Circuit Court for Baltimore City
Case No. 58635638

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2134

September Term, 2017

STATE OF MARYLAND

v

TYRONE NUTTER

Meredith,
Nazarian,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: May 14, 2019

On a petition for post-conviction relief, the Circuit Court for Baltimore City found that Tyrone Nutter received ineffective assistance of counsel and granted him a new trial. The State appealed, arguing that counsel's actions did not rise to the level of ineffective assistance. We agree with the State, and therefore reverse.

BACKGROUND

In 1987, Nutter was convicted of attempted murder and related offenses, and was sentenced to life in prison plus twenty years. Nutter appealed to this Court, which affirmed his conviction in an unreported opinion. *Nutter v. State*, No. 1270, Sept. Term 1987 (Md. Ct. Spec. App. Apr. 21, 1988). In 2009, Nutter filed a petition for post-conviction relief. The petition was denied, as was an application to seek leave from the denial.

Nutter filed a second petition for post-conviction relief in 2015. The second post-conviction court granted the petition, holding that Nutter received ineffective assistance of counsel both at trial and at his original post-conviction hearing (because post-conviction counsel failed to identify trial counsel's errors). The second post-conviction court found that counsel should have objected both to the State's use of a prior conviction for impeachment and to alibi instructions that shifted the burden of proof onto the defendant. The State filed an application for leave to appeal the second post-conviction court's decision, which we granted.

DISCUSSION

The State argues that the second post-conviction court committed two errors in concluding that Nutter received ineffective assistance of counsel. *First*, it evaluated the law on impeachment for prior offenses as it exists today, instead of as it existed at the time of

Nutter's trial. *Second*, it faulted counsel for failing to object to alibi instructions that necessitated no objection. We agree with both of the State's arguments.

I. Standard of Review

Claims of ineffective assistance of counsel are governed by a two-part test, under which the petitioner bears the burden of demonstrating: (1) that counsel's performance was deficient; and (2) that, as a result, the petitioner was prejudiced. *Barber v. State*, 231 Md. App. 490, 515 (2017) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). We need not reach one part of the test if the other is dispositive and here our analysis will focus on deficiency. *State v. Armstead*, 235 Md. App. 392, 408 n.8 (2018) (quoting *Strickland*, 466 U.S. at 697). To prove a deficiency in performance, "a petitioner must show that the acts or omissions of counsel were the result of unreasonable professional judgment and that counsel's performance fell below an objective standard of reasonableness considering prevailing professional norms." *Barber*, 231 Md. App. at 515 (cleaned up).

In reviewing the second post-conviction court's decision itself, our duties are as follows:

> The standard of review of the lower court's determinations regarding issues of effective assistance of counsel is a mixed question of law and fact. We will not disturb the factual findings of the post-conviction court unless they are clearly erroneous. But, a reviewing court must make an independent analysis to determine the ultimate mixed question of law and fact, namely, was there a violation of a constitutional right as claimed. In other words, the appellate court must exercise its own independent judgment as to the reasonableness of counsel's conduct and the prejudice, if any. Within the *Strickland* framework, we will evaluate anew the findings of the lower court as to the reasonableness of counsel's conduct and the prejudice suffered. As a question of whether a

> constitutional right has been violated, we make our own independent analysis by reviewing the law and applying it to the facts of the case. We will defer to the post-conviction court's findings of historical fact, absent clear error, but we will make our own, independent analysis of the appellant's claim.

Id. at 517 (cleaned up).

II. Impeachment for a Prior Conviction of Attempted Murder

At trial, Nutter took the stand in his own defense. In an effort to undermine his credibility, the State sought to impeach him with evidence that he was previously convicted of attempted murder.[1] Nutter's defense counsel did not object.

Attempted murder was held to be *not* relevant to credibility and therefore inadmissible for impeachment in the 2014 case, *Jones v. State*, 217 Md. App. 676, 709 (2014). Relying on the *Jones* decision, the second post-conviction court found that "the case law on this topic is clearly established" and that Nutter received ineffective assistance of counsel because defense counsel failed to object to the impeachment.

Where the law stands *today*, however, is not the standard under which we examine ineffective assistance of counsel claims. Instead, as the United States Supreme Court explained in *Strickland*, a "court deciding an actual ineffectiveness claim must judge the

[1] On appeal, Nutter argues that his first charge of attempted murder resulted in a juvenile adjudication, not a conviction, and that counsel's true deficiency was failing to object to the use of a juvenile adjudication for impeachment. This argument was not made in Nutter's second petition for post-conviction relief and is therefore not preserved. *Cirincione v. State*, 119 Md. App. 471, 503-04 (1998) (declining to review a claim not included in a petition for post-conviction relief or any amendment thereto). Further, when the juvenile adjudication argument was finally raised by Nutter, in his response to the State's opposition to his second petition for post-conviction relief, no evidence was presented to support the claim. While we do not reach this issue, for the sake of clarity, we refer to the first charge of attempted murder as a "conviction."

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 establishing that the prevailing professional norm *at the time of his trial* was to object" and if no such evidence is presented we assume "that counsel's conduct fell within a broad range of reasonable professional judgment." *Armstead*, 235 Md. App. at 422-23 (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. This means that counsel is not required to make predictions about what the law will be in the future and object accordingly. *Id.* at 422.

Given the legal landscape at the time, Nutter's counsel's failure to object was not unreasonable. At the time of Nutter's trial and first petition for post-conviction relief, there was no precedent deciding whether it was improper to use a prior conviction of attempted murder for impeachment and therefore no signpost alerting trial counsel or post-conviction counsel that an objection was necessary. As *Jones* makes clear, before its publication, "[n]o Maryland appellate court [had] addressed whether an attempted … murder conviction has sufficient relevance to a witness's credibility such that it should be admissible for impeachment." 217 Md. App. at 707. By evaluating the performance of Nutter's counsel against case law that post-dated Nutter's trial, the second post-conviction court failed to

properly apply the *Strickland* ineffective assistance of counsel test. The second post-conviction court, therefore, erred in finding that Nutter's counsel was deficient.[2]

III. Jury Instructions on Alibi

The second post-conviction court also found that Nutter's counsel rendered ineffective assistance by failing to object to alibi instructions that shifted the burden of proof onto the defendant. The question of who bears the burden of proving alibi has long vexed our courts. Through the early 1970's, trial courts in Maryland were "regularly referring to … alibi as an 'affirmative defense' and squarely allocating to the defendant the burden of persuasion as to such a defense by a preponderance of the evidence." *Schmitt v. State*, 140 Md. App. 1, 28 (2001). This changed with *Robinson v. State*, 20 Md. App. 450, 459 (1974), which clarified that "an alibi is not an affirmative defense, placing any burden upon a defendant beyond the self-evident one of attempting to erode the State's proof to a point where it no longer convinces the fact finder beyond a reasonable doubt." *See State v. Mann*, No. 80, Sept. Term 2018 (Md. Ct. Spec. App. May 1, 2019) (recounting the history

[2] Because Nutter's counsel was not deficient, we need not examine whether Nutter was prejudiced by the impeachment. *State v. Armstead*, 235 Md. App. 392, 408 n.8 (2018). However, if we were to address this second part of *Strickland*, we would conclude that Nutter was not prejudiced. To show prejudice, a post-conviction petitioner must establish "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 425. Nutter argues that he was prejudiced because had his credibility not been impeached, the jury would have believed his testimony that he was with a friend at the time of the shooting. This argument is not convincing given that the jury heard, and apparently did not believe, this same testimony directly from Darrin Grant, the friend that Nutter claimed to have been with at the time of the shooting.

of alibi instructions). Since *Robinson*, Maryland courts have vigilantly reviewed jury instructions on alibi to ensure that they do not contain language that could be perceived as allocating the burden of proof to the defendant.

An early example of this vigilance is *State v. Grady*, in which the Court of Appeals found the following alibi instructions improper:

> If, after a full and fair consideration of all the facts and circumstances in evidence, you find that the government has failed to prove beyond a reasonable doubt that the defendant was present at the time when, and the place where, the offense charged was allegedly committed, you must find the defendant not guilty.
>
> With reference to alibi, a defendant may be entitled to acquittal if you believe the alibi testimony as his not being present at a time and place of the alleged offense, by taking into consideration this testimony with all the other evidence raising a reasonable doubt of guilt, *but in order to prove an alibi conclusively, the testimony must cover the whole time in which the crime by any possibility might have been committed, and it should be subjected to rigid scrutiny*.

276 Md. 178, 181 (1975) (emphasis in original). The Court of Appeals in *Grady* held that the emphasized portion of the instructions was "misleading, ambiguous[,] and confusing," and that it improperly shifted the burden of proof to the defendant because "it could be understood as meaning that, while the State must prove its case against the accused beyond a reasonable doubt, the defendant has the responsibility of establishing his alibi." 276 Md. at 185.

In Nutter's case, the second post-conviction court compared the instructions invalidated in *Grady* to the instructions given at Nutter's trial, which read as follows:

> The Defendant has offered testimony to establish an alibi. An alibi is a defense which is based on evidence that the accused was not present at the time or at the place when he is alleged to have committed the offense charged. The claim of alibi is a legitimate and legal and proper claim. *When such a claim is thoroughly established it precludes the possibility of guilt*. The presence of the Defendant at the time and place of a criminal act is not to be presumed or assumed. In every case where the presence of a Defendant at the commission of the crimes is essential to his conviction, the State must establish his presence beyond a reasonable doubt.
>
> You are not to w[eigh] merely the evidence relating to the alibi and determine from that alone whether you have a reasonable doubt of guilt. You should consider such evidence along with all of the other evidence. In this section you should consider whether the alibi testimony covered the entire period of time during which the crime may have been committed. (Emphasis added).

The second post-conviction court found that the phrase "thoroughly established" in Nutter's instructions improperly shifted the burden of proving the existence of an alibi onto the defendant and therefore necessitated objection. That court reasoned that the phrase "thoroughly established" and the term "conclusively," found in the *Grady* instructions, "have nearly identical meanings [and therefore Nutter's] instruction placed an impermissible burden of proof [on Nutter] to prove his alibi."

On appeal, we review whether counsel acted unreasonably by failing to object to this instruction. *Armstead*, 235 Md. App. at 422-23. We hold that counsel did not act unreasonably, because, in our view, the instructions offered at Nutter's trial necessitated no objection as they did not shift the burden of proof onto the defendant and were not sufficiently similar to *Grady* to be erroneous.

As pointed out by *Grady*, jury instructions must be viewed *as a whole*. 276 Md. at 185. When we undertake this examination, it is clear why the instructions in *Grady* were found to shift the burden of proof. While the first paragraph of the *Grady* alibi instructions states that the government must prove that the defendant was present at the scene ("if … you find that the government has failed to prove beyond a reasonable doubt that the defendant was present at the time"), the second paragraph is vague to the point of incomprehensibility regarding who bears the burden of proof ("a defendant may be entitled to acquittal if you believe the alibi testimony as his not being present at a time and place of the alleged offense, by taking into consideration this testimony with all the other evidence raising a reasonable doubt of guilt"). *Id.*

By contrast, we cannot say that the instructions given at Nutter's trial, when viewed as a whole, suffer this same defect. The phrase the second post-conviction court took issue with ("thoroughly established") is directly trailed by the following:

> The presence of the Defendant at the time and place of a criminal act is not to be presumed or assumed. In every case where the presence of a Defendant at the commission of the crimes is essential to his conviction, *the State must establish* his presence beyond a reasonable doubt. (Emphasis added).

These two sentences place the burden of proof squarely on the State.

When taken as a whole, the instructions provided at Nutter's trial did not shift the burden of proof to Nutter. We therefore hold that counsel was not deficient in failing to object.[3]

[3] While we decline to follow the second post-conviction court's lead in an examination of the "thoroughly established" language in isolation, we note that the phrase

IV. Conclusion

We conclude that Nutter did not receive ineffective assistance of counsel and a new trial was improperly granted. We, therefore, reverse.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY REVERSED; COSTS TO BE PAID BY APPELLEE.

had outstanding pedigree and would not have been objectionable because the model jury instructions available at the time of trial used the same "thoroughly established" language. In 1987, the leading set of model jury instructions for criminal trials in Maryland was Professor David Aaronson's *Maryland Criminal Jury Instructions and Commentary* (the MSBA instructions, now the standard, were brand new in 1987). The alibi instructions contained in the edition of Aaronson in circulation at the time contained only minor differences from the instructions offered at Nutter's trial and included the entire sentence: "[w]hen such a claim is *thoroughly established* it precludes the possibility of guilt." DAVID E. AARONSON, MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY, §5.02, 324-25 (1975) (emphasis added). Because Nutter's instructions were delivered almost verbatim from the Aaronson model instructions, it would have been reasonable for counsel to conclude that no objection was necessary—regardless of whether that edition of the Aaronson model instructions is considered a correct statement of the law today.