REL: September 11, 2020

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-19-0138

Hunter Quillen Coan

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-15-1021.60; CC-15-1022.60; CC-15-1023.60)

McCOOL, Judge.

Hunter Quillen Coan appeals the circuit court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief. The petition challenged his June 1, 2017, convictions for one count of reckless murder, see § 13A-

6-2(a)(2), Ala. Code 1975, and two counts of third-degree assault, see § 13A-6-22(a)(2), Ala. Code 1975, and his resulting sentences of 18 years' imprisonment on the reckless-murder conviction and one year's imprisonment for each assault conviction. This Court affirmed Coan's convictions and sentences in an unpublished memorandum issued on December 8, 2017. Coan v. State (No. CR-16-0899), 268 So. 3d 615 (Ala. Crim. App. 2017)(table). The certificate of judgment was issued on April 13, 2018.

On or about April 12, 2019, Coan filed the instant petition, his first, in which he claimed that his trial counsel was ineffective for the following reasons: 1) trial counsel failed to move to suppress the toxicology report that was used against Coan in this case; 2) trial counsel failed to object "to the [Rule] 404(b)[, Ala. R. Evid.,] evidence of an allegedly similar accident [that occurred] only a year before the fatal accident" giving rise to the instant case, (C. 33); 3) trial counsel failed to object to an allegedly biased juror; 4) trial counsel improperly made a statement during his opening statement in which counsel "promised" that Coan would testify; 5) trial counsel was ineffective for failing to

call the defense's toxicologist; and 6) trial counsel failed to present evidence favorable to the defense.

The State filed a motion to dismiss Coan's petition, alleging that Coan's claims were insufficiently pleaded. The State also argued that the petition was precluded under Rule 32.2(a), 32.2(b), and 32.2(c).

The circuit court summarily dismissed Coan's petition on October 3, 2019.

On appeal, Coan reiterates the claims raised in his petition. Each of Coan's claims allege that his trial counsel was ineffective during his trial proceedings. In Strickland v. Washington, 466 U.S. 668, 687 (1984), the United States Supreme Court articulated two criteria that must be satisfied to show ineffective assistance of counsel. A defendant has the burden of proving (1) that his or her counsel's performance was deficient and (2) that the deficient performance actually prejudiced the defense. To prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is a

probability sufficient to undermine confidence in the outcome." Id. "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Ricter, 562 U.S. 86, 112 (2011). Furthermore, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." 466 U.S. at 689.

In discussing ineffective-assistance-of-counsel claims, this Court has held:

> "When reviewing claims of ineffective assistance of counsel, we apply the standard adopted by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on a claim of ineffective assistance of counsel a petitioner must show: (1) that counsel's performance was deficient; and (2) that the petitioner was prejudiced by the deficient performance.
>
> > "'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-34 (1982). 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. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, [350 U.S. 91] at 101 [(1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'

"Strickland v. Washington, 466 U.S. at 689, 104 S.Ct. 2052.

> "'"'This court must avoid using "hindsight" to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance.'" Lawhorn v. State, 756 So. 2d 971, 979 (Ala. Crim. App. 1999), quoting Hallford v. State, 629 So. 2d 6, 9 (Ala. Crim. App. 1992). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S.Ct. 2052.'

"A.G. v. State, 989 So. 2d 1167, 1171 (Ala. Crim. App. 2007)."

Lee v. State, 44 So. 3d 1145, 1154–55 (Ala. Crim. App. 2009).

Rule 32.3, Ala. R. Crim. P., provides that "[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Further, Rule 32.6(b), Ala. R. Crim. P., provides:

> "Each claim in the petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings."

In Boyd v. State, 913 So. 2d 1113, 1125-26 (Ala. Crim. App. 2003), this Court held:

> "'Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief.' Boyd v. State, 746 So. 2d 364, 406 (Ala. Crim. App. 1999). In other words, it is not the pleading of a conclusion 'which, if true, entitle[s] the petitioner to relief.' Lancaster v. State, 638 So. 2d 1370, 1373 (Ala. Crim. App. 1993). It is the allegation of facts in pleading which, if true, entitle a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged facts."

This Court has addressed the burden of pleading for petitioners alleging ineffective-assistance-of-counsel:

> "The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So. 2d 724 (Ala. Crim. App. 2003). To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must 'identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' 466 U.S. at 694, 104 S.Ct. 2052. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."

Hyde v. State, 950 So.2d 344, 356 (Ala. Crim. App. 2006).

With these principles in mind, we will now address each of Coan's ineffective-assistance-of-counsel claims.

I.

First, Coan alleges that his trial counsel was ineffective for failing to move to suppress the toxicology report during pretrial proceedings and subsequently, he

claims, "undermin[ing] the theory of defense in front of the jury by belatedly objecting to it." (Coan's brief, at 12.) In his petition, Coan appears to allege that the evidence of the toxicology results should have been suppressed because Coan's consent to the blood sample was undermined by evidence indicating that Coan was under the influence of the anti-anxiety medication Ativan (lorazepam) and the sleep medication Ambien (zolpidem) at the time the consent was given, as well as other evidence indicating that Coan did not remember giving the blood sample or signing the consent form. Coan specifically stated:

> "Trial counsel never sought a pretrial hearing to determine the voluntariness of Coan's supposed consent, where all of the circumstances surrounding Coan's supposed consent could have been explored, including, but not limited to, (1) finding out what Trooper Johnson would say, (2) finding out what Coan's roommate (who was present during the signing) would say, and (3) having a physician, toxicologist or both, testify about Coan's injuries at the time of his consent and what they indicated about his ability to make a knowing and informed consent."

(C. 28-29.) Although Coan conceded that his trial counsel did object to the voluntariness of Coan's alleged consent at trial, Coan contended that the "belated objection" constituted "constitutionally-deficient performance" because, he says,

using the line of defense at that point in the trial that Coan was incapable of consent undermined counsel's other defense. (C. 31.)

First, we note that Coan's contentions in his petition are nothing more than conjecture and speculation. He claims that counsel "could have" explored other possibilities, such as what Trooper Carl Johnson or what Coan's roommate might have said, without presenting any facts showing these witnesses would have testified to, or how their testimony would have changed the outcome of his case. "'It is well established that, in a claim of ineffective assistance of counsel, "[m]ere conjecture and speculation are not enough to support a showing of prejudice."'" McMillan v. State, 258 So. 3d 1154, 1178 (Ala. Crim. App. 2017)(quoting Elsey v. Commissioner of Corr. , 126 Conn. App. 144, 166, 10 A.3d 578, 593 (2011))(additional citations omitted). This Court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," and Coan "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" See Lee, 44 So. 3d at 1154-55. Here,

Coan's ineffective-assistance argument is nothing more than Coan second-guessing counsel's strategic decisions and speculation.

Moreover, Coan has failed to plead facts to establish that, even if counsel had moved to suppress the toxicology report on the ground that his consent to the blood sample was ineffective, his consent would have been rendered involuntary. In Rheuark v. State, 601 So. 2d 135, 138-139 (Ala. Crim. App. 1992), this Court has held that Rheuark's level of intoxication at the time of consent was not sufficient to prove that his consent was involuntary, citing the following standard from State v. Austin, 596 So. 2d 598, 601 (Ala. Crim. App. 1991):

> "'"[U]nless intoxication, in and of itself, so impairs the defendant's mind that he is 'unconscious of the meaning of his words' the fact that the defendant was intoxicated at the time he confessed is simply one factor to be considered when reviewing the totality of the circumstances surrounding the confession." Carr v. State, 545 So. 2d 820, 824 (Ala. Cr. App. 1989). "The intoxicated condition of an accused when he makes a confession, unless it goes to the extent of mania, does not affect the admissibility and evidence of the confession, but may affect its weight and credibility." Callahan v. State, 557 So. 2d

> 1292, 1300 (Ala. Cr. App.), affirmed, 557 So. 2d 1311 (Ala. 1989).'
>
> "White v. State, 587 So. 2d 1218 (Ala. Crim. App. 1990)."

Coan failed to plead facts indicating that the medications he was on impaired him to the extent of mania or made him unable to understand the meaning of his words. Thus, he has failed to plead sufficient facts to prove that his counsel was ineffective for failing to move to suppress the toxicology report. "Because the substantive claim underlying the claim of ineffective assistance of counsel has no merit, counsel could not be ineffective for failing to raise this issue." Lee v. State, 44 So. 3d 1145, 1173 (Ala. Crim. App. 2009). Consequently, the circuit court's summary dismissal of this claim was appropriate.

II.

Next, Coan alleges that his trial counsel was ineffective for failing to object to the evidence of an allegedly similar accident that occurred only a year before the fatal accident giving rise to the instant case, which he claims was admitted in violation of Rule 404(b), Ala. R. Evid.

Coan is not entitled to relief on this claim. Coan alleged in his petition that counsel should have objected to the alleged Rule 404(b) evidence, thereby preserving the issue for appellate review. However, he does not provide specific facts indicating that, if counsel had objected, he would have been entitled to the exclusion of the Rule 404(b) evidence. Additionally, he makes a general allegation that the failure to object "significantly prejudiced" his defense because "there is a reasonable probability that, but for this unprofessional error, the result of the proceeding would have been different." (C. 36.) However, Coan makes no statement of specific facts indicating how the outcome of his trial would have been different had counsel objected. "A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient." Hyde, 950 So. 2d at 356. Accordingly, this bare allegation, without facts indicating how he was prejudiced, is not sufficient to satisfy Coan's burden. See Hyde, 950 So. 2d at 356. Thus, this claim was properly summarily dismissed.

III.

Coan further alleges that his trial counsel was ineffective for failing to object to an allegedly biased juror. Specifically, Coan maintains that potential juror 25, who eventually served on the jury in his case, had a "business relationship of many years' standing with Trooper Johnson." (C. 36.)

This Court has stated:

> "'[W]here a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased.' Carratelli v. State, 961 So. 2d 312, 324 (Fla. 2007). 'Because [the appellant's] claim of ineffective assistance of counsel is founded upon a claim that counsel failed to strike a biased juror, [the appellant] must show that the juror was actually biased against him.' Miller v. Francis, 269 F.3d 609, 616 (6th Cir. 2001) (citing Hughes v. United States, 258 F.3d 453, 458 (6th Cir. 2001)). '[The appellant's] claim of ineffective assistance of counsel is grounded in the claim that counsel failed to strike a biased juror. To maintain a claim that a biased juror prejudiced him, however, [the appellant] must show that the juror was actually biased against him.' Goeders v. Hundley, 59 F.3d 73, 75 (8th Cir. 1995) (citing Smith v. Phillips, 455 U.S. 209, 215, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1981)). '[T]o show attorney error and prejudice in defense counsel's failure to use peremptory strikes for [biased] veniremen, it is necessary for [the appellant] to show that the veniremen did indeed harbor actual bias against [the appellant].' Parker v. Turpin, 60 F. Supp. 2d 1332, 1362 (N.D. Ga. 1999). 'Few decisions at trial are as subjective or prone to individual attorney strategy as juror voir dire,

> where decisions are often made on intangible factors.' Miller, 269 F. 3d at 620.
>
> > "'Because a defendant must demonstrate prejudice in a [post-conviction] proceeding, post-conviction relief based on a lawyer's incompetence with regard to the composition of the jury is reserved for a narrow class of cases where prejudice is apparent from the record, where a biased juror actually served on the jury.'
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> "Jenkins v. State, 824 So. 2d 977, 982 (Fla. App. 2002)."

Perkins v. State, 144 So. 3d 457, 472 (Ala. Crim. App. 2012).

Coan contends that the potential juror answered questions during voir dire indicating that he would believe the trooper's testimony and Coan argued that the potential juror's answers were equivocal as to whether the potential juror could be fair and impartial. The record from Coan's direct appeal indicates that the potential juror indicated during voir dire that Trooper Johnson, one of the potential witnesses in Coan's trial, was a client of the potential juror's place of business.[1] The following transpired:

> "THE COURT: ... [I]f you were selected on this jury and the officer does testify, because you know him as a customer, would that have any effect on your

[1]This Court may take judicial notice of its own records and does so in this case. See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998); Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992).

> ability to be fair and impartial; that is, to judge his testimony along with all the other testimony that comes in?
>
> "[Potential Juror:] I mean, I would believe him, but it shouldn't affect it.
>
> "THE COURT: How long has he been a customer of yours?
>
> "[Potential Juror:] A few years, I think.
>
> "THE COURT: All right. And he actually -- I mean, he actually contracts with you personally?
>
> [Potential Juror:] He comes into our shop and we do work for him. And, yes, I've had personal contact with him.
>
> "THE COURT: Have you spent much time with him when he's in the shop or, I mean --
>
> "[Potential Juror:] Just talking about what's going on in the day or something. That's about it.
>
> "THE COURT: So, the bottom line question is, in your judgment, based on what you feel, do you think that would in anyway affect or impede your ability to be fair and impartial to both sides in this case?
>
> "[Potential Juror:] I don't think so."

(Record from Coan's direct appeal, 152-53.)

Coan insists that this conversation during voir dire, alone, proves the potential juror harbored a bias in favor of the State and against him. We disagree. The potential juror, although he had previous interactions with one of the witnesses, indicated that he believed he could be fair and

impartial to both sides in this case. These facts alone do not show that the potential juror harbored an actual bias against the defendant. As a result, a challenge to the juror for cause on the ground that they were biased against Coan would have been meritless. "Counsel is not ineffective for failing to raise a baseless claim." Washington v. State, 95 So. 3d 71 (Ala. Crim. App. 2012). Consequently, the circuit court did not err in dismissing this claim, and Coan is not entitled to any relief.

IV.

Coan alleges that his trial counsel was ineffective for improperly "promising" during his opening statement that Coan would testify at trial but then resting the defense's case-in-chief without calling witnesses. Coan maintains that this decision by counsel "could not have been a reasonable strategic decision because there was no indication that the broken promise was the result of some unexpected development at trial." (Coan's brief, at 18.) Coan appears to be complaining about a portion of defense counsel's opening statement to the jury, wherein he stated:

> "[Coan] is going to tell you the car came over in his lane. Mr. Lindell's car came over in his lane. [Coan]

> is going to tell you he wasn't going that fast. [Coan] is going to tell you what he saw was two cars coming down the road at him, at this -- on this curb and hill on Snow Road and one car, apparently, he thought, was coming around another car that was going very slow and that car drifted over into his lane and that he couldn't get out of the way and they collided, and that's what happened. That's what he's going to say. That's what he told the police in his original statement that he wrote out. That's what he told the police on April 4, 2013."

(Record from Coan's direct appeal, 222-23.)

This Court has recognized that, generally, the contents of opening and closing statements lie within the professional judgment of counsel and, thus, cannot support an ineffective-assistance-of-counsel claim. See Washington v. State, 95 So. 3d 26 (Ala. Crim. App. 2012). However, Coan claims that this situation falls within an exception to that general rule. In making his argument, Coan relies on Hampton v. Leibach, 347 F.3d 219, 257 (7th Cir. 2003), in which defense counsel informed the jury during opening statements that the defendant would testify and that evidence would be presented showing that the defendant was not a member of a gang. However, the defendant did not testify, and the defense did not present evidence showing that the defendant was not a member of a gang. Id. The United States Court of Appeals for the Seventh

Circuit found that, based on the particular facts of that case, the circumstances that led counsel not to have his client testify were "entirely foreseeable at the time [counsel] made his opening statement," and, thus, because no "unforeseeable events" influenced defense counsel's decision not to present the promised evidence, defense counsel performed deficiently. Id.

In the instant case, even assuming that counsel's statements during opening arguments rendered counsel's performance deficient, Coan is still required to plead facts indicating that he was prejudiced by counsel's performance. As the circuit court noted in its order dismissing Coan's petition, the Seventh Circuit in Hampton "did not find that the breach of counsel's promise resulted in prejudice that entitled the defendant to relief." (C. 147. (quoting Hampton, 347 F.3d at 260 ("[W]e agree with the district court that [counsel's] breach of the promises he made in the opening statement was not so prejudicial that it would support relief in and of itself..."))). In his petition, Coan merely stated:

> "...[T]his act or omission by counsel fell below an objective standard of reasonableness, gauged by prevailing professional norms, and was not the result of reasonable professional judgment. Coan was

> significantly prejudiced by this act or omission because there is a reasonable probability that, but for this unprofessional error, the result of the proceeding would have been different."

(C. 38-39.) As previously stated: "[A] bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient" to satisfy the petitioner's burden. Hyde, 950 So. 2d at 356. Accordingly, as the circuit court found, Coan's petition was insufficiently pleaded. See Rule 32.3 and 32.6(b).

V.

Coan also argues that his trial counsel was ineffective for failing to call the defense's toxicologist to testify at trial. However, Coan failed to include the name of the alleged defense expert in his petition and failed to indicate whether this unnamed expert would have been available to testify at trial or what the expected testimony of the unnamed expert would have been; instead, he merely speculates how the failure of said expert to testify could have affected the jury's determination. See Mashburn v. State, 148 So. 3d 1094, 1151 (Ala. Crim. App. 2013)("To sufficiently plead a claim that counsel was ineffective for not calling witnesses, a Rule 32 petitioner is required to identify the names of the

witnesses, to plead with specificity what admissible testimony those witnesses would have provided had they been called to testify, and to allege facts indicating that had the witnesses testified there is a reasonable probability that the outcome of the proceeding would have been different."). Therefore, this claim was not sufficiently pleaded.

VI.

Lastly, Coan contends that his trial counsel was ineffective because, he says, counsel failed to present evidence that was favorable to the defense. Specifically, Coan alleges that Alaina Hulsey, Coan's co-worker who testified at trial that Coan appeared perfectly normal shortly before the accident and that he showed no signs of impairment, "could have also testified that, in the past, she called Coan at home and asked him to work at night, but Coan had stated that he could not because he had already taken his Ambien." (C. 41.) Coan contends that this "highly-exculpatory information" would have negated the State's "inference that Coan would drive after taking Ambien." (C. 41.)

Coan has failed to plead facts that show that there is a reasonable probability that, even if counsel had asked Hulsey

about the previous time that Coan told her he could not come to work because he had already taken Ambien, the result of the proceeding would have been different. Contrary to Coan's contention that this evidence was "highly-exculpatory," such testimony from Hulsey does not establish his innocence, and it is not necessarily exculpatory. The fact that Coan may have declined on another occasion to go to work while under the influence of Ambien does not negate any the State's alleged inferences that Coan had, at other times, driven while under the influence of Ambien. The jury could just have easily interpreted the testimony that Coan had previously declined to go into work after taking Ambien as more evidence of Coan's understanding and subsequent disregard of the dangers associated with taking an Ambien before driving or working. Coan's contention consists purely of conclusory allegations and speculation. When claiming ineffective assistance of counsel, "[i]t is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. Accordingly, the circuit court's summary dismissal of this claim was proper. See Rule 32.7(d) Ala. R. Crim. P.

A circuit court may summarily dismiss a petitioner's Rule 32 petition pursuant to Rule 32.7(d), Ala. R. Crim. P.,

> "[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings."

See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). Because the petitioner's claims were insufficiently pleaded or were without merit, summary disposition was appropriate.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Cole and Minor, JJ., concur. Kellum, J., concurs in the result.