STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: July 31, 2015]

VICTOR FERREIRA	:	
	:	
	:	
V.	:	**C.A. No. PM/2010-0023**
	:	
	:	
STATE OF RHODE ISLAND	:	

DECISION

MCGUIRL, J. Before this Court is the application of Victor Ferreira (Ferreira or Petitioner) for postconviction relief. Ferreira contends that he was denied his right to effective assistance of counsel as guaranteed by the Sixth Amendment of the United States Constitution prior to entering a plea of nolo contendere. Jurisdiction is pursuant to G.L. 1956 §10-9.1-1.

I

Facts and Travel

The following pertinent facts are derived from witness statements contained within the information package and Ferreira's testimony at the hearing on the motion for postconviction relief.

On October 22, 1996, Ferreira asked his girlfriend, Teresa Andrade (Andrade), if she wanted to go out for a ride. (Teresa Andrade Witness Statement at 1; P2/07-547A.) Despite "ha[ving] an idea that [Ferreira] was going to pick up . . . some cocaine[,]" and not typically condoning his drug use, Andrade agreed. Id. Consequently, the pair boarded Ferreira's blue Jeep and headed towards East Providence. Id.

Meanwhile that evening, Officer John R. Sequeira (Officer Sequeira), a member of the East Providence Vice Unit[1], sat in an unmarked police car surveying the Taunton Avenue off-ramp from I-195 East. (Officer Sequeira's Witness Statement at 1; P2/07-547A.) As he sat, he noticed a blue AMC Jeep drive by and pull up beside a pay phone. Id. A medium skinned, white male with dark hair, later identified as Ferreira, exited the car and appeared to make a phone call from the pay phone. Id. Ferreira returned to the Jeep and waited. Id.

In the time Officer Sequeira had spent with the Vice Unit, he had frequently observed persons use a public pay phone to contact drug dealers. Id. Based on Officer Sequeira's past observations, he suspected that after receiving the call, a dealer would drive to the pay phone location and have Ferreira follow him or her a short distance before completing the exchange. Id. This is exactly what happened next.

Officer Sequeira watched as, ten minutes later, a green Mercury Marquis approached the blue Jeep and flashed its headlights three times. Id. at 2. The driver of the Mercury then motioned for Ferreira to follow him. Id. Next, both the Jeep and the Mercury drove for approximately fifty feet as the officer tailed behind. Id. Ferreira proceeded to exit his Jeep, pull a quantity of dollar bills from his pocket, and hand the cash to the driver of the Mercury. Id. In response, the driver of the Mercury dropped something into the hands of Ferreira and drove away. Id. Sequeira followed Ferreira onto I-195. Id.

Once Ferreira realized the police were following him, he told Andrade, "it would be okay because he was going to put [the bag of cocaine] down his pants." (Andrade Witness Statement

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[1] The Vice Unit is entrusted with the enforcement of the Rhode Island Controlled Substances Act.

at 2.) Meanwhile, Officer Sequeira radioed for back-up and proceeded to stop Ferreira on I-195 with the assistance of Patrolmen Frazier and Enos. (Officer Sequeira's Witness Statement at 2.)

Ferreira's concealment strategy failed spectacularly. According to Andrade, "as [Ferreira] was putting the [cocaine] down his pants the police were walking up and the police saw what he was doing." (Andrade's Witness Statement at 2.) In Officer Frazier's statement, he confirmed that as he approached the driver's side of the Jeep, he noticed Ferreira stuff a small bag down the crotch of his pants. (Patrolman Richard K. Frazier's Witness Statement at 1; P2/07-547A.) Ferreira was then removed from the Jeep, asked to identify himself, and apprised of his rights under Miranda. (Sequeira's Witness Statement at 2.) Ferreira stated that he understood these rights. Id.

According to Officer Sequeira and Patrolman Frazier, Ferreira, when asked, stated that he did indeed have narcotics on his person and proceeded to pull a bag of cocaine out of his pants. Sequeira's Witness Statement at 2-3; Frazier's Witness Statement at 1. Ferreira contests this, stating that he admitted nothing to the police, but rather that the officer "found it on [him]" subsequent to a pat down after he voluntarily "put [the cocaine] down [his] pants." (Tr. 27.) Nevertheless, Ferreira was arrested by the East Providence Police Department and charged with one count of possession of cocaine. Tr. 16; P2/07-547A.

The next morning, at his arraignment, Ferreira pled not guilty and requested appointment of counsel from the Department of the Public Defender. (Tr. 16.) Not long after, the Public Defender's Office conducted an intake interview in order to obtain background information on Ferreira. (Tr. 16-17.) During the intake interview, Ferreira was allegedly asked by the intake officer whether he was a citizen of the United States. (Tr. 16-17.) According to Ferreira, the intake worker recorded in a standard intake form that Ferreira was not, but rather was only a

permanent resident. (Tr. 17.) These intake interview notes are typically appended to the file presented to a defense attorney appointed to a particular case. (Tr. 11-12.)

According to Ferreira, he then met with his appointed attorney, Assistant Public Defender Cannon (Cannon or Mr. Cannon), for the first time for about five to eight minutes in the hallway before the hearing. (Tr. 18-19.) During this meeting, Cannon advised Ferreira of his option to change his "not guilty" plea to one of nolo contendere. They discussed whether Ferreira's previous charge and prison time from a 1982 conviction for possession of a stolen motor vehicle would have any impact on the plea bargain Ferreira was given. (Tr. 23.) Cannon pointed out that by changing his plea, Ferreira would likely receive a more favorable sentence than would result from a trial. (Tr. 19.) Cannon did not inquire as to Ferreira's immigration status, nor did Ferreira, in his conversation with Cannon, do anything or say anything to tell Cannon that he was not a citizen. (Tr. 19.) Allegedly, Cannon did not inform Ferreira that by pleading nolo contendere to a controlled substance possession charge, he could be subject to deportation by the Department of Homeland Security under 8 U.S.C. § 1251(a)(2)(B)(i)(1994). (Tr. 19.) Based on the plea of nolo contendere, on March 3, 1997, Ferreira was sentenced to one year at the Adult Correctional Institutions suspended, and two years' probation. (Verified Application for Post-Conviction Relief ¶ 2.) He served no jail time.

At the hearing, Mr. Cannon testified that he has no recollection of the case or even of ever meeting Ferreira. (Tr. 4-5.) Cannon simply stated that as a matter of standard procedure, the intake interview notes would appear in the folder that an assistant public defender would receive when assigned a particular case. (Tr. 11-12.) Cannon was uncertain whether the intake form at that time contained information about the client's immigration status. (Tr. 12.) However, he stated his belief that it did. Id. Cannon also did not know whether he would have

discussed immigration consequences with Ferreira if he had learned of Ferreira's status as a permanent resident. (Tr. 11.) Additionally, Mr. Cannon noted he would have taken Ferreira's naturalization status into consideration in the plea negotiations. (Tr. 8.) However, he stated his belief that the plea deal proposed by the prosecutor involved "a reasonably proffered sentence[.]" (Tr. 9.)

In 2005, Immigration authorities arrested Ferreira and began removal proceedings against him. (Tr. 20.) The charging document was based on three criminal convictions: the first being a conviction from 1982 in Rhode Island for possession of a stolen motor vehicle for which Ferreira received a two-year suspended sentence; the second, a conviction from 1984 for simple possession of a controlled substance violation, to wit, marijuana; and the third, at issue here, for possession of a controlled substance, cocaine, from 1997. (Tr. 37-38.) Ferreira filed an Application for Relief from Deportation—more commonly referred to as a 212 Waiver C application. However, this application was pretermitted based on his conviction for possession of cocaine for which Ferreira seeks relief in the instant petition. (Tr. 39.) As a result, on October 16, 2009, Ferreira was ordered removed from the United States. Ferreira appealed the order before the Board of Immigration Appeals. This appeal was pending as of the hearing for postconviction relief.

On November 18, 2010, Ferreira filed this Application for Post-Conviction Relief. Petitioner alleges that he received ineffective assistance of counsel, based on the fact that Cannon did not explain to him the immigration consequences associated with his nolo contendere plea and his status as a permanent resident. Ferreira alleges that were he aware of the likelihood of deportation, as a result of the nolo contendere plea, he would have tried to "fight the case." (Tr. 23-24.) To support this claim, Ferreira states that he immigrated to the United

States at age three, has only visited his home country once at the age of nine, and has close family, including his three brothers and parents, in Bristol, Rhode Island. (Tr. 14.) Ferreira also has a son, Victor, who was about nine years old at the time of his nolo contendere plea contested here. (Tr. 15.) Considering his lack of ties to the Azores as well as significant familial ties here in Rhode Island, Ferreira contends that he "would have proceeded to trial" rather than plead if he had known he faced deportation in the wake of his controlled substances conviction. (Verified Application for Post-Conviction Relief ¶ 5.)

II

Standard of Review

'"Once a defendant has entered a plea of guilty or of nolo contendere and sentence has been imposed, any issue relating to the validity of the plea must be raised by way of postconviction relief."' State v. Vashey, 912 A.2d 416, 418 (R.I. 2006) (quoting State v. Desir, 766 A.2d 374, 375 (R.I. 2001)) (superseded by statute on other grounds). Postconviction relief is a statutory remedy for

> "[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 and who claims:
> "(1) That 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).

Under the statute, an application can be filed at any time. Sec. 10-9.1-3.

"A plea of nolo contendere is the substantive equivalent of a guilty plea in Rhode Island." State v. Figueroa, 639 A.2d 495, 498 (R.I. 1994) (citing State v. Feng, 421 A.2d 1258, 1266 (R.I. 1980)). A defendant, in entering such a plea, "waives several federal constitutional rights and consents to judgment of the court." Feng, 421 A.2d at 1266 (citing Johnson v. Mullen, 120 R.I. 701, 390 A.2d 909 (1978)). As such, the plea is only considered valid if "voluntarily and

intelligently entered[.]" Figueroa, 639 A.2d at 498 (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)).

In pursuing postconviction relief, a petitioner "bears the burden of proving, by a preponderance of the evidence, that he is entitled to [such] relief." Burke v. State, 925 A.2d 890, 893 (R.I. 2007) (citing Larngar v. Wall, 918 A.2d 850, 855 (R.I. 2007)). As such, a petitioner must prove that the plea was "obtained from a defendant unaware and uninformed as to its nature and its effect as a waiver of his fundamental rights." Figueroa, 639 A.2d at 498 (citing Cole v. Langlois, 99 R.I. 138, 142-43, 206 A.2d 216, 218-19 (1965)). The proceedings for postconviction relief are "civil in nature." Ouimette v. Moran, 541 A.2d 855, 856 (R.I. 1988) (citing State v. Tassone, 417 A.2d 323 (R.I. 1980)). As a result, the rules and statutes that are applicable in civil proceedings also apply in the postconviction relief context. See § 10-9.1-7 ("All rules and statutes applicable in civil proceedings shall apply[]").

III

Analysis

A

Ineffective Assistance of Counsel

Ferreira claims that his conviction and sentence were in violation of the United States Constitution. See § 10-9.1-1(a)(1). Specifically, Ferreira claims that he was denied the effective assistance of the representation of counsel as guaranteed by the Sixth Amendment.

It is well established that "[b]efore deciding whether to plead guilty, a defendant is entitled to 'the effective assistance of competent counsel.'" Padilla v. Kentucky, 559 U.S. 356, 364 (2010) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970); Strickland v. Washington, 466 U.S. 668, 686 (1984)). The Sixth Amendment of the United States

Constitution requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. Amend. VI. The right to assistance of counsel has been applied to the States through the Due Process Clause of the Fourteenth Amendment of the United States Constitution by selective incorporation. Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (holding in the context of a felony conviction that "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours[]"); see also Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (expanding the right such that "no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial[]"). Similarly, the Rhode Island Constitution provides that "[i]n all criminal prosecutions, accused persons shall enjoy the right . . . to have the assistance of counsel in their defense[.]" R.I. CONST. art I, § 10.

Here, Ferreira alleges that his former counsel, Mr. Cannon, "did not advise him that [his sentence] constituted a conviction for a controlled substance offense under the Immigration & Nationality Act, thereby subjecting him to removal proceedings." (Verified Application for Post-Conviction Relief ¶ 5.) Ferreira contends that he "would have definitely tried to fight the case" if he had been aware of such adverse immigration consequences. (Tr. 23.) In his petition, Ferreira argues that his counsel had an affirmative duty to warn him of the potential deportation implications associated with his plea. (Verified Application for Post-Conviction Relief ¶ 5.)

To support the proposition that his counsel held such an affirmative duty, Ferreira cites the United Supreme Court case Padilla, 559 U.S. at 374. In that case, the Supreme Court held "that counsel must inform her client whether his plea carries a risk of deportation." Id. However, Padilla was decided in 2010. Ferreira met with his attorney and made his plea in 1997,

over a decade earlier. Now, this Court must decide whether Mr. Cannon's advice of yesteryear, or lack thereof, must conform to the contours of today's legal landscape.

i

Retroactivity of Padilla

Petitioner provides no law for the proposition that Padilla should apply retroactively to his case. Indeed, cases from the Rhode Island Supreme Court after Padilla do not directly address this issue. See Guerrero v. State, 47 A.3d 289 (R.I. 2012) (affirming denial of postconviction relief where petitioner claimed ineffective assistance of counsel based on rule set forth in Padilla without discussing rule's retroactivity); Neufville v. State, 13 A.3d 607 (R.I. 2011) (same). Faced with a rising number of postconviction petitions seeking to retroactively apply Padilla and a split between the circuits on the issue, the United States Supreme Court decided to examine this issue. Chaidez v. United States, 132 S. Ct. 2101 (2012) (granting petition for writ of certiorari). In that case, the Court found that its holding in Padilla constituted a "new rule" under Teague and, as such, "does not have retroactive effect." Chaidez v. United States, 133 S. Ct. 1103, 1105 (2013); see also Pailin v. Vose, 603 A.2d 738, 742 (R.I. 1992) ("adopting [the rule set forth in] Teague" as part of Rhode Island jurisprudence).

In Chaidez, the Court discussed its holding in Hill v. Lockhart, 474 U.S. 52 (1985), which "explicitly left open whether advice concerning a collateral consequence must satisfy Sixth Amendment requirements." Id. at 1108. The Court noted that in the wake of Hill, "[a]ll 10 federal appellate courts to consider the question decided, in the words of one, that 'counsel's failure to inform a defendant of the collateral consequences of a guilty plea is never' a violation of the Sixth Amendment." Id. at 1109 (quoting Santos-Sanchez v. United States, 548 F.3d 327, 334 (5th Cir. 2008)). Additionally, "[a]ppellate courts in almost 30 states agreed." Id. Rhode

Island was among this majority faction of states. See id. at 1109 n.8 (citing State v. Alejo, 655 A.2d 692, 692-93 (R.I. 1995)).

This Court finds Ducally v. State particularly instructive in setting forth Rhode Island's relevant jurisprudence before Padilla. 809 A.2d 472 (R.I. 2002). In that case, Ducally "pled nolo contendere to charges of possessing a controlled substance" on October 21, 1997. Id. at 473. Several years after this plea was entered, he filed for postconviction relief, claiming ineffective assistance of counsel as "he was not informed that said plea[] could result in his deportation from the United States." The Rhode Island Supreme Court, in denying Ducally's petition for postconviction relief, stated, "the possibility of deportation is only a collateral consequence of a plea because that sanction is controlled by an agency which operates beyond the direct authority of the trial justice." Id. at 474 (internal citations omitted). The Court went on to hold that "the direct consequences of a plea of nolo contendere . . . were the only consequences that need[ed] to be addressed with the defendant[.]" Id.

Here, the facts closely mirror those of Ducally. Ferreira pled nolo contendere in 1997, a time when deportation was considered a collateral consequence of a plea and did not need to be addressed by counsel for such representation to be considered effective. Ducally, 809 A.2d at 474. As Padilla does not apply retroactively, this Court may not view Mr. Cannon's actions in the light of today's jurisprudence. At the time, there could be no claim of ineffective assistance of counsel when an attorney failed to address collateral consequences such as deportation. See Perkins v. State, 78 A.3d 764, 767 (R.I. 2013) (requiring a showing that "counsel's advice was not within the range of competence demanded of attorneys") (internal citations omitted). As such, Ferreira's petition for postconviction relief fails.

ii

Applying Padilla

Padilla removed the threshold question of whether "advice about deportation [was] 'categorically removed' from the scope of the Sixth Amendment right to counsel because it involved only a 'collateral consequence' of a conviction rather than a component of a criminal sentence[.]" Chaidez, 133 S. Ct. at 1108. Even if Padilla could be applied retroactively to his plea, Ferreira would still have the burden of proving that the counsel he received was constitutionally inadequate. Larngar, 918 A.2d at 855. In appraising claims of ineffective assistance of counsel, Rhode Island follows the standard established by the United States Supreme Court in Strickland. See Hazard v. State, 968 A.2d 886, 891-92 (R.I. 2009); Bustamante v. Wall, 866 A.2d 516, 522 (R.I. 2005). Under the two-pronged test of Strickland, a petitioner must show: (1) "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed defendant by the Sixth Amendment" and, (2) "that counsel's errors were so serious as to deprive [the] defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687.

Regardless of whether Cannon's assistance was deficient in some way, Ferreira would be unable to satisfy this test. See Barbosa v. State, 44 A.3d 142, 146 (R.I. 2012) (quoting Strickland, 466 U.S. at 697) (holding that '"[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed'"). When the Court evaluates a claim under Strickland "'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 and would have insisted on going to trial' and, importantly, that the outcome of the trial would have

been different."[2] Neufville, 13 A.3d at 610-11 (quoting Figueroa, 639 A.2d at 500) (emphasis added). This burden of showing prejudice is "almost insurmountable when the sentence received after a plea is shorter than the sentence that an applicant could have received had he proceeded to trial." Perkins, 78 A.3d at 769 (emphasis added). Possession of a Class II controlled substance, such as cocaine, G.L. 1956 § 21-28-2.08, carries with it a penalty of up to three years imprisonment. Sec. 21-28-4.01.

Here, as in Perkins, "there is nothing on which this Court could base a conclusion that a different outcome would have resulted from a trial." 78 A.3d at 769. If Ferreira proceeded to trial, the evidence against him would have included statements from three police officers as well as his own girlfriend affirming his possession of cocaine. See Pilla v. United States, 668 F.3d 368, 373 (6th Cir. 2012) (finding no prejudice where petitioner was "faced [with] overwhelming evidence of her guilt[,] . . . "had no rational defense, [and] would have been convicted"). Indeed, Ferreira conceded at the hearing that the police caught him with his hand in the cookie jar, so to speak, stuffing a bag of cocaine down his pants. (Tr. 27.) Furthermore, Petitioner has put forth no evidence tending to rebut the State's case or to suggest that his Fourth Amendment rights were violated during the scope of the police search. See Perkins, 78 A.3d at 769 (finding no prejudice where petitioner "failed to provide any reason why the outcome of a trial would

[2] Ferreira contends that in light of significant ties to the United States—i.e., his familial ties in Rhode Island, including a son who was nine years old at the time of the plea, the length of time spent in the United States, and lack of connection to his country of origin, the Azores—he "would have proceeded to trial" rather than plead if he had known he faced deportation in the wake of his controlled substances conviction. (Verified Application for Post-Conviction Relief ¶ 5.) This is of no moment. Ferreira must show that he not only would have proceeded to trial, but that the outcome at trial would have been different. See Figueroa, 639 A.2d at 500 ("Although [counsel] may have fallen below acceptable standards of attorney performance, [petitioner] did not satisfactorily prove that the outcome of this action would have been different if he had proceeded to trial").

have been more favorable to him than was his disposition[]"); United States v. Austin, 948 F.2d 783, 787 (1st Cir. 1991) (holding same where petitioner "conceded to the district court that the government's version of the case was substantially true and did not assert a claim of legal innocence or suggest the existence of any meritorious defenses[]"); Bahtiraj v. State, 840 N.W.2d 605, 612 (N.D. 2013) (holding same where petitioner "did not provide any information that would suggest the result would have been different . . . [and failed to] identif[y] any weaknesses in the State's case[]").

Additionally, while the Rhode Island Superior Court Sentencing Benchmarks provide for "[l]ess than jail" for the possession of "[l]ess than [one] ounce" of cocaine, it is foreseeable that Ferreira could have been incarcerated had the case proceeded to trial. Superior Court Sentencing Benchmarks at ¶ 29. As "the benchmarks are not mandatory . . . [and are] only a guide to proportionality[,]" a judge at sentencing is "bound only by the statutory limits[.]" State v. Snell, 11 A.3d 97, 102 (R.I. 2011) (internal citations omitted). Accordingly, a sentence may depart from the benchmarks "'when substantial and compelling circumstances exist' . . . [such as] a defendant's prior criminal record[.]" State v. Coleman, 984 A.2d 650, 655 (R.I. 2009) (quoting Superior Court Sentencing Benchmarks, Using the Benchmarks at 1).

The Court notes that, prior to entering his plea in the instant matter, Ferreira had a criminal record. On May 3, 1982, Ferreira pled nolo contendere to the breaking and entering of a dwelling and was placed on probation for eight years. (P1/1981-1683A.) At the same time, he also pled nolo contendere to possession of a stolen motor vehicle and was placed on probation for two years. (P1/1981-1683A.) Additionally, Ferreira pled nolo contendere on July 3, 1984 to driving with a revoked license and possession of marijuana; for the possession charge, he was placed on probation for one year and he received a fine for driving with a revoked license.

(P2/1984-1951A.) On December 16, 1988, Ferreira pled nolo contendere to two counts of simple assault and battery, receiving a fine. (11-1988-1503.) After pleading nolo contendere to disorderly conduct as well as simple assault and battery on March 2, 1990, he received a fine for both charges and was placed on one year probation for the assault and battery. (11-1990-0230.)

In light of these past convictions, an upward departure from the sentencing benchmarks and a jail sentence was certainly not inconceivable and, in fact, was a real risk. Instead, by heeding Mr. Cannon's advice in pleading nolo contendere, Ferreira received no jail time despite facing a sentence of up to three years. See Neufville, 13 A.3d at 614 (finding no prejudice under Strickland analysis where "when counsel has secured a shorter sentence than what the defendant could have received had he gone to trial"); see also Pilla, 668 F.3d at 373 (finding that "had [petitioner] been convicted after trial, she would have been just as removable as she was after her guilty plea[]"). As such, assuming arguendo that Padilla applied to the instant petition, this Court would still find that Ferreira's ineffective assistance of counsel claim fails. Conciliation propitiation

IV

Conclusion

Ferreira has failed to prove by a preponderance of the evidence that he is entitled to postconviction relief. After reviewing the record, this Court finds that Petitioner's plea of nolo contendere was not entered in violation of his Sixth Amendment right to effective assistance of counsel. This Court denies his motion for postconviction relief. Accordingly, Counsel shall submit an appropriate Order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Victor Ferreira v. State of Rhode Island
CASE NO:	PM 2010-0023
COURT:	Providence County Superior Court
DATE DECISION FILED:	July 31, 2015
JUSTICE/MAGISTRATE:	McGuirl, J.
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