

Circuit Court for Wicomico County
Case No. 22-K-05-000213

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2419

September Term, 2014

DESMOND JERROD SMITH

v.

STATE OF MARYLAND

Friedman,
Beachley,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: January 2, 2019

*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 the Circuit Court for Wicomico County, in 2005, Desmond Jerrod Smith was convicted by a jury of second degree murder and use of a handgun in the commission of a crime of violence as well as several related offenses, which merged for sentencing purposes. The court imposed a total executed sentence of 50 years in prison.

Smith's convictions were affirmed in an unreported opinion by this Court on direct appeal. *Smith v. State*, No. 1744, Sept. Term, 2005 (filed June 6, 2007). The Court of Appeals granted Smith's petition for certiorari and affirmed. *Smith v. State*, 403 Md. 659 (2008).

Subsequently, in 2013, Smith filed a petition for relief under the Maryland Uniform Postconviction Procedure Act.¹ Following a hearing in the Circuit Court for Wicomico County, relief was denied by order of July 21, 2014.² Smith's petition for leave to appeal to this Court was granted.

In this appeal, Smith argues that the post-conviction court abused its discretion in denying him relief based on his assertions of ineffective assistance of trial counsel for counsel's failure to investigate and challenge the academic qualifications of the State's expert witness, Joseph Kopera. This Court granted Smith's application for leave to appeal as to the following question only:

Did the post-conviction court abuse its discretion in denying appellant's petition for post-conviction relief on the ground that defense counsel's failure

¹ Md. Code (2001, 2008 Repl. Vol.), §§ 7-101, *et seq.* of the Criminal Procedure Article (CP).

² Smith was, however, granted leave to file a belated motion for modification of sentence.

to investigate or challenge Joseph Kopera’s academic credentials “was not deficient,” or in the alternative, appellant “failed to show that any error on [defense] counsel’s part prejudiced his defense?”³

BACKGROUND

Because this appeal does not implicate the sufficiency of the evidence, we adopt a brief summary from *Smith v. State*, 403 Md. at 661:

Desmond Jerrod Smith (“petitioner”) was charged by the State of Maryland (“respondent”) with murder, first degree assault, use of a handgun in the commission of a crime of violence, and other firearm related offenses. He prayed a jury trial, and it was held in August 2005 in the Circuit Court for Wicomico County, with the Honorable W. Newton Jackson, III, presiding. The jury acquitted Smith of first degree murder and found him guilty of second degree murder, first degree assault, use of a firearm in the commission of a felony, and wearing, carrying and transporting a handgun. In September 2005, petitioner was sentenced to an aggregate fifty-year term of incarceration for the second degree murder and for use of a handgun in commission of a felony. The remaining offenses were merged for purposes of sentencing. He filed a notice of appeal to the Court of Special Appeals on September 7, 2005. There, he argued that the Circuit Court erred in instructing the jury that it must consider the unsworn, out-of-court statement of a witness for petitioner “just as if she had testified at trial.” In an unreported opinion, the Court of Special Appeals rejected that argument, and affirmed the judgment below. Petitioner filed a timely petition for writ of certiorari, which [was] granted....

The post-conviction court’s factual findings, provided in its Statement of Reasons Regarding Petition for Post-Conviction Relief, as they pertain to the limited question before us in this appeal, were:

Based on the holding in *Kulbicki* [*v. State*, 207 Md. App. 412 (2012)] and a review of Mr. Kopera’s testimony at trial, the Court finds Mr. Kopera’s perjured testimony regarding his academic credentials had no influence on

³ Although appellate counsel presents an argument for the lack of independent testing for DNA and ballistics evidence, that claim is beyond the scope of the question posed by this Court in granting petitioner’s application for leave to appeal.

this jury’s verdict. During Petitioner’s jury trial, the State inquired into Mr. Kopera’s current position with the Maryland State Police and his previous position with the Baltimore City Police. Mr. Kopera testified that he has been with the Maryland State Police for 15 years. Prior to that, he spent 21 years with the Baltimore City Police. He further testified that he testifies as an expert witness on average 80 to 100 times per year. *As the Court held in Kulbicki, despite Mr. Kopera’s false testimony as to his academic credentials, he has vast experience in the field of ballistics and was an expert in the field without taking into account his academic credentials.* Further, the Court finds that Mr. Kopera only perjured his academic credentials, not any facts that were material to Petitioner’s case.

The Court finds that trial counsel’s performance was not deficient by failing to investigate or challenge Mr. Kopera’s academic credentials, and even if the Court was to hold as such, Petitioner failed to show that any error on trial counsel’s part prejudiced his defense. Therefore, relief ... is denied.

(Emphasis added).

Standard of Review

The standard of appellate review of the ruling of the post-conviction court regarding ineffective assistance of counsel is a mixed question of fact and law. Generally, 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* [*v. Washington*, 466 U.S. 668 (1984)] 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.

Barber v. State, 231 Md. App. 490, 517 (quoting *State v. Jones*, 138 Md. App. 178, 209 (2001)), *cert. denied*, 453 Md. 10 (2017).

“The 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.” *Barber*, 231 Md. App. at 516 (quoting *Coleman v. State*, 434 Md. 320, 331 (2013)).

Ineffective Assistance of Counsel

In order to effectively show ineffective assistance of trial counsel, the defendant must satisfy the *Strickland* performance and prejudice test. First, the “defendant must show that his ‘counsel’s representation fell below an objective standard of reasonableness, and that such action was not pursued as a form of trial strategy.’” *Newton v. State*, 455 Md. 341, 355 (2017) (quoting *Coleman*, 434 Md. at 331), *cert. denied*, 138 S. Ct. 665 (2018). Second, he “must show either: (1) ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different’; or (2) that ‘the result of the proceeding was fundamentally unfair or unreliable.’” *Id.* (quoting *Coleman*, 434 Md. at 340-41).

When making the determination of trial counsel’s performance, we accept that “[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.” *Newton*, 455 Md. at 355 (quoting *Strickland*, 466 U.S. at 689).

Performance

Smith’s specific allegations of ineffective assistance of trial counsel are based on counsel’s asserted failure to investigate the academic qualifications of the State’s expert ballistics witness, Joseph Kopera. That failure, he asserts, caused him prejudice.⁴

Kopera was a recognized ballistics expert who, while employed by the Baltimore City Police Department for over 21 years and the Maryland State Police for 15 years, testified as an expert on the average of 80 to 100 times per year. He claimed to hold engineering degrees from the Rochester Institute of Technology and the University of Maryland. Indeed, he testified to as much at Smith’s trial. Subsequently, it was publicly revealed that Kopera did not hold those degrees and, by testifying that he did, had perjured himself in many trials, including Smith’s. None of Kopera’s false academic claims were known at the time of Smith’s trial.

Smith avers that it would have only taken “two phone calls” by his trial counsel to have “discovered that Joseph Kopera did not, in fact, have an engineering degree from the Rochester Institute of Technology or from the University of Maryland as he had testified.”

As the post-conviction court acknowledged, “Mr. Kopera testified that he has been with the Maryland State Police for 15 years[,]” and “[p]rior to that, he spent 21 years with the Baltimore City Police. He further testified that he testifies as an expert witness on

⁴ We are compelled to refer to the assertion in Smith’s brief that “[o]f course, the failure of defense counsel to investigate the credentials of an expert witness, deemed and held out as such an expert by the state [sic], in no way mitigates the responsibility of the prosecutor to not suborn perjury.” That bald assertion is not, in the least, supported by the record. Nowhere in the life of this prosecution is there a suggestion that the prosecutor was aware of Kopera’s false claims, let alone that those unknown false claims were offered by the State as known false testimony.

average 80 to 100 times per year.” Indeed, Kopera also testified as having testified as an expert in the area of firearms “in the courts of the State of Maryland, all the counties in the states of Delaware, Virginia and Pennsylvania, and federal courts here in the United States.” The post-conviction court also pointed out that the question of the credibility of Kopera’s expert testimony, *vis-à-vis* his untrue claims of academic degrees, was resolved by this Court in *Kulbicki v. State*, which we shall discuss in greater detail, *infra*.

Prejudice

Smith bears the further burden of showing that counsel’s error, if any, caused him prejudice. *Barber*, 231 Md. App. at 515 (citing *Oken v. State*, 343 Md. 256, 283 (1996)). He contends that the witness testimony implicating Smith had been “thoroughly impeached” except for Kopera’s expert ballistics testimony that bullet fragments matched the gun found at the house “where [Smith] occasionally stayed[.]” Smith avers that witnesses Derwin Strand and Angela Henson had both been threatened by police and the prosecutor, respectively, and had recanted their initial recorded testimony given to police. Because of their impeachment, and “given [Kopera’s] propensity for lying, there is reason to doubt Kopera’s conclusions regarding the handgun[.]” Smith alleges that trial counsel was ineffective because “no investigation was undertaken,” which highly prejudiced him.⁵

The Supreme Court determined in *Strickland* that:

[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic

⁵ Additionally, Smith contends that counsel failed to have the evidence tested by a defense expert and, therefore, he was unable to challenge Kopera’s conclusions. Those assertions are beyond the scope of our order granting leave to appeal.

choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.

466 U.S. at 690–91.

The State responds generally to Smith’s claims that: appellant bears the burden of proving that counsel was ineffective and that conduct caused appellant prejudice; it was not error for counsel to accept Kopera’s resume as accurate; and, that Kopera’s testimony was not critical to the outcome. The State proffers that “Kopera’s falsehoods concerning his college education ... were utterly irrelevant. He was not qualified as a firearms examiner because he claimed to have engineering degrees; he was qualified as a firearms examiner because he had extensive on-the-job training and years of experience.”

The State further posits, and the record reveals, that trial counsel focused on impeaching the credibility of the remaining eye witnesses who had recanted their testimony and alleged police coercion by threats. Further, trial counsel did not seriously challenge that the weapon found was the murder weapon; rather, counsel’s efforts were to create doubt that Smith was, in any way, connected to the weapon. In short, Smith did not seriously challenge Kopera’s ballistics opinions.

In *McGhie v. State*, 449 Md. 494 (2016), the Court of Appeals recently considered another circumstance in which Kopera’s testimony was called into doubt. The Court said:

We discern no legal error or abuse of discretion on the part of the hearing judge in properly analyzing the petition by recognizing the reasonable possibility that the jury, aware of Kopera’s lies about his academic credentials, would have discounted his testimony on the merits, as well as the lay witness testimony that followed from it.

449 Md. at 514. Nevertheless, the Court observed, an appellant must still “prove that Kopera’s lies ‘create[d] a substantial or significant possibility that the result may have been different.’” *Id.*

Kulbicki v. State

Significant in any discussion of the aftermath of Kopera’s false academic claims, and resulting perjury, is *Kulbicki v. State*.⁶

Kulbicki, a Baltimore police sergeant, was convicted of shooting and killing his pregnant mistress. 207 Md. App. at 420-21, 427-28. Kopera had testified at the trial as a ballistics expert in 1995. *Id.* at 426-27. He had testified to having engineering degrees from both the University of Maryland and Rochester Institute of Technology, which, while unrelated to his ballistics training and expertise, were later proven to be false. *Id.* at 426, 430. In fact, evidence was produced during Kulbicki’s post-conviction hearing that

⁶ Kulbicki’s conviction was affirmed by this Court. *Kulbicki v. State*, 207 Md. App. 412 (2012). The Court of Appeals reversed in *Kulbicki v. State*, 440 Md. 33 (2014), one month after, the Smith post-conviction court issued its ruling. The Supreme Court of the United States reversed the Court of Appeals decision in *Maryland v. Kulbicki*, 136 S. Ct. 2 (2015), thereby affirming this Court’s holding in *Kulbicki v. State*, 445 Md. 451 (2015).

showed that Kopera had never been admitted to either institution and the transcript in his personnel file from the University of Maryland was found to have been forged.⁷ *Id.* at 430.

In our holding in *Kulbicki*, we determined that:

Kulbicki proved that Kopera presented false testimony as to his credentials. We agree with the postconviction court that there simply is no likelihood that the jury’s determination would have been influenced by the fact that Mr. Kopera did not have the academic credentials he claimed. As the State notes in its brief, the record reflected that ballistics is a field for which no college degree is offered, and the expertise for the field is usually based on experience, which Kopera had in copious amounts.

207 Md. App. at 447 (internal quotations omitted).

In the instant appeal, the post-conviction court held that trial counsel’s failure to inquire about or discover Kopera’s lying about his educational background did not fall below an objective standard of reasonableness and, in any event, Smith was not prejudiced by counsel’s failure to inquire or discover those lies. We agree wholeheartedly. Finding neither error nor abuse of discretion on the part of the post-conviction court, we affirm its findings of fact and conclusions of law.

**JUDGMENT OF THE CIRCUIT
COURT FOR WICOMICO COUNTY
AFFIRMED; COSTS TO BE PAID BY
APPELLANT.**

⁷After his false academic claims were exposed, Kopera committed suicide. *Kulbicki*, 207 Md. App. at 430 n.9.