The Circuit Court for Worcester County
Case No.: 23-K-11-0255

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1457

September Term, 2014

ROBERT LEE THOMAS

v.

STATE OF MARYLAND

Eyler, Deborah S.,
Reed,
Beachley,

JJ.

Opinion by Reed, J.

Filed: September 14, 2017

Robert Lee Thomas, appellant, entered an *Alford* plea[1] to sexual abuse of a minor and second degree sexual offense in the Circuit Court for Wicomico County on June 21, 2011.[2] He was sentenced to an aggregate of twenty-five years. On September 6, 2011, appellant pled guilty to sexual abuse of a minor in the Circuit Court for Worcester County.[3] He was sentenced to fifteen years with all but ten years suspended. Assigned post-conviction counsel for appellant filed a petition arguing that trial counsel, who represented appellant in both counties, was ineffective in failing to move to dismiss the charges in Worcester County on double jeopardy grounds.[4] Following a hearing on June 6, 2014, the court denied relief. Appellant filed a timely appeal and presents the following question for our review:

1. Did defense counsel, in light of *Copsey v. State*, 67 Md. App. 223 (1986), provide constitutionally ineffective assistance in failing to move for dismissal of the charges against Appellant on the ground of double jeopardy?

[1] An "*Alford* plea is a 'guilty plea containing a protestation of innocence,' which 'lies somewhere between a plea of guilty and a plea of *nolo contendere*[,]' where 'a defendant does not contest or admit guilt.'" *Jackson v. State*, 207 Md. App. 336, 361 (2012) (quoting *Bishop v. State*, 417 Md. 1, 18-19 (2010)). See also *North Carolina v. Alford*, 400 U.S. 25 (1970).

[2] Appellant was also charged with third degree sexual offense, unnatural or perverted practice, and attempted sodomy. The State entered a *nolle prosequi* to those charges as part of the plea agreement.

[3] In Worcester County, appellant was also charged with second degree sexual offense, third degree sexual offense, fourth degree sexual offense, second degree assault, and unnatural or perverted practice.

[4] Post-conviction counsel's petition was an amended petition following appellant's pro se petition.

For the following reasons, we affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

Robert Thomas, the appellant, sexually abused his stepson, Kevin McDowell, from October 9, 1988 through October 8, 1996. During the time of the abuse, Mr. McDowell lived with his biological father in Worcester County during the week. On weekends, the appellant would pick Mr. McDowell up from his father's house, take him to his mother's in Wicomico County, and then return him to his father's house. Mr. McDowell, then in his early thirties, reported the abuse to a detective in the Wicomico County Sheriff's office in 2011.

The abuse began when Mr. McDowell was eleven years old. He reported that some of the abuse occurred in Wicomico County at the house where the appellant and Mr. McDowell's mother lived. Most instances occurred on dirt roads in Worcester County while the appellant was transporting Mr. McDowell to his mother's home or back to his father's. The appellant initiated the abuse by taking Mr. McDowell to a racetrack in Delaware and providing him with cigarettes, marijuana, and alcohol. The abuse then became "almost a weekend ritual" that "went on for years," including forty to fifty incidents at Mr. McDowell's mother's home.

The appellant was convicted first in Wicomico County of committing sexual abuse of a minor and second degree sexual offense. The charging documents list the following pertinent offenses:

Count 1

> THAT ROBERT LEE THOMAS, between the 9th day of October, 1988 and 8th day of October, 1996, in Wicomico County, State of Maryland, did cause sexual abuse to Kevin McDowell, a child under 18 years of age, the Defendant having temporary responsibility for the supervision of the child, contrary to the form of the Act of Assembly in such cases made and provided, against the peace, government and dignity of the State.
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> Art. 27 Sec. 35C. (b) (1)
>
> Count 2
>
> THAT ROBERT LEE THOMAS, between the 9th day of October, 1988 and 8th day of October, 1996, in Wicomico County, State of Maryland, did engage in a sexual act with Kevin McDowell, a person under 15 years of age, the Defendant being four or more years older than the victim, contrary to the form of the Act of Assembly in such cases made and provided, against the peace, government and dignity of the State.
>
> Art. 27 Sec. 464A

When asked to state the basis for the charges, the prosecutor explained:

> The basis for the second degree sex offense is the oral sex, the first event that Kevin described the oral sex committed on him, the first instance by the Defendant when Kevin was 11 years old. The basis for the child abuse is all the other events that happened, sexual abuse that happened in that timeframe.

He was sentenced to an aggregate of twenty-five years (ten years for the sexual abuse and a consecutive fifteen years for second degree sexual offense). The appellant was then charged in Worcester County and appeared in court on September 6, 2011, represented by the same attorney. The appellant pled guilty to a single count of sexual abuse of a minor. That charge is listed as follows:

FIRST COUNT

> And the aforesaid, the State's Attorney for Worcester County, charges and alleges that the said ROBERT LEE THOMAS, late of said County, between October 9, 1988 to October 8, 1996, in Worcester County, Maryland, a person who has the custody and responsibility for the supervision of Kevin McDowell, a minor child under the age of eighteen years, did unlawfully cause abuse to the said Kevin McDowell; contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.
>
> (Article 27, Section 35C (b) (1))

For this Worcester County offense, the appellant was sentenced to fifteen years consecutive to his sentence in Wicomico County, with all but ten years suspended.

On January 23, 2014, the appellant filed a pro se petition for post-conviction relief in Worcester County. As later supplemented by post-conviction counsel, the appellant argued that the attorney who represented him at the plea hearings in Wicomico County and Worcester County was ineffective in failing to move to dismiss the charges in Worcester County on double jeopardy grounds. The post-conviction hearing was held on June 6, 2016. Appellant's trial attorney, Dale Watson, was the sole witness. He testified that he did not consider filing a motion to dismiss the charges in Worcester County, and that he viewed the appellant's cases as "pretty much separate."

On August 6, 2016, the Circuit Court for Worcester County issued a written order denying the petition for post-conviction relief. The court reasoned that "the prosecutors charged the Petitioner with charging documents confined to conduct which occurred in their respective counties." Additionally, the court found that the statement of facts proffered in support of the plea in Wicomico County focused on the conduct occurring in

that county, and that the statement of facts proffered in support of the plea in Worcester County did likewise. The court stated:

> In the instant matter, the prosecutors charged the Petitioner with charging documents confined to conduct which occurred in their respective counties. The Wicomico County charging document does not mention Worcester County. Moreover, the statement of facts evidenced by the plea hearing transcript, only mentions the abuse which occurred in Wicomico County. There was no mention of the woods outside of Pocomoke City or Worcester County.
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> The Worcester County charging document in this matter makes no mention of acts occurring within Wicomico County. It must be noted that at the presentation of the statement of facts in Worcester County, the residence in Wicomico County was mentioned. However, Petitioner's trial counsel immediately objected and the presiding judge made clear that he would not consider information involving Wicomico County in the determination of Petitioner's guilt for the crimes which occurred in Worcester County.
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> While it gives the Court concern that the State in Worcester County briefly referred to Wicomico County when reading the statement of facts at the plea hearing, that concern is alleviated by the Court of Appeals' decision in *Anderson v. State*, 385 Md. 123 (2005). In *Anderson*, the Court instructed that "in determining the scope of the former conviction the court must ordinarily look at the effective charging document upon which judgment was entered, not just the evidence presented in support of the charge." *Id*. at 140. The Court went on to explain that, "the only sensible and workable criterion for determining the nature and scope of the prior offense is the effective charging document." *Id*. at 141. Therefore, while this Court has reviewed the statement of facts presented in each count, the charging documents control. In the instant matter both charging documents only charged the Petitioner for crimes committed in the respective separate counties. Thus, jeopardy did not attach in Wicomico County for the crimes

> committed in Worcester County and the prosecution in Worcester County was not barred by double jeopardy.

Appellant then filed this timely appeal.

DISCUSSION

A. Parties' Contentions

Appellant contends that defense counsel's failure to move for dismissal of the Worcester County charges on double jeopardy grounds constitutes ineffective assistance of counsel. Appellant notes that Wicomico and Worcester County were both permitted to prosecute him for the offenses that occurred. However, appellant argues, because Wicomico County charged him generally with committing the offenses "between the 9th day of October, 1988 and 8th day of October, 1996," rather than separating the offenses by date and jurisdiction, jeopardy attached and the Worcester County indictment violated double jeopardy.

Appellant asserts that because his "counsel's performance was deficient and . . . the deficient performance prejudiced his defense" he must succeed on a claim of ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668 (1984). Appellant reasons that if his trial counsel had moved to dismiss the charges in Worcester County, the motion would have been granted or would have led to a successful appeal if denied. Appellant also heavily relies on *Copsey v. State*, 67 Md. App. 223, 608 A.2d 186 (1986),

where we held that the circuit court erred in denying the motion to dismiss on double jeopardy grounds after the defendant was charged in two counties for a continuing sexual offense. Based on our decision in *Copsey*, appellant argues that the judgment below must be reversed.

The State counters that appellant waived his ineffective assistance of counsel claim when he knowingly and intelligently failed to make the allegation in an application for leave to appeal his conviction based on a guilty plea. Md. Code Ann., Crim. Proc. §7-106. The State cites this Court's decision in *State v. Castellon-Gutierrez*, 198 Md. App. 633, 647 (2011), where we held that "[i]f an individual who pleads guilty, having been informed of his right to file an application for leave to appeal from his conviction and sentence, does not file such an application for leave to appeal, a rebuttable presumption arises that he has waived the right to challenge his conviction" in a subsequent post-conviction proceeding.

Alternatively, if the claim was not waived, the State argues that it is without merit. The State asserts that appellant's decision to plead guilty was made after receiving advice that was well "within the range of competence demanded of attorneys in criminal cases," and therefore his claim must fail. *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Furthermore, the State argues that the underlying double jeopardy claim is similarly without merit because, as the circuit court found, the facts supporting the guilty pleas in each case were confined to events that occurred in their respective counties.

B. Standard of Review

This Court has articulated the appropriate standard of review regarding ineffective assistance of counsel:

> Specifically, determinations by the circuit court regarding effective assistance of counsel claims are mixed questions of law and fact. *State v.* Gross, 134 Md. App. 528, 559-60, 760 A.2d 725 (2000), *aff'd*, 371 Md. 334 (2002). "We will not disturb the factual findings of the post-conviction court unless they are clearly erroneous." *State v. Jones*, 138 Md. App. 178, 209, 771 A.2d 407 (2001). We will make our own independent analysis, however, based on our own judgment and application of the law to the facts, of whether the State violated a Sixth Amendment right. *Id*. at 209 (citing *Harris v. State*, 303 Md. 685, 699, 496 A.2d 1074 (1985)). Consequently, absent clear error, we defer to the post-conviction court's historical findings, but we conduct our own review of the application of the law to the defendant's claim of ineffective assistance of counsel. *See Cirincione v. State*, 119 Md. App. 471, 485, 705 A.2d 96 (1998).

Evans v. State, 151 Md. App. 365, 374, 827 A.2d 157, 163 (2003).

C. Analysis

1. Waiver

The State's preliminary argument is that appellant waived his ineffective assistance of counsel claim, arising from his guilty plea, by failing to make the allegation in an application for leave to appeal.[5] In *Curtis v. State*, 284 Md. 132, 140 (1978), the Court of Appeals recognized double jeopardy as one of the fundamental constitutional rights that require an intelligent and knowing waiver. *See also McElroy v. State,* 329 Md. 136, n.1 (1993). Additionally, Section 7-106 of the Uniform Post-Conviction Act states, in pertinent

[5] This issue was neither preserved by the State in the Post-Conviction hearing, nor mentioned in the circuit court's Statement of Reasons and Order.

part, that an allegation made in a post-conviction proceeding is waived where the petitioner could have made the allegation "in an application for leave to appeal a conviction based on a guilty plea[,]" but "intelligently and knowingly" failed to do so. Md. Code Ann., Crim. Proc. §7-106. In the case at bar, appellant clearly waived the argument he makes in this appeal. However, "[i]t is well settled that a criminal defendant cannot be precluded from having [a claim of ineffective assistance of counsel] considered because of his mere failure to raise the issue previously." *Curtis*, at 150. Therefore, we will address the merits of appellant's claim.

2. Ineffective Assistance of Counsel.

Article 21 of the Maryland Declaration of Rights and the Sixth Amendment to the United States Constitution guarantee all criminal defendants effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, appellant must satisfy the two-prong test established by the Supreme Court. Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), appellant must prove: (1) that his counsel's performance was deficient; and (2) that the deficient performance prejudiced his defense. "[A] single, serious error can support a claim of ineffective assistance of counsel." *In re Paris W.*, 363 Md. 717, 726, 770 A.2d 202 (2001).

Appellant draws our attention to *Copsey v. State*, 67 Md. App. 223, 608 A.2d 186 (1986), in support of his argument that his trial counsel's performance was deficient and prejudicial. In *Copsey*, the State alleged that over a five to six year period the appellant picked up the minor victim at a gas station in St. Mary's County, took him to various

locations in Charles County where the sexual acts occurred, and then returned him to St. Mary's County. *Id*. at 228-29. Although "[l]ittle, if any" of the sexual conduct occurred in St. Mary's County, Copsey was charged with, and convicted of, a continuing sexual offense there before he was charged in Charles County with acts occurring during the same time period. *Id*. at 226-28.

At issue before this Court is whether the Charles County Circuit Court erred when it denied Copsey's motion to dismiss the charges in that county on double jeopardy grounds. Holding that the circuit court did err, this Court explained that "the charge as to which the appellant stood in jeopardy in St. Mary's County on July 9, 1985, operated to place him in jeopardy for all sexual offenses against the named victim between January 1, 1979 and November 1, 1984." *Id*. at 228. By including offenses taking place in Charles County, St. Mary's County determined the "breadth of jeopardy," thereby barring future prosecution by any other jurisdiction for sexual offenses committed during the same time period. *Id*. Appellant asserts that because we found error in *Copsey*, we will do the same here, thereby establishing that his trial counsel's deficiency caused prejudice to his defense.

The distinction between *Copsey* and the case *sub judice* is clear. In *Copsey*, the St. Mary's County charging documents included details of offenses that occurred in Charles County. Because the charging documents included incidents that occurred in both Charles and St. Mary's Counties, jeopardy attached and prevented Copsey from being prosecuted in Charles County. In the instant matter, neither charging document mentions the other county. Indeed, the Wicomico County indictment alleges that appellant committed child

sexual abuse and a second degree sexual offense "in Wicomico County." The Worcester indictment similarly specifies "Worcester County, Maryland" as the location of the offense.[6] Furthermore, in *Copsey* the factual basis for the acceptance of the guilty plea in St. Mary's county was predicated upon events that occurred in Charles County. *Id.* at 230-31. In contrast, here, the Worcester County prosecutor stated that she was "not going to describe the facts [of abuse] in Salisbury." Thereby further distancing the present case from *Copsey.*

Appellant argues that the charging documents were not "meticulously confined" to the respective counties. Rather, appellant asserts that the documents simply follow standard practice of referencing the county within the body of a charging document. Although it may be standard practice, it suffices. "In determining the scope of the former conviction, the court must ordinarily look at the effective charging document upon which judgment was entered, not just the evidence presented in support of that charge." *Anderson v. State*, 385 Md. 123, 140, 867 A.2d 1040 (2005). The charging documents and the evidence supporting the charges show that there was no overlap in this case.

As stated above, appellant needs to prove that his trial counsel's deficiency prejudiced his defense. To determine whether trial counsel's performance was deficient, the relevant inquiry is whether "counsel's representation fell below an objective standard

[6] In *Copsey v. State*, 67 Md. App. 223, 231 (1986) we suggested that prosecutors could have "put their heads together" and "meticulously confined" their charging documents to conduct having occurred on either side of their county line. Here, this separation of the criminal behavior in Wicomico and Worcester Counties, is precisely what was suggested.

of reasonableness." *Strickland*, 466 U.S. at 688. Reasonableness must be examined on the facts of the particular case, at the time of counsel's conduct, while "making every effort 'to eliminate the distorting effects of hindsight.'" *State v. Purvey*, 129 Md. App. 1, 9, 740 A.2d 54, 58 (1999) (quoting *Strickland*, 466 U.S. at 689). We hold that trial counsel's representation did not fall below an objective standard of reasonableness. Reasonable counsel in the trial counsel's position would not have interpreted *Copsey* to require him to file for dismissal of one or both of the charges. There was no indication that such effort would have prevailed. Certainly it is not unreasonable for an attorney to conclude that he would not prevail based on an assessment of the case under Maryland law and *Copsey* and proceed as trial counsel did.

Under the second prong, prejudice is established where there is "a reasonable probability, that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Holding that trial counsel was not deficient, there are no "unprofessional errors" of which to speak. For the sake of argument, however, if trial counsel's performance was deficient it most likely would not have affected the outcome of the proceedings. The charging documents were limited to acts occurring in their respective counties. A motion to dismiss likely would have failed, therefore, there is no prejudice here.

Appellant's reliance upon *Beatty v. State*, 56 Md. App. 627 (1983), also carries no weight. In *Beatty*, the victim was kidnapped and raped in Prince George's County, then taken to St. Mary's County where she was raped again and murdered. The defendants were

charged and convicted first in St. Mary's County, then in Prince George's. This Court held that Prince George's County was barred by double jeopardy from prosecuting the kidnapping because it was one continuing course of conduct which was already handled in St. Mary's. Here, the sexual offenses were separate acts, as opposed to one long course of conduct like the kidnapping in *Beatty*.

The prosecution in Worcester County was not barred by double jeopardy. The charging documents from Wicomico and Worcester counties were sufficiently confined to conduct occurring in their respective counties. Therefore, trial counsel's performance did not fall below an objective standard of reasonableness by failing to move for dismissal, and appellant's claim of ineffective assistance of counsel must fail.

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