Circuit Court for Prince George's County
Case No. CT00-1481X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1083
September Term, 2017

STATE OF MARYLAND

v.

JEROME FLEMING

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*Woodward,
Meredith,
Friedman,
JJ.

Opinion by Friedman, J.

Filed: October 18, 2019

*Woodward, Patrick L., J., now retired, participated in the hearing of this case while an active member of this Court, and as its Chief Judge; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and the preparation of this opinion.

Jerome Fleming alleges that he received constitutionally ineffective assistance of counsel both in his 2001 trial and in his 2002 direct appeal. In a 2017 postconviction proceeding, the Circuit Court for Prince George's County agreed, finding that Fleming's trial counsel was ineffective on three independent grounds and that his appellate counsel was ineffective on one ground. The postconviction court granted Fleming a new trial and concluded that by doing so, the question of whether he would also be entitled to a belated appeal became moot. In this appeal, the State argues that all four findings of ineffective assistance are erroneous and that Fleming should not be entitled to any relief. As to trial counsel we agree with the State: there was no ineffective assistance of trial counsel and we vacate the order of a new trial. As to appellate counsel, however, the postconviction court never reached a final determination. Accordingly, we must remand the case for further proceedings.

BACKGROUND

We rely on this Court's unreported opinion in Fleming's direct appeal for background surrounding the crime of which he was convicted:

> On the evening of December 15, 1998, the corpse of Robert Colbert was found in the doorway to his apartment building. He died from a single gunshot wound to his chest.
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> The evidence presented by the State demonstrated that, sometime before the date of the shooting, Colbert had approached Keith Jamison, with whom he worked, about purchasing four kilos of cocaine. Jamison expressed interest, but never made any arrangements for the drug purchase; instead, he devised a plan to rob Colbert of the $20,000 he would be carrying to purchase the cocaine. The plan was for Jamison to drive Colbert around, purportedly to meet a drug dealer, while two friends of Jamison's, Stephen Garcia and

> Christopher Donte Prince, followed them. The scheme was for Jamison to stop his vehicle and get out, saying he had to relieve himself. Garcia and Prince were to then drive up and rob Colbert.
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> On the date of the murder, pursuant to this plan, Garcia and Prince followed Jamison as he drove Colbert. When Jamison stopped his car and got out, Garcia and Prince pulled up in another vehicle. Prince approached Colbert with a shotgun and pulled him from Jamison's vehicle. When Prince glanced away from Colbert for a moment, Colbert was able to get away. Garcia and Prince then unsuccessfully pursued him.
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> Shortly thereafter, Jamison, Garcia, and Prince met again. Jamison opined that Colbert had to be killed because the robbery had failed and he worked with Colbert. At some point, [Fleming] joined the group, and he agreed to kill Colbert—although he had not participated in the botched robbery attempt.
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> The four men traveled to Colbert's apartment complex in two vehicles. According to Prince's trial testimony, Jamison telephoned Colbert and told him to come outside with the money for the cocaine; [Fleming] then got out of the car with a gun. [Fleming] walked toward the building where Colbert had been last seen, and then gunshots were fired. When he returned to the car, Prince asked [Fleming], "[W]as it done?" [Fleming] responded in the affirmative. The four then drove away from the area. Later, [Fleming] told Garcia that he "hit him one time in the chest." The next day, Jamison allocated portions of the $20,000 to each of the men involved.

Fleming v. State, No. 681, Sept. Term 2001, Slip op. at 1-2 (filed August 29, 2002), *cert. denied*, 372 Md. 133 (2002).[1]

Fleming was charged with murder in the first degree, conspiracy to commit murder in the first degree, use of a handgun in the commission of a felony or crime of violence,

[1] This unreported opinion is cited both as law of the case, MD. RULE 1-104(b)(1), and as a criminal case involving the same defendant. MD. RULE 1-104(b)(2).

and accessory after the fact to murder. In 2001, after a three-day trial, a jury sitting in the Circuit Court for Prince George's County convicted Fleming only of conspiracy to commit murder in the first degree. The court imposed a sentence of life imprisonment. On direct appeal Fleming raised a single issue, challenging whether the trial court abused its discretion "in failing to inquire of the potential jurors during *voir dire* as to whether they had any involvement with drugs and, if so, how that involvement might affect their perception of the case?" Slip op. at 2. This Court affirmed, reasoning that because Fleming had been charged with "murder and kindred crimes," "[a]ny inquiry into the jurors' involvement with drugs and its resultant [e]ffect on their perception of the case would not have related to [Fleming's] criminal acts and was unlikely to uncover relevant bias." Slip op. at 5 (citation omitted).

Thereafter, Fleming filed a postconviction petition raising claims of ineffective assistance of both trial and appellate counsel. Specifically, Fleming argued that his trial counsel had been ineffective for: (1) failing to request a voir dire question directed to whether any venirepersons harbored such strong feelings about murder or violent crime that they would be unable to decide the case impartially; (2) successfully moving for judgment of acquittal on the charge of accessory after the fact, thereby undermining his theory of the case; and (3) failing to seek appropriate curative action in response to the State's display in open court of an unrelated handgun. Fleming asserted that these errors individually and cumulatively resulted in prejudice sufficient to undermine confidence in the outcome of his trial. Fleming also argued that his appellate counsel had been ineffective

for failing to raise on direct appeal that the trial court had abused its discretion by permitting the State to reopen its case following his motion for judgment of acquittal.

A hearing was held in December 2016 at which Fleming's appellate counsel was the only witness.[2] At the hearing, the postconviction court made an oral ruling that Fleming's appellate counsel had been ineffective and Fleming should be entitled to a belated appeal, but reserved ruling on Fleming's remaining claims. In June 2017, the postconviction court issued a written order finding that Fleming's trial counsel had been ineffective and that, while none of the individual errors standing alone would be sufficient to entitle Fleming to relief, the cumulative effect called into question the outcome of Fleming's trial. *Fleming v. State*, No. CT00-1481X (Prince George's Cnty. Cir. Ct., June 19, 2017). The postconviction court issued an order vacating Fleming's conviction and granting him a new trial. The postconviction court further concluded that the earlier grant of a belated appeal had to be withdrawn because it was now moot. This Court granted the State's application for leave to appeal the postconviction court's decision. The State now argues that the postconviction court erred in finding that Fleming had received ineffective assistance from his trial counsel and his appellate counsel, and further erred in granting Fleming a new trial. For the reasons that follow, we conclude that the postconviction court erred in finding that Fleming's trial counsel was ineffective and we vacate its award of a new trial to Fleming. We remand the matter, however, to permit the postconviction court

[2] Fleming's trial counsel was deceased by the time of the postconviction hearing.

to consider anew whether Fleming received ineffective assistance of appellate counsel and should be granted a belated appeal.

DISCUSSION

To prevail on a claim of ineffective assistance of counsel, a defendant must establish two elements: *first*, "that counsel's performance was deficient," and *second*, "that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Counsel's performance is deficient if it is objectively unreasonable "under prevailing professional norms." *State v. Thaniel*, 238 Md. App. 343, 360 (2018) (quoting *Strickland*, 466 U.S. at 687-88). "Judicial scrutiny of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689. A "fair assessment of attorney performance requires that every effort be made 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 [of trial]." *Id.* We therefore start with a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

If a defendant successfully shows that his attorney's performance was objectively unreasonable, he must next show that there is a reasonable probability that he was prejudiced by the mistakes and that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Thaniel*, 238 Md. App. at 360-61 (quoting *Strickland*, 466 U.S. at 694). "A 'reasonable probability,' in turn, "is a probability sufficient

to undermine confidence in the outcome." *Id.* In other words, the errors must be serious enough that they deprived the defendant of a fair trial. *Strickland*, 466 U.S. at 687, 694.

The United States Supreme Court explained in *Strickland* that a "court deciding an actual ineffectiveness claim 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." 466 U.S. at 690 (emphasis added). The party claiming ineffective assistance of counsel must therefore present evidence speaking to "the prevailing professional norm *at the time of his trial*" and if no such evidence is presented we assume "that counsel's conduct fell within a broad range of reasonable professional judgment." *State v. Armstead*, 235 Md. App. 392, 422-23 (2018) (emphasis added) (cleaned up). Thus, a claim for ineffective assistance of counsel will not prevail when "there was no legal signpost alerting trial counsel to the possibly inappropriate nature" of an action during trial. *Id.* at 415.

Whether counsel was ineffective is ultimately a mixed question of law and fact. *Thaniel*, 238 Md. App. at 359. "We defer to the factual findings of the postconviction court unless clearly erroneous, but we review its ultimate legal conclusions without deference, re-weighing the facts in light of the law to determine whether a constitutional violation has occurred." *Id.* at 359-60 (cleaned up).

I. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

A. Voir Dire Question Regarding Strong Feelings About Murder or Violent Crime

The State first contends that the postconviction court erred in finding that defense counsel was ineffective for failing to request a voir dire question on whether any of the

venirepersons harbored such strong feelings about murder or violent crime that they would be unable to decide the case impartially. The State points out that it was not until ten years after Fleming's 2001 trial that the Court of Appeals, in *State v. Shim*, 418 Md. 37 (2011), *modified by Pearson v. State*, 437 Md. 350 (2014), mandated that this type of voir dire question be asked and that, therefore, it was error for the postconviction court to assess trial counsel's performance under the *Shim* standard. We agree.

At the time of Fleming's trial, *Shim* had not yet been decided, meaning that the decision whether to ask a strong feelings question during voir dire still would have been within the trial court's discretion. *See Dingle v. State*, 361 Md. 1, 33 (2000) (observing that "the sole purpose for the inquiry is to establish cause for disqualification" and that "[q]uestions not directed to a specific ground for disqualification . . . may be refused in the discretion of the court, even though it would not have been error to have asked them") (citations and quotations omitted). Because, at that time, the trial court was not required to ask such a voir dire question, it was not unreasonable for trial counsel to decline to make the request. More importantly, there were no legal signposts in the years before *Shim* that suggested the Court of Appeals would mandate the strong feelings question. Rather, *Shim* caught practitioners unaware. *See, e.g.*, *Stewart v. State*, 399 Md. 146, 160–62 (2007) (noting that "the trial judge is not required, with some limited exceptions, to ask specific questions requested by trial counsel"). An attorney is not ineffective for failing to predict the future. Because there were no signposts alerting counsel to the potential shift in the law, it was not ineffective assistance for counsel to decline to raise the issue.

B. Obtaining a Judgment of Acquittal on the Charge of Accessory After the Fact

The State next contends that the postconviction court erred in determining that defense counsel rendered ineffective assistance by *successfully* persuading the trial court to grant a judgment of acquittal on the charge of accessory after the fact, thereby undermining the defense theory of the case and rendering Fleming more vulnerable to a guilty verdict on the more serious charges.

After the close of the State's evidence, defense counsel moved for judgment of acquittal on all counts on the grounds that the State had relied exclusively on the uncorroborated testimony of Garcia and Prince, Fleming's accomplices, making the evidence insufficient as a matter of law. *See Crouch v. State*, 77 Md. App. 767, 768-69 (1989) (noting that "[w]hen a conviction is based upon the testimony of an accomplice, there must be some independent corroboration establishing the defendant's criminal agency"). The State responded with a request to reopen its case to cure that deficiency. Over defense objection, the trial court granted the State's request.[3]

The State then called two police detectives who had interrogated Fleming after his arrest. Through the testimony of one of those detectives, the State introduced Fleming's statement, in which Fleming said that he had given Prince a ride and then waited in the car listening to music while Prince got out and went "to talk to this guy[.]" When Prince

[3] This ruling also forms the basis of Fleming's claim of ineffective assistance of appellate counsel. *See infra*, Part II.

returned, Fleming said that he asked whether Prince had "[heard] that," apparently referring to the sound of a gunshot, and Prince said that he had not. Fleming then drove Prince home and went home himself.

After Fleming's statement was introduced into evidence, the State again rested and defense counsel renewed his motion for judgment of acquittal on all charges. The trial court denied the motion as to all counts except accessory after the fact, reasoning that "[o]ne of the requirements [of being an accessory after the fact] is that you are not present during the commission of the crime" and Fleming's statement had placed him at the crime scene. The trial court's reasoning was, however, premised on a legal error. *Cf. State v. Hawkins*, 326 Md. 270, 294 (1992) (holding that "it is [not] an element of the crime of accessory after the fact that the accessory may not be a principal in either degree, in the commission of the substantive felony").

In making its ruling, the postconviction court found that defense counsel should have anticipated "how the landscape [would change] once the State reopened its case," and consequently withdrawn the motion for judgment of acquittal as to the charge of accessory after the fact. We cannot agree. The trial court is "presumed to know the law and to apply it properly," *Ball v. State*, 347 Md. 156, 206 (1997), and defense counsel cannot have been expected to anticipate that the trial court would commit the error that it did. Following the admission of Fleming's statement, the only change in the landscape was that defense counsel's renewed motion should have been denied as to all counts. We are not persuaded that counsel was deficient for not predicting the trial court's error and preemptively withdrawing his motion. Neither are we persuaded that it was deficient for defense counsel

to not object when the court granted his motion only in part and ask the court to instead fully deny the motion he had just raised.[4] We therefore conclude that the postconviction court erred in finding deficient performance for renewing the motion for judgment of acquittal on the charge of accessory after the fact.

C. Failure to Object to the Display of an Unrelated Handgun and Seek a Curative Instruction

The State further contends that the postconviction court erred in determining that defense counsel was ineffective for failing to object to the display of an unrelated handgun and for failing to request a curative instruction after the gun was displayed to the jury.

The murder weapon in this case was never recovered. According to Garcia, he had disposed of the 9 mm handgun used to kill Colbert the day after the murder. Nonetheless, during the direct examination of the State's firearms expert, the witness was asked about a Ruger 9 mm pistol from an entirely unrelated case that he had examined and ruled out as the murder weapon in Fleming's case. After it was marked for identification, defense counsel asked to approach the bench. At the ensuing bench conference, the State argued that the handgun should be admitted into evidence because it had been examined and ruled out as the murder weapon. Defense counsel insisted that the gun was not relevant. The court agreed that the unrelated gun had "no probative value," and it was not received into

[4] Even if defense counsel had made such an objection, it would have been largely repetitive of the State's motion urging the trial court to reconsider. The State argued that Fleming's statement admitted guilt as to that charge because he had admitted "driving away with the person he says is the shooter." But the trial court rejected the State's request, remarking that it could not "giv[e] something to compromise on." It likely would have been futile for defense counsel to have made essentially the same motion.

evidence. No curative instruction regarding the handgun was requested, and none was given.

Later, after the close of all the evidence but before the jury was charged, the jury sent a note to the court asking "[whose] finger prints were on the 9 mm gun used in the shooting???" With the agreement of the State and defense counsel, the only response to the note was the standard jury instruction on witnesses and evidence, explaining that the "evidence in this case is the testimony you heard from the witness stand, the physical evidence, or exhibits which were offered and received into evidence," as well as stipulations. During his closing argument, defense counsel stated, "Did Steve [Garcia] give him the gun or did he have the gun? So was there even a gun? You see a gun in this case some place? I don't see a gun any place." In rebuttal, the State countered, "There was a question raised for your hearing. Where is the gun in this case? You don't have to worry about that. And if you have a question, you ought to send a note out to the judge."

As noted above, we start with a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 U.S. at 689-90. We must therefore presume that defense counsel had tactical reasons for his actions. As previously noted, defense counsel was deceased by the time of the postconviction hearing and thus unavailable to testify as to why he had not sought additional curative action after the State had marked the unrelated handgun for identification. According to the State, defense counsel did object—albeit not in front of the jury—and did obtain the ruling he had sought, which was to prevent the State from introducing the gun into evidence. Perhaps counsel wanted to continue to verdict with

the current jury rather than seek a mistrial and did not want to draw further attention to the handgun by seeking a curative instruction. Fleming has failed to rebut the presumption that the decisions were strategic, and thus has failed to prove deficient performance. Moreover, even if we were to assume, for the sake of argument, that trial counsel performed deficiently in this regard, Fleming has failed to show prejudice. The jury acquitted Fleming of every charge for which the use of a handgun was an element of the crime.

D. Conclusion

Defense counsel's performance at trial was not objectively unreasonable. Because we have concluded that none of the challenged actions were individually deficient, there is no basis for finding that the harm resulting from those alleged errors cumulatively prejudiced the outcome of Fleming's trial. We therefore hold that the postconviction court erred in granting Fleming a new trial based on ineffective assistance of trial counsel.

II. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

As described above, the postconviction court made an oral finding at the hearing that Fleming had received ineffective assistance of appellate counsel. The postconviction court later indicated that it would subsequently grant Fleming the right to a belated appeal, as that is the appropriate remedy for the ineffective assistance of appellate counsel. It never got that far, however, because the postconviction court next found that Fleming had received ineffective assistance of trial counsel and ordered a new trial. As a result of that finding, the postconviction court explicitly held that its ruling on Fleming's claim of ineffective assistance of appellate counsel was "moot." The net effect is that the postconviction court has not made a final ruling on whether Fleming received ineffective

assistance of appellate counsel. We now remand the matter for that determination to be made.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY VACATED. CASE REMANDED FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION. COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.