Circuit Court for Baltimore City
Case Nos. 107249017, 107249018

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1171

September Term, 2020

SHAWN DICKEY

v.

STATE OF MARYLAND

Friedman,
Ripken,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Friedman, J.

Filed: October 15, 2021

*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.

In May 2007, Shawn Dickey, appellant, shot and killed one man, Alexander Rose, and shot and wounded another, Robert Rochester, in a drug territorial dispute. In January 2009, a jury sitting in the Circuit Court for Baltimore City found Dickey guilty of first- and second-degree murder of Rose and use of a handgun in the commission of a crime of violence. The same jury found Dickey guilty of attempted first- and second-degree murder of Rochester, use of a handgun in the commission of a crime of violence, and first-degree assault, but it found him not guilty of second-degree assault. Trial counsel did not object to the apparently inconsistent verdicts (more on that later), and the court subsequently sentenced Dickey to life imprisonment, with all but 50 years suspended, for first-degree murder, and additional concurrent terms for the other offenses. We affirmed those judgments on direct appeal. *Dickey v. State*, No. 468, Sept. Term, 2009 (filed Nov. 23, 2011) ("*Dickey I*").

In March 2018, Dickey filed a postconviction petition claiming, among other things, that trial counsel had rendered ineffective assistance by failing to object to the inconsistent verdicts and by failing to file a timely motion for modification of sentence ("*Flansburg* claim"[1]). After a hearing, the postconviction court found that trial counsel had been ineffective in failing to object to the inconsistent verdicts. The court awarded Dickey a new

[1] In *State v. Flansburg*, 345 Md. 694 (1997), the Court of Appeals held that an ineffective assistance claim based upon counsel's alleged failure to file a timely motion for modification of sentence was cognizable in a postconviction proceeding. For brevity, we will call Dickey's claim based on this allegation a "*Flansburg* claim."

trial, but only as to the charges involving Rochester, and it further held that its disposition rendered moot his *Flansburg* claim.

The State did not seek leave to appeal, but Dickey did, contending that he was entitled to a new trial on all charges involving both victims, Rose and Rochester. We granted the application and transferred the case to the regular appellate docket. We affirm except as to Dickey's *Flansburg* claim in the case involving Rose, and we remand so that the court may decide that claim.

BACKGROUND

During the afternoon of May 22, 2007, a Baltimore City police officer on a routine patrol encountered a man, subsequently identified as Rochester, "staggering down the street" because he "had been shot and was having difficulty breathing." *Dickey I*, slip op. at 4-5. Rochester informed the officer that his companion, Rose, "was wounded and lying in the street." *Id.* at 5. Other police officers responded to the scene and searched it for evidence, recovering, "among other things, shell casings from a semiautomatic handgun and a green baseball hat." *Id.*

According to Rochester, "he and Mr. Rose were selling drugs on the corner of Fayette Street and Patterson Park Avenue" when they "were approached by two men," one of whom was identified as Dickey. *Id.* As Dickey and his companion approached Rochester and Rose, they asked, "[y]o, you all got some dope down here?" *Id.* Rochester and Rose replied that they did not. Dickey and his companion left briefly, but they re-appeared, five minutes later, about one block up the street, and "started shooting." *Id.* at 5-6. Another witness, named Gotti, testified that he saw Dickey, wearing a green baseball hat, standing

over Rose and, while declaring, "[t]ake my fuck[ing] territory," shoot him in the head. *Id.* at 6-7.

Two indictments were returned, by the Grand Jury for Baltimore City, one for each shooting victim. Indictment 107249017 (hereinafter "-017") charged Dickey with first- and second-degree murder of Rose and use of a handgun in the commission of a crime of violence. Indictment 107249018 (hereinafter "-018") charged Dickey with attempted first- and second-degree murder of Rochester, first- and second-degree assault, and use of a handgun in the commission of a crime of violence.[2]

In January 2009, the cases were tried together by a jury sitting in the Circuit Court for Baltimore City. The jury found Dickey guilty, in Case No. -017, of first- and second-degree murder of Rose and use of a handgun in the commission of a crime of violence. The same jury found Dickey guilty, in Case No. -018, of attempted first- and second-degree murder of Rochester, use of a handgun in the commission of a crime of violence, and first-degree assault, but it found him not guilty of second-degree assault, despite the court's instruction that "if you find no second-degree assault, you can't have first-degree assault because second-degree is the lesser." As noted above, trial counsel did not object to the inconsistent verdicts, despite that the trial took place seven months after the Court of Appeals' decision in *Price v. State*, 405 Md. 10 (2008), which held, for the first time, that legally inconsistent verdicts were reversible error in jury trials, and three

[2] Each indictment also included a charge of wearing, carrying, or transporting a handgun on the person, but those charges were nol prossed after the close of the State's case-in-chief.

months after our decision in *Tate v. State*, 182 Md. App. 114 (2008), which held, among other things, that a claim of legally inconsistent verdicts is subject to the contemporaneous objection rule.

In Dickey's ensuing postconviction petition, he claimed: "[t]he jury rendered a legally inconsistent verdict in Case No. [-018] when it acquitted [Dickey] of second-degree assault but convicted him of first-degree assault, attempted second-degree murder, and attempted first-degree murder. Trial counsel did not object." He further claimed that trial counsel had failed to file a timely motion for modification of sentence upon request, entitling him to file a belated motion for modification under *Flansburg*.

Following a hearing on Dickey's petition, the postconviction court issued a memorandum opinion and order, awarding Dickey a new trial in Case No. -018 only, and finding that its disposition rendered moot Dickey's *Flansburg* claim. Regarding the ineffective assistance claim based upon the failure to object to the inconsistent verdicts, the court found that "the inconsistency was provoked by a lack of clarity in the instructions" for second-degree assault, further explaining that the trial court "used language in describing the differences between first[-] and second-degree assault that would be confusing to a layperson without further clarification." The court concluded that trial counsel had no "sound trial strategy" for failing to object to the inconsistent verdicts because there was "nothing to lose and potentially everything to gain by rendering an objection." As for prejudice, the court found that trial counsel's deficient conduct "essentially failed to hold the State to its burden of proving every element of its case beyond a reasonable doubt."

The State did not seek leave to appeal from the decision in Case No. -018. Dickey appeals from the denial of a new trial in Case No. -017.

DISCUSSION

Standard of Review and Applicable Legal Principles

"The review of a postconviction court's findings regarding ineffective assistance of counsel is a mixed question of law and fact." *Newton v. State*, 455 Md. 341, 351 (2017) (citation omitted). "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." *State v. Thaniel*, 238 Md. App. 343, 360 (2018) (citation and quotations omitted) (cleaned up).

An accused has a right, under the Sixth Amendment and Article 21 of the Maryland Declaration of Rights, to the effective assistance of counsel throughout his trial. *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984); *Flansburg*, 345 Md. at 698-99. Moreover, where a statute, such as the Public Defender Act, provides additional rights to representation by counsel, that representation also must be effective. *Flansburg*, 345 Md. at 699.

A claim that the right to effective assistance was violated comprises two elements, deficient performance and prejudice. *Strickland*, 466 U.S. at 687. "To establish deficient performance, the petitioner must show that counsel's performance was objectively unreasonable under prevailing professional norms." *State v. Wallace*, 247 Md. App. 349, 359 (2020) (citations and quotations omitted), *aff'd*, __ Md. __, Sept. Term, 2020, No. 46

(filed Aug. 16, 2021). A reviewing court 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."[3] *Id.* (citation and quotation omitted). "To establish prejudice, the petitioner must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (citation and quotations omitted).

At the time of Dickey's trial, the law of inconsistent verdicts was governed by *Price* and *Tate*. As we explained in *Tate*, only legally inconsistent verdicts, that is, "where a jury acts contrary to a trial judge's proper instructions regarding the law," fall under *Price*'s proscription. *Tate*, 182 Md. App. at 130 (quoting *Price*, 405 Md. at 35 (Harrell, J., concurring)). As we further explained, "a defendant must note [an] objection to allegedly inconsistent verdicts prior to the verdicts becoming final and the discharge of the jury" or else "the claim is waived." *Id.* at 132 (emphasis omitted) (quoting *Price*, 405 Md. at 40 (Harrell, J., concurring)).

Analysis

We begin with preservation.[4] According to the State, Dickey's claim that he was entitled to a new trial in Case No. -017 was not raised below and therefore is waived. We agree.

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[3] This means, among other things, that we apply the law as it existed at the time of trial. *See*, *e.g.*, *Bobby v. Van Hook*, 558 U.S. 4, 6-7 (2009) (per curiam) (reversing a grant of habeas relief because the appellate court relied upon professional guidelines published 18 years after the defendant's trial).

[4] A transfer does not automatically excuse or cure non-preservation of a claim. In that respect, a grant of transfer is analogous to a grant of certiorari. *See*, *e.g.*, *Conaway v.*

First, Dickey's petition claimed error only in Case No. -018. Nowhere in Dickey's petition did he claim any inconsistency in the -017 verdict or explain how the inconsistent verdict in Case No. -018 had any effect on the verdict in Case No. -017.[5]

Second, during the hearing on the petition, the court asked Dickey's counsel, "we're dealing now, am I correct to understand that we are dealing with the matter focusing on the Robert Rochester case ending in [-]018?" Postconviction counsel replied, "[c]orrect." Then, after an extended discussion about how trial counsel should have objected to preserve the claim by requesting re-instruction of the jury "on the counts that they are reconsidering," the postconviction court asked, "[a]ll of them . . . as to Case [-]018, the Rochester case?" Postconviction counsel replied:

> Yes. Yes. And I think probably to all the counts. I think all the counts need -- I don't think the court can accept the partial verdict. And this is not necessarily super clear in how it carries out in the case law, but I think all the counts go back, everything goes back.
>
> I don't think the court is in the position at that point to accept a partial verdict and not to accept, you know, to accept a partial verdict at that point. I think all the counts go back and the jury has to deliberate further until they are able to sort [out] the inconsistency, however they are going to do that.

State, 464 Md. 505, 519 (2019) (exercising discretion to consider unpreserved issue on which certiorari had been granted); *Robinson v. State*, 404 Md. 208, 213-19 (2008) (declining to consider unpreserved issues on which certiorari had been granted); *Klauenberg v. State*, 355 Md. 528, 539-46 (1999) (same).

[5] Dickey now argues that when his petition sought the relief of a "new trial" he meant a new trial in both Case No. -017 and Case No. -018. The trial court can be forgiven for having missed that subtlety.

The closest Dickey came to linking the two sets of verdicts was during the hearing, when postconviction counsel asserted that the trial court, had it been apprised of the inconsistent verdicts in Case No. -018, would not have been in a position "to accept a partial verdict at that point." We doubt that this was enough to "make[] known to the court the action that the party desire[d] the court to take." MD. RULE 4-323(c).

But even if we assume this claim was preserved, it still would not entitle Dickey to relief because he failed to show prejudice. Second-degree assault of Rochester was not a lesser included offense of any of the crimes charged in Case No. -017, all of which involved the murder of Rose, not the attempted murder of Rochester. In fact, there was no assault instruction given in Case No. -017 because no assault was charged in that case. There was neither a legal nor even a factual inconsistency between the acquittal, in Case No. -018, of second-degree assault of Rochester, and the findings of guilt, in Case No. -017, involving the murder of Rose. There is no reasonable probability that, had trial counsel objected to the inconsistent verdict in Case No. -018 and the jury been properly re-instructed,[6] the jury would have returned with a different verdict in Case No. -017. Dickey's claim that it might have done so is sheer speculation and does not satisfy his burden under *Strickland*. *See Harrington v. Richter*, 562 U.S. 86, 112 (2011) (observing that, to establish prejudice, the

[6] In determining prejudice arising from trial counsel's failure to object to a trial error, we presume that, had there been a timely objection, the trial court would have sustained the objection and taken appropriate curative action. *Newton*, 455 Md. at 361. Although we assume this is a rebuttable presumption, there is nothing before us to rebut that presumption.

"likelihood of a different result must be substantial, not just conceivable" (citing *Strickland*, 466 U.S. at 693)).

Dickey's *Flansburg* claim affected the sentences in both Case No. -017 and Case No. -018. Because the postconviction court awarded a new trial only in Case No. -018, its ruling could not have rendered his *Flansburg* claim moot as to Case No. -017. Accordingly, we affirm except as to Dickey's *Flansburg* claim as it relates to Case No. -017, and we remand so that the postconviction court may rule on that claim only.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED EXCEPT AS TO THE *FLANSBURG* CLAIM IN CASE NO. -017. CASE REMANDED TO THAT COURT SO THAT IT MAY DECIDE THAT CLAIM ONLY. COSTS ASSESSED EQUALLY TO BOTH PARTIES.