STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: May 22, 2018)

ROBERT RASO	**:**	
v.	**:**	**C.A. No. PM-2014-6181**
STATE OF RHODE ISLAND	**:**	

DECISION

McGUIRL, J. Before this Court is Petitioner Robert Raso's (hereinafter, Petitioner) application for postconviction relief (hereinafter, Application). Petitioner asserts two theories in support of his Application: (1) that his counsel, during his probation violation hearing, rendered ineffective assistance of counsel and (2) that his appellate counsel rendered ineffective assistance of counsel.[1] This matter is before this Court pursuant to G.L. 1956 § 10-9.1-1.

I

Facts and Travel

In March of 2011, the State of Rhode Island (hereinafter, State) alleged that Petitioner violated his probation by sexually assaulting his then fourteen-year-old step-daughter. Pursuant to Super. R. Crim. P. 32(f), this Court (Savage, J.) held a probation violation hearing. On March 29, 2011, at the conclusion of the hearing, the Court found that Petitioner had violated the terms of his probation and sentenced him to twenty-five years to serve.[2]

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[1] Petitioner initially asserted several grounds in support of his Application for postconviction relief, including an issue regarding an alleged recording of the complaining witness, but only the abovementioned theories were deemed to have merit by Petitioner's postconviction counsel.

[2] Petitioner could have been sentenced up to twenty-eight years to serve. The remaining three years were suspended.

Petitioner appealed, but our Supreme Court denied the appeal on December 3, 2013. On December 17, 2014, Petitioner filed an application for postconviction relief. Petitioner then obtained counsel, who, on behalf of Petitioner, filed an amended application.[3] This Court held a hearing on the Application on May 19, 2016.

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, Petitioner filed his Application asserting two theories: (1) ineffective assistance of counsel during the probation violation hearing and (2) ineffective assistance of counsel during his appeal.

[3] The amended application is the Application before this Court.

A

Ineffective Assistance of Counsel During Probation Violation Hearing

Petitioner contends that he was deprived of his right to effective assistance of counsel during the probation violation hearing because his counsel "neglected to properly examine a key piece of evidence, the diary of the complaining witness . . . ." (Pet'r's Mem. Supp. of Am. Appl. at 4.) In addition, Petitioner claims that his counsel was ineffective because counsel received "Facebook posts made by the complaining witness that were potentially exculpatory and . . . chose not to introduce those posts at the hearing." *Id.* at 5.

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. In other words, "[t]he [petitioner] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

1

Failure to Read Diary

Petitioner contends that he was deprived of effective assistance of counsel during the probation violation hearing because his counsel did not "properly examine a key piece of evidence, the diary of the complaining witness . . . ." (Pet'r's Mem. Supp. Am. Appl. at 4.) This Court is not persuaded that Petitioner was deprived of his right to effective assistance of counsel because his counsel did not read the entirety of the diary.

At the probation violation hearing, Petitioner's counsel informed the hearing justice that he had possession of the diary and another journal. After the hearing justice asked if he had the journal in question in his possession, Petitioner's counsel answered:

> "I do, your Honor. Well, I don't know which is the journal, which is the notebook, your Honor. I have not looked at either one of these but I am giving them to the Burrillville Police at this time. So there are two books; one is a looseleaf notebook and the other looks like a binded [sic] hard cover smaller book. I'm giving them both to the Burrillville detective at this time." Prob. Viol. Hr'g Tr. at 113, Mar. 25, 2011.

The hearing justice then held a sidebar, at which point the following colloquy took place:

> "THE COURT: This witness just indicated that she had given a journal to you, [Petitioner's counsel]. You now have given two notebooks two [sic] the detective, correct?
>
> "[PETITIONER'S COUNSEL]: Yes.
>
> "THE COURT: And you indicated that you have not reviewed those materials?
>
> "[PETITIONER'S COUNSEL]: That's correct.
>
> "THE COURT: And whether that is in your client's interest or not, you don't want to look at them?
>
> "[PETITIONER'S COUNSEL]: Judge, after discussing with [the complaining witness's mother] what she indicated was in the journal I indicated to her it was not relevant to my investigation and I felt uncomfortable reading about details in a little girl's life that were not involving allegations in this case.
>
> "THE COURT: Okay, and you don't know if, in fact, that these journals contain matters relevant to this case and notwithstanding that, you've chosen not to read them?
>
> "[PETITIONER'S COUNSEL]: All is know is I asked [the complaining witness's mother] when she gave me those documents and she indicated it was evidence about people that were written . . . involving the fact that [the complaining witness] was mad about different things, none of them involved anything sexual so I didn't think it was relevant to anything. I may have – in retrospect – I'm thinking I should have given it back to [the complaining witness's mother] because they were clearly not relevant to me. I was not going to use them but I did put them in the file and I've never looked at them.
>
> "THE COURT: Well, they've now been turned over?
>
> "[PETITIONER'S COUNSEL]: Yes." *Id.* at 113-15.

At the postconviction hearing, Petitioner's counsel testified about the diary and other journal. After Petitioner's counsel testified as to how he obtained the diary and journal, this Court questioned Petitioner's counsel. A pertinent portion of the colloquy follows:

> "THE COURT: Okay. And you made the journals available and notified the Court and counsel about the journals?
>
> "[PETITIONER'S COUNSEL]: I did, your Honor.
>
> "THE COURT: And at any point during the [probation violation] hearing did you go through the journals?
>
> "[PETITIONER'S COUNSEL]: I didn't go through them thoroughly, Judge. And I have been regretting not doing that actually.
>
> "THE COURT: When you said 'not thoroughly,' did you look at them at all?
>
> "[PETITIONER'S COUNSEL]: I did.
>
> "THE COURT: And do you remember specifically anything you looked at?
>
> "[PETITIONER'S COUNSEL]: I remember there was poems in there. I remember there was some prose in there. I didn't see anything that was offhand particularly helpful or damaging at the time. And given the time constraints, I probably, looking back, I really wish that I had looked closer at them to see if there was something that would be more helpful to [Petitioner]." Tr. 28-29, May 19, 2016.

Petitioner's counsel further testified that:

> "At the time [the mother of the complaining witness] had given [the diary] to [him], given the time constraints, it appear[ed] that [he] had asked her what was in those journals. She indicated to [him] what w[as] in those journals, and [he], as a follow-up, probably flipped through and *made a determination* at that point that [he] didn't think they would be relevant to the proceedings." *Id*. at 31. (Emphasis added.)

Petitioner's counsel then testified that "retrospectively, [he] probably should have – [he] wished [he] had given [the journal] a longer look to make a determination." *Id.* Finally, towards the end of the postconviction hearing, this Court asked one final question regarding the diary:

> "THE COURT: So your decision not to do anything with the journals and not to look through them further, you looked at them

> in a cursory fashion and did not see anything that was relevant to the [probation violation] hearing?
>
> "[PETITIONER'S COUNSEL]: Exactly." *Id.* at 34.

Based on the transcripts of the two hearings—the probation violation hearing and the postconviction hearing—there appears to be an inconsistency regarding whether or not Petitioner's counsel reviewed the diary before deciding not to make use of it. At the probation violation hearing, Petitioner's counsel informed the hearing justice that he did not look at the content of the diary because the complaining witness's mother informed him of the content. He then determined, based on what the complaining witness's mother told him, that the content of the diary was irrelevant to the probation violation hearing. At the postconviction hearing, however, Petitioner's counsel testified that he did review the diary, albeit not thoroughly. He further testified that it was based on his cursory review of the content of the diary that he "made a determination" that it "would be [ir]relevant to the proceedings." Tr. 31, May 19, 2016.

If what Petitioner's counsel said during the probation violation hearing is accurate—that he did not review the diary's content at all—this Court would find that to be deficient performance. *See Vega v. Ryan*, 757 F.3d 960, 968 (9th Cir. 2014) ("There is no dispute that counsel's failure to review his client's file led to a failure to present a key witness to the jury . . . [and] we can conceive of no circumstances where the decision not to read a client's file . . . would be reasonable."); *Washington v. Smith*, 219 F.3d 620, 629 (7th Cir. 2000) (finding that a lower court properly applied *Strickland* when it ruled that a counsel's failure to read a police report amounted to deficient performance). If, however, what Petitioner's counsel said during the postconviction hearing is accurate—that he cursorily reviewed the content of the diary—it may still amount to deficient performance. It could, however, be argued that it was a tactical decision—because Petitioner's counsel could have skimmed through some of the pages and

determined that it would be unnecessary to read the entire diary—which by itself may not be considered deficient performance. *See Rivera v. State*, 58 A.3d 171, 180-81 (R.I. 2013). For the purposes of this Decision, however, this Court will find that it does amount to deficient performance, especially since Petitioner's counsel testified at the postconviction hearing that he may have received the diary before the probation violation hearing began, which would have given him more time to review it. *See* Tr. at 34, May 19, 2016. In addition, the probation violation hearing justice gave Petitioner's counsel the opportunity to read the diary, but he turned down the offer. *See* Prob. Viol. Hr'g Tr. at 114, Mar. 25, 2011. With that finding in mind, regardless of whether Petitioner's counsel read none, or some, of the diary, Petitioner cannot overcome the second prong of *Strickland*.

As stated earlier, if the first prong of *Strickland*—deficient performance—is satisfied, an ineffective assistance of counsel claim is only successful if it is "show[n] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. In this case, the content of the diary is uncontradicted. The diary consisted mostly of poems and "general streams of consciousness regarding the victim's broken heart and the overall pain and sadness in her life." (State's Mem. Opp. Am. Appl. at 4.); *see also* Tr. 29, May 19, 2016. In addition, the diary did not mention anyone by name, particularly Petitioner. *See* State's Mem. Opp. Am. Appl. at 4. Moreover, the diary only contained one dated entry, which makes it difficult to determine when entries were made. *See id.*; Tr. 29, May 19, 2016. Petitioner's postconviction counsel had ample opportunity—before, during, and after the postconviction hearing—to review the content of the diary and bring to this Court's attention portions of the content that would have had value to Petitioner's defense in the probation violation hearing.

Petitioner's postconviction counsel, however, failed to present to this Court—at the postconviction hearing or in the post-hearing memorandum—any content of the diary that could have been used to impeach the credibility of the complaining witness. In fact, Petitioner's postconviction counsel is of the belief that "[s]uch a blatant neglect to review *potentially exculpatory* evidence cannot be overlooked. *Regardless of the contents of the diary*, [Petitioner's counsel] had an obligation to review it to determine its relevance to the proceedings. His failure to do so indisputably constitutes ineffectiveness of counsel." (Pet'r's Mem. Supp. of Am. Appl. at 5.) (Emphasis added.) This is inaccurate, however, because it overlooks the second prong of *Strickland*. The content is necessary to determine whether or not Petitioner was prejudiced by his counsel's failure to read the diary.

Based on the uncontradicted content of the diary, and the hearing justice's credibility findings in her decision, Petitioner has failed to show that "there is a reasonable probability that . . . the result of the [probation violation hearing] would have been different" had his counsel read the diary. *Strickland*, 466 U.S. at 694. Therefore, this Court finds that Petitioner was not deprived of his right to effective assistance of counsel because his counsel failed to read the entire diary.

2

Failure to Introduce Facebook Posts

Petitioner contends that he was deprived of his right to effective assistance of counsel during his probation violation hearing because his counsel "chose not to introduce [certain Facebook] posts at the hearing." (Pet'r's Mem. Supp. of Am. Appl. at 5.) This Court is not persuaded that Petitioner was deprived of his right to effective assistance of counsel because his counsel did not introduce the Facebook posts.

At the postconviction hearing, Petitioner's counsel testified about the Facebook posts. Much like the colloquy regarding the journals, this Court had a colloquy with Petitioner's counsel regarding the Facebook posts. The colloquy follows:

> "THE COURT: All right. Tell me the Facebook – there was a reference of Facebook postings. Tell me your recollection of that again.
>
> "[PETITIONER'S COUNSEL]: Yes, Judge. There w[ere] pictures posted on Facebook of [the complaining witness] acting more adult I guess than her age.
>
> "THE COURT: Did you see the pictures?
>
> "[PETITIONER'S COUNSEL]: They were provided to me, yes, Judge.
>
> "THE COURT: And you made a decision not to do anything with them?
>
> "[PETITIONER'S COUNSEL]: I did.
>
> "THE COURT: But you saw them and looked at them and considered them?
>
> "[PETITIONER'S COUNSEL]: I did consider them." Tr. 32, May 19, 2016.

It is clear from the postconviction hearing transcript that Petitioner's counsel viewed the Facebook posts. It is also clear from the postconviction hearing transcript that the posts did not mention Petitioner or his conduct toward the complaining witness.[4] Based on the content of the Facebook posts—which was rather irrelevant to the issue at the probation violation hearing—Petitioner's counsel made a conscious, tactical decision to not introduce them. *See Rodriguez v. State*, 941 A.2d 158, 162 (R.I. 2008) (noting that a counsel's decision to not introduce evidence is a tactical decision); *Cf. Thomas v. Chappell*, 678 F.3d 1086, 1104-05 (9th Cir. 2012) (finding

[4] When asked if the Facebooks posts referred to abuse or molestation by Petitioner, Petitioner's counsel testified that "[t]hey did not." Tr. 21, May 19, 2016.

Strickland error when trial counsel's failure to call a witness could not be excused as a tactical decision because counsel did not have sufficient information to make an informed decision). When it comes to strategic or tactical decisions, our Supreme Court has said that a court should 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.

Thus, Petitioner has failed to show that his counsel's failure to introduce the Facebook posts amounts to deficient performance, *see Rodriguez*, 941 A.2d at 162, and this Court need not address the second prong of the *Strickland* test.[5] *See Guerrero*, 47 A.3d at 300-01. Therefore, this Court finds that Petitioner was not deprived of his right to effective assistance of counsel because his counsel failed to introduce the Facebook posts.

B

Ineffective Assistance of Counsel During Appeal

Petitioner contends that he was deprived of his right to effective assistance of counsel during his appeal because his appellate counsel "failed to raise th[e] issue [of the excessiveness

[5] Even if Petitioner had established that failing to introduce the Facebook posts amounted to deficient performance, he still would not have succeeded on his ineffective assistance of counsel claim. As mentioned earlier, the *Strickland* test has two prongs. If the first prong—deficient performance—is satisfied, an ineffective assistance of counsel claim is only successful if it is "show[n] that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Petitioner has failed to show that introducing the Facebook posts would have led to a different result in the probation violation hearing. The Facebook posts did not mention Petitioner or his treatment of the complaining witness. Furthermore, as mentioned above, the hearing justice gave great weight to the complaining witness's testimony in making her decision. The irrelevant Facebook posts would not have overcome the weight given to the complaining witness's testimony. Therefore, Petitioner—if he had succeeded on the first prong—would have failed to show that "the result of the [probation violation hearing] would have been different" had his counsel introduced the Facebook posts. *Id.*

of the imposed sentence] . . . ." (Pet'r's Mem. Supp. of Am. Appl. at 5.) This Court is not persuaded that Petitioner was deprived of his right to effective assistance of counsel because his appellate counsel did not raise the issue of the length of his sentence.

According to our Supreme Court, "the *Strickland* standard for reviewing claims of ineffective assistance of counsel applies to appellate counsel as well as trial counsel." *Barros v. State*, 180 A.3d 823, 839 (R.I. 2018) (citing *Page*, 995 A.2d at 943). Our Supreme Court has noted that, "for appellate counsel's performance to pass muster under the *Strickland* test, appellate counsel . . . need not (and should not) raise every nonfrivolous claim, but rather may select from among them in order to maximize the likelihood of success on appeal." *Page*, 995 A.2d at 943 (internal quotation marks omitted). Furthermore, our Supreme Court has stated that, for both prongs of the *Strickland* test to be satisfied by appellate counsel's failure to raise an issue, "an applicant must demonstrate that the omitted issue was not only meritorious, but clearly stronger than those issues that actually were raised on appeal." *Id.* (internal quotation marks omitted).

During the postconviction hearing, Petitioner's appellate counsel testified that the only issue she raised on appeal focused on the sufficiency of the evidence presented at the probation violation hearing. She also testified that even though she thought that the sentence imposed was lengthy, "it didn't occur to [her] that [she] could raise the issue at the time." (Tr. 6, May 19, 2016.) Relevantly, almost a year after our Supreme Court decided Petitioner's appeal, our Supreme Court released an opinion in which a probationer challenged the length of the sentence imposed for violating probation. *See State v. McKinnon-Conneally*, 101 A.3d 875 (R.I. 2014). In fact, our Supreme Court had addressed the issue on prior occasions as well. *See State v. Jackson*, 966 A.2d 1225 (R.I. 2009); *State v. Christodal*, 946 A.2d 811 (R.I. 2008). These cases suggest

that Petitioner's counsel could have raised that issue on appeal. The fact that the issue had been raised in the past, however, only means that the issue was meritorious, which is only one of the things Petitioner needs to prove. In order to succeed on his ineffective assistance of counsel claim, Petitioner must still demonstrate that arguing the length of the sentence was "clearly stronger than th[e] issues that actually were raised on appeal." *Page*, 995 A.2d at 944 (internal quotation marks omitted). Petitioner has failed to do so.

As our Supreme Court has stated, "[a] trial justice has wide discretion to determine whether to execute any or all of a defendant's previously suspended sentence." *McKinnon-Conneally*, 101 A.3d at 879 (citing *State v. Roberts*, 59 A.3d 693, 697 (R.I. 2013)); *see also State v. Tucker*, 747 A.2d 451, 454 (R.I. 2000) (noting that hearing justices possess "wide latitude in deciding whether a probation violator's suspended sentence should be removed in whole, in part, or not at all"). When determining the amount of a prior suspended sentence to impose, a hearing justice should primarily consider the first offense, but the second offense does not have to be completely ignored. *See State v. Pires*, 525 A.2d 1313, 1314 (R.I. 1987). The imposition of a probation violation sentence is reviewed under an abuse of discretion standard. *See McKinnon-Conneally*, 101 A.3d at 879.

During the postconviction hearing, Petitioner presented no evidence to suggest that the probation hearing justice abused her discretion in imposing the twenty-five year probation violation sentence. Before imposing the twenty-five year probation violation sentence, the probation hearing justice specifically addressed her reasoning for finding that Petitioner violated his probation and for imposing such a sentence. At the beginning of the hearing justice's decision, she stated:

> "I have sat in this courtroom for the past five days and listened to one of the most gut-wrenching sagas that I have heard in my

> eighteen years on the bench. Thirteen witnesses have paraded through this courtroom for a violation hearing . . . that lasted longer than many criminal trials. There were three children or perhaps I should refer to them as young adults, the alleged victim . . . with her two best friends, from Ninth Grade . . . supporting her story of [Petitioner's] sexual assault; and then there were five other adults, almost all unrelated to [the alleged victim] who supported her version of events or at least did not discount them and there were five other adults all either related to [the alleged victim] or close to her mother and her and did not support her testimony including her mother, [Petitioner] . . . and her mother's two best friends." Prob. Viol. Hr'g Tr. at 1, Mar. 29, 2011.

The hearing justice then spoke about the complaining witness's testimony and stated:

> "Well, [complaining witness], I have heard your voice and it is the voice that matters. You told us in court that your stepfather, [Petitioner], sexually assaulted you on March 6, 2011 and molested you frequently and repeatedly over the past four years ever since he hooked up with your mother and lived with you first in North Smithfield and then in Burrillville. In court under oath you never wavered. Your testimony was fraught with pain and anguish and it was credible and convincing. I believe you, [complaining witness]. I believe that [Petitioner] . . . sexually assaulted you on March 6, 2011 and over a period of four years before that." *Id.* at 4-5.

The hearing justice then went on to explain how the complaining witness's testimony was consistent with a number of things, including: 1) the testimony of her two best friends; 2) her behavior in the immediate aftermath of the events on March 6, 2011; 3) the information she provided to DCYF; 4) her statements on March 10, 2011 during an interrogation by her mother and others who did not believe her; 5) her statements to the police on March 17, 2011; and 6) the forensic evidence in the case, such as Petitioner's seminal fluid found in her bed and on her comforter. In addition, the hearing justice acknowledged the coerced recantation made by the complaining witness while she was being interrogated by her mother and others, stating:

> "Once [the complaining witness] was released from the basement, she reverted to the truth. She too told the police it had happened. She also explained at the hearing here that she had recanted because her mother did not believe her and she just wanted that

> night to all be over. Once she recanted, the questions stopped." *Id.* at 19.

The hearing justice then proceeded to address Petitioner and his testimony. According to the hearing justice, because of the testimony of the complaining witness, Petitioner's "[denial] cannot be believed." *Id.* at 21. Specifically, the hearing justice stated:

> "[Petitioner] had every incentive to lie in this proceeding, not the least of which is the 28 years in prison that he is facing if [the complaining witness] is believed. Not only did he have an incentive to lie, however, he did lie. He was surprised to be confronted by one of his crimes from the past, surprised because it wasn't one of the eight violent felony cases on which the State seeks to violate him here and surprised because now he has to discuss that case in front of his wife and others in court who undoubtedly knew nothing about that [Petitioner].
>
> "Now he's trapped. He can't admit to past sexual assault, that would look really bad. It would make [the complaining witness] look credible. What does he do? He says it didn't happen. He says that when he admitted under oath to the Court in 1990 that he committed that sexual assault that he lied to the Court. More likely, [Petitioner], you lied to me about having lied before and regardless, if you lie to the Court then, then you cannot be believed." *Id.* at 21-22.

The hearing justice then made her finding that Petitioner had violated his probation by stating:

> "[Petitioner], I am not only reasonably satisfied that you sexually assaulted [the complaining witness] on March 6, 2011 and over the course of the four years before that, I am near certain of it and what happens to you today is not [the complaining witness's] fault but yours because you made a promise to this Court back in 1990, almost 10 years before [the complaining witness] was even born, after admitting that you committed eight violent felonies including multiple armed robberies and first degree arson. You agreed to go to jail for 12 years and then the next 28 years to keep the peace and be of good behavior and based on this Court's findings, you have not.
>
> "I declare you to be a violator of the terms of your sentences and probation in the following cases P1-87-482 for the first degree robbery of Maria Faiola and Pamela Caito in eluding a police officer; P1-87-2828, for the first degree robbery of Francisco

> Pinales and conspiracy to rob; P1-89-941 for the first degree robbery of Donald Lupo; P1-89-1667 for first degree robbery of Gloria Walsh, Lori Ferry, John Walsh and conspiracy to rob; P1-90-246 for the armed robbery in the jewelry store; P1-90-247 for first degree arson of Eagle Park Motors; P1-90-248 for the armed robbery of New England Check Cashing Company and P1-90-250 for the armed robbery of Greater Providence Trust." *Id.* at 23-24.

Finally, the hearing justice then turned her attention to the sentence. She stated:

> "With regard to sentencing on the eight underlying violations, this Court [Petitioner], will revoke the suspended sentences and probation previously imposed in each of those cases and sentence you as a violator imposing 25 of the 28 years to serve in each of the 8 cases to run concurrently." *Id.* at 28.

It is clear—from the totality of the hearing justice's decision—that she based her sentence on the credible testimony of the complaining witness, the Petitioner's lack of credibility and the "gut-wrenching sagas" that were described during the probation violation hearing. Prob. Viol. Hr'g Tr. at 1, Mar. 29, 2011. She also considered the underlying felonies that Petitioner violated and noted that the felonies were violent in nature. In addition, she made reference to Petitioner's overall criminal history, which happened to include a prior sexual assault. *See State v. Jackson*, 966 A.2d 1225, 1230 (R.I. 2009) (holding that there was no abuse of discretion for considering criminal history before imposing probation violation sentence); *see also Pires*, 525 A.2d at 1314 (noting that the second offense in probation violation hearing does not have to be completely ignored when fashioning a sentence for probation violation).

Since Petitioner failed to present evidence that the probation hearing justice abused her discretion in imposing the twenty-five year sentence, this Court is hard-pressed to find that the issue of sentence length was "clearly stronger than those issues that actually were raised on appeal." *Page*, 995 A.2d at 944 (internal quotation marks omitted). Therefore, this Court finds

that Petitioner was not deprived of his right to effective assistance of counsel during his appeal. *See id.*

IV

Conclusion

Petitioner's counsel's decision during the probation violation hearing to not read the entirety of the diary and not introduce the Facebook posts did not deprive Petitioner of his right to effective assistance of counsel. In addition, Petitioner's appellate counsel's failure to raise the issue of the excessiveness of the probation violation sentence did not deprive Petitioner of his right to effective assistance of counsel. Accordingly, Petitioner's Application is denied. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Cover Sheet

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

CASE NO: **PM-2014-6181**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **May 22, 2018**

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

ATTORNEYS:

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