Circuit Court for Harford County
Case No. C-12-CR-21-001001

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1525

September Term, 2022

CRYSTAL NICHOLE BANKS

v.

STATE OF MARYLAND

Reed,
Tang,
Eyler, James R.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: September 11, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

At the conclusion of a jury trial in the Circuit Court for Harford County, Crystal Nichole Banks, appellant, was convicted of, *inter alia*, driving while impaired by alcohol and driving while impaired by alcohol while transporting a minor. She was sentenced to one year of incarceration with all but sixty days suspended. On appeal, she presents a single question for our review which we have rephrased:

> Was appellant denied effective assistance of counsel when counsel failed to object to a non-testifying officer's opinion that appellant was driving under the influence?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

A two-day jury trial took place in August 2022. Two witnesses, Donna Colson and Trooper James Montgomery, testified for the State, and appellant testified in her defense. The following evidence was adduced at trial:

In the late afternoon on June 2, 2021, appellant was at home with her husband and four-year-old son. She drank two, half glasses of wine with a meal. Later that evening, she had an argument with her husband, and he left. In the early morning hours of June 3, appellant received a call from her daughter in New York who was experiencing suicidal ideations. Appellant loaded her son in her car and began driving to New York. She got to I-95, where she experienced rainy, wet road conditions, and began feeling unwell. She lost control of her vehicle and got stuck in an embankment.

Ms. Colson and her co-worker were at the nearby Park and Ride that morning and saw appellant, barefoot and disoriented, outside the disabled vehicle. They spoke with

appellant and when Ms. Colson suggested calling the police, appellant retreated to her car. Appellant returned to the interstate but drove southbound against northbound traffic, nearly striking a semi-truck. The co-worker called the police while Ms. Colson recorded the event on her cell phone. Appellant exited the interstate a second time and returned to the Park and Ride, where Trooper Montgomery encountered appellant. Other officers arrived shortly thereafter.

Trooper Montgomery began conversing with appellant to determine what happened. He smelled alcohol on appellant's breath. He observed appellant slurring her words, stating that he "couldn't quite understand where exactly she was headed from her speech[.]" He did not observe any alcohol bottles in or around the car, but he saw appellant's child asleep in the back seat. When asked her name, appellant misspelled it. She was "sluggish or lethargic in her movements," and she was unable to focus.

Appellant agreed to submit to a field sobriety test. Trooper Montgomery began with the horizontal gaze nystagmus ("HGN") test.[1] At trial, the trooper was admitted as an expert in the administration and evaluation of the HGN test, and he testified to observing six of six HGN clues on appellant. Trooper Montgomery was unable to complete further field sobriety testing due to appellant's lack of focus and because appellant became "a bit irate" with the officers on scene. Trooper Montgomery testified that he then placed

[1] The HGN test is a scientific field sobriety test during which an officer trained in administration of the test tracks the movement of the subject's eyes to determine the presence of alcohol in the body. *See Schultz v. State*, 106 Md. App. 145, 156 (1995) (the HGN test is based upon "a scientific principle that the extent and manner in which one's eye quivers can be a reliable measure of the amount of alcohol one has consumed").

appellant under arrest for driving under the influence of alcohol. The State attempted twice to elicit from Trooper Montgomery his opinion as to appellant's sobriety, but on both occasions, defense counsel lodged an objection and the court sustained it.

Trooper Montgomery proceeded to handcuff appellant outside of his patrol car with the assistance of other officers. Appellant protested, and the following exchange took place between appellant and an unidentified officer standing nearby ("Trooper 2"):

> [APPELLANT]: You don't have to take me from my son. That's what y'all gonna let him do?
>
> TROOPER 2: Yeah. It's our job. **You're driving under the influence.**
>
> [APPELLANT]: No. I'm okay.
>
> TROOPER 2: **No, I watched. I watched what he was doing. I looked in your eyes. And you're driving under the influence (indiscernible – 00:21:11).**

(Emphasis added).

The encounter, arrest, and subsequent exchange with Trooper 2 were recorded on Trooper Montgomery's in-car camera, and the video recording was admitted into evidence as State's Exhibit 2. The video is 22 minutes and 44 seconds long.

Initially, the State had intended to introduce a redacted version of the video that ended just past the 19-minute mark. Defense counsel, however, took issue with the shortened version of the video, arguing that it provided an incomplete picture of the interactions with law enforcement. Defense counsel specifically argued that appellant was "placed in the officer's car at about 21:35[,]" and there were other "interactions going on" during the prior two minutes that counsel wanted to include in the exhibit:

> [DEFENSE COUNSEL]: My client is placed in the officer's car at about 21:35. And so I think the rule of completeness my client is still in view of the camera. There's interactions going on. I'm arguing that it needs to go until she's out of the view and the entire interaction is complete.
>
> There's relevant -- the officer is telling her why she's under arrest at **21:10**. So two minutes before that I think it's inappropriate. I think the entire rule of completeness would say that they should show the entire interaction, not just cut it off right before that.

(Emphasis added). Defense counsel explained the relevance of the interaction at the 21:10-minute mark in the video:

> [DEFENSE COUNSEL]: . . . The officer is going to say, if the [c]ourt would like me to proffer, **the officer is going to say I looked in your eyes and you are under the influence**, because all he performed is the HGN. **It's very relevant.**

(Emphasis added). The State indicated that it would "go back to IT" and modify the video exhibit to accommodate counsel's request. The court found that:

> it is appropriate for [the entire interaction] to be included. The disputed portion, apparently, is there are a couple of minutes before [appellant] is placed in the police vehicle. And in order to give the complete picture, [defense counsel] wants to have that portion included. That's fine.

Defense counsel asked that the video stop at the 22:44-minute mark and the State modified the video accordingly. The modified version included the statement by Trooper 2: "No, I watched. I watched what he was doing. I looked in your eyes. And you're driving under the influence." The modified video exhibit (State's Exhibit 2, *supra*) was then admitted into evidence without objection.

In closing argument, defense counsel argued that appellant's behavior was due to emotional exasperation, not alcohol impairment. Defense counsel emphasized that law

enforcement "[r]ushed to get judgment, jump[ed] to conclusions" regarding appellant's alcohol impairment:

> [DEFENSE COUNSEL]: In the beginning, I ask[ed] each of you . . . to listen intently to what the officer said; what the officer did; . . . what the officer didn't do, could have done; **listen to the video**, which you will have in front of you. And **I'm asking you again to listen to the video carefully.**
>
> * * *
>
> And in fact, you'll hear it. You'll hear it in the video. **Let me get my time right, at 21 minutes and 10 seconds he says to my client, I looked at your eyes and you're under the influence.** That's all he had to do he says. Look at her eyes and that's enough, called rush to judgment.
>
> * * *
>
> But the officer said it best. He said I did that eye test. You're under the influence, and that's what the State wants you to believe. A simple movement of the eyes is enough to call the (indiscernible), and it's simply not. That is not beyond a reasonable doubt.

(Emphasis added).

DISCUSSION

"Generally, in Maryland, a defendant's attack of a criminal conviction due to ineffective assistance of counsel occurs at post-conviction review." *Crippen v. State*, 207 Md. App. 236, 250 (2012). Post-conviction proceedings "are preferred with respect to ineffective assistance of counsel claims because the trial record rarely reveals why counsel acted or omitted to act, and such proceedings allow for fact finding and the introduction of testimony and evidence directly related to allegations of the counsel's ineffectiveness." *Mosley v. State*, 378 Md. 548, 560 (2003) (footnote and citation omitted). "By having counsel testify and describe [the] reasons for acting or failing to act in the manner

complained of, the post-conviction court is better able to determine intelligently whether the attorney's actions met the applicable standard of competence." *Addison v. State*, 191 Md. App. 159, 175 (2010) (citation omitted).

Direct appellate review of an ineffectiveness claim is a rare exception that applies only when "the critical facts are undisputed, the record is sufficiently developed, and/or the legal representation is so egregiously ineffective that it is obvious from the trial record that a defendant was denied his Sixth Amendment right to counsel." *Mosley*, 378 Md. at 564.

Appellant argues that direct appellate review is applicable here because it is "facially evident" from the record that defense counsel's failure to object to Trooper 2's statement was not tactical. She claims that defense counsel "knew an ultimate opinion on intoxication was unfavorable given that counsel *twice* objected to State attempts to elicit that evidence from Trooper Montgomery." Thus, she contends, "[i]t is inconceivable that failure to do the same with Trooper 2 was trial strategy."

We are not persuaded that appellant's claim falls under the rare exception for consideration on direct appellate review. Based on the colloquy recounted above, defense counsel insisted that State's Exhibit 2 include Trooper 2's statement because she thought it was "relevant." In closing argument, defense counsel referred to the statement to cast doubt on the State's case by arguing that law enforcement rushed to judgment. Considering counsel's focused attention on Trooper 2's statement, there is a strong possibility that her failure to object to the statement was strategic, notwithstanding her earlier objections to Trooper Montgomery's opinion. Thus, a post-conviction proceeding is the appropriate

forum to test defense counsel's performance and examine whether any alleged deficiency resulted in prejudice. *See Wallace v. State*, 475 Md. 639, 654 (2021) (To prevail on an ineffective assistance of counsel claim, the defendant must show: (1) that his attorney's performance was deficient, and (2) that the defendant was prejudiced as a result.). We therefore decline to address appellant's claim on direct appeal.

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