Circuit Court for Wicomico County
Case No. 22-K-11-000705

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1196

September Term, 2017

STATE OF MARYLAND

v.

PHILLIP SCOTT BAILEY

Graeff,
Nazarian,
Fader,

JJ.

Opinion by Fader, J.

Filed: March 26, 2018

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Phillip Scott Bailey contends that his trial counsel was constitutionally ineffective in failing to adequately research and argue a pre-trial motion to suppress heroin and cocaine that was recovered from Mr. Bailey after a traffic stop. The postconviction court agreed with Mr. Bailey, vacated his convictions for possession with intent to distribute those substances, and granted him a new trial. We disagree, and so reverse.

BACKGROUND

The Traffic Stop and Search

At 11:35 p.m. on July 17, 2011, Deputy Benjamin Jones of the Wicomico County Sheriff's Office pulled over a rental truck being driven by Mr. Bailey for travelling 13 miles per hour over the speed limit. Deputy Jones, an 11-year veteran of the office who had made "[p]robably thousands" of traffic stops, was patrolling that evening with his trained drug-sniffing dog, Fiasko. Mr. Bailey, who volunteered that the rental was in the name of a family friend, exhibited signs of extreme nervousness, well in excess of what Deputy Jones had observed in most traffic stops, including a pulsating chest, shaking hands, a visible carotid artery, and a rapid and chopped manner of speech. Mr. Bailey's sole passenger simply stared straight ahead. Deputy Jones "knew right from the get-go . . . that some type of criminal activity was afoot . . . ."

Upon returning to his vehicle, Deputy Jones immediately requested backup, began checking Mr. Bailey's license and the vehicle's registration, and initiated the process to issue a traffic citation. When the records check identified that Mr. Bailey's license was suspended, Deputy Jones discontinued processing the traffic citation and waited for backup, which arrived at 11:41 p.m. Deputy Jones then removed Mr. Bailey and his

passenger from the car, patted them down for weapons, and placed them under the supervision of another officer near the front of Deputy Jones's car. At 11:45 p.m., approximately ten minutes after initiating the stop, Deputy Jones began a canine scan. Fiasko alerted within approximately eight seconds. The deputies proceeded to search the vehicle, which yielded nothing illegal; they then searched Mr. Bailey, and found four bags of heroin and cocaine in his shoe. Mr. Bailey was placed under arrest.

The Suppression Hearing and Trial

Mr. Bailey moved to suppress the drugs seized by the officers. Deputy Jones, the sole witness at the suppression hearing, testified generally to the facts set forth above. Mr. Bailey's counsel, relying on two federal cases that he said Mr. Bailey had provided to him, argued that Deputy Jones's search was unreasonable because nervousness was not sufficient to provide reasonable suspicion and that "this whole scheme, to me, it's just a transparent cover for an illegal search and seizure."

The suppression court denied the motion. The court found that the speeding violation justified the initial stop and that there "was no undue delay in getting the K-9 [to] the scene, [because] the K-9 [was] in the back of Deputy Jones's car." Moreover, Mr. Bailey was "not free to leave" at the time of the canine scan because, separate and apart from the initial traffic stop, he had been driving on a suspended license and in a rental car for which he was not an authorized driver. Thus, the court found, Mr. Bailey was "certainly about to be placed under arrest." The court concluded that: (1) the search was incident to the arrest of Mr. Bailey; and (2) even if that were not the case, the discovery of the drugs

was inevitable because Mr. Bailey was about to be arrested on the other charges and would have been searched incident to that lawful arrest.

A jury convicted Mr. Bailey of, among other charges, possession with the intent to distribute heroin and possession with the intent to distribute cocaine. A judge ultimately sentenced him to 14 years for each charge, to be served consecutively.[1]

Postconviction Proceedings

Mr. Bailey sought postconviction relief in the Circuit Court for Wicomico County on the ground that his counsel was ineffective for failing to adequately investigate and argue the motion to suppress. The only evidence considered at the postconviction hearing on that claim was the transcript from the suppression hearing.[2]

The postconviction court granted Mr. Bailey's petition. In a written opinion, the court found deficient counsel's apparent failure: (1) to conduct independent research regarding "the issues surrounding the pre-arrest search"; and (2) "to argue issues other than the nervousness issue, including, *inter alia*, the legal impact of the fact that the search

[1] The trial court initially sentenced Mr. Bailey to two consecutive 25-year terms. After a successful direct appeal to this Court, *Bailey v. State*, No. 682, Sept. Term 2012 (June 21, 2013), the details of which are not relevant here, the circuit court resentenced Mr. Bailey to the two consecutive 14-year terms.

[2] Mr. Bailey, who initially filed his petition pro se, also sought postconviction relief on the ground that the trial court denied his right to self-representation when it refused to allow him to discharge his counsel prior to his trial. The postconviction court denied relief on that ground, and Mr. Bailey has not challenged that ruling in this appeal. During the suppression hearing, Mr. Bailey gave testimony in support of his self-representation claim, but not on any issues relevant to the current appeal. The postconviction court also took judicial notice of the transcripts from every hearing in the original case, but only considered the suppression hearing transcript in determining whether Mr. Bailey's counsel provided ineffective assistance at that hearing.

occurred prior to any arrest." The postconviction court concluded that Mr. Bailey's counsel's performance could not conceivably be justified as a matter of trial strategy and that if counsel had conducted research and "properly argued the motion, there is a substantial probability that the outcome would have been different." The court thus vacated Mr. Bailey's conviction and granted him a new trial. This appeal followed.

DISCUSSION

The State contends that Mr. Bailey waived his ineffective assistance of counsel claim by failing to challenge the denial of his motion to suppress on direct appeal. The State further argues that, even if not waived, the postconviction court erred both in finding counsel's performance constitutionally deficient and in finding resulting prejudice.[3] Because we find that the arguments Mr. Bailey now contends his counsel should have made are not meritorious, we conclude that counsel's performance did not prejudice Mr. Bailey.

A postconviction court's determination of an ineffective assistance of counsel claim is a mixed question of law and fact. *Newton v. State*, 455 Md. 341, 351 (2017). We defer to findings of fact made by the postconviction court unless clearly erroneous. *Newton*, 455 Md. at 351. We review de novo the postconviction court's ultimate determination of whether the defendant's Sixth Amendment right to counsel was violated; in doing so, we "'re-weigh' the facts in light of the law to determine whether a constitutional violation has occurred." *Id.* at 351-52 (quoting *Harris v. State*, 303 Md. 685, 698 (1985)).

[3] The State framed its single question presented as "Did the post-conviction court err in finding ineffective assistance of counsel in connection with the motion to suppress made at the trial below?"

I. MR. BAILEY DID NOT WAIVE HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

The State argues that Mr. Bailey waived his ineffective assistance of counsel claim by not challenging the denial of his motion to suppress on direct appeal. However, the only authority the State cites, *Washington v. State*, stands for the proposition that, "[g]enerally, the appropriate avenue for the resolution of a claim of ineffective assistance of counsel is a post-conviction proceeding." 191 Md. App. 48, 71 (2010); *see also Mosley v. State*, 378 Md. 548, 562 (2003) (stating that postconviction proceedings are generally the preferred method for evaluating counsel's performance). We do not find any ground for deviating from that principle here.

II. THE POSTCONVICTION COURT ERRED IN GRANTING MR. BAILEY'S PETITION.

The Sixth Amendment to the United States Constitution requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." This requirement, applicable to the states via the Fourteenth Amendment to the United States Constitution, applies at critical stages of criminal prosecution. *Mosley v. State*, 378 Md. at 556. That the defendant has an attorney is not sufficient by itself; "[t]he right to counsel is the right to the effective assistance of counsel." *Harris*, 303 Md. at 694.[4] If a criminal "defendant is denied effective assistance of counsel, it is the integrity of the adversarial process that is compromised." *Mosley*, 378 Md. at 557.

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[4] The Court of Appeals has "repeatedly stated that 'there is no distinction between the right to counsel guaranteed by the Sixth Amendment of the U.S. Constitution and

Whether an attorney provided ineffective assistance is determined by a two-pronged test; the defendant must show that the attorney's conduct (1) was constitutionally deficient and (2) that this deficiency prejudiced the defendant. *Newton*, 455 Md. at 355 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). To be deficient, counsel's conduct must "'f[a]ll below an objective standard of reasonableness,'" *Coleman*, 434 Md. 320, 331 (2013) (quoting *Strickland*, 466 U.S. at 688), and the defendant must "overcome the presumption that the challenged action might, under the circumstances, be considered sound trial strategy," *Oken v. State*, 343 Md. 256, 283 (1996).[5] The reasonableness of counsel's conduct is judged by "prevailing professional norms" and is based on the totality of the circumstances. *Smith v. State*, 394 Md. 184, 207 (2006) (internal quotation marks and citations omitted).

To establish prejudice, a defendant must show "'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Coleman*, 434 Md. at 331 (quoting *Strickland*, 466 U.S. at 687). The defendant must establish "'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). "'A reasonable probability is a probability sufficient to undermine

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Article 21 of the Maryland Declaration of Rights.'" *Newton*, 455 Md. at 362 (quoting *State v. Colvin*, 314 Md. 1, 24 (1988)) (alterations omitted).

[5] The State also argues that Mr. Bailey was required to present the testimony of his former defense counsel at the postconviction hearing to prove that the failure to make the arguments at issue was not a matter of trial strategy. Although that argument might be well-taken where the decision might conceivably have been a strategic one, we agree with the postconviction court that this is not such a case.

confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). This "is a high threshold, a difficult test to meet." *Perry v. State*, 357 Md. 37, 79 (1999). When the underlying issue in an ineffective assistance of counsel claim is suppression of evidence, the defendant must establish "that 'there is a reasonable probability that the verdict would have been different absent the excludable evidence.'" *Id.* at 81 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986)).

The defendant must prove both deficient conduct and prejudice. *Strickland*, 466 U.S. at 687. But a court need not review the prongs in sequential order or even review both prongs; "'[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.'" *Newton*, 455 Md. at 356 (quoting *Strickland*, 466 U.S. at 697). This is such a case.

We begin by examining the arguments that Mr. Bailey now contends his counsel should have made at the suppression hearing: (1) the search was not incident to arrest because Deputy Jones did not testify that he intended to arrest Mr. Bailey before the search; and (2) the search was improper because Deputy Jones (a) unreasonably delayed the traffic stop to carry out the canine scan and (b) lacked reasonable suspicion of criminal activity to justify Mr. Bailey's continued detention. The State responds that the search was incident to arrest because Deputy Jones had probable cause to arrest Mr. Bailey from both the canine scan and the suspended license. Additionally, the State contends, Deputy Jones did not unreasonably delay the traffic stop and, in any event, he had reasonable suspicion to justify continuing to hold Mr. Bailey for the canine search.

A. The Failure of Mr. Bailey's Counsel to Argue that the Search Was Not Incident to Arrest Was Not Prejudicial to Mr. Bailey.

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." The Court of Appeals generally has interpreted Article 26 of the Maryland Declaration of Rights to provide the same protections as the Fourth Amendment. *Byndloss v. State*, 391 Md. 462, 465 n.1 (2006). Under both, warrantless searches are "per se unreasonable" unless one of a few narrow exceptions applies. *City of Ontario v. Quon*, 560 U.S. 746, 760 (2010); *Belote v. State*, 411 Md. 104, 112 (2009); *see also State v. Harding*, 196 Md. App. 384, 425 (2010) (listing the exceptions). One of those exceptions is for a search incident to a lawful arrest. *Belote*, 411 Md. at 112.

A search that precedes an arrest is nonetheless considered incident to it if "there was probable cause to support an arrest at the time of the search," *Lee v. State*, 311 Md. 642, 668 (1988); *see also Anderson v. State*, 78 Md. App. 471, 483 (1989) (finding search not incident to arrest where probable cause to arrest did not arise until after defendant was searched), and "the search is essentially contemporaneous with the arrest," *Barrett v. State*, 234 Md. App. 653, 672 (2017), *cert. denied*, Pet. Docket No. 429 (Feb. 16, 2018) (internal quotation omitted). Here, Deputy Jones had probable cause to arrest Mr. Bailey at the time of the search, and the arrest occurred immediately following the search. Under our case law, the search was thus incident to arrest.

Mr. Bailey concedes that at the time of the search, Deputy Jones had probable cause to arrest him both because he was driving on a suspended license, Md. Code Ann., Transp.

§ 26-202(a)(3)(iv), and because of the K-9 alert, *Harding*, 196 Md. App. at 391. But the postconviction court concluded, and Mr. Bailey now argues, that the State cannot sustain its burden of demonstrating that the search was incident to arrest in the absence of affirmative testimony from Deputy Jones that he subjectively intended to arrest Mr. Bailey before searching him. We disagree.

As we confirmed last year in *Barrett*, the search incident to arrest exception "is applicable as long as the search is 'essentially contemporaneous' with the arrest." 234 Md. App. at 672 (quoting *Wilson v. State*, 150 Md. App. 658, 673 (2003)); *see also Barrett*, 234 Md. App. at 673 ("Because the police had probable cause to arrest appellant . . . and the arrest occurred right after the search, the search was valid as a search incident to arrest."). This articulation of the exception accords with longstanding Court of Appeals precedent. In *Lee*, decided in 1988, the officer conducting the search of a gym bag believed that his legal justification for doing so was a protective search for weapons, not a search incident to arrest. 311 Md. at 669. Although the Court observed that there was a divergence of views as to whether such a search qualified as a protective search, the Court found no need to resolve that issue because "the police had probable cause for a custodial arrest." *Id.* at 668. The Court rejected the notion that the search incident to arrest analysis was precluded by the officer's subjective belief as to the justification for the search. *Id.* at 669. The "search incident analysis applie[d] because [the officer] had probable cause to arrest at the time he [conducted the search]," without regard to the officer's view of the basis for the search. *Id.* Here, the search and the arrest of Mr. Bailey were contemporaneous. Under our case law, that is enough.

Moreover, even if we were to agree that pre-search indicia of an intent to arrest were required, they were present here. Deputy Jones testified that as soon as he learned that Mr. Bailey's license was suspended, he stopped writing the speeding citation and waited for backup, indicating that he had already determined to arrest Mr. Bailey. And when Deputy Jones removed Mr. Bailey from the vehicle to conduct the scan, he placed him under the supervision of another officer. These indicia support the suppression court's factual finding that Mr. Bailey was "certainly about to be placed under arrest" at the time he was searched. Contrary to Mr. Bailey's contention, the fact that Deputy Jones did not place Mr. Bailey under arrest immediately after backup arrived or immediately upon the canine alert does not itself suggest that he was not going to do so, especially in the context of a continuous chain of events that, in total, lasted only a few minutes. In that context, the particular sequence in which the search and arrest occurred is unimportant. As we have previously recognized, "'[t]here is *no* case in which a defendant may validly say, 'Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards.''" *Conboy v. State*, 155 Md. App. 353, 365 (2004) (quoting *Sibron v. New York*, 392 U.S. 40, 77 (1968) (Harlan, J., concurring)).

In concluding that counsel's performance was deficient and that Mr. Bailey was prejudiced, the postconviction court relied primarily on dicta contained in this Court's decision in *State v. Funkhouser*, 140 Md. App. 696 (2001). The postconviction court interpreted that decision as requiring affirmative testimony from Deputy Jones that he intended to arrest Mr. Bailey before the search took place. We disagree. As an initial

matter, the relevant discussion in *Funkhouser* was dicta and so is not binding.[6] Moreover, to the extent that the dicta could be read as suggesting that an investigation into the subjective intent of the searching officer is required, it is inconsistent with the law discussed above. But we also have reason to doubt that is an appropriate reading of *Funkhouser*, which involved a fairly unique set of facts, arguments, and procedural history that led this Court to conclude that "there [wa]s no suggestion that Funkhouser was going to be arrested regardless of what the search" revealed. 140 Md. App. at 731. As already discussed, that is simply not the case here.

The other case on which Mr. Bailey relies on this point is also inapposite. In *Belote*, the Court of Appeals addressed whether a custodial arrest had occurred when a law enforcement officer subjected the defendant to a *Terry* stop, seized marijuana found on the defendant's person, and then released him. 411 Md. at 108. The defendant was arrested more than two months later and filed a pre-trial motion to suppress the marijuana. *Id.* In analyzing whether the initial search was incident to arrest, the court found the officer's objective conduct ambiguous. *Id.* at 120-21. As a result, the court proceeded to consider the officer's testimony, which was that he did not believe that he had placed the defendant under arrest at that time. *Id.* at 125-26. As the Court noted, "[i]t is only when an arresting

[6] In *Funkhouser*, like here, the issue was the suppression of drugs recovered after a traffic stop. The basis for our holding in *Funkhouser* was that, viewing the facts in the light most favorable to Mr. Funkhouser (as the prevailing party below), the initial traffic stop was improper and so everything that followed from that initial stop was properly suppressed as fruit of the poisonous tree. 140 Md. App. at 705-06. Although we proceeded to address several additional arguments, including the unpreserved issue of whether the search could be justified as a search incident to arrest, the remainder of that opinion is dicta.

officer's objective conduct is ambiguous that his or her subjective intent increases in importance to a court's legal inquiry into whether a custodial arrest of the suspect occurred." *Id.* at 117. Here, there is no such ambiguity. Deputy Jones arrested Mr. Bailey and took him into custody contemporaneously with the events that gave rise to probable cause and the search. As long as Mr. Bailey was still being held lawfully at the time of the search—the issue to which we next turn—the search was thus incident to a lawful arrest.

B. The Failure of Mr. Bailey's Counsel to Argue that Deputy Jones Impermissibly Extended the Initial Traffic Stop Was Not Prejudicial to Mr. Bailey

Alternatively, Mr. Bailey argues that we should uphold the postconviction court's judgment on the separate ground that Deputy Jones lacked reasonable suspicion to continue to hold Mr. Bailey after Deputy Jones stopped processing the traffic citation. We disagree for two independent reasons. First, at the time he stopped processing the traffic citation, Deputy Jones had probable cause to arrest Mr. Bailey for driving on a suspended license, which was sufficient justification to continue holding him. Second, considering the totality of the circumstances, Deputy Jones had reasonable suspicion of criminal activity sufficient to justify holding Mr. Bailey long enough to conduct the canine search.

The Fourth Amendment's protections extend to investigatory traffic stops such as that of Mr. Bailey. *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Ferris v. State*, 355 Md. 356, 369 (1999). In determining whether such stops violate an individual's Fourth Amendment rights, courts examine the objective reasonableness of the stop. *Whren v. United States*, 517 U.S. 806, 813 (1996). Thus, an otherwise-valid traffic stop does not

become unconstitutional just because the actual purpose of the law enforcement officer making the stop was to investigate potential drug crimes. *Id.*

So-called *Whren* stops—valid but pretextual traffic stops undertaken for the primary purpose of investigating other illegal activity—though "a powerful law enforcement weapon," *Charity v. State*, 132 Md. App. 598, 601 (2000), are restricted in scope and execution. A *Whren* stop "'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'" *Ferris*, 355 Md. at 369 (quoting *Florida v. Royer*, 460 U.S. 491, 500 (1983)). This Court has recognized, though, that officers may pursue investigations into both a traffic violation and another crime "simultaneously, with each pursuit necessarily slowing down the other to some modest extent." *Charity*, 132 Md. App. at 614. But investigation into the original traffic violation cannot "be conveniently or cynically forgotten and not taken up again until after [the other] investigation has been completed or has run a substantial course." *Id.* at 615; *see also Whitehead v. State*, 116 Md. App. 497, 506 (1997) ("Stopping a car for speeding does not confer the right to abandon or never begin to take action related to the traffic laws . . . .").

The purpose of a traffic stop is "to address the traffic violation that warranted the stop and attend to related safety concerns." *Rodriguez v. United States*, 135 S. Ct. 1609, 1614 (2015) (internal citation omitted); *see also Byndloss*, 391 Md. at 483. Thus, "[a]uthority for the seizure . . . ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." *Rodriguez*, 135 S. Ct. at 1614. Because a scan by a drug-sniffing dog serves no traffic-related purpose, traffic stops cannot be prolonged while waiting for a dog to arrive. *Henderson v. State*, 416 Md. 125, 149-50 (2010). Once

the officer completes the tasks related to the original traffic stop or extends the stop beyond when it reasonably should have been completed, any continued detention is considered a second stop for Fourth Amendment purposes and thus requires a new, constitutionally-sufficient justification. *Byndloss*, 391 Md. at 483. Absent such independent justification, any further detention, even if very brief, violates the detainee's protection against unreasonable seizures. *Id.*

In this case, Deputy Jones ceased writing a traffic citation for Mr. Bailey as soon as he learned that Mr. Bailey was driving on a suspended license. Even if that arguably ended the traffic stop, Deputy Jones then had two separate constitutionally-sufficient justifications for holding Mr. Bailey. First, Deputy Jones now had probable cause to arrest Mr. Bailey, and was thus justified in continuing to hold him.

Second, Deputy Jones had reasonable suspicion to detain Mr. Bailey until the canine search could be completed. There is no bright-line rule for what constitutes reasonable suspicion; the concept "'purposefully is fluid because . . . [it] is not readily, or even usefully, reduced to a neat set of legal rules.'" *Holt v. State*, 435 Md. 443, 459 (2013) (quoting *Cartnail v. State*, 359 Md. 272, 286 (2000)). Reasonable suspicion is an officer's expression of "'a particularized and objective basis for suspecting the particular person stopped of criminal activity.'" *Id.* (quoting *Illinois v. Wardlow*, 528 U.S. 119, 128 (2000)). Although it requires more than a mere hunch, reasonable suspicion is "a less demanding standard than probable cause." *Longshore v. State*, 399 Md. 486, 507-08 (2007). "'[T]he officer must explain how the observed conduct, when viewed in the context of all of the other circumstances known to the officer, was indicative of criminal activity.'" *Sizer v.*

State, 456 Md. 350, 365 (2017) (quoting *Crosby v. State*, 408 Md. 490, 508 (2009)). We look to the totality of the circumstances and determine whether the officer has articulated sufficient facts to show "'a suspicion that the particular individual being stopped is engaged in wrongdoing.'" *Id.* at 366 (quoting *Cartnail*, 359 Md. at 288).

Here, Deputy Jones articulated sufficient facts to establish reasonable suspicion. Mr. Bailey was driving 13 miles per hour over the speed limit on a suspended license in a rental vehicle that he was not authorized to operate. He exhibited signs of extreme nervousness that stood out among the thousands of other traffic stops Deputy Jones had made. And Mr. Bailey's passenger also acted oddly, staring rigidly forward when Deputy Jones approached on his side of the vehicle. Taken all together, these facts rise beyond a mere hunch and create a sufficient basis for Deputy Jones to have suspected that criminal activity was afoot.

In sum, we conclude that the arguments that Mr. Bailey faults his counsel for not making were not, on these facts, meritorious arguments, and so making them would not have given rise to a substantial probability of a different outcome. As a result, Mr. Bailey was not prejudiced by his counsel's failure to make the arguments and the postconviction court erred in vacating the conviction.

JUDGMENT OF THE CIRCUIT COURT FOR WICOMICO COUNTY REVERSED; CASE REMANDED WITH INSTRUCTIONS TO DENY APPELLEE'S POSTCONVICTION PETITION. COSTS TO BE PAID BY APPELLEE.