STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: January 13, 2015)

MICHAEL P. CHARETTE	:	
	:	
V.	:	**C.A. No. PM 2010-2195**
	:	**(P1-1992-1980A)**
STATE OF RHODE ISLAND	:	

SUPPLEMENTAL DECISION

CARNES, J. This matter is before the Court for further decision on additional grounds advanced in support of the application for postconviction relief brought by Michael P. Charette (Petitioner). Jurisdiction is pursuant to G.L. 1956 §§ 10-9.1-1 et seq.,

I

Facts and Travel

The factual underpinnings of the criminal case are set forth in the Rhode Island Supreme Court's opinion affirming Petitioner's convictions, State v. Charette, 688 A.2d 1286 (R.I. 1997). Thereafter, Petitioner filed an application for postconviction relief. After amending his application with the assistance of counsel, this Court issued an initial Decision on April 9, 2012. Charette v. State of R.I., No. PM 2010-2195, 2012 WL 1245547 (Super. Ct. Apr. 9, 2010) (hereinafter, initial Decision). In said initial Decision, relevant facts were further discussed by this Court in the context of Petitioner's claims for postconviction relief. To the extent necessary, some of those facts will be referenced herein.

After the Court's initial Decision, both an Order and a Judgment in favor of the State of Rhode Island entered on April 19, 2012. Petitioner thereafter filed a timely Notice of Appeal on April 30, 2012. Prior to docketing the Notice of Appeal in the Supreme Court, the Petitioner

moved for a stay on September 14, 2012 in order to allow him to assert additional grounds not already ruled upon by the Court. The Court granted the stay and, thereafter, Petitioner filed a new application for postconviction relief under the same file number on December 9, 2013. Petitioner and the State of Rhode Island each filed additional briefs and memoranda. Petitioner, his counsel, and counsel for the State of Rhode Island have waived a hearing, submitted brief oral arguments, and submitted the case to this Court on the additional grounds raised.

Additional Grounds Asserted At Present Time

Petitioner alleges that the concurrent sentences he received in Counts 1 and 7 of his indictment, alleging robbery and assault with intent to commit robbery, respectively, were unlawful. (Pet'r's Supplemental Post-Conviction Mem. 2.) Petitioner submits that his trial counsel should be found to be ineffective for failing to raise the double jeopardy issue at the appropriate time before the trial court. Id. at 2, 3. Petitioner further submits that "trial counsel's failure to raise this issue at trial requires no proof of malfeasance other than omission itself." Id. at 2. Petitioner asserts that the constitutional prohibition against double jeopardy prohibits multiple sentences to be imposed for conduct constituting the same criminal act.[1]

In order to fully understand Petitioner's argument, it is necessary to look back upon the sentencing history, especially as applied to Count 1 (robbery) and Count 7 (assault with intent to commit robbery). Petitioner was originally sentenced by the trial justice on August 30, 1993. He received, in relevant part, fifty years to serve on Count 1, with twenty years to serve on Count 7 consecutive to Count 1 (emphasis added).[2] On May 9, 1997, another justice of the Superior

[1] Petitioner cites State v. Ahmadjian, 438 A.2d 186 (R.I. 1981) for this proposition. At oral argument, Petitioner's counsel corrected the citation to "438 A.2d at 1086." For the purposes of this Court's Supplemental Decision, the Court accepts the premise as true.

[2] Petitioner was sentenced to consecutive terms on each of the four counts he was convicted of. Those other counts are not germane to Petitioner's argument here.

Court, pursuant to a motion brought under Rule 35 of the Superior Court Rules of Criminal Procedure, further reduced the sentence in Count 7 by ordering that its twenty years run concurrent with the fifty years in Count 1 and not consecutive thereto (emphasis added). Petitioner next notes that, as of this date, he has served "the entirety of his sentence on Count 7 assault with intent to rob, [and] has thus been punished for those facts constituting his criminal conduct in both Count 7 and Count 1. By his continuing to serve his sentence for robbery, he is in effect and actuality, being punished again for those facts for which he has already been punished by the completion of his sentence in Count 7." (Pet'r's Supplemental Post-Conviction Mem. 3.) Petitioner suggests that the Court should "vacate and dismiss his conviction on Count 1 robbery." Id. Petitioner claims he is "prejudiced" by said conviction in Count 7 because it "carries a societal stigma, can result in an increased sentence for a future offense, and may have a prejudicial effect on his parole eligibility as well as his prison classification." Id.

As to Petitioner's new ineffective assistance claim, the State maintains at oral argument and in its written brief that it is "the same argument only now phrased differently." (State's Obj. to Pet'r's Supplemental Post Conviction Relief Arg. 2.)

II

Standard of Review

In addition to what this Court set forth in its initial Decision of April 9, 2012, also incorporated by reference here, the benchmark for a claim of ineffective assistance of counsel is Strickland v. Washington, 466 U.S. 668 (1984), which has been adopted by our state Supreme Court. Brown v. Moran, 534 A.2d 180, 182 (R.I. 1987); LaChappelle v. State, 686 A.2d 924, 926 (R.I. 1996). Whether an attorney has failed to provide effective assistance is a factual question which petitioner bears the heavy "burden" of proving. Crombe v. State, 607 A.2d 877,

877 (R.I. 1992) (citing Pope v. State, 440 A.2d 719, 723 (R.I. 1982)); Ouimette v. State, 785 A.2d 1132, 1139 (R.I. 2001). Strickland presents "a high bar to surmount." Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

When reviewing a claim of ineffective assistance of counsel, the inquiry is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Heath v. Vose, 747 A.2d 475, 478 (R.I. 2000). A Strickland claim presents a two-part analysis. First, the petitioner must demonstrate that counsel's performance was deficient. That test requires a showing that counsel made errors that were so serious that the attorney was "not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687; Powers v. State, 734 A.2d 508, 521 (R.I. 1999). The Sixth Amendment standard for effective assistance of counsel, however, is "very forgiving," United States v. Theodore, 468 F.3d 52, 57 (1st Cir. 2006) (quoting Delgado v. Lewis, 223 F.3d 976, 981 (9th Cir. 2000)) and "a strong (albeit rebuttable) presumption exists that counsel's performance was competent." Gonder v. State, 935 A.2d 82, 86 (R.I. 2007).[3]

III

Analysis

1

Petitioner's Prior Claims

Petitioner's three claims, as described in this Court's initial Decision of April 9, 2012 appear as follows:

> "Specifically, petitioner alleges (1) that said ineffective assistance of trial

[3] See Chum v. State of Rhode Island, No. PM 13-1919, 2014 WL 6855341 (Trial Order) (R.I. Super. Dec. 1, 2014).

> counsel, in failing to move to dismiss that charge of assault with intent to rob at the close of the State's case, caused him to be unlawfully convicted of assault with intent to rob (Count VII) because said count was a lesser included offense of the robbery count thus violating his right to be free from double jeopardy. Petitioner's Memo p. 2. Petitioner also alleges (2) that his trial counsel's failure to move for dismissal of the robbery and burglary counts (Counts I and III) at the close of the State's case caused him to be unlawfully convicted of each of those counts as well. Id. Petitioner argues that he should not have been convicted of the robbery because there was no evidence at trial that he took the victim's property from her person or her presence. Id. at p 4. Petitioner further argues (3) that he should not have been convicted of the burglary count because the burglary count was "derivative of" the robbery count and there was no evidence that he broke into and entered the victim's home with the intent to commit a felony. Id. at p 5.
>
> "Charette alleges that the convictions and sentences were imposed in violation of his right to effective assistance of counsel guaranteed by the Sixth Amendment of the United States Constitution and Article 1, section 10 of the Rhode Island Constitution." Initial Decision 3.

At first blush, it appears Petitioner's present claim that "his trial counsel should have been found to be ineffective for failing to raise the double jeopardy issue at the appropriate time before the trial court," (Pet'r's Supplemental Post-Conviction Mem. 3) is substantially similar to his initial claim "(1) that said ineffective assistance of trial counsel, in failing to move to dismiss that charge of assault with intent to rob at the close of the State's case, caused him to be unlawfully convicted of assault with intent to rob (Count VII) because said count was a lesser included offense of the robbery count thus violating his right to be free from double jeopardy." Petitioner reminds this Court of its finding that the "offense of assault with intent to commit robbery and the offense of robbery merged." Initial Decision 12.

Petitioner cites Jackson v. Leonardo, 162 F.3d 81 (2nd Cir. 1998). The Second Circuit Court of Appeals notes that "appellate counsel's failure to raise a well-established, straight forward and obvious double jeopardy constitutes ineffective performance." Id. at 85. This appears to be directed at this Court's discussion at pages 13 through 15 of the initial Decision where this Court declined to characterize trial counsel's performance as deficient in light of the

case law and the fact that Petitioner did not seek an evidentiary hearing. Petitioner now appears to argue that in light of the above-described holding in Jackson, no such evidentiary hearing is needed.

2

Petitioner's Present Claim in Light of his Citation to Jackson v. Leonardo

The Jackson case involved efforts of an appellate counsel.[4] That is not the case here. Petitioner argues that his trial counsel should have moved to dismiss the assault with intent to commit robbery charge in Count 7. This Court is not persuaded. Petitioner is correct that this Court previously found that the offense of assault with intent to commit robbery merged with the offense of robbery. However, Petitioner avoids the precise context of that particular finding. This Court actually stated in its initial Decision:

> "After comparing the elements of the two charges under consideration, this Court is not sufficiently satisfied that each offense 'requires proof of a fact which the other does not.' Blockburger, 284 U.S. at 304, 52 S.Ct. 180. Significantly, assault with intent to commit robbery specifically, and in so many words, equates that offense with robbery once factual testimony evidencing the accomplished robbery becomes manifest on the record. The offense of assault with intent to rob is subsumed into the offense of robbery." (Emphasis added here.) See initial Decision 12, located directly before the Court's line finding a merger.

Addressing Petitioner's present argument, this Court finds that trial counsel was not faced with a "well-established, straight forward and obvious double jeopardy" scenario despite the holding in Jackson. The reason this Court was "not sufficiently satisfied" that each offense (the assault with intent to commit robbery and the actual robbery) contained an element that the other did not was due to the nuances associated with the crime of assault. This Court previously noted that an

[4] This Court is aware that double jeopardy was extensively addressed in the appellate briefings. See State of Rhode Island v. Michael Charette, No. 94-165, 1996 WL 34362220 (R.I. May 28, 1996) (Appellate Br. of State of Rhode Island).

assault is an "unlawful attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness." Initial Decision 10. The Rhode Island Supreme Court discussed the facts of Petitioner's original case early in its Opinion. The Supreme Court stated:

> "Living alone in her home, eighty-eight-year-old Aldea DesPlaines (DesPlaines) had been watching television (the Lawrence Welk Show) during the early evening hours of Saturday, December 15, 1990. Expecting company, she heard a rap at her front door and opened it. To her dismay, she was immediately accosted by a hooded man who said, "Let's go upstairs." Terrified, DesPlaines tried desperately to push the intruder out, but he would not go gently into the night. Instead, he knocked her to the floor, dashed upstairs, snatched her pocketbook, and slunk away." State v. Charette, 688 A.2d at 1288.

As previously discussed, the offense of "assault" is defined as an "unlawful attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness. State v. Baker, 20 R.I. 275, 277, 38 A. 653, 654 (1897)." Initial Decision 10. Notwithstanding the elements of malice or wantonness, this Court notes at this juncture that the "assault" could have been a simple assault or a battery under G.L. 1956 § 11-5-3. Battery is defined as "an act that was intended to cause, and does cause, an offensive contact with or unconsented touching of or trauma upon the body of another, thereby generally resulting in the consummation of the assault." (emphasis added); see State v. Cardona, 969 A.2d 667, 675 (R.I. 2009). "As this definition reflects, these two crimes, although independent and distinct from each other, are closely related and often arise from a single incident. See Proffitt v. Ricci, 463 A.2d 514, 517 (R.I. 1983) (emphasizing that "assault and battery are separate and different acts, each with independent significance," that often arise out of the same incident)." Id. at 675-76. This Court reiterates that once factual testimony evidencing the accomplished robbery becomes manifest on the record, the offense of assault with intent to rob is subsumed into the offense of robbery. Whether there was an unlawful attempt or offer, with force or violence, to do a corporal hurt to another (Ms. DesPlaines), whether from malice or wantonness, or whether there was a battery

involved in the element of the force needed to accomplish the robbery was, under the facts of the case, a matter that needed to be resolved by the jury. At the time the charges were submitted to the jury, there was both the substantive offense of robbery and the inchoate offense of attempt (assault with attempt to commit robbery). By moving to dismiss the attempt charge, trial counsel would forego the possibility that the jury would convict on the assault with attempt to commit robbery (punishable by twenty years in prison) and simultaneously return a not guilty verdict on the substantive offense of robbery (punishable by life in prison).[5] Given the standard for ineffective assistance of counsel set forth in Part II above, this Court does not fault trial counsel for keeping the "attempt" possibility alive before the jury and declines to characterize trial counsel's performance as defective.

3

Further Proceedings in Superior Court – Sentence Reduction

As recounted in its initial Decision, Petitioner's original sentence, imposed on August 30, 1993, was reduced and modified by a different justice on May 9, 1997. After receiving a total of 125 years on Counts 1, 3, 4, and 7, Petitioner's fifty-year sentence on Count 1 (charging robbery)

[5] Even if trial counsel successfully moved to dismiss the assault with attempt to commit robbery, the trial justice could still have charged the attempt crime. See G.L. 1956 § 12-17-14:

> "**Conviction of lesser-included offense or attempt. –** Whenever any person is tried upon an indictment, information, or complaint and the court or jury, as the case may be, shall not be satisfied that he or she is guilty of the whole offense, but shall be satisfied that he or she is guilty of so much of the offense as shall substantially amount to an offense of a lower nature, or that the defendant did not complete the offense charged, but that he or she was guilty only of an attempt to commit the same offense, the court or jury may find him or her guilty of the lower offense or guilty of an attempt to commit the offense, as the case may be, and the court shall proceed to sentence the person for the offense of which he or she shall be so found guilty, notwithstanding that the court had not otherwise jurisdiction of the offense."

was upheld by the motion justice. However, the fifty-year sentence on Count 3 (charging burglary) was reduced to twenty years and ordered to run concurrently instead of consecutively as originally imposed. The sentences of five years in Count 4 (charging assault on a person over sixty) and Count 7 (charging assault with attempt to commit robbery) were also ordered to run concurrently instead of consecutively as originally imposed. (Emphasis added.); see initial Decision 2. Petitioner argues that he has already finished serving his sentence on Count 7 and reminds this Court that it previously found a merger with Count 1, a robbery charge with a fifty-year sentence. Petitioner urges this Court to dismiss outright the robbery charge and vacate the fifty-year sentence as an appropriate remedy for the double jeopardy violation. At oral argument before this Court, Petitioner cited United States v. Mastrangelo, 733 F.2d 793 (11th Cir. 1984) in general support of his argument. While he does not cite a specific page or section of the opinion, it appears to this Court that he relies on a portion that reads, "While Mastrangelo's failure to object to the indictment bars him from asserting that he cannot be indicted or convicted for two crimes, he may challenge the imposition of multiple sentences for the alleged commission of one crime." Id. at 800. The case involved false statements in connection with firearms transactions under 18 U.S.C.A. § 922(a)(6).

The matter before this Court does not involve that charge. The fallacy in Petitioner's argument lies in the fact that he has not served his fifty-year sentence on the completed robbery charge at this time. Certainly, the completed crime is more culpable than the attempt. The statutory potential penalties recognize this as well. Robbery is punishable by imprisonment for up to life while assault with intent to commit robbery is only punishable by a maximum term of twenty years. Furthermore, Petitioner's sentence on the assault with intent to commit robbery has been changed to run concurrently with the robbery sentence and not consecutive to it.

Therefore, the Petitioner is not prejudiced given the reduction and modification of his sentence. Petitioner argues that the "additional count carries a societal stigma, can result in an increased sentence for a future offense, and may have a prejudicial effect on his parole eligibility as well as his prison classification." See Pet'r's Supplemental Post-Conviction Mem. 3. However, a check of Petitioner's court records reveal that he has been convicted of a number of felony offenses after his release on parole. That will certainly have more of an effect on Petitioner's concerns stated here than the additional conviction. This Court will not vacate the sentence on Count 1, charging robbery, and will dismiss the charge.

4

Additional Cases Cited by Petitioner

At oral argument on Petitioner's present claim on November 17, 2014, he cited additional cases in general support of his claim without giving specifics. Petitioner cites United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426 (1980) (allowing Government the right, under specified conditions, to appeal a sentence imposed upon a convicted, dangerous special offender did not violate the guarantee against multiple punishment or the guarantee against multiple trials inherent in the Double Jeopardy Clause). Petitioner also cited United States v. Lundien, 769 F.2d 981 (4th Cir. 1985) and United States v. Silvers, 90 F.3d 95 (4th Cir. 1996). Both latter cases appear to stand for the proposition that a later restructuring of sentences of a particular defendant do not violate the double jeopardy clause. This Court generally accepts the propositions set forth by the cases cited. This claim involves an assertion of ineffective assistance of counsel. The claim of double jeopardy has been waived under a previous ruling of this Court. The Court is not persuaded to grant any further relief to Petitioner based upon these cases.

IV

Conclusion

For the reasons stated above, the Court declines to characterize Petitioner's trial counsel's performance as deficient. The additional grounds as stated in the present claim are denied.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE:	**Michael P. Charette v. State of Rhode Island**
CASE NO:	**PM 2010-2195 (P1-1992-1980A)**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**January 13, 2015**
JUSTICE/MAGISTRATE:	**Carnes, J.**
ATTORNEYS:	
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For Defendant:	**Kurt F. Mutter, Esq.**