

**VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 3rd day of March, 2022.*

Present: Goodwyn, C.J., Mims, Powell, Kelsey, McCullough, and Chafin, JJ., and Russell, S.J.

Richard Sullivan, Appellant,

against Record No. 200198  
Circuit Court No. CL18-114

Harold W. Clarke, Director, Virginia Department of Corrections, Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Fauquier County.

Upon consideration of the record, briefs, and argument of counsel, for the reasons set forth below, the Court is of the opinion that there is no error in the judgment of the circuit court, which denied Richard Sullivan’s petition for a writ of habeas corpus.

I. BACKGROUND

On August 5, 2015, officers from the Culpeper County Sheriff’s Office and the Fauquier County Sheriff’s Office formed a “controlled-buy” team to apprehend Richard Allen Sullivan for the distribution of Phencyclidine (PCP). The team had an informant arrange a purchase of two glass vials of PCP from Sullivan.

When Sullivan called the informant to let the informant know that Sullivan had arrived at their planned meeting place in Fauquier County, the informant in turn conveyed that information to the controlled-buy team.

Two detectives, Detective J.R. Clark and Detective Jonathan Waddell, who were part of the controlled-buy team, identified and approached Sullivan’s vehicle. As they approached, they noticed a strong odor, which they identified as PCP, coming from the open front passenger-side window of the vehicle. The detectives recognized the front passenger as Sullivan. When they got to the vehicle, they saw that there were two small glass vials on Sullivan’s lap; the vials

contained liquid consistent with the appearance of PCP. The detectives arrested Sullivan.

A criminal charge for possession with intent to distribute was instituted against Sullivan; Benjamin Kent, Esq., was Sullivan's court-appointed counsel for the proceedings. Prior to a preliminary hearing in the General District Court of Fauquier County, the Commonwealth's Attorney's Office (the Commonwealth) told Kent that if Sullivan pled guilty to simple possession of a controlled substance, it would not indict him for possession with intent to distribute. Kent informed the Commonwealth that Sullivan rejected the plea offer.

At the preliminary hearing, the general district court found insufficient evidence to certify a charge for possession with intent to distribute a controlled substance, but it certified a charge for simple possession of a controlled substance.

After the preliminary hearing, the certified charge for simple possession of a controlled substance, and a new charge for possession with intent to distribute were brought before a grand jury. The grand jury indicted Sullivan on both charges. Prior to the start of the jury trial, however, the Commonwealth nolle prossed the simple possession charge.

At the jury trial, Detective D.R. Dorrough testified that after Sullivan was arrested and read his *Miranda* rights, he told Detective Dorrough that, just before driving to meet the informant, he had been in Maryland where he purchased six vials of PCP for \$300, intending to sell some of the vials for \$100 per vial.

The Commonwealth also called the two arresting detectives, Detective J.R. Clark and Detective Jonathan Waddell, to testify. Detective Clark testified concerning the events that led up to Sullivan's arrest. On cross-examination, Detective Clark testified that the controlled-buy was "the second buy," because the officers "already bought from [Sullivan] once [before]." Sullivan's counsel, Kent, followed up by asking, "Are you saying that [you] bought from him before?" Detective Clark replied that other members of the unit purchased PCP from Sullivan a few months earlier.

Detective Waddell also testified regarding the events that led up to Sullivan's arrest. When asked by the Commonwealth, Detective Waddell admitted that, at the preliminary hearing, he testified differently concerning several facts and circumstances regarding his encounter with Sullivan because he wanted to protect the identity of the informant.

The informant also testified for the Commonwealth, stating that he was working with law enforcement when he agreed to pay Sullivan \$100 per vial for two vials of PCP. On

cross-examination, Kent asked the informant, “[B]efore that date, had [Sullivan] sold you anything before?” The informant answered, “Yes.”

Sullivan’s case-in-chief consisted of Sullivan’s testimony. Sullivan testified that he was present at the meeting place, where he was arrested, only because he accompanied his girlfriend in picking up a mutual friend. He denied communicating with the informant on the day of the arrest, and he also denied telling Detective Dorrough that he purchased PCP or that he intended to sell PCP.

The jury found Sullivan guilty of possession with intent to distribute PCP, recommending eighteen years’ imprisonment and a \$90,000 fine. The circuit court adopted the jury’s verdict but suspended six years of the sentence. Sullivan appealed; the Court of Appeals denied his petition for appeal.

Sullivan subsequently filed, in the Circuit Court of Fauquier County (the Habeas Court), a petition for a writ of habeas corpus against the Director of the Virginia Department of Corrections (the Director), claiming ineffective assistance of counsel.<sup>1</sup> He asserts that his counsel, Kent, was ineffective because: (1) Kent elicited prejudicial testimony—from Detective Clark and the informant—concerning Sullivan’s alleged prior uncharged sale of PCP; (2) Kent rejected the Commonwealth’s offer to reduce Sullivan’s charge to simple possession without first communicating the offer to Sullivan; and (3) Kent failed to challenge Detective Waddell’s bias and motive to testify.

Concerning the plea offer, Sullivan alleged that after the preliminary hearing, but before the grand jury, the Commonwealth informed Sullivan’s counsel, Kent, that if Sullivan would plead guilty to the charge of simple possession of PCP, then the Commonwealth would not indict Sullivan for the charge of possession with intent to distribute. Sullivan asserted that Kent rejected the offer without communicating the offer to Sullivan because Kent “felt that [they] could beat [the] charge[s] at trial.” Sullivan contends that he only learned about the rejected plea offer sometime after one of the circuit court hearings, before trial. He insists that he would have accepted the offer if he had known about it when it was made.

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<sup>1</sup> The instant appeal only concerns three of the four grounds for Sullivan’s claim of ineffective assistance of counsel. This order will only discuss the portions of Sullivan’s petition for habeas corpus, the Director’s response, and the Habeas Court’s rulings that are relevant to Sullivan’s assignments of error.

In response, the Director filed an answer that included, as exhibits, an affidavit executed by Kent and an affidavit executed by the Assistant Commonwealth's Attorney who prosecuted Sullivan's case. In his answer, the Director argues that Sullivan's ineffective assistance of counsel claim, regarding Detective Clark's testimony about the prior drug transaction, should be dismissed. The Director asserts that even if Kent's representation of Sullivan was deficient because Kent solicited that testimony, Sullivan was not prejudiced because the Commonwealth presented other evidence which overwhelmingly proved Sullivan's guilt regarding the offense for which he was on trial.

Regarding Sullivan's claim concerning the informant's testimony, the Director, supported by Kent's affidavit, asserts that Kent asked the informant questions as to prior drug sales only because Sullivan instructed Kent to do so. Sullivan believed, and told Kent, that the informant was his friend and would provide testimony helpful to Sullivan.

As to Sullivan's claim related to the plea offer, the Director relies on the Assistant Commonwealth's Attorney's statements in her affidavit as well as Kent's statements in his affidavit affixed to the answer; in their respective affidavits, the Assistant Commonwealth's Attorney and Kent stated that the Commonwealth communicated a plea offer *before* the preliminary hearing, which offer expired after the preliminary hearing. The Assistant Commonwealth's Attorney states in her affidavit that she did not re-extend the plea offer after the preliminary hearing. Kent also states, in his affidavit, that he told Sullivan about the plea offer before the preliminary hearing, prior to communicating Sullivan's rejection to the Commonwealth.

Concerning Sullivan's claim as to Detective Waddell, the Director argues that Kent's strategy in questioning witnesses is a tactical matter not subject to the Habeas Court's review.

The Habeas Court denied Sullivan's claims and dismissed Sullivan's petition with prejudice. Regarding Kent's handling of Detective Clark's examination as the basis for an ineffective assistance of counsel claim, the Habeas Court held that Sullivan failed to prove prejudice because "his own self-serving testimony" failed to rebut the overwhelming evidence presented by the Commonwealth concerning Sullivan's guilt. With respect to Kent's questioning of the informant, the Habeas Court dismissed Sullivan's ineffective assistance of counsel claim for two reasons: (1) Sullivan did not prove deficient performance because Kent could not be faulted for asking questions in accordance with Sullivan's instructions and (2) Sullivan was not

prejudiced because the Commonwealth presented overwhelming unrelated evidence of Sullivan's guilt.

As to the plea offer, the Habeas Court found that Kent's affidavit, which denied Sullivan's account of the events, was credible. Finally, the Habeas Court held that Kent's representation was not deficient regarding his examination of Detective Waddell because Kent "pursued a reasonable defense strategy in his questioning of Detective Waddell," and it further held that Sullivan was not prejudiced because the Commonwealth presented other evidence that overwhelmingly established Sullivan's guilt.

Sullivan appeals the Habeas Court's final order. We granted three assignments of error:

1. The Circuit Court erred in finding that Appellant's trial counsel was not ineffective for eliciting, from two different witnesses, testimony about prior, uncharged alleged drug transactions allegedly involving Appellant because Appellant cannot prove he was prejudiced.
2. The Circuit Court erred in finding that Appellant's trial counsel was not ineffective for rejecting the Commonwealth's plea offer to a reduced charge of simple possession of PCP before communicating the plea offer to Appellant and for urging Appellant to go to trial based on ineffective assistance of counsel.
3. The Circuit Court erred in finding that Appellant's trial counsel was not ineffective for failing to challenge Detective Waddell's bias and motive to testify based on information obtained in discovery indicating Waddell was being investigated for issues in Culpeper County related to the use of force and truthfulness.<sup>2</sup>

## II. ANALYSIS

### A. Testimony Concerning Prior Drug Sales

Sullivan asserts that the Habeas Court erred in holding that he failed to prove that he was prejudiced when Kent elicited testimony concerning prior drug sales from Detective Clark and the informant. We disagree.

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<sup>2</sup> This assignment of error is deemed waived for lack of an adequate supporting argument in Sullivan's brief. Rule 5:27; *Andrews v. Commonwealth*, 280 Va. 231, 252 (2010).

## 1. The Informant's Testimony

A two-prong test is applied to assess a claim of ineffective assistance of counsel. *Zemene v. Clarke*, 289 Va. 303, 313 (2015); *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Under the first prong (the performance prong), a defendant must show deficient performance by establishing that counsel's representation fell below an objective standard of reasonableness. *Fuentes v. Clarke*, 290 Va. 432, 439 (2015). We "apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Id.* (quoting *Premo v. Moore*, 562 U.S. 115, 121–22 (2011)). It is the defendant's burden to overcome that presumption. *Id.* Under the second prong (the prejudice prong), the 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." *Id.*; *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

An ineffective assistance claim fails if the claim makes an insufficient showing on either the performance prong or the prejudice prong. *Dominguez v. Pruett*, 287 Va. 434, 440 (2014).

In this instance, the Habeas Court anchored its denial of Sullivan's ineffective assistance of counsel claim, regarding Kent's examination of the informant, on findings that Sullivan's claim failed as to both the performance and prejudice prongs. The Habeas Court held that Kent did not render deficient performance when he asked the informant about prior drug sales because, in doing so, Kent was only following Sullivan's instructions. The Habeas Court also held that Sullivan was not prejudiced when Kent elicited adverse testimony from the informant because the Commonwealth presented other unrelated evidence that overwhelmingly supported a finding of Sullivan's guilt.

Sullivan only assigned error to the Habeas Court's ruling as to the prejudice prong. Sullivan failed to assign error to the Habeas Court's ruling concerning the performance prong. The circuit court's uncontested ruling that Sullivan failed to demonstrate that Kent's performance was deficient regarding his examination of the informant forms a separate and independent basis to affirm the Habeas Court's ruling, because an ineffective assistance claim fails if it does not satisfy both the performance and prejudice prongs of the analysis required by *Strickland*.

On appeal, a party who assails a lower court’s ruling must assign error to each articulated basis for the ruling. *Rankin v. Commonwealth*, 297 Va. 199, 202 (2019). “Where, as here, an appellant’s assignment[] of error leave[s] [a basis] for the challenged ruling uncontested, our review is satisfied by a determination that [the uncontested basis] provides a sufficient legal foundation for the ruling.” *Manchester Oaks Homeowners Ass’n v. Batt*, 284 Va. 409, 422 (2012). We cannot review the ruling of a lower court for error once we determine that an uncontested separate basis is sufficient legal foundation for the challenged ruling. *Id.* at 422–23; *Berry v. Fitzhugh*, 299 Va. 111, 120 (2020).

Having determined that the Habeas Court’s ruling on the performance prong provided sufficient legal foundation for the dismissal of Sullivan’s ineffective assistance of counsel claim, which is based upon Kent’s examination of the informant, we must affirm the Habeas Court’s ruling on that claim.

## 2. Detective Clark’s Testimony

As noted above, to be successful on an ineffective assistance of counsel claim, a habeas petitioner must prove not only that there was deficient performance by the attorney, but also that such deficient performance prejudiced the outcome of the case. *Strickland*, 466 U.S. at 686, 694; *Dominguez*, 287 Va. at 440. “When a defendant challenges a conviction [based upon a claim of ineffective assistance of counsel], the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.” *Strickland*, 466 U.S. at 695.

In this case, we must determine whether Sullivan met his burden to show that there is a reasonable probability that a factfinder would have had reasonable doubt respecting his guilt, absent the alleged error by counsel, which purportedly resulted in counsel being ineffective. We find that Sullivan failed to meet that standard.

The significance of Detective Clark’s testimony elicited by Kent regarding a prior drug sale by Sullivan, relates to Sullivan’s intent to distribute PCP on the date he was charged. Even if Detective Clark’s testimony is disregarded, however, there is other evidence on the record that amply proves Sullivan’s intent to distribute PCP on the day in question. The controlled-buy team found Sullivan at the agreed-upon meeting place at the agreed-upon time for the purportedly planned sale of PCP; it is undisputed that Sullivan was at that location with vials of PCP in his possession; testimony showed that the number of PCP vials that were confiscated

from Sullivan corresponded with the number of PCP vials that the informant was supposed to purchase from Sullivan; and Sullivan admitted to Detective Dorrough that he purchased the PCP vials with the intention of selling some of those vials at a sale price that matched the sale price quoted to the informant—\$100 per vial. Even absent the allegedly improper testimony elicited from Detective Clark, by Kent, regarding Sullivan selling drugs on a different occasion, the record supports the Habeas Court’s ruling that Sullivan failed to satisfy the prejudice prong of the *Strickland* test because the Commonwealth presented evidence, unrelated to the purportedly improper testimony, which independently provides overwhelming evidence of Sullivan’s guilt regarding the criminal charge he was being tried on.

#### B. Plea Offer

Sullivan avers that the Habeas Court erred when it did not find that Kent’s representation fell below an objective standard of reasonableness because Kent rejected the Commonwealth’s plea offer without first communicating the offer to Sullivan. This argument is without merit.

“In the event the allegations of illegality of the petitioner’s detention can be fully determined on the basis of recorded matters, the court may make its determination whether such writ should issue on the basis of the record.” Code § 8.01-654(B)(4); *Smith v. Brown*, 291 Va. 260, 264 (2016). When the trial record is inadequate to fully determine a habeas claim, the habeas court may base its disposition on the use of affidavits, where appropriate. Code §§ 8.01-660, -662, -654(B)(5); *Yeatts v. Murray*, 249 Va. 285, 288 (1995); *Smith*, 291 Va. at 264.

“The habeas court’s findings of historical fact ‘are entitled to deference and are binding upon this Court unless those findings are plainly wrong or without evidence to support them.’” *Fuentes*, 290 Va. at 438. The habeas court’s ruling that an attorney advised his client of a particular point is a finding of fact that we will not disturb on appeal, if it is supported by evidence in the record. *Id.*

In the instant case, the Habeas Court found that Kent timely and properly communicated the plea offer to Sullivan. This is a finding of fact that we will not disturb on appeal because it is supported by the completed record submitted for the Habeas Court’s consideration.

The trial record did not contain any reference to a plea offer that was rejected by Sullivan during the preliminary hearing stage. It was thus appropriate for the Habeas Court to rely on the assertions in Sullivan’s petition and the statements in the affidavits, which were attached as



exhibits to the Director's answer, in order to determine the circumstances and facts relating to the allegedly uncommunicated plea offer. Sullivan claims that a plea offer was made by the Commonwealth after the preliminary hearing, and he would have accepted that offer if it had been communicated to him. The affidavits presented support the Habeas Court's factual determination that Kent communicated the plea offer, described by Sullivan, to Sullivan prior to the preliminary hearing and Sullivan rejected it. The Commonwealth confirmed in an affidavit that it did not make the plea offer available after the plea offer was rejected prior to the preliminary hearing. We will not disturb the Habeas Court's finding of fact because that finding was not plainly wrong and was supported by the record. The Habeas Court did not err in finding that Kent was not ineffective for rejecting the Commonwealth's plea offer because the Habeas Court found that Kent rejected the offer after consulting with Sullivan.

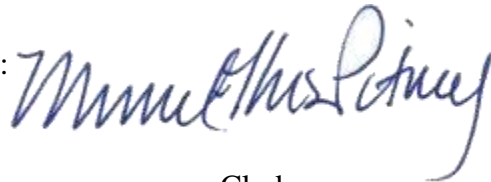
### III. CONCLUSION

Accordingly, we affirm the judgment of the Circuit Court of Fauquier County.

This order shall be certified to the Circuit Court of Fauquier County.

A Copy,

Teste:

A handwritten signature in blue ink, appearing to read "M. M. [unclear]".

Clerk