STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: JUNE 20, 2012)

ALFREDO BOLARINHO	:	
	:	
	:	
v.	:	**C.A. PM-2011-3700**
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	:	
STATE OF RHODE ISLAND	:	

DECISION

K. RODGERS, J. This matter is before the Court on Petitioner's Application for Post-Conviction Relief from a plea entered and sentence imposed on September 18, 1989, in a criminal action captioned State v. Alfredo A. Bolarinho, P2/89-1460A.[1] In that case, Alfredo Bolarinho (Petitioner or Bolarinho) pled nolo contendere to one count of breaking and entering a dwelling with the intent to commit larceny, in violation of G.L. 1956 § 11-8-3, as amended (1981 Reenactment). Petitioner was sentenced to ten years at the ACI, all of which was suspended, and ten years probation, and was ordered to pay $1,973 in restitution, $100 to the indemnity fund, and $100 to the probation fund. Recently, the United States Immigration Court entered an order of removal against Petitioner. Petitioner now asserts that he was denied his right to effective assistance of counsel because his attorney failed to advise him of the immigration consequences

[1] The trial justice has since retired. This matter was assigned to this Court in accordance with Rule 2.3(d)(4) of the Superior Court Rules of Practice.

arising from his plea. For the reasons that follow, the State is entitled to judgment as a matter of law on Petitioner's Application.

I

Facts and Travel

The facts of the case as gleaned from the 1989 criminal information packet are as follows. On February 11, 1989, Providence police responded to the property of Frank Andreozzi (Andreozzi) for a report of a possible breaking and entering and theft of an electric mitre saw. Andreozzi's property, a one-story home, was under construction at the time of the incident. In the ensuing investigation, police obtained a description of the suspect and the license plate of the car used in the incident from Andreozzi's neighbor, Alice D'Alessio (D'Alessio), who claimed to have observed the suspect jumping two fences in the area of Andreozzi's home twice, just minutes apart. On the second time, D'Alessio observed the suspect carrying a circular saw, putting it in the rear of the car, and "tak[ing] off" in the car. Providence police traced the vehicle back to Petitioner and soon thereafter apprehended him in his apartment. Petitioner was advised of his rights and ultimately confessed to breaking into Andreozzi's home but denied stealing the saw. D'Alessio identified Petitioner in a police lineup conducted at the Providence police station.

Represented by a public defender, Petitioner, a Portuguese citizen who had been granted legal permanent resident status in the United States in 1979, entered a plea of nolo contendere. As was customary in 1989, the plea colloquy of record failed to address potential immigration consequences as a result of the plea. Moreover, the only evidence before this Court concerning counsel's advice on immigration consequences is set forth

in Petitioner's Affidavit in which he states that his public defender "failed to advise [him] of the immigration consequences of [his] plea." The State does not dispute this assertion.

At the time of the plea, the criminal offense of breaking and entering a dwelling was not a deportable offense – it was neither an aggravated felony nor a crime involving moral turpitude as defined by federal law. In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which, inter alia, expanded the definition of "aggravated felony" to include a crime of violence for which the term of imprisonment is at least one year, see 8 U.S.C. § 1101(a)(43)(F), "crime of violence" being further defined as "the use, attempted use or threatened use of physical force against a person or property of another." 18 U.S.C. § 16. "Aggravated felony" was also expanded to include a theft offense or burglary offense for which the term of imprisonment is at least one year. 8 U.S.C. § 1101(a)(43)(G). Importantly, Congress expressly stated that the "term 'aggravated felony' applies regardless of whether the conviction was entered before, on or after September 30, 1996." 8 U.S.C. § 1101(a)(43). Any alien convicted of an aggravated felony at any time after admission to the United States is deportable. 8 U.S.C. § 1227(a)(2)(A)(iii). Thus, prior to 1996, a nonresident alien who was convicted of the charge of breaking and entering a dwelling pursuant to § 11-8-3 would not suffer any immigration consequences as a result of that conviction, but that offense became an automatic, non-discretionary deportable offense in 1996, regardless of when the conviction was entered. See 8 U.S.C. § 1101(a)(43); 8 U.S.C. § 1227(a)(2)(A)(iii).

By a Notice to Appear dated February 4, 2009, Petitioner was advised by the Immigration and Naturalization Service (INS) that, as an "arriving alien" from Portugal

to Boston's Logan International Airport on January 6, 2009,[2] he was subject to removal based upon his 1989 conviction for breaking and entering.[3] (Petitioner's Memo, Ex. 4.) A hearing before the Immigration Court was conducted and the Court issued an oral decision on July 12, 2011, ordering Petitioner's removal and further denying Bolarinho's application for cancellation of removal under the Immigration and Nationality Act (INA) § 240A(a)[4] and application for waiver under INA §§ 212c and 212h.[5] (Petitioner's Memo, Exs. 2-3.)

Petitioner filed this Application for Post-Conviction Relief to vacate his 1989 plea based upon ineffective assistance of counsel, specifically alleging that his public defender at the time failed to advise him of the plea's potential immigration consequences. The State responded to Petitioner's Application and the parties briefed the issues before the Court. In a hearing on February 8, 2012, the parties agreed that the proceeding would be treated as the State's Motion for Summary Judgment.

II

Standard of Review

When a defendant has entered a plea of nolo contendere and sentence has been imposed, "any issue relating to the validity of the plea must be raised by way of post-conviction relief." State v. Vashey, 912 A.2d 416, 418 (R.I. 2006); see also G.L. 1956 §

[2] Petitioner did not address his status as an "arriving alien" in his argument before this Court.

[3] The Notice of Removal states that the crime for which Petitioner was convicted is a crime of moral turpitude, citing § 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act. (Petitioner's Memo, Ex. 4.) Like his status as an "arriving alien," Petitioner did not address the distinction of being a crime of moral turpitude in his argument before this Court. Because Petitioner has waived these issues, and because the parties do not dispute that the conviction also renders Petitioner an aggravated felon and that the Immigration Court has ordered Petitioner removed, it is unnecessary for this Court to further analyze the grounds for the Notice of Removal or the Immigrations Court's decision thereon.

[4] As codified at 8 U.S.C. § 1229b(a), the Attorney General may cancel removal for certain permanent residents who are otherwise inadmissible or deportable if, inter alia, the alien has not been convicted of any aggravated felony.

[5] As codified at 8 U.S.C. §1182(h), aggravated felons are disqualified from eligibility for a waiver of removal.

10-9.1-1, et seq. It is the applicant's burden to prove by a preponderance of the evidence that he or she is entitled to post-conviction relief. Burke v. State, 925 A.2d 890, 893 (R.I. 2007). Section 10-9.1-6(c) of the Rhode Island General Laws permits the Court to "grant a motion by either party for summary disposition of the application when it appears from the pleadings, depositions, answers to interrogatories, and admissions of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." The Rhode Island Supreme Court has recognized that these standards are the same as those used in passing on a summary judgment motion under Rule 56. Palmigiano v. State, 120 R.I. 402, 206, 387 A.2d 1382, 1385 (R.I. 1978). In opposing a motion for summary judgment, the nonmoving party "has the burden of proving by competent evidence the existence of a disputed issue of material fact and cannot rest upon mere allegations or denials in the pleadings, mere conclusions or mere legal opinions." D'Allesandro v. Tarro, 842 A.2d 1063, 1065 (R.I. 2004). The Court must consider the affidavits and pleadings in the light most favorable to the nonmoving party, here, the Petitioner. See Casador v. First Nat'l Stores, Inc., 478 A.2d 191, 194 (R.I. 1984).

III

Analysis

A

Petitioner Has Failed to Satisfy the Two-Part Test in Strickland

In reviewing claims of ineffective assistance of counsel, Rhode Island courts adhere to the standard announced by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). Under Strickland, when confronted with a claim that

a criminal defendant received ineffective assistance of counsel, the Court must conduct a two-part test. Id. at 687. First, the defendant must show that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment. Id. A defendant must demonstrate that counsel's advice was not within the range of competence demanded of attorneys in criminal cases, and counsel's performance must be assessed in view of the totality of the circumstances. Id. at 695. There is a strong presumption that counsel's conduct falls within the permissible range of assistance. Hazard v. State, 968 A.2d 886, 892 (R.I. 2009) (quoting Strickland, 466 U.S. at 689). Moreover, "[a] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690 (emphasis added).

The second prong of the Strickland test requires that the defendant show that counsel's deficient performance prejudiced the defendant. Id. at 687. The Rhode Island Supreme Court has further stated that when evaluating a claim for ineffective assistance of counsel in a plea situation, the defendant must demonstrate a reasonable probability that, but for counsel's errors, he or she would not have pleaded guilty or nolo contendere, would have insisted on going to trial, and, importantly, that the outcome of the trial would have been different. Neufville v. State, 13 A.3d 607, 610 (R.I. 2011).

In recent years, legal advice concerning immigration consequences has become a familiar ground for ineffective assistance of counsel claims in the context of post-conviction relief petitions. The Rhode Island Supreme Court's decision in Neufville addressed this very issue, citing the momentous 2010 opinion from the United States

Supreme Court in Padilla v. Kentucky, 130 S.Ct. 1473 (2010). In Padilla, the Supreme Court commented on the changes to the landscape of federal immigration law over a 90-year span and ultimately held that criminal defense attorneys are responsible for affirmatively providing at least some immigration advice to non-citizen clients. Recognizing the importance of Padilla, the Neufville Court quoted Padilla as follows:

> "Immigration law can be complex, and it is a legal specialty of its own. * * * There will * * * undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. * * * When the law is not succinct and straightforward * * * a criminal defense attorney need do no more than advise a non-citizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear * * * the duty to give correct advice is equally clear." Neufville, 13 A.2d at 612 (quoting Padilla, 130 S.Ct. at 1483).

Notwithstanding the significant holding in Padilla, the issue before this Court on the first prong of the Strickland test is whether "counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct [and] . . . in light of all the circumstances, . . . [was] outside the wide range of professionally competent assistance." Strickland, 466 U.S. at 690 (emphasis added). Thus, counsel's duty to explain immigration consequences will be dictated by what immigration law required – including, as required in Padilla, whether consequences of a plea were unclear or certain – at the time of counsel's conduct, namely, at the time of the plea.

Here, it is undisputed that Petitioner's counsel did not provide him any information concerning immigration consequences, nor did the trial justice advise him of the impact that a conviction could have on his immigration status as is now required after the Rhode Island Supreme Court decision in Machado v. State, 839 A.2d 509, 513 (R.I. 2003). It is also undisputed that, as of September of 1989, the time of the plea, there were no immigration consequences that Petitioner would suffer upon his nolo contendere

plea to the breaking and entering charge. The State maintains that defense counsel was not obligated to advise Petitioner of any immigration consequences because no such consequences existed as of 1989. Petitioner, on the other hand, argues that his defense counsel should have informed him of the risk even if there was none at the time, pointing out that "current plea forms in our state require defense counsel to explain to all non-citizen criminal defendants that any criminal plea may have adverse immigration consequences even if the attorney believes that currently there is no present risk." Petitioner's Memo, at 13. Thus, Petitioner would have this Court hold past defense counsel to the insurmountable standard of (1) foreseeing (i) a change in the definition of aggravated felonies, and (ii) its express retroactive application to pre-1996 convictions; and (2) explaining the possibility of such events impacting Petitioner's immigration status some time in the future.

Not only is Petitioner's argument requiring clairvoyance wholly unreasonable and not within the "range of competence" demanded of attorneys in criminal cases, but also it is contrary to established precedent. Courts have repeatedly recognized that "[f]ailure to anticipate a change in the existing law does not constitute ineffective assistance." State v. Brennan, 627 A.2d 842, 846 (R.I. 1993); see also Powell v. United States, 430 F.3d 490, 491 (1st Cir. 2005) ("the case law is clear that an attorney's assistance is not rendered ineffective because he failed to anticipate a new rule of law"); Clark v. Moran, 749 F. Supp. 1186, 1201 (D.R.I. 1990) ("counsel not ineffective for failing 'to anticipate changes in the law'") (quoting United States v. Baynes, 687 F.2d 659, 668 n.11 (3rd Cir. 1982)); State v. Figueroa, 639 A.2d 495, 499-500 (R.I. 1994) (rejecting ineffective assistance of counsel claim in part because advice that defendant would most probably

not be deported was proper and correct in light of law as it existed at time of plea, regardless of change in immigration law just weeks after plea entered).

In 1989, there were no immigration consequences of which to warn the Petitioner upon his nolo contendere plea to breaking and entering. It is wholly unrealistic, impractical and contrary to law to require that criminal defense attorneys forecast future changes in immigration laws, let alone such drastic and retroactive changes that were implemented by Congress seven (7) years after Petitioner's plea. Thus, at the time of the plea, it was not deficient for defense counsel to have omitted any discussion of potential immigration consequences with Petitioner that may take place in the future. As there are no genuine issues of material fact concerning the deficient nature of counsel's representation, the State is entitled to judgment as a matter of law on Petitioner's ineffective assistance of counsel claim.

Even had Petitioner satisfied the first prong of the Strickland, or at least overcome the summary judgment hurdle on the first prong, Petitioner's Affidavit and other materials submitted to the Court fail to demonstrate the existence of a genuine issue of material fact concerning any prejudice suffered by Petitioner. To satisfy the second prong of Strickland, Petitioner must demonstrate that, had he been advised that there could be immigration consequences in the future, he would have insisted on going to trial and that the outcome of the trial would have been different. Neufville, 13 A.3d at 611 (citing Figueroa, 639 A.2d at 500). Petitioner's Affidavit is wholly bereft of any evidence of such prejudice. As the nonmoving party, it is Petitioner's obligation to come forward with competent evidence to demonstrate the existence of a genuine issue of material fact, and Petitioner cannot rest upon mere allegations, conclusions or legal

opinions. D'Allesandro v. Tarro, 842 A.2d 1063, 1065 (R.I. 2004). It is evident that Petitioner has failed to comply with this obligation as there is no evidence whatsoever that Petitioner would have insisted on going to trial and that, faced with a signed confession and an impartial witness who identified Petitioner in a lineup, he would have been acquitted. Accordingly, as there is no genuine issue of material fact presented by Petitioner on the second prong, the State is entitled to judgment as a matter of law on Petitioner's ineffective assistance of counsel claim.

B

The State Is Not Entitled to Summary Judgment on the Doctrine of Laches

In addition to Petitioner's failure to satisfy the two-prong ineffective assistance of counsel test, the State also contends that Petitioner's application should be barred by the doctrine of laches. The State asserts that, as a matter of law, it would be prejudiced if it were required to reopen this case almost twenty-three (23) years after Petitioner's plea, subpoena D'Allesio, the eye witness, search for additional witnesses, and elicit testimony from people who may no longer have any memory of the event at issue.

In Raso v. Wall, 884 A.2d 391 (R.I. 2005), the Rhode Island Supreme Court adopted the criteria used by other state courts applying the doctrine of laches to overdue post-conviction relief motions. Specifically, the Court found that "the State has the burden of proving by a preponderance of the evidence that the applicant unreasonably delayed in seeking relief *and* that the state is prejudiced by the delay." Id. at 395. Further, the Court required the State to show a "lack of due diligence on the part of the defendant in bringing forth the claim" and the delay must be "inexcusable as well as prejudicial to the government." Id. at 396. The Court also noted in Raso that whether

there has been an unreasonable delay and prejudice suffered by the State are questions of fact reserved for the trier of fact. Id.

Here, the State has failed to show that Petitioner unreasonably delayed in seeking this relief. The within Application was filed approximately thirty (30) months after Petitioner was served with a Notice to Appear in Immigration Court in February 2009, but even before the Immigration Court rendered a decision thereon. See Petitioner's Memo, Exs. 2-4. There is no competent evidence that demonstrates that this thirty (30) month period is unreasonable, or that a different measure of time should be used to assess the reasonableness of the delay in seeking relief. Moreover, the State has provided no evidence in support of the prejudicial effect of the Petitioner's delay, aside from mere speculation that this would be a difficult case to prove beyond a reasonable doubt twenty-three (23) years after the events in question occurred. While it may be reasonable to so speculate, the State bears the burden of proving its affirmative defense of laches and the Court cannot rely on mere conjecture or speculation to find that laches should bar Petitioner's request for post-conviction relief. Certainly the State could present an affidavit specifying that an investigation was undertaken and the specific reason(s) why re-trial would be difficult for the State, i.e., that such investigation revealed that certain witnesses can no longer be found, are outside the subpoena powers of Rhode Island, or have passed away; or that memories of certain witnesses have, in fact, lapsed. The State has presented no such evidence. Because the State failed to present competent evidence of Petitioner's unreasonable delay in seeking relief and the prejudice to the State resulting from that delay, this Court cannot conclude that the State would be entitled to judgment

as a matter of law based upon the doctrine of laches.[6]

Conclusion

For the foregoing reasons, the State is entitled judgment as a matter of law on Petitioner's claim of ineffective assistance of counsel. The State's request for summary judgment on the doctrine of laches is denied.

Counsel for the State shall prepare an Order consistent with this Decision.

[6] In light of this Court's decision granting the State summary judgment on Petitioner's ineffective assistance of counsel claim, it will not be necessary for this Court to resolve the questions of fact raised by the State's affirmative defense of laches.