STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: March 15, 2018)

MARK ROBERTS

v. **C.A. No. PM-2012-0593**

STATE OF RHODE ISLAND

DECISION

PROCACCINI, J. Before this Court is Petitioner Mark Roberts' (hereinafter Petitioner or Roberts) application for postconviction relief (hereinafter, Application). Petitioner asserts two theories in support of his Application: (1) that his counsel rendered constitutionally ineffective assistance of counsel and (2) that his *nolo contendere* plea was in violation of his constitutional rights. This matter is before this Court pursuant to G.L. 1956 § 10-9.1-1.

I

Facts and Travel

On March 14, 2005, the Providence Police Department arrested Petitioner for an alleged sexual assault. Shortly after his arrest, Petitioner went to Eleanor Slater Hospital (hereinafter, ESH). While at ESH, two separate doctors evaluated Petitioner in order to determine if he was competent to stand trial.[1] The first doctor to evaluate Petitioner concluded that he was incompetent to stand trial. The second doctor, who evaluated Petitioner approximately seven weeks later, concluded that he was competent to stand trial. On August 12, 2005, a grand jury indicted Petitioner on the charge of first degree sexual assault. A different trial justice held a bail hearing on January 5, 2006. Petitioner later pled *nolo contendere* to the charge on January 9,

[1] The first evaluation took place on March 25, 2005. The second evaluation took place on May 13, 2005.

2007. Petitioner filed this Application on December 12, 2011. This Court held a hearing for Petitioner's Application on February 12, 2018.

II

Standard of Review

"[T]he remedy of postconviction relief is available to any person who has been convicted of a crime and who thereafter alleges either that the conviction violated the applicant's constitutional rights or that the existence of newly discovered material facts requires vacation of the conviction in the interest of justice." *DeCiantis v. State*, 24 A.3d 557, 569 (R.I. 2011) (citing *Page v. State*, 995 A.2d 934, 942 (R.I. 2010)). The action is civil in nature, with all rules and statutes applicable in civil proceedings governing. *See* § 10-9.1.-7; *see also Ouimette v. Moran*, 541 A.2d 855, 856 (R.I. 1988) ("In this jurisdiction an application for postconviction relief is civil in nature."). The applicant for postconviction relief "bears '[t]he burden of proving, by a preponderance of the evidence, that such relief is warranted' in his or her case." *Brown v. State*, 32 A.3d 901, 907 (R.I. 2011) (quoting *State v. Laurence*, 18 A.3d 512, 521 (R.I. 2011) (alteration in original)).

III

Analysis

As mentioned above, Roberts filed his Application asserting two theories: (1) ineffective assistance of counsel and (2) an unconstitutional plea. For the reasons stated herein, this Court rejects Petitioner's Application and upholds his conviction.

A

Ineffective Assistance of Counsel

Petitioner contends that he was deprived of his right to effective assistance of counsel because his counsel did not pursue an insanity defense. Specifically, Petitioner argues that the information contained in his competency reports from ESH should have motivated his counsel to pursue an insanity defense.

The benchmark decision when faced with a claim of ineffective assistance of counsel is the United States Supreme Court case *Strickland v. Washington*, 466 U.S. 668 (1984), which has been adopted by our Supreme Court. *See LaChappelle v. State*, 686 A.2d 924, 926 (R.I. 1996) ("This Court has adopted the standard announced by the United States Supreme Court in *Strickland v. Washington*, when generally reviewing claims of ineffective assistance of counsel."); *Brown v. Moran*, 534 A.2d 180, 182 (R.I. 1987) ("The appropriate standard for reviewing a claim of ineffective assistance of counsel is set forth in *Strickland v. Washington* . . . ."). The *Strickland* test is two-tiered, and "provides certain criteria that a [petitioner] must establish in order to show ineffective assistance of counsel." *Brennan v. Vose*, 764 A.2d 168, 171 (R.I. 2001). Pursuant to the first prong of the *Strickland* test, a petitioner must "demonstrate that counsel's performance was deficient, to the point that the errors were so serious that trial counsel did not function at the level guaranteed by the Sixth Amendment." *Id.* (citing *Strickland*, 466 U.S. at 687). According to our Supreme Court, "[a] trial attorney's representation of his or her client will be deemed to have been ineffective under that criterion only when the court determines that it fell 'below an objective standard of reasonableness.'" *Guerrero v. State*, 47 A.3d 289, 300 (R.I. 2012) (quoting *Brennan*, 764 A.2d at 171).

"If (but only if) it is determined that there was deficient performance, the court proceeds

to the second prong of the *Strickland* test . . . ." *Guerrero*, 47 A.3d at 300-01. Pursuant to the second prong, a petitioner "must show that such deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant's right to a fair trial." *Brennan*, 764 A.2d at 171.

1

First Prong

As previously stated, the first prong of the *Strickland* test requires a petitioner to "demonstrate that counsel's performance was deficient, to the point that the errors were so serious that trial counsel did not function at the level guaranteed by the Sixth Amendment." *Id.* at 171 (citing *Strickland*, 466 U.S. at 687). In essence, this prong of the *Strickland* test evaluates whether counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The Sixth Amendment standard, however, is "very forgiving," *United States v. Theodore*, 468 F.3d 52, 57 (1st Cir. 2006), and the presumption is that counsel performed competently. *See Gonder v. State*, 935 A.2d 82, 86 (R.I. 2007) ("With respect to the first prong of the *Strickland* test, in determining whether counsels [sic] performance was deficient, a strong (albeit rebuttable) presumption exists that counsel's performance was competent.").

When dealing with a claim of ineffective assistance of counsel, a reviewing court should aim "to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. As a result, tactics used by counsel that "appear[] unwise only in hindsight, do[] not constitute constitutionally-deficient representation under the reasonably competent assistance standard." *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978). Moreover, "tactical decisions by trial counsel, even if ill-advised, do not by themselves constitute ineffective assistance of counsel." *Rivera v. State*, 58 A.3d 171, 180-81 (R.I. 2013). Furthermore, it is not appropriate for

this Court to "meticulously scrutinize an attorney's reasoned judgment or strategic maneuver in the context of a claim of ineffective assistance of counsel." *Brennan,* 764 A.2d at 173.

This Court is not persuaded that the failure of Petitioner's counsel to present an insanity defense amounts to deficient performance. In *State v. Johnson,* our Supreme Court adopted the American Law Institute's Model Penal Code test for legal insanity. 121 R.I. 254, 267, 399 A.2d 469, 476 (1979). According to our Supreme Court:

> "A person is not responsible for criminal conduct if at the time of such conduct, as a result of mental disease or defect, his capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law is so substantially impaired that he cannot justly be held responsible." *Id.*

At the postconviction hearing, Petitioner's counsel testified, convincingly, about the dilemmas she felt she faced in raising an insanity defense. Petitioner's counsel testified that she elected to forgo an insanity defense because she did not feel she could successfully prove the elements, given the purposeful acts that Petitioner was alleged to have committed.[2] In other words, Petitioner's counsel made a tactical decision not to present an insanity defense. As stated earlier, this Court will not "meticulously scrutinize an attorney's reasoned judgment or strategic maneuver in the context of a claim of ineffective assistance of counsel," *Brennan,* 764 A.2d at 173, and "tactical decisions by trial counsel, even if ill-advised, do not by themselves constitute ineffective assistance of counsel." *Rivera,* 58 A.3d at 180-81. Therefore, this Court finds that Petitioner's claim of ineffective assistance of counsel regarding the insanity defense is without merit.

[2] The specific actions Petitioner's counsel referenced were (1) locking himself in the bathroom with the alleged victim and (2) telling two other individuals in the apartment to go and get $100.00 or else he would hurt the alleged victim. Petitioner's counsel felt that the deliberateness of these acts would cut against proving that, at the time of the crime, Petitioner could not appreciate the wrongfulness of his conduct or conform his conduct to the requirements of law.

Since this Court determined that Petitioner failed to show that his counsel's performance was deficient, as is required under the first prong of the *Strickland* test, it need not address the second prong.[3]

[3] For the record, this Court is aware that "in the case of someone who has entered a plea of *nolo contendere*, [t]he sole focus of an application for post-conviction relief . . . is the nature of counsel's advice concerning the plea and the voluntariness of the plea." *Guerrero*, 47 A.3d at 300 (alteration in original) (internal quotation marks omitted). In these cases the petitioner bears the burden of demonstrating that "the advice was not within the range of competence demanded of attorneys in criminal cases." *Tollett v. Henderson*, 411 U.S. 258, 266 (1973) (internal quotation marks omitted); *see also State v. Dufresne*, 436 A.2d 720, 723 (R.I. 1981) ("A defendant who pleads guilty on the advice of counsel must demonstrate at his postconviction hearing that that advice was not within the range of competence demanded of attorneys in criminal cases."). Although Petitioner focused his ineffective assistance of counsel claim on his counsel's failure to present an insanity defense and not the advice given by his counsel concerning the *nolo contendere* plea, this Court, for the record, will briefly address that issue.

At the postconviction hearing, Petitioner's counsel testified, convincingly, about her lawyer/client relationship with Petitioner and the work she did for his case. She testified that she looked into the potential alibi witnesses who Petitioner informed her of. She further testified that she and Petitioner had multiple phone calls and visits, prior to the plea proceeding, in which they discussed the State's discovery and the strengths and weaknesses of Petitioner's case based on that discovery. Moreover, she testified that after the bail hearing, which was held on January 5, 2006, she felt that the alleged victim would be a compelling witness at trial.

After seeing how strong the State's case was, and knowing that Petitioner was facing a potential life sentence—if found guilty at trial—Petitioner's counsel negotiated with the State for a potential plea. Based on these negotiations, the State offered Petitioner a twenty-five year sentence, with twelve years to serve and thirteen years suspended. Petitioner's counsel presented Petitioner with this offer and relayed the message from the State that this would be its final offer. Although she informed Petitioner that the ultimate decision to plead was his, Petitioner's counsel advised that he take the offer.

Based on the evidence that the State had presented at the bail hearing, and was prepared to present at trial, and knowing that her client faced a potential life sentence if convicted, Petitioner's counsel's advice to plead *nolo contendere* was competent. *See Gonder*, 935 A.2d at 88 (finding that, after four days of trial, in which the State put on a strong case against the defendant, an attorney's advice to plead guilty, rather than risk being sentenced to life without parole, was "well within the acceptable range of competence").

B

Constitutionality of Plea

Petitioner contends that his conviction should be overturned because his plea was not made knowingly, intelligently, or voluntarily. Specifically, Petitioner argues that "the failure on the part of the judge to ask [him] about any drugs and the failure of all parties in not making the judge aware of [his] psychiatric history causes the plea to be highly suspect and not voluntary at that particular time."

"Before accepting a defendant's plea, a trial justice is obliged to conduct a thorough review of the plea agreement with the defendant as is required by Rule 11 of the Superior Court Rules of Criminal Procedure." *Njie v. State*, 156 A.3d 429, 434 (R.I. 2017). Super. R. Crim. P. 11 states, in pertinent part, that:

> "A defendant may plead not guilty, guilty or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." Super. R. Crim. P. 11.

According to our Supreme Court, "a hearing justice should engage in as extensive an interchange as necessary so that the record as a whole and the circumstances in their totality . . . disclose to a court reviewing a . . . nolo plea that the defendant understood the nature of the charge and the consequences of the plea." *Njie*, 156 A.3d at 434 (quoting *State v. Frazar*, 822 A.2d 931, 935 (R.I. 2003)) (internal quotation marks omitted).

Here, the trial justice conducted a colloquy with Petitioner before accepting Petitioner's *nolo contendere* plea. The colloquy went as follows:

> "THE COURT: Matter before the Court is P1-2005-2450A, charge is first degree sexual assault. I have a request for change of plea to

nolo contendere.

"[DEFENSE COUNSEL]: That's correct.

"THE COURT: With that plea, Mr. Roberts, you would be giving up all the rights contained in this plea form. Do you understand that?

"THE DEFENDANT: Yes.

"THE COURT: Did you go through the form with your attorney?

"THE DEFENDANT: Yes.

"THE COURT: I'm going to give you a summary of those rights. If you have any questions, let me know, I'll answer them. You have a right to trial. If convicted you have a right to appeal to the Supreme Court. You have a right to have the State meet its burden of proof, a right to the presumption of innocence and privilege against self-incrimination. At trial you would have the right to challenge the State's evidence. You have a right to present evidence, you have a right to appeal this Court's sentence, and you have a right to a presentence report. Those are the same rights in the form that you reviewed with your attorney. Do you have any questions about them, the rights you're giving up?

"THE DEFENDANT: No.

"THE COURT: What are the facts in support of this charge?

"[PROSECUTOR]: Your Honor, reading from the single count in the indictment, if this matter proceeded to trial, the State was prepared to show beyond a reasonable doubt that this defendant on or about March 14, 2005 in the City of Providence did engage in sexual penetration, to wit, vaginal intercourse, with [alleged victim] by force or coercion.

"THE COURT: Do you accept as true that statement?

"THE DEFENDANT: Yes.

"THE COURT: The sentence to be imposed here is a 25 year sentence with 12 years to serve, the balance suspended, probation. You will get credit for time served. If I accept your plea, impose that sentence, you can't change your mind later on about this. Do you understand that?

> "THE DEFENDANT: Yes.
>
> "THE COURT: That means you have 11 years to serve retroactive to March 14, 2005. Throughout the entire 25-year period you must abide by the terms of probation. If the State were to allege during that period that you violated those terms, after hearing a judge were satisfied that you did, the judge could take back the suspended portion, you could be ordered to serve the additional 13 years in prison. You understand that?
>
> "THE DEFENDANT: Yes.
>
> "THE COURT: Do you have any questions?
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> "THE DEFENDANT: No.
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> "THE COURT: I would also advise you if you're not a United States citizen the plea could result in your deportation, your exclusion of admission to this country and/or the denial of naturalization under the laws of this country. Those matters are outside the control of this Court.
>
> . . . .
>
> "THE COURT: I find he does have the capacity to understand the nature and the consequences of his plea including but not limited to the waiver of those rights reviewed. I find there is a factual basis for it. I accept it. Mr. Roberts, do you wish to say anything before you're sentenced?
>
> "THE DEFENDANT: No." Tr. 1-4, Jan. 9, 2007.

It is clear from the transcript of the plea colloquy that the trial justice did not ask Petitioner if he was under the influence of alcohol, drugs, or medication at the time of entering his plea. This Court is aware that our Supreme Court has found that a trial justice's inquiry as to whether a defendant is under the influence of alcohol, drugs, or medicine while entering a plea is helpful in determining the voluntary and knowing nature of a plea. *See Njie*, 156 A.3d at 435 (discussing a trial justice's determination that a plea was knowing, intelligent, and voluntary after establishing, among other things, that the defendant "was not under the influence of alcohol or narcotics"

while entering the plea); *Jolly v. Wall*, 59 A.3d 133, 139 n.8 (R.I. 2013) ("The better practice may be for the court to specifically inquire whether a defendant has taken 'any drugs, alcohol or medication' before the plea hearing, as did the hearing justice in *Gonder v. State*, 935 A.2d 82, 86 (R.I. 2007)."); *Gonder*, 935 A.2d at 86. Try as it might, however, this Court can find no authority from our Supreme Court that stands for the proposition that a trial justice's failure to make such an inquiry during a plea colloquy invalidates an otherwise voluntary and knowing plea.

After reviewing the colloquy between the trial justice and Petitioner, this Court is satisfied that the "[trial] justice . . . engage[d] in as extensive an interchange as [was] necessary so that the record as a whole and the circumstances in their totality . . . disclose to [this] [C]ourt . . . that the [Petitioner] understood the nature of the charge and the consequences of the plea." *Njie*, 156 A.3d at 434 (quoting *Frazar*, 822 A.2d at 935) (internal quotation marks omitted). Under oath, Petitioner stated that he had reviewed and discussed the plea agreement and plea form with his attorney before entering the plea.[4] Also under oath, Petitioner stated that he understood the rights he was giving up by entering the plea. He also stated that he did not have any questions regarding the rights that he was giving up by entering the plea. Moreover, Petitioner stated that he understood the additional consequences of his plea, including the sentence that would be imposed and the procedure for probation. Furthermore, Petitioner

[4] This Court finds it important to note that Petitioner reviewed the plea form on more than one occasion. At the postconviction relief hearing, Petitioner's counsel testified that she had gone over the plea form with Petitioner when the plea was initially offered. Petitioner did not agree to the deal on that day because he wanted to wait and see if the alleged victim appeared in court to testify at trial. The alleged victim did appear in court to testify. Petitioner's defense counsel went over the plea agreement and plea form, for a second time, with Petitioner. Petitioner then signed the plea form.

accepted the facts presented in support of the charge against him.[5] Nothing in the record suggests that Petitioner acted in such a way that would cause the trial justice to question the knowing, intelligent, and voluntary nature of the plea. Therefore, this Court finds that Petitioner knowingly, intelligently, and voluntarily entered the *nolo contendere* plea. *See Jolly*, 59 A.3d at 139.

IV

Conclusion

Petitioner's counsel's decision to not present an insanity defense did not deprive Petitioner of the right to effective assistance of counsel. In addition, Petitioner knowingly, intelligently, and voluntarily entered his plea of *nolo contendere*. Accordingly, Petitioner's Application is denied. Counsel shall submit an appropriate order for entry.

[5] This Court notes that Petitioner's responses to all of the questions during the plea colloquy were clear and unequivocal.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **Mark Robert v. State of Rhode Island**

CASE NO: **PM-2012-0593**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **March 15, 2018**

JUSTICE/MAGISTRATE: **Procaccini, J.**

ATTORNEYS:

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