

Circuit Court for Baltimore City
Case No. 114258013-16

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2583

September Term, 2019

STATE OF MARYLAND

v.

PHILIP MASON

Reed,
Friedman,
Zarnoch, Robert A.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: March 31, 2021

*This is an unreported opinion and therefore may not be cited either as precedent or as persuasive authority in any paper, brief, motion, or other document filed in this Court or any other Maryland court. Md. Rule 1-104.

A jury in the Circuit Court for Baltimore City convicted Phillip Mason of second-degree murder and related offenses in 2015. After the trial, the court sentenced Mason to serve a cumulative sentence of 55 years' incarceration, the first five without possibility of parole. On November 9, 2019, the court granted appellee's petition for postconviction relief and ordered that he be granted a new trial. On appeal, the State presents the following questions¹ for this Court's review:

- I. Did the post-conviction court err when it granted Mason a new trial because his counsel failed to object to a compound "strong feelings" question?
- II. Did the post-conviction court err in granting Mason the right to file a belated Motion for Modification of Sentence, Motion for Review of Sentence, and Motion for a New Trial?

For the reasons set forth below, we reverse the post-conviction court.

BACKGROUND & PROCEDURAL HISTORY

During *voir dire* at Mason's trial in 2015, the circuit court asked the venire panel the following questions:

Does any member of the jury panel hold strong views concerning the charge of murder or related laws, that would affect your ability to be fair and impartial in this case? If so, please stand.

Does any member of the jury panel hold strong views concerning the charge of robbery, or related laws, that would affect your ability to be fair and impartial in this case? If so, please stand.

Does any member of the jury panel hold strong views concerning the charge of handguns, or related laws, that would affect your ability to be fair and impartial in this case? If so, please stand.

¹ The State only presented one question for this court's review, however, they presented two arguments for the court to consider.

In total, 78 prospective jurors answered one of the above questions in the affirmative. Mason’s counsel did not object to these questions, and did not challenge the *voir dire* questions in his direct appeal. On April 16, 2019, Mason filed a petition in the Circuit Court for Baltimore City seeking post-conviction relief, arguing he was entitled to a new trial because his trial counsel was ineffective by failing to object to the compound strong-feelings *voir dire* questions.

On October 2, 2019, a hearing on the motion was held. Mason’s counsel acknowledged that though he had numerous opportunities to object to the form of the strong-feelings questions, he did not do so. He admitted that he was aware of *Pearson v. State*, 437 Md. 350 (2015) (holding that the trial court abused its discretion when the court framed strong-feelings questions in compound form); it was his practice to object to such questions; and he could not offer a good explanation as to why he did not object to the form of the questions. Counsel also testified that it was not uncommon for trial courts to ask compound strong-feelings questions at the time of Mason’s trial, and he did not know how the trial court would have ruled had he objected to the phrasing of the questions.

In a written opinion, the post-conviction court agreed with Mason’s petition that his trial counsel was ineffective for failing to object to the compound strong-feelings questions. The court concluded that the questions were improper; the failure to object had no potential to benefit Mason; and the requirement to prove prejudice was a “virtual impossibility,” thus, prejudice was presumed.

This timely appeal follows.

STANDARD OF REVIEW

This Court’s review of “a post-conviction court’s findings regarding ineffective assistance of counsel is a mixed question of law and fact.” *State v. Syed*, 463 Md. 60, 73 (2019) (Citation omitted). “We will not disturb the factual findings of the post-conviction court unless they are clearly erroneous.” *Shortall v. State*, 237 Md. App. 60, 74 (2018). This 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.” *Id.*

DISCUSSION

Pursuant to the Sixth Amendment of the United States Constitution, defendants have the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984). The Supreme Court has set out a two-prong test when reviewing ineffective assistance of counsel claims. *Id.* at 687. The first prong is the performance prong, where the petitioner must show that trial counsel’s performance was so deficient that “counsel was not functioning as ‘counsel’ guaranteed ... by the Sixth Amendment.” *Id.* In other words, the petitioner “must show that counsel’s representation fell below an objective standard of reasonableness ... under prevailing professional norms.” *Id.* at 688. The second prong requires the petitioner to show that counsel’s deficient performance prejudiced the defense. *Id.* at 687. The prejudice prong requires the petitioner 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.” *Bailey v. State*, 464 Md. 685, 703 (2019) (Internal citations and quotations omitted).

Post-conviction courts may presume prejudice in three limited circumstances: “(1) the petitioner was actually denied the assistance of counsel; (2) the petitioner was constructively denied the assistance of counsel; or (3) the petitioner’s counsel had an actual conflict of interest.” *Ramirez v. State*, 464 Md. 532, 541 (2019). “Absent these three circumstances, the presumption of prejudice does not apply, and the petitioner must prove prejudice.” *Id.*

I. Voir Dire Questions

“*Voir dire* (i.e., the questioning of prospective jurors) is critical to implementing the right to an impartial jury. *Pearson v. State*, 437 Md. 350, 356 (2014) (Internal citations and quotations omitted). In Maryland, “the sole purpose of *voir dire* is to ensure a fair and impartial jury by determining the existence of specific cause for disqualification.” *Id.* (Internal citations and quotations omitted). On request, “a trial court must ask during *voir dire* whether any prospective juror has strong feelings about the crime with which the defendant is charged.” *Id.* at 360 (Internal citations and quotations omitted).

The issue arises when a court phrases a strong-feelings question in a way that “shifts from the trial judge to the venire responsibility to decide juror bias.” *Dingle v. State*, 361 Md. 1, 21 (2000). The Court of Appeals has held that asking compound strong-feelings *voir dire* questions, such as whether “any member of the panel hold[s] such

strong feelings ... that it would be difficult for [them] to fairly and impartially weigh the facts of this trial[,]” is an abuse of discretion because it shifts the responsibility from the judge to the prospective juror to determine whether there is bias. *Pearson*, 437 Md. at 364. The Court of Appeals stressed that a prospective juror is not automatically disqualified if they respond affirmatively to a strong-feelings question. *Id.* After the prospective juror is individually questioned about the affirmative answer, “the trial court determines whether or not that prospective juror’s strong feelings about the crime with which the defendant is charged constitute specific cause for disqualification.” *Id.*

Here, the circuit court relied on *Dingle* and *Pearson* in finding that Mason’s trial counsel rendered ineffective assistance of counsel in failing to object to the compound strong-feelings questions at issue. The State contends that the post-conviction court erred in finding that Mason’s counsel was ineffective because Mason failed to sustain his burden to overcome the presumption that his trial counsel’s failure to object to the compound strong-feelings questions was not sound trial strategy. The State also asserts that the post-conviction court wrongly presumed prejudice and Mason failed to prove he was prejudiced.

Mason contends that the post-conviction court correctly concluded that his counsel was ineffective because this court has previously held that compound strong-feelings questions are improper. Further, Mason asserts that the court properly presumed prejudice because it is a “virtual impossibility” to prove prejudice from an incomplete *voir dire*, requiring he “prove a negative” or that he was “prejudiced by a non-event.”

Wright v. State, 411 Md. 503, 513 (2009). In the alternative, Mason argues that he was completely denied counsel at a critical stage of trial, and thus he is afforded a presumption of prejudice because he was deprived of his constitutional right to a fair trial and impartial jury.

Turning to the first prong, we agree that the post-conviction court properly held that trial counsel was deficient when they failed to object to numerous compound strong-feelings *voir dire* questions. “When a claim is based upon a violation of a constitutional right it is our obligation to make an independent constitutional appraisal from the entire record.” *Harris v. State*, 303 Md. 685, 697 (1985). “In making our independent appraisal, we accept the findings of the trial judge as to what are the underlying facts unless he is clearly in error. We then re-weigh the facts as accepted in order to determine the ultimate mixed question of law and fact.” *Id.* at 698.

Here, the post-conviction court addressed the three compound questions the circuit court asked with respect to prospective juror’s strong feelings on crimes associated with the trial. Over seventy prospective jurors answered in the affirmative that they held strong views that would affect their ability to be fair and impartial. Mason’s counsel failed to object to the compound questions.

To show deficient performance, Mason must show that “counsel’s actions were not the result of trial strategy.” *Coleman v. State*, 434 Md. 320, 338 (2013). “Counsel makes a strategic trial decision when it is founded upon adequate investigation and preparation.” *Id.* (Internal citations and quotations omitted).

At the post-conviction hearing, trial counsel testified that he was aware of the holding in *Pearson*, but acknowledged it was not uncommon for trial courts to ask compound strong-feelings questions in 2014 and 2015, and he was unsure how the trial court would have ruled had he objected to the phrasing. Further, counsel testified that it was his practice to object to such questions and he could not offer a “good explanation” as to why he did not object to the form of the court’s questions. He further acknowledged that he had multiple opportunities to object and did not do so.

The State contends that there are numerous ways to provide effective assistance and there is a presumption that this could be considered sound trial strategy. We disagree. The record reflects that though trial counsel appeared informed of the law, whether by neglect or ignorance he failed to object to improper questions. Trial counsel’s testimony “does not indicate any particular strategy founded upon adequate investigation and preparation.” *Coleman*, 434 Md. at 339. (Internal citations and quotations omitted). The purpose of *voir dire* is to impanel a fair and impartial jury, and by asking these compound strong-feelings questions, the court lacked the ability to determine whether a prospective juror would be fair and impartial. The failure to object provides no potential benefit to Mason. We conclude that the failure to object was deficient because it fell below the objective standard of reasonableness demanded of attorneys and was not “in furtherance of sound trial strategy.” *Id.* at 340.

Moving to the prejudice prong, the State asserts that the post-conviction court erred in presuming Mason was prejudiced by trial counsel’s failure to object and Mason failed to sustain his burden that, but for his counsel’s failure to object to the compound strong-feelings questions, there was a substantial possibility of a different outcome to his trial.

Mason sets forth three theories why the court was correct in finding a presumption of prejudice. Mason’s first theory is that had trial counsel objected to the compound strong-feelings questions, the issue would have been preserved on appeal and an allegation of structural error would have led to a new trial.

In *Newton*, the Court of Appeals analyzed whether “the presumption of prejudice due to a structural error ... satisfied *Strickland’s* prejudice prong.” *Newton v. State*, 455 Md. 341, 356 (2017). The Court in *Newton* cited the Supreme Court’s analysis in *Weaver*, explaining that even though the violation would require reversal on direct appeal, it is analyzed under the framework set forth by *Strickland* when raised in a claim for ineffective assistance of counsel. *Id.* Further, the benefit of granting a new trial on direct appeal is the chance that witness memories are still accurate and evidence is available. *Id.* On the other hand, post-conviction courts do not address the merits of trial court errors, and “these differences justify imposing a higher standard for granting a new trial when a defendant raises a structural error on post-conviction.” *Id.* at 356-57. The Court in *Newton* held that the petitioner must establish *Strickland’s* prejudice prong in light of the holding in *Weaver*. *Id.* at 357. Further, “[t]he case law of both the Supreme Court and

[the Court of Appeals] demonstrates that a petitioner is not relieved of his or her burden of proving prejudice simply because he or she alleges that his or her trial counsel caused structural error.” *Ramirez v. State*, 464 Md. 532, 576-77 (2019). We agree. Despite alleging that, on direct appeal, the violations would have required automatic reversal, Mason must still prove he was prejudiced under *Strickland*.

Mason’s second theory is that he was completely denied counsel at a critical stage of trial, thus under *Ramirez*, a specific showing of prejudice is not required, and a presumption of prejudice is appropriate. 464 Md. 532, 563 (2019).

The court in *Ramirez* held that a presumption of prejudice shall apply if a petitioner was actually denied counsel, the petitioner was constructively denied counsel, or counsel had an actual conflict of interest. 464 Md. 532, 574 (2019). Mason argues that there was a “complete denial of counsel” during jury selection. Actual denial of counsel occurs when “counsel was either totally absent, or prevented from assisting the [petitioner] during a critical stage of the proceeding.” *Ramirez*, 464 Md. at 574. (Internal citations and quotations omitted).

Constructive denial of counsel occurs where “even though counsel was neither absent nor prevented from assisting the petitioner during a critical stage of the proceeding, the circumstances still amount to a denial of the assistance of counsel.” *Id.* Constructive denial occurs where “counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing[.]” *Id.* (Internal citations and quotations omitted). Constructive denial of counsel typically results in “an adversary process itself [that is]

presumptively unreliable.” *Walker v. State*, 391 Md. 233, 247 (2006) (Internal citations and quotations omitted). The Supreme Court has made clear that the exception to the *Strickland* rule requiring proof of prejudice is very narrow, and “for the exception to apply, the [attorney’s] failure must be complete.” *Id.* (Internal citations and quotations omitted). For example, the Supreme Court explained the applicability of the constructive denial of counsel:

When we spoke in *Cronic* of the possibility of presuming prejudice based on the attorney's failure to test the prosecutor's case, we indicated that the attorney's failure must be complete. We said ‘if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing.’ Here, respondent's argument is not that his counsel failed to oppose the prosecution throughout the sentencing proceeding as a whole, but that his counsel failed to do so at specific points.

Walker v. State, 391 Md. 233, 248 (2006) (quoting *Bell v. Cone*, 535 U.S. 685, 696 (2002)). Mason argues that his counsel failed to object to three impermissible *voir dire* questions. In other words, Mason argues that his counsel was ineffective “at specific points.” We cannot conclude that counsel’s failure to object to three compound strong-feelings *voir dire* questions equates to Mason being either actually denied the assistance of counsel or constructively denied the assistance of counsel.

Finally, Mason’s third theory is that there is “a fourth category of circumstances in which the presumption of prejudice shall apply.” According to Mason, *Ramirez* is silent on this fourth category, which he argues occurs when the Court has already determined the method of *voir dire* to be improper. Mason contends that because it is “virtually impossible” to prove the existence of actual prejudice from improper *voir dire*, a

presumption of prejudice is appropriate. Though Maryland courts have held that the failure to investigate potential juror biases “forecloses further investigation into the venirepersons’ states of mind, and makes proof of prejudice a virtual impossibility,” *Wright v. State*, 411 Md. 503, 525 (2009), this does not translate to a presumption of prejudice under *Ramirez*. Mason relies heavily on *Wright*, which held that the court abused its discretion by employing an improper method of *voir dire*. 411 Md. at 515. Though the Court in *Wright* determined that it would be an insurmountable burden to prove a defendant was prejudiced by “a non-event (i.e., a failure to disclose relevant information),” *Wright* does not consider the *Strickland* prejudice standard. 411 Md. at 513-14.

A presumption of prejudice is typically applicable when the defendant is unable to point to particular events from trial or sentencing to demonstrate that they have been prejudiced. Absent a presumption of prejudice, defendants must articulate “how specific errors of counsel undermined the reliability of the finding of guilt.” *Walker v. State*, 391 Md. 233, 247 (2006). Attorney errors that are particular to the facts of a certain case “cannot be classified according to the likelihood of causing prejudice or defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid,” therefore “the Court has declined to accord presumptively prejudicial status to them.” *Redman v. State*, 363 Md. 298, 312 (2001) (quoting *Scarpa v. DuBois*, 38 F.3d 1, 12 (1st Cir. 1994)). We are unwilling to create a new category in which the presumption of prejudice applies because it disincentivizes counsel to identify these specific errors in

trial and bring these errors to the court’s attention. The errors in Mason’s case, specifically the failure to object to improper compound strong-feelings *voir dire* questions, are sufficiently precise to “inform defense attorneys correctly just what conduct to avoid.” *Id.*

Having determined that a presumption of prejudice is inapplicable in Mason’s case, Mason had the burden of proof on the issue of prejudice and had the opportunity to demonstrate prejudice in the post-conviction court. Mason failed to prove his counsel’s deficient performance was prejudicial, and thus he failed to prove ineffective assistance of counsel.

Because trial counsel’s failure to object to the compound strong-feelings *voir dire* questions does not fall within the three categories of deficiencies recognized in *Ramirez*, we decline to find a “fourth category,” and because Mason failed to demonstrate prejudice, we hold that the post-conviction court erred in granting Mason a new trial on this basis.

II. Failure to Timely File a Motion for Modification of Sentence, Motion for Review of Sentence, and Motion for a New Trial

A. Motion for Modification and/or Reduction of Sentence

The State contends that the post-conviction court erred in granting Mason post-conviction relief on his claims that his counsel was ineffective for failing to file a motion for modification of his sentence. The State alleges Mason failed to sustain his burden to show that his trial counsel was deficient.

The post-conviction court determined that Mason’s counsel intended to file, and did file post-sentencing actions to set aside the conviction and sentence; informed Mason that he had 90 days to file a motion for reconsideration or modification of the sentence; and assured Mason that “[he] will pursue the relief in writing.” This Court has held that “when a defendant in a criminal case asks his attorney to file a motion for modification of sentence, and the attorney fails to do so, the defendant is entitled to the post conviction remedy of being allowed to file a belated motion.” *Matthews v. State*, 161 Md. App. 248, 252 (2005). The post-conviction court determined that though Mason did not establish that he requested trial counsel to file this motion, he reasonably believed that his counsel would file the motion to modify based on the aforementioned conversation. Mason established that his counsel was deficient in failing to file a motion that Mason reasonably believed he would, and Mason was prejudiced when he was barred from filing the motion by the ninety day deadline.

B. Review of Sentence by Three-Judge Panel

The State next alleges that the post-conviction court erred in permitting Mason to file a belated Motion for Sentence Review by a Three-Judge Panel because the post-conviction court made no finding that Mason requested counsel file such a motion. The post-conviction court determined that “it is difficult to ascertain why any reasonable person would not file an application for sentence review,” and thus Mason’s counsel was deficient and this deficiency prejudiced Mason.

Maryland courts have held that a defendant does not need to show a likelihood of success on the merits of an appeal in order to be granted post-conviction relief to file a belated appeal. *Garrison v. State*, 350 Md. 128, 135 (1998). The post-conviction court noted that Mason’s counsel advised he would file an appeal to this court within thirty days, and advised Mason that he had thirty days to file a motion for a review of sentence by a three-judge panel. Again, it is clear that Mason reasonably relied on his counsel to file these motions, but due to his error, Mason lost this post-trial remedy. We hold that Mason’s counsel was deficient in failing to file a motion for sentence review by a three judge-panel and established he was prejudiced by this failure.

C. Motion for New Trial

Finally, the State argues that the post-conviction court erred when it granted Mason the right to file a motion for a new trial. The post-conviction court determined that Mason was permitted to file a belated motion because “statutory provisions and rules expressly extend representation to such a motion.” The post-conviction court noted that neither the trial court nor trial counsel addressed Mason’s right to file a Motion for New Trial at the disposition hearing on September 28, 2015. Although the court made no reference to *Strickland* or the deficiency and prejudice prongs set forth in *Strickland*, it is apparent that the court implicitly concluded that Mason was prejudiced by the loss of the opportunity to file a motion for a new trial. The failure to advise Mason of his right to file a motion for a new trial was a deficient act, and this failure was prejudicial because it results in the loss of an opportunity to file a motion for a new trial.

Mason is entitled to the post-conviction remedy of being allowed to file these belated motions for modification of sentence, review of sentence by a three-judge panel, and for a new trial.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED IN
PART AND REVERSED IN PART. COSTS
TO BE DIVIDED EVENLY BY THE
PARTIES.**