Circuit Court for Baltimore County
Case No. 03-K-14-001586

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 815

September Term, 2023

GRANT LEWIS

v.

STATE OF MARYLAND

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

JJ.

Opinion by Beachley, J.

Filed: March 18, 2024

*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).

On October 30, 2014, a Baltimore County jury convicted appellant Grant Lewis of first-degree murder and conspiracy to commit first-degree murder. This case involves the Circuit Court for Baltimore County's denial of appellant's petition for post-conviction relief based on an allegation of ineffective assistance of counsel related to the failure to file a motion for modification of sentence.[1] Pursuant to our granting of appellant's application for leave to appeal, appellant presents the following question for our review:

> Did the postconviction court err in propounding a categorical rule that, absent a request from the defendant, a trial attorney has no obligation to file a motion for modification of sentence, including, as here, where the defendant was not told, either on or off the record, that he has a right to counsel on the motion?

For the reasons below, we shall affirm.

FACTS AND PROCEEDINGS

In 2000, Mr. Lewis and an associate, Alexander Bennett, were hired by Stephen Cooke, Jr. as part of a contract killing scheme to kill Mr. Cooke's girlfriend, Heidi Bernadzikowski. Mr. Cooke obtained a $700,000 insurance policy on Ms. Bernadzikowski's life and hired appellant and Mr. Bennett after he had seen their murder-for-hire advertisement online. Mr. Cooke promised to pay Mr. Lewis and Mr. Bennett $60,000 to kill Ms. Bernadzikowski and make her death look like an accident. With appellant's assistance and planning, Mr. Bennett killed Ms. Bernadzikowski on April 20, 2000.

[1] We will interchangeably refer to the motion for modification of sentence as a "motion to modify" or "motion for reconsideration."

Although DNA was taken at the scene, police were unsuccessful in identifying a suspect until improved technology enabled the police to identify Mr. Bennett in 2011. Mr. Bennett was arrested on January 19, 2012, and pursuant to a plea agreement, he provided details of appellant's role in the murder. After a three-day jury trial, Mr. Lewis was convicted of first-degree murder and conspiracy to commit first-degree murder and sentenced to life imprisonment for the murder and a concurrent five-year sentence for the conspiracy conviction. Appellant's conviction was affirmed on direct appeal. *Lewis v. State*, 229 Md. App. 86 (2016), *aff'd* 452 Md. 663 (2017).

APPELLANT'S PETITION FOR POST-CONVICTION RELIEF

On November 28, 2017, Mr. Lewis filed a *pro se* petition for post-conviction relief. With the assistance of counsel, appellant then filed an amended petition on July 25, 2018, alleging for the first time ineffective assistance of counsel due to counsel's failure to file a motion for modification of sentence.[2] Citing *Strickland v. Washington*, 466 U.S. 668 (1984), Mr. Lewis argued that trial counsel was deficient for both failing to file the motion and for failing to properly advise him on the motion, and asserted that this deficiency was *per se* prejudicial because of the lost opportunity for a reconsideration hearing.

The court held a hearing on May 10, 2019. Appellant's trial counsel, Steven Scheinin, was the only witness. Mr. Scheinin provided the following testimony regarding the failure to file a motion to modify:

[2] Mr. Lewis also filed a second amended petition in July 2018 and asserted a claim unrelated to this appeal.

[APPELLANT'S COUNSEL]: Claim five is that you -- it has to do with the motion for modification. So the record reflects that there was an appeal in this case.

My first question is: Did you approach [appellant] about noting an appeal? Did he come to you about noting an appeal? How did that happen?

[MR. SCHEININ]: Well, I always note an appeal when I lose. But, in this particular case, even before sentencing, Mr. Lewis told me he wanted to appeal the case. I informed him I can't until we -- I can't appeal it until after sentencing.

[APPELLANT'S COUNSEL]: Okay.

[MR. SCHEININ]: So he brought up [the] appeal first.

[APPELLANT'S COUNSEL]: Now, the record also reflects that a three-judge panel was filed in this case. How did that come about?

[MR. SCHEININ]: I got a call either from his mother or his girlfriend, I can't recall which, saying that Mr. Lewis evidently had spoken to someone in jail and he wanted me to request a three-judge panel, which I did.

[APPELLANT'S COUNSEL]: Okay. And no motion for reconsideration was filed. Did you have any conversations about the motion for modification before sentencing or after sentencing?

[MR. SCHEININ]: No.

[APPELLANT'S COUNSEL]: Did you see him after sentencing?

[MR. SCHEININ]:	I am sure I did. But I don't independently recall.
[APPELLANT'S COUNSEL]:	Do you recall any particular -- you don't recall -- I'm sorry. Do you recall any conversation at all about a motion for modification?
[MR. SCHEININ]:	There was no conversation about a motion for modification.

Mr. Lewis did not testify at the post-conviction hearing.

On November 14, 2019, the post-conviction court granted appellant's petition on grounds unrelated to this appeal. We granted the State's application for leave to appeal, and in an unreported opinion, vacated the post-conviction court's grant of a new trial and remanded for consideration of issues not decided by the post-conviction court. *State v. Lewis*, No. 2584, Sept. Term 2019 (filed Dec. 30, 2020). On September 26, 2022, in accordance with our mandate remanding the case to the circuit court, the post-conviction court denied all remaining post-conviction claims, including the allegations of ineffective assistance of counsel related to the failure to file a motion for modification of sentence. The court relied on *Rich v. State*, 230 Md. App. 537 (2016), *aff'd* 454 Md. 448 (2017), and *Matthews v. State*, 161 Md. App. 248 (2005), for the proposition that post-conviction petitioners are not entitled to relief when they fail to demonstrate that they asked counsel to file a motion to modify on their behalf.

On June 26, 2023, we granted appellant's application for leave to appeal the post-conviction judgment.

DISCUSSION

The sole issue in this appeal is whether the post-conviction court erred in determining that trial counsel was not ineffective for failing to file a motion for modification of sentence on appellant's behalf. Mr. Lewis's principal contention is that the post-conviction court erred because his trial counsel was deficient when he failed to inform appellant of the right to counsel on the motion and, concomitantly, that Mr. Lewis's "failure to request that the motion be filed cannot be held against him" because he was not informed of his right to counsel. In Mr. Lewis's view, trial counsel's testimony that he did not discuss the motion with Mr. Lewis was sufficient to demonstrate deficient performance. To establish prejudice, Mr. Lewis relies on *Matthews* and *Butler v. State*, 255 Md. App. 152, 157 (2022), for the proposition that once deficiency is established in the context of a failure to file, prejudice is "presumed" because of the "lost opportunity to the proceeding."

The State responds that the post-conviction court correctly denied appellant's ineffective assistance of counsel claim because established precedent demonstrates that counsel is not ineffective when a defendant fails to provide evidence that he or she made a request to file a motion to modify. Because there is no evidence that Mr. Lewis requested counsel to file the motion, the State asserts that trial counsel was not deficient. The State alternatively argues that, even if trial counsel was deficient, appellant cannot demonstrate prejudice because he failed to show that, but for counsel's "deficient failure to consult with him" regarding his motion to modify, "he would have timely" filed that motion. *See Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000).

Review of a "post-conviction court's findings regarding ineffective assistance of counsel [i]s a mixed question of law and fact. The factual findings of the post-conviction court are reviewed for clear error. The legal conclusions, however, are reviewed *de novo*." *McGhee v. State*, 482 Md. 48, 66 (2022) (quoting *Wallace v. State*, 475 Md. 639, 653 (2021)).

I. APPELLANT FAILED TO DEMONSTRATE COUNSEL'S DEFICIENT PERFORMANCE UNDER THE CIRCUMSTANCES OF THIS CASE

When filing a motion for modification of sentence, "it is clear that, under Maryland statutory provisions, rules, and case-law, [petitioners have] a right to counsel."[3] *State v. Flansburg*, 345 Md. 694, 699 (1997). Although this does not originate from a "constitutional right[,] . . . [r]egardless of the source, the right to counsel means the right to the effective assistance of counsel." *Id.* at 703. To demonstrate an ineffective assistance of counsel claim, defendants must meet a two-prong test established by the Supreme Court in *Strickland*: (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced" the petitioner. 466 U.S. at 687. Because a petitioner must prove both prongs, "we need not approach the inquiry in any particular order, nor are we required in every instance to address both components of the *Strickland* test." *Oken v. State*, 343 Md. 256, 284 (1996). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of

[3] Mr. Lewis contends that the post-conviction court denied his claim, in part, because the court concluded that "by not asking counsel for assistance, Mr. Lewis waived his right to be represented on the motion for modification[.]" We see nothing in the record to indicate that the post-conviction court determined that Mr. Lewis waived his right to an attorney.

sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

When evaluating allegations of deficiency in the context of a failure to file a motion for modification of sentence, Maryland precedent clearly establishes that counsel is deficient when counsel fails to comply with the client's request to file a motion for modification. *See Flansburg*, 345 Md. at 705 ("The failure to follow a client's directions to file a motion . . . is a ground for the post conviction remedy of permission to file a belated motion for reconsideration of sentence."); *Franklin v. State*, 470 Md. 154, 184 (2020) ("An attorney's failure to file such a motion after being asked to do so cannot be considered a strategic decision; rather, such a failure 'reflects inattention to the defendant's wishes[.]'" (quoting *Flores-Ortega*, 528 U.S. at 477)). When counsel fails to file the requested motion, the deficiency is *per se* "prejudicial because it results in a loss of any opportunity to have a reconsideration of sentence hearing." *Matthews*, 161 Md. App. at 252.

The record here, however, is undisputed that Mr. Lewis did not ask trial counsel to file a motion for modification of sentence. Mr. Lewis did not testify at the post-conviction hearing and his counsel testified that he had no discussion with Mr. Lewis about a motion to modify. Appellant acknowledges that in *Rich v. State* this Court rejected an ineffective assistance of counsel claim for failing to file a motion for modification of sentence because there was no evidence that Mr. Rich asked counsel to file the motion. 230 Md. App. at 551 n.5. Appellant attempts to distinguish *Rich* by noting that it was a *coram nobis* case where no hearing was held. Appellant points out that there was a post-conviction hearing in this case and that trial counsel testified that he never spoke to appellant about a motion

for modification of sentence. Appellant overlooks the fact that the record in the case at bar, as in *Rich*, fails to demonstrate that appellant ever asked counsel to file the motion. *See id.* ("[w]e will not find that his counsel rendered ineffective assistance on a silent record").

Implicitly recognizing that *Rich* presents an obstacle in his quest for post-conviction relief, Mr. Lewis fashions a more nuanced argument: that trial counsel was deficient in failing to advise appellant about his right to counsel with regard to filing a motion for modification of sentence on his behalf.[4] We initially note that we are not aware of any precedent that would support appellant's specific argument. Nevertheless, even if we assume that counsel had a duty to advise appellant of his right to counsel with respect to a motion for modification of sentence, the United States Supreme Court's decision in *Roe v. Flores-Ortega* suggests that trial counsel's performance in this case was not deficient.

In *Flores-Ortega*, the Court specifically identified the issue for review: "Is counsel deficient for not filing a notice of appeal when the defendant has not clearly conveyed his wishes one way or the other?" 528 U.S. at 477. The Court noted that some Circuit Courts of Appeal had "answered the question with a bright-line rule: "Counsel must file a notice of appeal unless the defendant specifically instructs otherwise; failing to do so is *per se* deficient." *Id.* at 478. The Court rejected "this *per se* rule as inconsistent with *Strickland*'s

[4] Maryland Rule 4-342(h)(1) requires the court to ensure that defendants are informed of their right to be represented by counsel when filing a motion for modification. Although the court failed to properly inform appellant on the record of this right, appellant does not assert trial court error in this case.

holding that 'the performance inquiry must be whether counsel's assistance was reasonable considering all of the circumstances.'" *Id.* (quoting *Strickland*, 466 U.S. at 688). The Court noted that, as a general rule, counsel should consult with the defendant "about the advantages and disadvantages of taking an appeal[.]" *Id.* The Court held: "If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Id.*

More relevant to the instant case, the Court proceeded to consider the situation where counsel had not consulted with the defendant about the advantages and disadvantages of taking an appeal. *Id.* Although the Court acknowledged that "the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal[,]" the Court expressly declined to adopt a "bright-line rule that counsel must always consult with the defendant regarding an appeal." *Id.* at 479–80. The Court concluded: "We cannot say, as a *constitutional* matter, that in every case counsel's failure to consult with the defendant about an appeal is necessarily unreasonable, and therefore deficient. Such a holding would be inconsistent with both our decision in *Strickland* and common sense." *Id.* at 479.

Applying the principle that "a court must assess a claim of deficient performance . . . based on the specific facts and circumstances" of the case under review, *Franklin*, 470 Md. at 180, we conclude that appellant failed to show that trial counsel acted unreasonably under *Strickland*. At sentencing, appellant was twice advised that he had the right to file

for modification of sentence within 90 days of sentencing. In addition, appellant signed a "Notice of Post-Trial Rights" form that advised him, among other things, of his right to file a notice of appeal within 30 days, the right to request three-judge panel review within 30 days, and the right to file for modification of sentence within 90 days. Appellant himself requested counsel to note an appeal and appellant, via a family member, requested counsel to file for three-judge panel review. Trial counsel filed appropriate pleadings as to both requests, which at least inferentially supports the notion that Mr. Lewis was likewise aware that he had the right to counsel vis-à-vis a motion for modification.

Despite requesting that counsel note an appeal and file for three-judge panel review, appellant made no request of counsel to file a motion for modification. In any event, the record is completely devoid of any evidence that appellant was unaware of his right to counsel. Based on this record, it is plausible that appellant was aware of his right to have counsel file a motion for modification of sentence; such awareness would obviate any requirement of trial counsel to advise appellant about a right of which he was already aware. Applying the "context-dependent consideration" of appellant's ineffective assistance of counsel claim based on this limited record, *id.* (quoting *State v. Borchardt*, 396 Md. 586, 603 (2007)), appellant failed to overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *State v. Davis*, 249 Md. App. 217, 222 (2021) (quoting *Strickland*, 466 U.S. at 689). In the parlance of *Flores-Ortega*, to hold otherwise "would be inconsistent with both [the

Supreme Court's] decision in *Strickland* and common sense."[5] *Flores-Ortega*, 528 U.S. at 479.

II. APPELLANT FAILED TO DEMONSTRATE PREJUDICE UNDER *STRICKLAND*

Assuming *arguendo* that trial counsel's performance was deficient for *Strickland* purposes, appellant cannot prevail because he failed to establish prejudice. Rejecting a *per se* prejudice rule, *Flores-Ortega* stated,

> Unfortunately, [the] *per se* prejudice rule ignores the critical requirement that counsel's deficient performance must actually cause the forfeiture of the defendant's appeal. If the defendant cannot demonstrate that, but for counsel's deficient performance, he would have appealed, counsel's deficient performance has not deprived him of anything, and he is not entitled to relief.

528 U.S. at 484. The Supreme Court reiterated that in the context of a failure to note an appeal in the absence of a specific request, courts "require the defendant to demonstrate that, but for counsel's deficient conduct, he would have appealed." *Id.* at 486.

The dearth of evidence in this record leads us to conclude that appellant failed to demonstrate that, but for counsel's failure to consult with and advise him of his right to counsel on the motion, he would have filed a motion to modify his sentence. In short, appellant failed to establish that, had he received reasonable advice from counsel related

[5] Although we do not find deficient performance here, we note that the better practice would be for counsel to specifically advise the defendant concerning the right to counsel related to a motion for modification of sentence.

to the motion to modify, he would have instructed counsel to file the motion.[6] *See id.* Appellant therefore did not satisfy *Strickland*'s prejudice prong.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. APPELLANT TO PAY COSTS.

[6] In his reply brief, appellant asserts that it "is plain that he would have" and "[o]f course[] he would have" wanted to file a motion for modification. The simple answer to this contention is that, because appellant elected not to testify, the record does not reflect one way or the other his desire to file a motion for modification. We also reject appellant's reliance on *Bostick v. Stevenson*, 589 F.3d 160, 168 (4th Cir. 2009), because the court there concluded that the evidence showed that the defendant was "prejudiced by counsel's failure to consult given that he wanted to appeal and would have done so notwithstanding counsel's advice." No such evidence exists here.