Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2017-074

AUGUST TERM, 2017

In re Thomas Gauthier	}	APPEALED FROM:
	}	
	}	Superior Court, Orange Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 236-10-12 Oecv
		Trial Judge: Timothy B. Tomasi

In the above-entitled cause, the Clerk will enter:

Petitioner appeals from the trial court's dismissal of his petition for post-conviction relief (PCR) on summary judgment. He argues that the trial court erred in concluding that he needed expert testimony to support his ineffective-assistance-of-counsel claim. We affirm.

In 2009, petitioner was charged with sexual assault of a minor and furnishing alcohol to a minor. He agreed to plead guilty to the first charge in exchange for the dismissal of the second and the imposition of a deferred sentence with certain agreed-upon conditions of probation. In March 2010, the court accepted the plea agreement and imposed the deferred sentence with the agreed-upon probation conditions. In June 2010, petitioner was charged with violating several probation conditions and in September 2010, he was charged with violating two additional conditions. Petitioner entered into an agreement with the State pursuant to which the State would dismiss the second probation-violation complaint and, in connection with the first, petitioner would be sentenced on the underlying charges to a suspended sentence of zero to four years with certain probation conditions. Petitioner admitted the violation, and the trial court imposed the agreed-upon sentence at an October 2010 hearing. Additional probation violation complaints were filed, and in 2014, the court revoked petitioner's probation. We affirmed this decision on appeal. See State v. Gauthier, 2016 VT 37, __ Vt. __.

Meanwhile, in October 2014, petitioner filed the amended PCR petition at issue here. He alleged that trial counsel was ineffective for failing to challenge the imposition of certain probation conditions—the ones he later admitted to violating—in connection with the March 2010 deferred sentence agreement, and for failing to collaterally challenge those conditions as a defense to the violation of probation that defendant admitted. The State moved for summary judgment, arguing that petitioner was required, and failed, to present expert testimony to establish the applicable standard of care and to establish whether trial counsel's performance fell below that standard. Petitioner responded that his attorney did not raise "obvious defenses" to the probation violation complaint (apparently referring to the claimed illegality of the unchallenged conditions), which he argues had a "reasonable probability of success." He further argued that the judge had the knowledge and experience to determine the standard of care for a criminal defense attorney in

Vermont, and that counsel's shortcomings were "so blatant" that expert testimony was unnecessary.

In a January 2017 order, the trial court granted summary judgment to the State. It explained that expert testimony was required to establish ineffective assistance of counsel except in those "rare situations" where "a professional's lack of care is so apparent that only common knowledge and experience are needed to comprehend it." In re Grega, 2003 VT 77, ¶ 16, 175 Vt. 631 (quotation omitted). The court concluded that this was not such a case. In order to find ineffective assistance of counsel, the court would need to understand not only the law on probation conditions, violations thereof, and collateral challenges thereto, but would also need to understand the give and take that went into the creation of the agreements. It would need to hear from an expert as to why counsel's advice and actions, in light of those facts, was ineffective. The court therefore granted summary judgment to the State and dismissed the petition. This appeal followed.

Petitioner asserts that he did not need to present expert testimony because there was a complete failure of the adversarial process. He cites In re J.B. where we reiterated that "[i]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," then there has been a denial of Sixth Amendment rights that "makes the adversary process itself presumptively unreliable." 159 Vt. 321, 325 (1992) (quoting United States v. Cronic, 466 U.S. 648, 659 (1984)). Petitioner argues that his attorney was ineffective by failing to challenge the probation conditions imposed at the deferred sentencing hearing, and by advising him to admit to violating the conditions rather than collaterally challenging them. Petitioner asserts that if any expert testimony was needed, it was provided in the quotations from the cases cited in his amended complaint. According to petitioner, because this was a bench trial, the judge would have known or been able to research any necessary information.

We agree with the trial court that the State is entitled to summary judgment here. See V.R.C.P. 56(a) (summary judgment appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"); In re Towne, 2013 VT 90, ¶ 12, 195 Vt. 42 (explaining that this Court "reviews a grant of summary judgment de novo, employing the same standard as the trial court" (quotation omitted)).

To support his ineffective-assistance-of-counsel claim, petitioner needed to show "by a preponderance of the evidence that: (1) his counsel's performance fell below an objective standard of performance informed by prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the proceedings would have resulted in a different outcome." In re Grega, 2003 VT 77, ¶ 7; see also Hill v. Lockhart, 474 U.S. 52, 59 (1985) (explaining that where individual pleads guilty, second requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process," that is, he "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"). To establish his claim, "petitioner cannot rely on the distorting effects of hindsight, and must surpass the strong presumption that counsel's performance fell within the wide range of reasonable professional assistance." In re Grega, 2003 VT 77, ¶ 7. As noted above, "[o]nly in rare situations will ineffective assistance of counsel be presumed without expert testimony. Id. ¶ 16. A petitioner can prove an ineffective assistance of counsel claim without an expert only "[w]here a professional's lack of care is so apparent that only common knowledge and experience are needed to comprehend it." Id.

Expert testimony was plainly required here. The conditions petitioner now challenges were imposed as an integral part of a deferred sentence agreement. In exchange for his plea, and for accepting the probation conditions and terms, petitioner received a deferred sentence on a felony sexual assault charge involving a minor as well as the dismissal of an additional charge. Whether counsel's advice and representation were ineffective depends not only on whether the conditions at issue were subject to legal challenge; it depends on an assessment of the negotiation that led to that agreement, and on the reasonableness of the overall agreement. Likewise, in exchange for petitioner's admitting the violations, the State dropped other probation violation charges and agreed to a sentence of zero to four years, all suspended. Whether counsel was ineffective in negotiating and recommending this agreement depends not only on whether the conditions themselves may have been subject to a collateral challenge, it also requires an analysis of the agreement as a whole.

We reject petitioner's suggestion that it was enough to cite the legal standards applicable to probation conditions, and his related argument that the judge should essentially act as a de facto expert on his behalf. As noted above, petitioner's ineffective assistance of counsel claim does not rest solely on a legal analysis of the probation conditions in question. It requires an evaluation of the circumstances surrounding the initial deferred sentence agreement and the later agreement regarding the violations of probation, the potential consequences to petitioner of declining the agreements, and the advantages he gained by entering into the respective agreements. This is not an analysis that is reflected in the case law cited by petitioner. Nor could it be. The analysis is necessarily fact specific. The absence of expert testimony in this case is fatal to petitioner's claim.

Petitioner maintains that because his attorney wholly failed to challenge the probation conditions that were imposed as part of the deferred sentence, either at the time they were imposed or at the time he was charged with violating them, he needs not proffer expert testimony. He points to cases in which courts have held that there are some "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." Cronic, 466 U.S. at 658. This includes cases where counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." Id. at 659 (explaining that "right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing," and "[w]hen a true adversarial criminal trial has been conducted—even if defense counsel may have made demonstrable errors—the kind of testing envisioned by the Sixth Amendment has occurred" (footnote omitted)).

We reject this argument. The rule petitioner relies on is narrow. "For it to apply, the attorney's failure must be complete," such as refusing to participate at a sentencing hearing, Miller v. Martin, 481 F.3d 468, 473 (7th Cir. 2007) (emphasis added) (quotation omitted), or providing no meaningful representation whatsoever, In re J.B., 159 Vt. at 325-26. The U.S. Supreme Court has made clear that this exception applies only to a total failure to represent a client throughout the process; it does not apply to claims that counsel failed to "oppose the prosecution" at certain points in a proceeding. Bell v. Cone, 535 U.S. 685, 696-97 (2002); see also In re Williams, 2014 VT 67, ¶¶ 32-33, 197 Vt. 39 (discussing Bell, and concluding that petitioner's counsel did not entirely fail to represent him at the sentencing proceeding, and even though counsel's performance was deficient, it was not "tantamount to non-representation"). Petitioner has not identified any wholesale failure of representation here. As in Williams, petitioner identifies specific actions and advice of counsel at two different junctures that he argues were deficient. The burden is on him

to establish that the representation in connection with each of the agreements at issue fell below the applicable standard, and that he suffered prejudice as a result.

Affirmed.

BY THE COURT:

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Beth Robinson, Associate Justice

_____
Karen R. Carroll, Associate Justice

_____
Brian J. Grearson, Superior Judge,
Special Assigned