in the first degree, attempting to elude police, driving on a suspended license, and nine other related traffic offenses. The court sentenced appellant to a term of incarceration of twenty-five years, all but thirteen years suspended, followed by five years' probation for the first assault in the first degree; twenty-five years, all but thirteen years suspended, for the second assault in the first degree; three years suspended for eluding police, consecutive to the first two sentences; and one year suspended for driving on a suspended license, consecutive to the assault sentences but concurrent with the three-year sentence. Appellant's total sentence was fifty-three years, all but twenty-six years suspended, followed by five years' probation.

The following evidence was presented at trial and the post-conviction hearing: On November 7, 2011, police shut down traffic in an area where gunshots had been reported.[1] Detective James McDaniel, on foot, waved at appellant's car to pull over to the side of the road. Appellant responded by driving directly at Detective McDaniel, forcing him to jump out of the way. As appellant drove away from the detective, Officer Chad Mothersell, also on foot, then directed appellant to stop and had to jump out of the way of appellant's car as it continued past his position. Both officers were in full police uniform.

Sergeant John Lewis tried to block appellant's car with his patrol car, and when appellant drove around the patrol car, Sergeant Lewis pursued him with lights and siren. Appellant fled at a high rate of speed and did not stop at stop signs. Appellant's car then hit an unoccupied pickup truck, and appellant and another man fled on foot. Three people remained in the car, including a boy who testified that appellant was drinking beer in the car during the incident.

Prior to trial, appellant wrote letters to the judge asking for treatment for drug and alcohol addiction. Appellant's trial counsel represented appellant in four additional cases while this case was pending. Counsel met with appellant several times to discuss the various cases and talked to appellant's mother, but never asked appellant or his mother for mitigating information that he could use at sentencing.

[1] Appellant is not connected to the noises that triggered the traffic shutdown.

On April 11, 2012, appellant, having waived his right to a jury trial, was found guilty by the trial judge. When the judge asked "As to sentencing is everyone prepared today?" defense counsel replied "Yes, Your Honor," and proceeded to sentencing immediately, without seeking a continuance. The State requested a sentence "in the upper end of the guidelines," which recommended eight–twenty-six years.[2] Counsel called no witnesses at the sentencing proceeding and presented no evidence. His entire mitigation presentation was as follows:

> "[DEFENSE COUNSEL]: [Appellant] is thirty years old. I've been representing him for about eight months at this point. When I was informed of this incident and I spoke with him. And it's always been his statement to me that from the very beginning he had no intent to injure these people, these officers.
>
> I know he does have a long record, Your Honor, but I would ask that you take into consideration that this is his first conviction for any crime of violence. That you allow him—he's also had a long and ongoing problem with drugs and alcohol that he has related to me. And I believe he gave letters that he said he sent to you alleging or stating that he's done with these ways and would hope to get into some sort of assistance when he is released.
>
> I would ask that for the majority of the traffic violations that you just impose no incentive—excuse me, no sentence. And because this is his first crime of violence he's facing—he's already serving time and he is facing time coming from a violation of probation hearing we are having tomorrow I ask

[2] On the sentencing worksheet, the judge determined that each assault conviction: A) fit in Seriousness Category III, B) produced "No Injury," C) was conducted with a "Weapon Other Than Firearm," and D) did not affect a specially vulnerable victim. Appellant was evaluated as being under Court or Other Criminal Justice Supervision, having a Major Criminal Record, and having no Prior Adult Parole/Probation Violation. The worksheet recommends eight to thirteen years for each conviction (which has a statutory maximum penalty of twenty-five years) or eight to twenty-six years combined.

that you go toward the lower end of the guidelines if not below that for sentencing purposes and giving him a long period of suspended time and go from there.

So, [appellant], at this point if you'd like to say anything to Judge Wilson before he decides your sentence. You have that ability. If not nothing can be taken against you for not saying anything.

[APPELLANT]: No."

Prior to imposing sentence, the judge stated as follows:

"I don't know what it was you were running from. On the fact of it worst case scenario you get stopped and you're driving while suspended and even as a subsequent offender you're looking at two years. And you have worked this into much more than it had to be and endangered people you didn't have to endanger not only the officers but the kids in the car. And you didn't wait to see if they were hurt from the impact you booked it. So apparently it's all about you and saving your own bacon and not about respect with anyone else.

You've been a nuisance to this Court for a long time. And you've elevated it at this point. There have been things certainly that you've been here for that have past and gone in your favor, but now we are into violent crimes as opposed to motor vehicle situations or domestic situations or theft situations.

So if you're running because you've been drinking or running because you were suspended bad choice. If you're doing it for Mr. Payton bad choice. I've had him since he was fourteen years old. I believe he knifed somebody over at the bowling alley. Sometimes the company we keep can not be a good thing.

In any case you made a series of bad choices. You endangered people who were innocent people and you are going to have to pay for it unfortunately.

And these guidelines are a reflection of your record. You have the criminal record put you in the major category. Now any of these by themselves, you know, a felony theft, felony theft schemes and failing to stop and minor drug charges, you know separately don't look that bad. But when

> you put them all together you're a major criminal according to the sentencing guidelines. And that's what runs your guidelines up. Everything we do in life builds on the last thing we did.
>
> So as to count one . . ."

Appellant's total unsuspended sentence of twenty-six years was the maximum reflected in the sentencing guidelines.

Appellant noted a direct appeal from his judgment of convictions. This Court affirmed. *George v. State*, No. 626, Sept. Term 2012 (filed October 7, 2013).

Appellant filed a petition for post-conviction relief in the Circuit Court for Dorchester County, alleging ineffective assistance of counsel. In the petition, he claimed that for mitigation in sentencing, defense counsel had neither investigated nor presented appellant's history of abuse as a child and the ensuing decades of his drug abuse.[3]

On March 21, 2016, the Circuit Court for Dorchester County held a hearing on appellant's petition for post-conviction relief. At the hearing, appellant's mother testified about appellant's background. She related that defense counsel never contacted her to get any information about appellant and that she was present at the trial and sentencing. Appellant had been physically abused by his step-father and sexually molested by his father (which appellant had not told his mother until he was twenty-seven years old). Appellant attempted suicide when he was eight years old, after which he was under a psychiatrist's care and hospitalized twice. He was diagnosed with ADHD and bipolar disorder. He began

[3] Appellant also claimed that counsel had not conveyed the State's plea offer to him prior to trial, but he did not raise that issue before this Court.

drinking alcohol at thirteen years old, and started taking other drugs at fourteen years old. Appellant confirmed the background provided by his mother and testified about the molestation as follows:

> "[APPELLANT]: And then, you know, [my father] molested me which is—I didn't want her to say all that but as a man twenty some years old I guess I should have went to a police officer or whatnot but it's kind of a pride. . . . You know, the man molested me. I kept away from my father after that. After awhile my mother [stopped making me see him] and she never knew. I mean I never told my mom because if I told my mom she probably wouldn't be here today.
>
> ***
>
> [THE STATE]: Okay. You didn't tell [defense counsel] about the abuse that you suffered; right?
>
> [APPELLANT]: I never had a chance to talk about it.
>
> [THE STATE]: Well, you didn't want to tell anybody really, did you? You weren't pleased with your mom said it today?
>
> [APPELLANT]: About me getting molested that's something different.
>
> [THE STATE]: Right. That's what I'm talking about?
>
> [APPELLANT]: But I'm talking about the abuse like getting beat and all that.
>
> [THE STATE]: I'm taking about the molestation. You wouldn't want him to have known that?
>
> [APPELLANT]: I didn't want nobody to know that."

Both appellant and his mother testified that defense counsel never spoke to appellant's mother and never returned her telephone calls. Appellant's mother stated that

she had not approached defense counsel at any of the proceedings in this case, although she knew she could.

The State called defense counsel as a witness. He testified that he met with appellant a handful of times to review all five of appellant's cases and that he had gotten all of the information he needed to develop his trial strategy. He could not remember if he asked for a continuance, but remembered presenting appellant's drug and alcohol addiction during sentencing. He related that appellant's mother called him twelve times, and he met with her in January 2011 about drug court and enrolling appellant in a rehabilitation program. He believed at the time of trial that the judge had made up his mind about appellant from past interactions, but could not say exactly what the judge did or did not know. Counsel testified that he generally did not discuss sentencing with clients before trial—he preferred to keep them positive by not considering a guilty verdict. He would then request a continuance as a general practice to strategize for sentencing. He did not remember discussing sentencing with appellant before the trial, or why he did not ask for a continuance, although he mentioned that he did not think the judge would grant a continuance.

The trial court denied appellant's claims for post-conviction relief, ruling that appellant received effective assistance of counsel because defense counsel presented sufficient mitigation evidence based on the information he had. The court reasoned that appellant would not have told his attorney about his abusive childhood, and therefore, counsel could not have presented that evidence at sentencing. This timely appeal followed.

II.

Before this Court, appellant argues that defense counsel's performance was deficient and prejudicial. He faults counsel's performance in failing to investigate appellant's background, his alcohol and drug problems and his abusive childhood. Where appellant was facing up to fifty years' incarceration, counsel was deficient in failing to either investigate appellant's background himself, ask for a continuance, or, at a minimum, request a pre-sentence investigation. For deficient performance, his decision to only recite appellant's "long and ongoing problem with drugs and alcohol" was not a strategic trial decision because it was not based upon adequate investigation and preparation. Counsel did not take time to learn important details about his client, which included physical abuse by his father and stepfather and alcohol and drug abuse beginning at age thirteen. He argues that counsel did not present *any* reasonable basis for his failure to discover or present this mitigating information to the sentencing court. His "general policy" of keeping clients positive could not excuse these omissions because he did not proceed with his general policy to request a continuance for a pre-sentence investigation report.

Recognizing that under *Strickland v. Washington*, 466 U.S. 668 (1984), to succeed on an ineffective assistance of counsel claim, a defendant must show deficient performance and prejudice, appellant argues that counsel's failure to investigate his background and to present adequate and existing mitigation evidence prejudiced him because there is a reasonable possibility that if the court had heard about appellant's background and alcohol and drug abuse, the sentence would have been shorter.

The State argues that defense counsel exercised reasonable professional judgment in deciding how much mitigation evidence to present. The State points out that this is not a case of total failure to present mitigation evidence but instead a challenge to the quality and quantity of the evidence that counsel presented at the sentencing proceeding. As to prejudice, the State maintains that appellant cannot show that the outcome would have been different had counsel proceeded differently and hence there is no prejudice. Continuing, the State argues that courts must be highly deferential to counsel's performance, including whether and how to conduct a pre-trial investigation. Finally, the State notes that the affirmative duty to present mitigation evidence on behalf of a client usually arises in death penalty cases, not otherwise.

III.

This Court "will not disturb the factual findings of the post-conviction court unless they are clearly erroneous." *Wilson v. State*, 363 Md. 333, 348 (2001). We will, however, "make an independent determination of relevant law and its application to the facts." *State v. Adams*, 406 Md. 240, 255 (2008).

In ineffective assistance of counsel claims, Maryland has applied the test set out in *Strickland v. Washington*, 466 U.S. 668 (1984), in deciding whether defense counsel has rendered constitutionally ineffective assistance of counsel based upon the Sixth Amendment to the United States Constitution. *State v. Jones*, 138 Md. App. 178, 205 (2001). Appellant must demonstrate two prongs: deficient performance and prejudice.

Strickland, 466 U.S. at 687. In order to prove ineffective assistance of counsel, appellant must prove deficient performance by showing counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Id*. at 688. For prejudice, appellant must show that counsel's deficient performance deprived him of a fair trial. *Id.* at 691–92. Appellant must show that a reasonable probability exists that, but for counsel's performance, the result of the proceedings would have been different.[4] *Id*. at 694. A reasonable probability means "a probability sufficient to undermine confidence in the outcome." *Id.* A reviewing court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. In judging counsel's performance, we look to the totality of the circumstances. *Id.* at 695.

Strickland addresses counsel's duty to investigate. The Supreme Court noted as follows:

> "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the

[4] The Maryland cases express the standard in terms of "substantial possibility." *See, e.g.*, *Newton v. State*, 455 Md. 341, 371 (2017); *Coleman v. State*, 434 Md. 320, 325 (2013); *Fullwood v. State*, 234 Md. App. 57, 68 (2017); *Jones*, 138 Md. App. at 207. Inasmuch as we are applying the Sixth Amendment to the United States Constitution, "substantial possibility" and "reasonable probability" must have the same meaning.

> circumstances, applying a heavy measure of deference to counsel's judgments."

Id. at 690–91. We have noted that "[f]ailure to conduct any pretrial investigation constitutes a clear example of ineffectiveness." *State v. Johnson*, 143 Md. App. 173, 192 (2002). Although stated in the context of a death penalty case and mitigation discussion, the Supreme Court stated as follows:

> "In assessing the reasonableness of an attorney's investigation, however, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further."

Wiggins v. Smith, 539 U.S. 510, 527 (2003).

In *Commonwealth v. Lykus*, 546 N.E.2d 159 (Mass. 1989), the Supreme Judicial Court of Massachusetts considered a defendant's ineffective assistance of counsel claim based upon allegations that defense counsel failed to present the sentencing judge with mitigating evidence. The court recognized that "[s]entencing is a critical stage of the criminal proceeding at which [the defendant] is entitled to the effective assistance of counsel." *Id.* at 165, citing *Gardner v. Florida*, 430 U.S. 349, 358 (1977). The court explained as follows:

> "A sentencing judge is given great discretion in determining a proper sentence. [The judge] has the power to determine the length of the defendant's sentence, so long as he does not violate statutory limits. The judge can order that multiple sentences be served concurrently, rather than consecutively, thereby effectively shortening the defendant's term of punishment. [The judge] may consider a wide range of factors in mitigation of the defendant's guilt, including the defendant's

> behavior, family life, and employment. Indeed, a sentencing judge is encouraged to take these and other factors into account by affording the defendant or defense counsel 'an opportunity to speak on behalf of the defendant and to present any information in mitigation of punishment.' The sentencing hearing is not a static proceeding in which the result is predictable. It is a crucial stage in the system of justice at which the skill and performance of defense counsel can significantly affect the interests of the defendant."

Id. at 145–46 (citations omitted). Finding ineffective assistance of counsel (because counsel made no reference at sentencing to the defendant's employment history, his charitable activities or civic contributions or civic activities, called no witnesses, and "[m]ost disturbingly, [] did not request the imposition of concurrent sentences"), the Massachusetts high court vacated the sentences imposed and remanded for a new sentencing proceeding. *Id.* at 146.

It goes without saying that the sentencing stage of a case is a significant stage of the criminal proceeding. This is true not only in death penalty cases, but in all criminal cases, and especially so where the potential punishment is a significant term of incarceration. Although most of the United States Supreme Court jurisprudence related to ineffective assistance of counsel and counsel's duty to investigate and to present mitigation evidence arose in death penalty cases, our sister jurisdictions have considered the issue in non-capital cases. *See, e.g.*, *McCarty v. State*, 802 N.E.2d 959 (Ind. Ct. App. 2004); *Milburn v. State*, 15 S.W.3d 267 (Tex. App. 2000); *Commonwealth v. Lykus*, 546 N.E.2d 159 (Mass. 1989). In *Lampkin v. State*, 470 S.W.3d 876 (Tex. App. 2015), Texas, which has a well-developed jurisprudence in non-capital punishment ineffective assistance of counsel sentencing cases,

set out factors for a reviewing court to consider in assessing prejudice in these types of cases. They are as follows:

> "In summary, in deciding whether a defendant has established *Strickland* prejudice during the punishment phase of non-capital cases as a result of deficient attorney performance of any kind, the following non-exclusive list of factors are relevant: (1) whether the defendant received a maximum sentence, (2) the disparity, if any, between the sentence imposed and the sentence(s) requested by the respective parties, (3) the nature of the offense charged and the strength of the evidence presented at the guilt/innocence phase of trial, (4) the egregiousness of counsel's error—essentially, the relationship between the amount of effort and resources necessary to have prevented the error as compared to the potential harm from that error—and (5) the defendant's criminal history. Where the deficient performance arises from counsel's failure to investigate and introduce mitigating evidence, the following additional factors are also relevant: (1) whether mitigating evidence was available and, if so, whether the available mitigating evidence was admissible, (2) the nature and degree of other mitigating evidence actually presented to the jury at punishment, (3) the nature and degree of aggravating evidence actually presented to the jury by the State at punishment, (4) whether and to what extent the jury might have been influenced by the mitigating evidence, (5) whether and to what extent the proposed mitigating evidence serves to explain the defendant's actions in the charged offense, and (6) whether and to what extent the proposed mitigating evidence serves to assist the jury in determining the defendant's blameworthiness."

Id. at 922. Although sentencing is a jury function in Texas, the factors set out to review prejudice to a defendant are instructive in Maryland where sentencing lies within the broad discretion of the judge.

In this case, the Texas factors balance in favor of ineffective assistance by defense counsel. Appellant's total sentence of fifty-three years more than doubled the sentencing guidelines' maximum recommendation of twenty-six years, and his unsuspended sentence equals the guidelines' maximum term. The State requested a sentence "in the upper range," and defense counsel requested one "toward the lower end," and the trial court exceeded both requests. While drinking and driving can have serious consequences, no one was injured in this incident. An overwhelming fact that relates to three factors (egregiousness of the error and the availability and presentation of mitigating evidence) is that merely asking appellant would have elicited information about his early drug and alcohol abuse and physical abuse in his childhood. Asking his mother would have led to discovering the sexual abuse appellant suffered. Given defense counsel's normal strategy of only discussing acquittal before trial, gathering this information might have required a continuance, but that was also part of counsel's normal strategy. Counsel offered no explanation for the deviation from his normal trial and sentencing strategy. Minimal effort would have produced significant mitigating information.

Factors that weigh against error include appellant's criminal history (including theft, drug possession, and driving while intoxicated) and the State's presentation of aggravating evidence in the form of that history as well as the potential danger to the police officers and the neighborhood during appellant's chase. The additional mitigating evidence, however, offered the judge an explanation for appellant's actions that directly reflect on appellant's blameworthiness.

Beyond the factors, counsel's investigation and sentencing preparation, immediately following the finding of guilt, was inadequate and, given the potential penalties facing appellant, fell below prevailing standards of reasonableness and cannot be treated as a trial tactic or a matter of reasonable judgment. Sentencing immediately followed the court's guilty finding. Counsel did not request a pre-sentence report nor submit a sentencing memorandum. Counsel called no witnesses to testify to appellant's childhood abuse. Counsel offered no substantiation of appellant's drug or alcohol abuse. Counsel did not call appellant's mother as a witness at sentencing, a witness with knowledge of appellant's abusive childhood. The sentence the court imposed, fifty-three years' incarceration, exceeded the sentencing guidelines in this case, and counsel never asked the court to impose concurrent terms of incarceration.

Appellant was prejudiced by counsel's deficient performance. We need not speculate or resort to conjecture to find that there is a substantial possibility that, at a minimum, if the court knew the full extent of appellant's background, the sentences for eluding police and driving on a suspended license might have run concurrent to the first degree assault sentences. Requesting a deferred sentencing and a pre-sentence investigation report would not have created any undue burden upon defense counsel or the court. While the general rule is that counsel's actions are reasonable, under the circumstances presented herein, where counsel testified that his ordinary strategy was to request a continuance, he stated no strategic or tactical reason for deviating from his ordinary practice.

We agree with appellant that he was denied effective assistance of counsel in the sentencing phase of his case. Counsel's performance was deficient, and appellant was prejudiced. We are not unmindful that there are many, many cases tried in this State, and particularly in District Court, in which pre-sentence investigative reports and continuances following a guilty finding are not necessary and not called for. Whether counsel must conduct investigation following a guilty finding depends on the facts and circumstances of each case and the potential penalty facing the defendant.

We hold that appellant received ineffective assistance of counsel and is entitled to a new sentencing hearing.

JUDGMENTS OF THE CIRCUIT COURT FOR DORCHESTER COUNTY REVERSED. SENTENCE VACATED. CASE REMANDED TO THAT COURT FOR A NEW SENTENCING. COSTS TO BE PAID BY DORCHESTER COUNTY.