Circuit Court for Baltimore City
Case No. 217279006

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 738

September Term, 2018

EMMANUEL ILIONELE OKOJIE

v.

STATE OF MARYLAND

Reed,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: October 21, 2019

A jury sitting in the Circuit Court for Baltimore City found the appellant, Emmanuel Okojie ("Okojie"), guilty of one count of fourth-degree sexual offense, and one count of second-degree assault. The circuit court sentenced Okojie to one year of imprisonment, all suspended, in favor of three years of probation for the fourth-degree sexual offense, and a concurrent term of five years of imprisonment, all suspended, in favor of three years of probation for second-degree assault. Okojie noted a timely appeal and presents us with the following questions:

1. Was [appellant] denied the effective assistance of counsel at sentencing?

2. Did the trial court fail to properly exercise her discretion in sentencing [appellant]?

BACKGROUND

1. Evidence Introduced by the State

In September 2017, D.B.[1] took a computerized driving examination in Okojie's office at a driving school that Okojie owned. After D.B. requested assistance with the examination, Okojie returned to his office and, according to D.B., "went underneath [her] and grabbed [her] breasts." D.B. said "what are you doing?" and "don't do that" and pushed Okojie away. She then finished the test, called a relative for a ride, and went home and called the police. The police went to her house and interviewed her and took her statement.

[1] To protect the privacy of the victim, we refer to her using her initials.

The next day D.B. and her cousin went back to the driving school to reschedule her classes with another instructor. Okojie invited D.B. and her cousin into his office and told them that what happened the previous day was a "misunderstanding," that he "does not like women," and that he was "gay." D.B replied that Okojie's explanation was "nonsense." When she attempted to leave the office, Okojie shut and locked the door. D.B. then called 911.

When the police arrived, D.B. told them about the events of the previous day. The police officer questioned why she would return to the driving school after what had happened the day before. D.B. responded that she returned because she had already paid for her driving lessons. The police officer then told Okojie to return D.B.'s money to her, which Okojie did.

2. <u>Okojie's Testimony</u>

At trial, Okojie was asked if he had touched D.B. while she was taking the test. Okojie answered: "I didn't touch her the way she said I did. But can I explain what happened?" Okojie continued:

> Her friend – (indiscernible) got into this. Her cousin came in. That's my friend, the one I call my friend[2]. She came in, and I said D.B. is busy. Then I went in. And I said your better half was here. She flared up. I said what. Said she's my cousin. I said, oh, I'm sorry. I said (indiscernible) and then she hugged me. Then I said, listen, I don't do this. I don't hug women no more because I have a case. A woman said I touch her, so I don't hug women.

[2] In apparent reference to D.B.'s "friend" who Okojie also called his "friend," Okojie had earlier testified "her friend that I called my friend, because she is of the other side so I identify with that look. I call her the family of lesbians and homosexuals. So knew my assistant. Don't worry about it. We are work together."

> I don't deal with women no more. I hope – I made a statement. I said I hope I have not done something wrong.
>
> She said no, no, no, no, no.
>
> Then I now stood up. I was standing by her side. I was standing here. And she turned the chair like this when she hugged me. That's when she said no, no, no. I said thank you. I did – that was when I touch her.
>
> I say thank you because I'm so paranoid and scared of women these days that even before my wife I apologize.
>
> She said you did nothing wrong.

The gist of Okojie's defense at trial was that D.B. had fabricated her sexual assault complaint in order to not have to pay an extra $150 to Okojie. Okojie claimed he was owed that sum because D.B. had missed three appointments.

3. Other Matters

As noted above, the jury found Okojie guilty of a fourth-degree sexual offense and of second-degree assault. Thereafter, counsel for Okojie asked that the sentencing proceeding be postponed until an unrelated criminal trial involving Okojie could be concluded. The circuit court denied that request because the other case would be tried by another judge, and also because D.B. was then present and ready to deliver a victim impact statement at sentencing. The court then began the sentencing proceeding. For the fourth-degree sexual offense conviction, the State asked for a suspended one year sentence, three years supervised probation, COMET[3] supervision through Parole and Probation,

[3] COMET stands for Collaborative Offender Management Enforcement Treatment program. As we explained in *Russell v. State*, 221 Md. App. 518 (2015): "The COMET supervision program was created in response to legislation passed by the General Assembly in 2006 which mandated the establishment of sexual offender management teams for the (continued)

registration as a sexual offender, and for Okojie to have no contact with D.B. The State requested a five-year suspended sentence with three years' supervised probation for the second-degree assault conviction.

After D.B. was asked if she had anything to say, she said:

> My purpose here was not for him to like go to jail. My purpose was that it's not right, and it should never happen again.
>
> It's just like when you – you're a school teacher, you know, elementary, anywhere, that should never happen to a woman, a man, a child, nobody.
>
> So I just feel like he should register as an offender; I feel that need because he is a teacher of young women [and] children as well.

Okojie's counsel then addressed the court and said:

> I'd like to give you a little history of my client. He was born in Nigeria. He's been [in] the United States for about 45-46 years. He has a bachelor's degree from the University of Wisconsin. He earned two master's degrees from Morgan State here in Baltimore. He has owned multiple businesses. He's a tax preparer. He is a married man. He has a family. He has children. He has grandchildren.
>
> This case has impacted him greatly. The situation. There are cultural issues at work here that we have not explored during the course of this case.
>
> He is still denying to me that he committed the offense that was found by the jury. I have no insight as to whether or not his denial is truthful or untruthful. I know that in his mind he does not believe the offense he is charged with is the offense that he committed. I think that because of his age, which is 68, now. Correct? . . . That this verdict will have devastating consequences to his business life.
>
> And I would suggest to the Court on the day in which the confrontation with [the victim] occurred he called me afterwards and told me that he was

supervision of sexual offenders." *Id.* at 522-23 (citing Md. Code Ann., Criminal Procedure Art. § 11-725). "A probationer on COMET supervision is required to comply with a sexual offender management program, which may include intensive reporting requirements, specialized sex offender treatment, electronic GPS monitoring, polygraph testing, computer monitoring, and being compelled to take medication." *Id.* at 523.

> suicidal because the allegations that had happened. And I'm concerned for his psychological well-being and his physical well-being as a result of this verdict.
>
> And I had the opportunity to meet many of his family members. They have stood behind him repeatedly throughout this ordeal.
>
> And to the extent that he has committed wrongdoing, I would express his most sincere apology to the victim and to the State in this situation.

Prior to imposing sentence, the court noted that:

> At some point, you are going to have to be accountable and take responsibility of your actions. Right now, you are still in denial, but you have been found guilty. And for those reasons -- and I don't think, based on what you've stated, you've learned a thing, Mr. Okojie. Life is all about choices. You chose to put your hands on the breasts of [D.B.]. Don't shake your head, please. You chose all your actions. And now you're going to be accountable.

The court also explained that "You are 68 years old, but you've been here long enough, for 45 years. You know the culture of – of the United States and what is appropriate and not appropriate." The court then sentenced Okojie as follows:

> Your sentence on Count 1 for sex offense, fourth degree, is one year suspended, three years supervised probation. You will be supervised by the COMET program through Parole and Probation. You must register as a sex offender as required by law. No contact whatsoever with [the victim].
>
> Count 2 [second-degree assault], your sentence is five years suspended, three years supervised probation with the same conditions. They run concurrent with each other.

Additional facts will be presented as they become relevant to our discussion.

DISCUSSION

I.

Okojie claims that he was denied his Sixth Amendment right to effective assistance of counsel during the sentencing proceeding. He claims that his trial counsel performed deficiently by not requesting that the court make a probation before judgment (PBJ) disposition on the fourth-degree sexual offense, and for not requesting that the trial judge exercise her discretion and not require him to register as a sex offender.

Ineffective Assistance of Counsel Generally

"The Sixth Amendment to the United States Constitution, applicable to the states through the Fourteenth Amendment, and Article 21 of the Maryland Declaration of Rights, 'guarantee criminal defendants the right to the assistance of counsel at critical stages of the proceedings.'" *Smith v. State*, 394 Md. 184, 205 (2006) (quoting *Mosley v. State*, 378 Md. 548, 556 (2003)) (footnotes omitted). To ensure that the right to counsel provides meaningful protection, the right has been construed to require the "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

The Supreme Court stated in *Strickland* that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686. The analysis of a claim of ineffective assistance of counsel has two components, which may be considered in any order. *Newton v. State*, 455 Md. 341, 356 (2017), *cert. denied*, 138 S. Ct. 665 (2018). Moreover, courts need not address

both components in every case. *Id*. In *Coleman v. State*, 434 Md. 320, 331 (2013), the Court of Appeals explained the two components as follows:

> First, the "defendant must show that counsel's performance was deficient," which is proven by showing that "counsel's representation fell below an objective standard of reasonableness," and that such action was not pursued as a form of trial strategy. *Strickland*, 466 U.S. at 687-89; *see also Oken v. State*, 343 Md. 256, 283-84 (1996). Second, "the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. This Court has noted that the standard to be used is whether there is a "substantial or significant possibility that the verdict of the trier of fact would have been affected." *Bowers v. State*, 320 Md. 416, 426 (1990) (quoting *Yorke v. State*, 315 Md. 578, 588 (1989)); *see also Williams v. State*, 326 Md. 367, 375 (1992).

"In assessing the performance prong of an ineffective assistance of counsel claim under the Sixth Amendment, a court will indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Peterson*, 158 Md. App. 558, 583 (2004) (quotation marks and citation omitted). Moreover, "[t]he court must be highly deferential in reviewing counsel's performance, in order to avoid second-guessing counsel's assistance." *Id*. (quotation marks and citations omitted) (alterations from original).

"It is the general rule that a claim of ineffective assistance of counsel is raised most appropriately in a post-conviction proceeding . . . [because] ordinarily, the trial record does not illuminate the basis for the challenged acts or omissions of counsel." *In re Parris W.*, 363 Md. 717, 726 (2001). "[W]e rarely consider ineffective assistance of counsel claims on direct appeal." *See also Bailey v. State*, 464 Md. 685, 703 (2019). In the rare situations where an appellate court, on direct appeal, will consider an allegation of ineffective

assistance of counsel, the court will only do so if there is no need for a collateral fact-finding proceeding. *Parris W.*, 363 Md. at 726-27 and the cases cited therein; *see also Testerman v. State*, 170 Md. App. 324, 343-44 (2006) (holding in a direct appeal that defense counsel failed to provide effective assistance of counsel as to the charge of fleeing and eluding where defense counsel did not make a particularized motion for judgment of acquittal on that count despite the State's failure to provide sufficient evidence and that failure could not be deemed trial strategy); *Letley v. State*, 358 Md. 26, 32 (2000) (addressing claim of ineffective assistance of counsel on direct appeal when the record was clear and contained all facts necessary for resolution of the issue and no useful purpose would be served by relegating the issue to post-conviction proceedings).

For the reasons set forth below, we hold that this is clearly not one of those rare cases where we can appropriately consider on direct appeal an ineffective assistance of counsel claim. If appellant has such a claim he will need to prove it by filing a post-conviction petition. We explain below.

Okojie's ineffective assistance argument is premised on provisions in Maryland statutes, which provide that a trial court has the option of entering a PBJ on a fourth-degree sexual offense, and after it does so, it can elect not to require the defendant to register as a sex offender. Those statutes are: Md. Code, Criminal Procedure Article ("CP") (2018 Repl. Vol. § 6-220 which permits a court, with certain exceptions not here pertinent, to impose a probation before judgment disposition, after a finding of guilt; CP § 11-701(o), which defines a "Tier 1 sex offender" as a person who has been "convicted" of, among other

things, committing a fourth-degree sex offense;[4] CP § 11-702 which states that a person is "convicted," for purposes of the sexual offender registry, when the person (1) is found guilty of a crime, (2) enters a plea of guilty or *nolo contendere*, or (3) is granted a PBJ after a finding of guilt, but only if the court requires sexual offender registration as a condition of probation.

Okojie claims that his trial counsel's failure to seek a PBJ on the fourth-degree sexual offense count and failure to ask that his client not be required to register as a sex offender, can only be the result of counsel's ignorance of the law. According to Okojie, had his counsel "understood the law, he should have argued for probation before judgment on the fourth[-]degree sex offense count and requested that the court not order registration."

Even if we were to assume, purely for the sake of argument, that appellant proved that his trial counsel's performance "fell below an objective standard of reasonableness,"[5] *Strickland*, 466 U.S. at 688, there is nothing in the record to show that appellant surmounted

[4] The crime of fourth-degree sexual offense is defined in § 3-308 of the Criminal Law article. Section 11-707 of the Criminal Procedure article provides that a Tier 1 sex offender is required to register for a term of 15 years.

[5] Nothing in this opinion should be interpreted to mean that we agree with appellant's contention that the record shows that his trial counsel was "ignorant of the law." That argument, if accepted, would suggest that any lawyer, who didn't ask for the least onerous sentence for his client, did not know the minimum punishment allowed. That cannot be the law because if it were, absurd consequences would result. For instance, such a rule would require lawyers to ask for a PBJ disposition in every case where such a disposition was allowable, regardless of the type of misconduct by the client and irrespective of whether the client showed remorse. Moreover, often times competent counsel would know that asking for an unreasonably lenient sentence might backfire and lead to a harsher sentence than what would have otherwise been imposed.

the prejudice prong of the *Strickland* test. To meet that prong, appellant would have been required to show from the trial record, that he was prejudiced by counsel's deficient performance. In this case that would mean that appellant would have to show that if his counsel had asked for a PBJ disposition along with a finding by the trial judge that registration as a sex offender was not required, there was a substantial or significant possibility that the trial judge would have given defense counsel what he requested. In his brief, appellant does not even argue that the second prong of the *Strickland* test was met. When no argument is set forth to support a party's contention, we are not required to consider that contention. *See Burson v. Capps*, 440 Md. 328, 340-41 n.18 (2014), *Honeycutt v. Honeycutt*, 150 Md. App. 604, 618 (2003). In any event, based on what the trial judge said at sentencing (that defendant had deliberately put his hands on the victim's breasts, that he had not accepted responsibility for his criminal action and that it was important that he be held "accountable" for his actions), the possibility of a PBJ disposition, if requested, appears exceedingly remote. Therefore, on this record, we cannot say that appellant met the second prong of the *Strickland* test.

II.

Okojie claims that the sentencing court abused its discretion, by failing to exercise its discretion, when it required Okojie to register as a sexual offender under the "mistaken belief" that such registration was mandatory. To support this mistaken belief claim, appellant relies on the words, which we have emphasized, used when the judge sentenced appellant:

> Your sentence on Count 1 for sex offense, fourth degree, is one year suspended, three years supervised probation. You will be supervised by the COMET program through Parole and Probation. You must register as a sex offender as required by law. No contact whatsoever with [the victim].
>
> Count 2 [second-degree assault], your sentence is five years suspended, three years supervised probation with the same conditions. They run concurrent with each other.

According to appellant, by using the emphasized words, the trial judge showed that she was unaware that the law allowed her to not impose a sex registration requirement if the court first struck the finding of guilt and imposed a PBJ disposition. The argument overlooks the fact that judges are presumed to know the law. *Ball v. State*, 347 Md. 156, 206 (1997).

In *State v. Chaney*, 375 Md. 168 (2003), the defendant, Chaney, argued that the trial court erred when it "imposed a life sentence without expressly recognizing that the sentence, or a portion of it, could have been suspended." *Id* at 175. Like Okojie, Chaney relied entirely on the transcript of the sentencing in his attempt to prove that the sentencing court was ignorant of the law. *Id*. The sentencing court in *Chaney* said:

> Well, gentlemen, there is only one punishment in this State for the crime of which this man has been convicted. The law provides a single penalty and no other penalty and so the sentence in the discretion of the [c]ourt in this case is limited to the imposition of that penalty.

Id.

The Court of Appeals held in *Chaney* that the longstanding presumption that trial judges know the law and apply it properly was a "compelling reason" for rejecting Chaney's argument that, because the sentencing court failed to mention the possibility of

suspending some portion of Chaney's life sentence, the trial judge must not have realized that he had the power to suspend a portion of the life sentence. *Id*. at 179.

In the instant case, what the judge said in the eleven words at issue, was in every respect accurate. The court had not granted a PBJ disposition and thus appellant was required to register as a sex offender. Nothing the sentencing judge said could support the inference that she was unaware that she had the option of making a PBJ disposition. Just like in *Chaney*, the mere fact that the sentencing court did not mention an option, does not support the inference that it was unaware of options. In other words, as in *Chaney*, Okojie fails to provide us with evidence sufficient to rebut the presumption that trial judges know the law and apply it properly. *Id*. at 184.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.