

Circuit Court for Baltimore City
Cases No. 118169018, 118296001

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2038

September Term, 2019

HILARIO SANCHEZ

v.

STATE OF MARYLAND

Fader, C.J.,
Wells,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Raker, J.

Filed: February 2, 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.

Appellant, Hilario Sanchez, was convicted by a jury in two consolidated cases of three counts of first-degree rape and lesser included offenses. Following the jury's guilty verdicts, appellant retained new counsel to represent him at the hearing on his motion for a new trial and sentencing. The trial court denied his motion for a new trial and imposed sentence. He presents the following single issue for our review:

“Whether the lower court erred in failing to hear evidence on Mr. Sanchez’s Motion for New Trial and in misstating the applicable law governing claims of ineffective assistance of counsel.”

For the reasons stated below, we find that the trial court erred. We shall neither affirm nor reverse but remand this case for further proceedings consistent with this opinion.

I.

Hilario Sanchez was indicted by the Grand Jury for Baltimore City in case number 118169018 with two counts of first-degree rape, two counts of second-degree rape, two counts of attempted first- and second-degree rape, third-degree sex offense, fourth-degree sex offense, first- and second-degree assault, reckless endangerment and use of a deadly weapon with intent to injure. In case number 118296001, he was indicted with first- and second-degree rape. The jury found appellant guilty of two counts of first-degree rape in case -9018 and first-degree rape in case -6001. Appellant discharged his trial counsel and obtained different defense counsel who filed a motion for a new trial. The trial court denied the motion without an evidentiary hearing and imposed the following sentence: an aggregate term of life imprisonment, with all but 40 years suspended.

Appellant alleged in his new trial motion that his trial counsel was ineffective for failing to call four character witnesses during the defense case in chief. Those witnesses would have testified that appellant was a peaceful and non-violent person. He alleged in his motion that trial counsel was deficient because he misunderstood the law as to impeachable offenses. Because appellant maintains that he was prejudiced by his trial counsel's conduct, we set out the facts as presented at trial.

The State called Ms. R.C.M., the victim, who testified that on May 14, 2018, she was sexually assaulted by appellant. She related that she was at a Metro PCS store and that when she left the store, while waiting for a bus, appellant pulled up in a van and told her to get in the car. She said that he pulled out a pocket knife, put it to her neck, and started kissing her. While continuing to threaten her with the knife, he drove to a parking lot, pulled down her pants and underwear, performed cunnilingus and penetrated her digitally and with his penis, all against her will. He then drove to a nearby CVS store, where he released her. After she was dropped off, she photographed the license plate of the car onto her cell phone. Ms. R.C.M. testified that the next thing she recalled was waking up in the hospital, explaining that appellant gave her two white pills which she swallowed because he was holding a knife to her neck.

The State called a Sexual Assault Forensic Examiner (SAFE) nurse, an emergency medical technician, and a City police officer. The EMT, Mr. John Ebert, Jr., testified that Ms. R.C.M. appeared in pain but exhibited no signs of trauma or injuries on her face or body. Officer Kamburger testified that Ms. R.C.M. appeared confused and disoriented but

had no signs of physical injury. Ms. Nana, the SAFE nurse, testified that she found no bodily fluids on any external areas of Ms. R.C.M.'s body, there were no injuries to her mouth, and no visible injuries to her genital area. She did not appear to her to be drugged, confused or drowsy, and Ms. R.C.M.'s urinalysis toxicology exam was negative for drugs.

Several witnesses testified for the State as to DNA analysis. Although the vaginal swabs came back negative for semen or sperm presence and the DNA recovered from Ms. R.C.M.'s genital area could not be attributed to appellant, Virginia Sladko, a qualified serology expert, testified that appellant's DNA was recovered from a swabbing of Ms. R.C.M.'s fingernails.

Appellant called three witnesses in his case: Michael Hyatt, Officer Eduardo Quelhas, and Ms. Patricia Bitting. Mr. Hyatt testified to the location of the Metro PCS store. Officer Quelhas testified that on May 14 he spoke with Ms. R.C.M. who told him that earlier that day she was in the area of a Burger King when she tripped and was then confronted by appellant. Ms. Bitting testified about the 911 calls made in this case.

The trial judge, outside the presence of the jury, advised appellant of his Fifth Amendment right to remain silent and to decline to testify. The court inquired whether appellant had any impeachable offenses that he could be cross-examined on if he were to testify. The court noted that appellant had no prior record — “no impeachables” — but appellant elected not to testify.

The jury returned the guilty verdicts and appellant filed his motion for a new trial. New counsel argued that appellant's counsel was ineffective for not calling four character

witnesses who would have testified to appellant's non-violent character. This was prejudicial, he argued, because of the nature of the evidence in this case. The trial court did not hold an evidentiary hearing and denied the motion, ruling as follows:

“I've heard your motion and listened closely to it. Not only is my practice but it is something that you need to review the trial record for as well. The defendant was advised of his right to take the stand. He was also advised by counsel. I observed him discuss with him his option to testify or not to testify.

“Trial strategy encompasses many things including the decision to take the stand or not take the stand. That is a decision that's made by counsel but ultimately it is the decision of the defendant to decide whether he wishes to remain silent and invoke his Fifth Amendment right or waive that right and to testify. The options are explained on the record and they also are waived on the record.

“And I would direct your attention to the trial record in this case as it related to whether or not Mr. Sanchez and his counsel was aware of those impeachable offenses that could have been used against him if Mr. Sanchez chose to take the stand.

“But, nevertheless, I was present in the courtroom and I did hear the testimony of the witnesses and I disagree with you. The law is very clear that the testimony of one eyewitness if believed beyond a reasonable doubt may be sufficient as a matter of law. Acts of violence, particularly rape, are not done where there are an abundance of other witnesses. That is the type of offense and the nature of the crime that it be done somewhere where people aren't watching or looking.

“And it is often a case where there's one witness versus another witness or one witness who tells her story. In this case, we have a very interesting and intelligent witness who not only testified clearly about what happened to her but she had the presence of mind to use her cell phone and to record some of what was going on during the incident.

“It is that thoughtfulness during the presence of a violent act that helped to resolve and solve the crime and to identify her perpetrator. I felt very strongly that the evidence was clear, precise, understandable.

“And I have no doubt in my mind that when that verdict came back that it was a fair and reasonable one where the jury found the thread of case [sic] beyond a reasonable doubt and warranted a conviction on the counts against your client.

“As recorded by this court we have a record, and as counsel for the State raised there are a number of things that you suggest that might be

more appropriate for post-conviction relief, but even in that analysis trial strategy is not one that allows for do-overs for as the Court of Special Appeals and the Court of Appeals of Maryland has said, ‘No defendant is entitled to a perfect trial.’ And, until the day we all get a crystal ball, as defendants come up with trial strategy sometimes the strategy works and sometimes it doesn’t, but you cannot be heard to say I get do-overs because the decision of my trial counsel didn’t work so let me get new counsel and try it again.

“He had his opportunity for a fair trial and, as the judge in this case, I believe he received a fair one and a jury that listened closely and their considered judgement was that the State has proven its case beyond a reasonable doubt as to rape-1, and that was digital penetration, vaginal penetration, and the conviction stands as a matter of law....

“For the reasons set forth on this record, and as I adopt herein by reference the trial of this case, all testimony and exhibits, your motion for a new trial is denied.”

The court imposed sentence, and this appeal followed.

II.

It is noteworthy to recognize that appellant is not requesting that this court reverse the judgments of conviction but only asks this Court to remand the matter for further hearing on his motion for a new trial, with the trial court applying the appropriate standard under *Strickland v. Washington*, 466 U.S. 668 (1984). Before this Court, appellant’s argument is two-pronged: first, that the lower court erred in failing to hear evidence on his motion for a new trial; and, second, that the court misstated the applicable law related to ineffective assistance of counsel. Because the standard for assessment of ineffective assistance of counsel is set forth in *Strickland v. Washington*, and the trial judge failed to address the *Strickland* strictures, remand, appellant argues, is required. Appellant points out, first, that the trial court, instead of addressing whether trial counsel was deficient in

failing to call the available character witnesses to testify as to appellant's reputation for good character, discussed and maintained that appellant properly waived his right to testify after the court advised him properly of those rights. The court never addressed trial counsel's decision not to call the character witnesses to testify. Second, the trial court did not properly address the *Strickland* prejudice prong, but instead addressed the sufficiency of evidence to support the conviction.

The State argues that the trial court correctly denied appellant's motion for a new trial alleging ineffective assistance of counsel, because even without an evidentiary hearing the claim was defective as a matter of law. The State maintains that appellant is not entitled to any relief for two reasons: first, his allegation of deficient performance is mistaken as a matter of law; and, second, even assuming the truth of his allegation of deficient performance, the trial court was correct to conclude that he could not show *Strickland* prejudice "given the documentary evidence." As to the deficient performance prong, the State argues that trial counsel's understanding of the law regarding impeachment was not wrong, and that a witness may be impeached if a prior charge was placed on the stet docket. The State concludes by stating that, although not neatly couched in *Strickland* language, the trial court found that counsel's assumed deficient performance by failing to call character witnesses did not establish a reasonable possibility of an acquittal. Therefore, no evidentiary hearing was required, in the view of the State.

III.

Before we address the merits of appellant’s argument, it is most important to address the parties’ overarching positions in this case. At oral argument, appellant’s counsel responded to the court’s question as to why this matter was not best left to a post-conviction proceeding. Claims of ineffective assistance of counsel are ordinarily best left to post-conviction relief pursuant to the Postconviction Procedure Act, Md. Code Ann., Criminal Procedure §§ 7-101 through 7-301 (2001, 2008 Repl. Vol., 2014 Supp.). *Walker v. State*, 338 Md. 253, 262 (1995). At oral argument, appellant’s counsel represented that he expected the State would argue at any post-conviction proceeding that appellant’s ineffective assistance of counsel claim was fully resolved, adversely, by the trial judge in the motion for a new trial. The State conceded that indeed the State would do so. Ordinarily, a trial judge’s denial of a motion for a new trial is not reviewable by this Court except under the most extraordinary or compelling of circumstances, even though the judge’s decision is based on mistake or erroneous conclusions of law. *Ruth v. State*, 133 Md. App. 358, 367 (2000); *Marks v. State*, 84 Md. App. 269, 290 (1990). Even though ineffective assistance of counsel claims are left usually to post-conviction proceedings, trial courts do have discretion to consider the claim when raised in a motion for a new trial and the record and circumstances are sufficient to consider the claim. This case falls within an exception to the general rule, and, because of the likely collateral consequences of the trial judge’s ruling, we shall review appellant’s arguments in that light.

It is within the discretion of the trial court whether to review an ineffective assistance claim at the stage of the motion for new trial. If, however, the trial court elects to entertain an ineffective assistance of counsel claim raised in a motion for a new trial, the court is required to evaluate the claim based upon *Strickland* and its progeny. Appellant’s complaint here is that the trial court entertained the ineffective assistance of counsel claim but failed to apply the correct legal standard. We agree with appellant. Appellant also argues that the trial court *must* hold an evidentiary hearing, although we believe that is at the discretion of the trial judge.

While it is true that a court reviewing effective assistance of counsel “need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies,” *Strickland*, 466 U.S. at 687, the court must nonetheless apply the test set out in *Strickland*. Maryland has consistently applied the *Strickland* test in deciding whether counsel has rendered constitutionally ineffective assistance. *See, e.g., Redman v. State*, 363 Md. 298, 309–14 (2001); *Wiggins v. State*, 352 Md. 580, 602–03 (1999); *Oken v. State*, 343 Md. 256, 283 (1996); *Gilliam v. State*, 331 Md. 651, 665–66, (1993); *Williams v. State*, 326 Md. 367, 373 (1992); *State v. Thomas*, 325 Md. 160, 170–73 (1992).

To establish ineffective assistance of counsel under *Strickland*, an appellant must demonstrate two requirements: (1) that counsel’s performance was deficient; and (2) that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687; *Wiggins*, 352 Md. at 602. To demonstrate deficient performance, appellant must prove “that his

counsel's acts or omissions were the result of unreasonable professional judgment and that counsel's performance, given all the circumstances, fell below an objective standard of reasonableness considering prevailing professional norms." *Oken v. State*, 343 Md. 256, 283 (1996). Appellant must show "that 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. A reasonable probability of a different outcome is "consistent with the purposes of the guarantee of counsel at trial, 'a probability sufficient to undermine confidence in the outcome.'" *Id.* at 693.

As appellant argues, the trial court did not address appellant's claim of deficient performance, *i.e.*, that counsel's performance was deficient in not calling the character witnesses because counsel misunderstood the law on impeachment of a witness with prior convictions. Instead, the trial court focused on appellant's United States constitutional rights under the Fifth Amendment. The court then addressed the strength of the State's case, in terms of sufficiency of the evidence, and failed to address the prejudice prong of *Strickland*. The trial court was within its discretion in denying the motion for a new trial. The trial court was not required to hold an evidentiary hearing or to consider the merits of the ineffective assistance of counsel claim at that stage. But, if the trial court did in fact consider the ineffective assistance of counsel claim, it does not appear that the court applied the *Strickland* test.

Maryland Rule 8-604(d)(1) permits this Court to remand to the circuit court for further proceedings "[i]f the Court concludes that the substantial merits of a case will not

be determined by affirming, reversing or modifying the judgment, or that justice will be served by permitting further proceedings.” In order to clarify its Order, we remand this matter to the circuit court for further proceedings consistent with this opinion. As an aid to the trial court, we are remanding to the trial court for that court: (1) to determine whether to exercise its discretion to consider appellant’s claims of ineffective assistance of counsel, which would require application of the *Strickland* test; (2) if so, to (a) determine whether to hold an evidentiary hearing,¹ and (b) apply the *Strickland* test to the allegations made by appellant and identify the reasons for the court’s conclusions on the record; and (3) if not, make that explicit. In any case, the trial court should make clear whether it is considering ineffective assistance of counsel.

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE CITY NEITHER
AFFIRMED NOR REVERSED. CASE
REMANDED TO THAT COURT FOR
FURTHER PROCEEDINGS CONSISTENT
WITH THIS OPINION. COSTS TO BE
DIVIDED EVENLY BETWEEN THE
PARTIES.**

¹ The State argued that there was no deficient performance because trial counsel’s understanding of the law as to impeachable offenses was correct as a matter of law. Therefore, according to the State, no evidentiary hearing was required. Whether counsel’s performance was deficient is a matter for the trial judge to determine, assuming that the trial judge elects to consider ineffective assistance as part of the new trial motion. Part of that decision is whether an evidentiary hearing is necessary.