STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

(FILED: May 19, 2014)

KATHLEEN THOMPSON	:	
	:	
VS.	:	**C.A. No. KD-2014-0361**
	:	
STATE OF RHODE ISLAND	:	

DECISION

RUBINE, J. This action is before this Court on Kathleen Thompson's (Petitioner) appeal from the District Court's denial of her petition for postconviction relief. This Court has jurisdiction over the appeal pursuant to G.L. 1956 § 10-9.1-2(b). For the reasons set forth in this Decision, Petitioner's appeal is denied, and the underlying petition is denied and dismissed.

I

Facts and Travel

Petitioner filed a petition for postconviction relief in District Court on February 14, 2014, seeking to vacate a District Court conviction resulting from a September 2000 nolo contendere plea to a misdemeanor violation of a protective order. Petitioner asserted that the District Court violated G.L. 1956 § 12-12-22 during the plea colloquy by failing to inform her of the potential immigration consequences of her plea.[1] The State did not file an answer to the petition in the District Court, but argued at the hearing that the doctrine of laches would prevent Petitioner from

[1] Section 12-12-22 became effective on July 20, 2000, which is less than two months before Petitioner entered her nolo contendere plea on September 18, 2000 to the charge of violating a protective order. According to § 12-12-22(b), prior to accepting any plea, courts must inform a defendant that if he or she is not a Unites States citizen, "a plea of guilty or nolo contendere may have immigration consequences, including deportation, exclusion of admission to the United States, or denial of naturalization pursuant to the laws of the United States." The failure of a court to give the required warnings may, upon proper petition for postconviction relief, result in having the plea vacated. Sec. 12-12-22(c).

receiving the postconviction relief sought.[2] After a hearing on the petition, the District Court denied Petitioner's requested relief on April 8, 2014. Petitioner timely appealed this denial to the Superior Court. This Court held a hearing on April 23, 2014, and took the appeal under advisement.

II

Standard of Review

Rhode Island law provides that "[a]ny person who has been convicted of, or sentenced for, a crime, a violation of law, or a violation of probationary or deferred sentence status . . . may institute . . . a proceeding under this chapter to secure relief" on one of six grounds. Sec. § 10-9.1-1. One of the grounds is "[t]hat the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state." Sec. 10-9.1-1(a)(1). The petitioner bears the burden of establishing, by a preponderance of the evidence, that he or she is entitled to the relief sought. Anderson v. State, 45 A.3d 594, 601 (R.I. 2012) (citing Mattatall v. State, 947 A.2d 896, 901 n.7 (R.I. 2008)). This Court's review of an appeal from a District Court's denial of a petition for postconviction relief is de novo. Id. (citing State v. Laurence, 18 A.3d 512, 521 (R.I. 2011) (further citations omitted)). Pursuant to § 10-9.1-7, "[a]ll rules and statutes applicable in civil proceedings shall apply except that pretrial discovery proceedings shall be available only upon order of the court."

III

Analysis

The State did not file an answer to the petition in the District Court but argued at both the District Court hearing and the hearing before this Court that Petitioner's claim for postconviction

[2] All references to the substance of the hearing in District Court, and the result thereof, are based on the undisputed statements by the attorneys during the hearing in this Court.

relief should be denied based on laches. Petitioner argued that the State waived this defense of laches by not raising it in a responsive pleading. The merits of Petitioner's postconviction relief petition need not be considered if her claim is barred by laches.

According to Super. R. Civ. P. 8(c), the affirmative defense of laches shall be set forth in a responsive pleading to a preceding pleading. It is well settled that the failure to plead an affirmative defense in a responsive pleading results in the waiver of that defense. Catelli v. Fleetwood, 842 A.2d 1078, 1081 (R.I. 2004) (citing Duquette v. Godbout, 416 A.2d 669, 670 (R.I. 1980)). However, Super. R. Civ. P. 15(b), entitled "Amendments to Conform to the Evidence," provides that "when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." Our Supreme Court has held that the affirmative defense of laches may be raised and tried by implied consent of the parties even if not pleaded. Kelly v. C.H. Sprague & Sons Co., 455 A.2d 1302, 1305 (R.I. 1983) (citing Kenney v. Providence Gas Co., 118 R.I. 134, 372 A.2d 510 (1977)). In Kenney, our Supreme Court stated that "[t]here can be no implied consent under Rule 15(b) unless the parties clearly understand that the evidence in question is aimed at the unpleaded issue." 118 R.I. at 141, 372 A.2d at 514 (holding that laches was not tried by implied consent when the only evidence to support the defense were two statements made at trial in relation to other issues, and the parties had no other notice of the unpleaded defense of laches).

At the hearing before this Court, Petitioner's counsel argued that the affirmative defense of laches was waived because it was not raised in a responsive pleading or motion in the District Court. In response, the State argued that Petitioner and her counsel were well aware of the State's assertion of the defense of laches because the District Court heard both parties on the issue of laches and found the State's assertion of the defense to be meritorious. This Court finds

that the defense of laches was raised and argued through the implied consent of the parties at both the District Court and before this Court. Accordingly, this Court concludes that the State's failure to assert the defense in a pleading under these circumstances does not result in a waiver of the defense of laches. See Catelli, 842 A.2d at 1081 (citing Duquette, 416 A.2d at 670); Kelly, 455 A.2d at 1305. Pursuant to Super. R. Civ. P. 15(b), this defense shall be treated as if it had been raised in the pleadings.

IV

Analysis of Laches Defense

When the State asserts the affirmative defense of laches in response to a petition for postconviction relief, it has the burden to prove, by a preponderance of the evidence, that (1) the petitioner unreasonably delayed seeking postconviction relief in that he or she negligently failed to assert a known right; and (2) that the state is prejudiced by this unreasonable delay. Raso v. Wall, 884 A.2d 391, 395-96 (R.I. 2005). Both elements are questions of fact. Id. at 396 (citing Lombardi v. Lombardi, 90 R.I. 205, 209, 156 A.2d 911, 913 (1959)). While § 10-9.1-3 provides that an application for postconviction relief may be filed at any time, our Supreme Court has construed "any time" to mean "any reasonable time." Raso, 884 A.2d at 395. "Because it is equitable in nature, the applicability of the defense of laches in a given case generally rests within the sound discretion of the trial justice." Hazard v. E. Hills, Inc., 45 A.3d 1262, 1270 (R.I. 2012).

Here, there is no dispute that Petitioner pled nolo contendere to the misdemeanor violation of the protective order almost fourteen years before filing her petition seeking to vacate that plea.[3] In support of its defense of laches, the State asserts that both elements of laches are

[3] As previously stated, Petitioner entered the nolo contendere plea on September 18, 2000 and filed her petition for postconviction relief in District Court on February 14, 2014. Since

met by the facts of this case. In response, Petitioner contends that the State has failed to establish unreasonable delay. Petitioner testified without rebuttal that she only became aware in early 2014 of her right to seek postconviction relief to vacate her plea when her present counsel so advised her. Petitioner urges this Court to accept the date of early 2014 as the earliest date when Petitioner could reasonably have been expected to seek postconviction relief for the September 2000 violation of § 12-12-22 and that Petitioner filed for postconviction relief only one month after she actually learned that such relief was available.

To determine whether the length of time between plea and petition seeking to vacate the plea is reasonable in this case, this Court is to consider the circumstances surrounding Petitioner's nolo contendere plea during the State's prosecution of the protective order violation. See Raso, 884 A.2d at 396, (citing Lombardi, 90 R.I. at 209, 156 A.2d at 913). Prior to her decision to plead nolo contendere to the misdemeanor offense, Petitioner was represented by competent counsel from the Office of Public Defender. The docket entries in the District Court establish that, on August 10, 2000, her attorney sought a reassignment to August 17, 2000 to "review immigration status." Thereafter, at a conference held on August 17, 2000, the record reflects that the State made a plea offer of "one year to serve." This docket notation also states that "P.D. to look into immigration status." After the plea, the docket shows that Petitioner, through counsel, filed two postconviction motions. One, dated October 19, 2000, was a motion to clarify her sentence. This motion was granted. On November 6, 2000, a motion to reduce sentence was filed by Petitioner's then-counsel. This motion was denied. The chronology as outlined above leads this Court to find that Petitioner and her counsel knew or should have

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Petitioner has a pending felony case in Superior Court that is based on her alleged third violation of the same protective order, it is reasonable to infer that the instant petition is motivated at least in part by a strategy to eliminate one of Petitioner's existing convictions for protective order violations, thereby eliminating the ability of the State to prosecute the current felony charge.

known of the potential immigration consequences of her nolo contendere plea, and the failure of the District Court to recite the immigration warnings during the plea colloquy pursuant to § 12-12-22 could have been challenged immediately by way of a petition for postconviction relief seeking to vacate the plea. While Petitioner did seek postconviction relief to clarify her sentence and then reduce her sentence, she did not seek an order vacating her plea. Rather than seeking postconviction relief on the basis of a violation of § 12-12-22 in the months following her conviction, Petitioner waited nearly fourteen years to assert this claim.

Petitioner asserts that the unreasonableness of the delay should be measured from the date when her current counsel actually informed her of the availability of a post-conviction remedy. This Court disagrees. Although January 2014 may be the first time Petitioner had actual knowledge that a postconviction remedy was available to potentially vacate her September 2000 conviction, our Supreme Court has stated that unreasonable delay can be measured by circumstances in which a petitioner either knew or should have known about the ability to protect their rights. Arena v. City of Providence, 919 A.2d 379, 396 n.13 (R.I. 2007) (quoting 1 Dan B. Dobbs, Law of Remedies, § 2.4(4) at 103 (2d ed.1993)) (quotation marks omitted). Here, the evidence establishes that shortly after the plea Petitioner was aware of the way in which her immigration circumstances could be affected by her conviction, and should have known that this could be grounds for an immediate and successful petition for postconviction relief in light of the newly enacted § 12-12-22. Based on the facts considered above, this Court finds that fourteen years represents an unreasonable delay.

Not only does the Court find the fourteen year delay to be unreasonable, but the Court also finds that the State has met its burden of proving that the delay would cause actual prejudice to the State. Although the Warwick Police Department has been able to retrieve its file

concerning Petitioner's arrest in 2000, and the two police officers primarily responsible for the investigation are available if needed to testify, the complaining witness of the incident in 2000 (Petitioner's ex-husband) is now eighty-four years old. This Court believes that with the substantial passage of time and the victim's advanced age, his memory of events occurring nearly fourteen years ago will not be as accurate or reliable as his memory would have been in the year 2000. If the Court were to vacate the conviction resulting from the September 2000 nolo contendere plea, the State would be severely hampered in its ability to successfully prosecute Petitioner for this incident.

V

Conclusion

For the above-stated reasons, the Court finds that Petitioner unreasonably delayed filing this petition for postconviction relief and that such delay caused prejudice to the State. Accordingly, the State has sustained its burden of proving the affirmative defense of laches. See Raso, 884 A.2d at 395-96. Therefore, the instant appeal is denied and dismissed and the underlying petition is likewise denied and dismissed.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Thompson v. State of Rhode Island**
CASE NO:	**KD-2014-0361**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**May 19, 2014**
JUSTICE/MAGISTRATE:	**Rubine, J.**
ATTORNEYS:	
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