STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC. **SUPERIOR COURT**

[Filed: July 17, 2018]

STEPHEN A. SYLVIA	:	
	:	
VS.	:	**C.A. No. PM-2017-5474**
	:	
STATE OF RHODE ISLAND	:	

DECISION

PROCACCINI, J. Before this Court is Petitioner Stephen A. Sylvia's (hereinafter Petitioner) application for postconviction relief (hereinafter Application). In support of his Application, Petitioner asserts that his counsel rendered constitutionally ineffective assistance of counsel. This matter is before this Court pursuant to G.L. 1956 § 10-9.1-1.

I

Facts and Travel

On December 2, 2003, Petitioner entered a plea of *nolo contendere* for violation of G.L. 1956 § 21-28-4.01(a)(2). As a result of this plea, Petitioner received a five-year deferred sentence.[1] In July of 2005, the Bristol Police Department initiated a traffic stop of Petitioner's vehicle.[2] During the traffic stop, members of the Bristol Police Department confiscated a substance that was later determined to be cocaine. Consequently, the State of Rhode Island (hereinafter State) charged Petitioner with: 1) possession of cocaine in excess of one ounce and 2) conspiracy. In addition to charging Petitioner with these new charges, the State also presented

[1] For his defense to this charge, Petitioner hired John M. Cicilline, Esq. (hereinafter Mr. Cicilline).

[2] There were at least two passengers in Petitioner's car at the time of this traffic stop.

Petitioner as a violator of the 2003 deferred sentence.[3] Petitioner searched for an attorney to handle the 2005 charges and the violation matter, and eventually rehired Mr. Cicilline. On November 9, 2005, Petitioner entered a plea of *nolo contendere* to the 2005 charges. Pursuant to the plea agreement, this Court imposed a ten-year sentence with two years to serve and eight years suspended, with an additional eight years of probation for the possession of cocaine in excess of one ounce and conspiracy, and a five-year suspended sentence with five years of probation for the violation of the 2003 deferred sentence.[4]

On November 15, 2017—twelve years and six days after entering the *nolo contendere* plea—Petitioner filed his Application, *pro se*. Five days later, on November 20, 2017, Petitioner met with Kevin Hagan, Esq. (hereinafter Mr. Hagan), who was the prosecutor for the 2005 charges. Petitioner secretly recorded the conversation, which revolved around Petitioner's Application, between himself and Mr. Hagan on his cell phone. Petitioner then met with Mr. Cicilline on December 14, 2017, and secretly[5] recorded this conversation on his cell phone as well.

[3] Based on the 2005 charges, Petitioner faced a sentencing range of up to fifty years in prison. As a violator of the 2003 deferred sentence, Petitioner faced a sentencing range of up to thirty years in prison.

[4] In securing such an offer from the State, Petitioner's defense counsel utilized a well-accepted plea bargaining device commonly referred to as a "wrap," which contemplates a sentencing agreement that disposes of all pending matters—in this case the violation of probation related to the 2003 disposition and the new 2005 charges. The respective sentences ran concurrently.

[5] The Court's explicit recognition of the surreptitious nature of Petitioner's manner of recording these conversations is not intended to imply that such conduct was unlawful in any respect. The Court does, however, find Petitioner's taping of the conversations of Mr. Hagan and Mr. Cicilline related to a case that was over twelve years old—which became a postconviction relief matter only five days earlier—to be "interesting" to say the least.

On June 5, 2018, this Court commenced a hearing on Petitioner's Application. Petitioner began the hearing as a *pro se* litigant.[6] During the first day of testimony, Petitioner questioned Mr. Cicilline and Mr. Hagan. Before resuming the hearing on June 6, 2018, Petitioner requested that R. Francis DiPrete, Esq. (hereinafter Mr. DiPrete), who was present as an interested observer during the prior day's testimony, enter on his behalf. The State did not object to Mr. DiPrete's entry on the condition that Petitioner would not be allowed to recall Mr. Cicilline and Mr. Hagan in order to have, for lack of a better term, a "second bite at the apple." This Court then granted a week continuance in order for Mr. DiPrete to acclimate himself with the case. The hearing continued and concluded on June 13, 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*,

[6] This Court, on numerous occasions leading up to the hearing, advised Petitioner about the difficulties of acting as a *pro se* litigant, but Petitioner was adamant about proceeding *pro se*. In addition, prior to commencement of the hearing, this Court advised Petitioner of the law related to his claim and the burden of proof that he was required to meet.

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 asserts that Mr. Cicilline rendered ineffective assistance of counsel in 2005. Specifically, Petitioner asserts that Mr. Cicilline acted under a conflict of interest during the 2005 representation—which ended in a plea of *nolo contendere*—and never received Petitioner's informed consent to continue representation in spite of the conflict. Our Supreme Court, however, has limited this Court's review of an application for postconviction relief when the applicant pled guilty or *nolo contendere*.

According to our Supreme Court, "a plea of *nolo contendere* is treated as a guilty plea" and the decision to enter into such a plea "is not one to be taken lightly." *Cote v. State*, 994 A.2d 59, 63 (R.I. 2010). Consequently, "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 v. State*, 47 A.3d 289, 300 (R.I. 2012) (internal quotation marks omitted) (alterations in original). "If the plea is validly entered, [this Court will] not consider any alleged prior constitutional infirmity." *State v. Dufresne*, 436 A.2d 720, 722 (R.I. 1981). Therefore, Petitioner's argument regarding Mr. Cicilline's alleged conflict of interest does not fall within this limited scope of review and will not be addressed.

A

Counsel's Advice Concerning *Nolo Contendere* Plea

With regards to the advice of an applicant's attorney, the applicant must "demonstrate that . . . [it] 'was not within the range of competence demanded of attorneys in criminal cases.'" *Gonder v. State*, 935 A.2d 82, 87 (R.I. 2007) (quoting *Dufresne*, 436 A.2d at 723). If the applicant can show this, the applicant must then show that the incompetent advice prejudiced he or she, which means that there is "a reasonable probability that, but for counsel's [incompetent advice], the result of the proceeding would have been different," *Brown v. State*, 964 A.2d 516, 529 (R.I. 2009). In the context of a plea this means that the applicant "'would not have pleaded [*nolo contendere*] and would have insisted on going to trial' and, importantly, that the outcome of the trial would have been different." *Neufville v. State*, 13 A.3d 607, 611 (R.I. 2011) (quoting *State v. Figueroa*, 639 A.2d 495, 500 (R.I. 1994)). According to our Supreme Court, "when counsel has secured a shorter sentence than what the [applicant] could have received had he gone to trial, the [applicant] has an almost insurmountable burden to establish prejudice." *Id.* at 614 (citing *Rodrigues v. State*, 985 A.2d 311, 317 (R.I. 2009)).

Here, Mr. Cicilline testified on cross-examination about discussions with Petitioner regarding the *nolo contendere* plea. A pertinent portion of the cross-examination follows:

> "[PROSECUTOR]: In this particular case, this Mr. Sylvia was arrested in August and the violation hearing was scheduled on November 9th. Between that time period, which was just over two months, you had several conferences about the nature of these allegations; is that fair to say?
>
> "[MR. CICILLINE]: Yes.
>
> "[PROSECUTOR]: And, having had those conferences, those conferences would have involved a judge and the prosecutor?
>
> "[MR. CICILLINE]: Yes.

> "[PROSECUTOR]: And you would have discussions about the general nature of the case against Mr. Sylvia?
>
> "[MR. CICILLINE]: Yes.
>
> "[PROSECUTOR]: Would it have been your practice to discuss those conversations or the information that you obtained with Mr. Sylvia after those conferences?
>
> "[MR. CICILLINE]: Yes.
>
> "[PROSECUTOR]: Is it fair to say that normally at a violation hearing an offer is made relating to wrapping up the violation?
>
> "[MR. CICILLINE]: As you are well aware, if someone goes to a violation hearing, all a judge has to be is reasonably satisfied that he violated the terms and conditions of his release. He doesn't have, the State doesn't have to prove beyond a reasonable doubt, just reasonable satisfaction which is the old standard, now changed, but the old standard. So, you certainly bring that up when you talk to your client, say look, all they have to do is prove to a reasonable satisfaction of this judge that you violated the terms and conditions of your release and you could get up to 30 years. I don't think any judge would have given 30 years in these facts but that is the maximum exposure he could have." Hr'g Tr. 49-51, June 5, 2018.

The cross-examination continued with more discussion about Mr. Cicilline's communications with Petitioner:

> "[PROSECUTOR]: Mr. Cicilline, I'm showing you a four page document. Can you take a look at that?
>
> "[MR. CICILLINE]: Yes.
>
> "[PROSECUTOR]: Did you have a chance to review that briefly?
>
> "[MR CICILLINE]: Yes.
>
> "[PROSECUTOR]: What is that?
>
> "[MR. CICILLINE]: That is a witness statement given by [Petitioner] on August 23rd, 2005, which I believe was the day that he was called to the Bristol Police Department and was placed

under arrest. I was not present for this statement. His rights were given to him by detective, I think it was Colenda, and [Petitioner] signed the Rights Form waiving his rights to remain silent and all of the other constitutional rights.

"[PROSECUTOR]: Is it fair to say that in that statement that he made inculpatory statements relevant to the sale of marijuana?

"[MR. CICILLINE]: Yes.

"[PROSECUTOR]: And based on your practice and understanding, do you think being there for a violation hearing this evidence would have had an impact on the judge who heard the hearing?

"[MR. CICILLINE]: To [Petitioner's] detriment it would have an impact, yes.

"[PROSECUTOR]: Because the standard was basically keep the peace and be of good behavior?

"[MR. CICILLINE]: Correct. And if a judge is satisfied that he violated by reasonable satisfaction, pretty easy standard.

"[PROSECUTOR]: Is it fair to say that your responsibility is to try to work out the best situation you could for your client given the facts that you had in front of you?

"[MR. CICILLINE]: Absolutely.

…

"[PROSECUTOR]: Did you have discussions about the culpability or possible sentence that [Petitioner] could have been exposed with [him]?

"[MR. CICILLINE]: Absolutely. My practice involves talking to a client, explaining what the facts are in a case, what a judge is likely to do, the strength of the government's case or state's case and what do we do, do we go to a hearing, do we try to cut a deal, what is the best thing. I would have had those conversations because if I didn't have those conversations, I couldn't have made a decision. [Petitioner] has to decide. It is his choice, no, I want a violation hearing, I want to go forward. I don't make those decisions, my client does. So I do that with everybody.

> "[PROSECUTOR]: Is it fair to say that you give them all of the information but [Petitioner] has to make the decision?
>
> "[MR. CICILLINE]: I tell my clients that all of the time. It is not my call. It is [their] call. These are the facts. This is what we have to deal with." *Id.* at 54-56.

Mr. Cicilline further testified on redirect examination about his advice and reasoning for recommending that Petitioner enter the *nolo contendere* plea:

> "[PETITIONER]: But what type of evidence were you basing the fact that I should wrap cocaine charges onto myself? Because I was violated?
>
> "[MR. CICILLINE]: The fact that —
>
> "[PETITIONER]: That was obvious?
>
> "[MR. CICILLINE]: You asked a question. I'm going to answer it. The fact that I received a 32(f) package that said Brendan Hale gave a statement to the police in which he indicated that you bought cocaine, excuse me you sold him cocaine, that alone was enough in my mind that a judge would be reasonably satisfied that you violated the terms and conditions of your deferred sentence. And, in my opinion, that is why you got it down to the two years in work release. Because, normally that would be a good jail case. If we had gone to hearing, you would have gone to jail for a significant amount of time, in my opinion.
>
> "[PETITIONER]: I agree that I was, I was a violator because he was in my car with cocaine and by that I'm liable for it. I understand that completely. But with that one piece of paper, that proves that is not all of the statements he made. You had me wrap up a cocaine charge because you believed that everyone would believe that I did it?
>
> "[MR. CICILLINE]: The only thing that mattered is he said you sold him the cocaine. That is what was significant. That alone gets you violated.
>
> "[PETITIONER]: And I am agreeing that I should have been violated just because it was my car. Didn't you have a duty to try to fight the charges?

> "[MR. CICILLINE]: He didn't say you just had it in your car. He said you sold it to him.
>
> "[PETITIONER]: Correct. But he also said twenty other statements about someone that was not me?
>
> "[MR. CICILLINE]: I don't care about the twenty other statements. I care about you.
>
> "[PETITIONER]: Isn't that a reliability problem? If he says he gets it from me, but can't say where I got it from?
>
> "THE COURT: Question. Ask a question. Ask a question.
>
> "[PETITIONER]: If you did obtain the rest of those documents, then I made a decision to wrap that up based on that one statement because I was led to believe that no one would believe me but I believe a jury of twelve would believe that there was a possibility it wasn't me?
>
> "[MR. CICILLINE]: You were not looking at a jury of twelve at that point. You were looking at a violation hearing, right? Not only did we have Hale saying you sold him the cocaine, but we also had one or two police officers who were watching you who described the actions that were going on in the car, bending over, doing all that stuff. That, in my mind, I got that and I got him making a statement, I got to say is that enough to violate you? Yeah, that is pretty much, that is enough to violate you. Yes. That is what I believe. Based on everything I read, I thought I gave you good advice. I'm sure we talked about it and you decided to waive the case and get rid of it because we could have had a violation hearing and then you could have faced the charges. I wrapped everything up together. I'm sorry you feel I didn't treat you right, but I think I treated you very well." *Id.* at 58-61.

It is clear from the transcript of the postconviction hearing that Mr. Cicilline provided competent advice to Petitioner. Petitioner faced a violation hearing, which could have resulted in a significant term of incarceration given the thirty-year maximum. He then would have faced the 2005 charges, which allowed for punishment of up to fifty years in prison. Mr. Cicilline clearly considered the facts of the case, and the low burden of proof that the State would have needed to meet in order to show that Petitioner was a violator. Knowing the likelihood of the State proving

that Petitioner was a violator, along with the potential sentences Petitioner could have received for being a violator and the pending 2005 charges, Mr. Cicilline, an experienced criminal lawyer, negotiated with the State for a potential plea. Based on these negotiations, the State offered a ten-year sentence with two years to serve, eight years suspended and an additional eight years of probation for the 2005 charges, and a five-year suspended sentence with five years of probation for the violation of the 2003 disposition. Mr. Cicilline informed Petitioner of this offer and explained why he thought it was a good offer and worthy of serious consideration. Mr. Cicilline also emphasized to Petitioner that the ultimate decision to accept the offer belonged to him. Based on the ease with which Petitioner could have been found to be a violator, and the potential sentences he was facing for both the violation and the 2005 charges, Mr. Cicilline'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"). Having found that Mr. Cicilline's advice was competent, this Court will now address the voluntary nature of Petitioner's *nolo contendere* plea. *See Guerrero*, 47 A.3d at 300.

B

Voluntariness of *Nolo Contendere* Plea

"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—this Court—conducted a detailed colloquy with Petitioner before accepting Petitioner's *nolo contendere* plea. This Court informed Petitioner that by entering such a plea, he was giving up rights as a defendant before the Court, including the right: (a) to a trial by judge or jury; (b) to his presumption of innocence and his privilege against self-incrimination; (c) to confront and cross-examine the State's witnesses; (d) to present witnesses on his behalf; (e) to have the State prove beyond a reasonable doubt each and every element of the charges; (f) to obtain and consider a presentence report; and (g) to an appeal to our Supreme Court. Plea Tr. 2-6, Nov. 9, 2005. This Court specifically asked whether Petitioner understood that he was giving up those rights, to which Petitioner answered affirmatively. *Id.* In addition, this Court asked whether Petitioner reviewed the plea form and the details of the plea with Mr. Cicilline, to which Petitioner again answered in the affirmative. *Id.* at 3. Moreover, this Court asked if Petitioner understood the sentences—for the violation of the 2003 disposition and 2005 charges—to be imposed pursuant to the plea agreement, and Petitioner again answered affirmatively. *Id.* at 6-7. Furthermore, after the State recited the facts which it intended to prove beyond a reasonable doubt, had the case gone to trial, this Court asked Petitioner if he accepted

those facts as true, to which Petitioner responded: "Yes, I do."[7] *Id.* at 8. Therefore, this Court finds that its colloquy established the knowing, intelligent and voluntary nature of Petitioner's *nolo contendere* plea. *See Tavarez v. State*, 826 A.2d 941, 943 (R.I. 2003) (acknowledging proper colloquy when trial justice clearly explained the defendant's rights and inquired about the defendant's understanding of the plea form); *Frazar*, 822 A.2d at 936 (recognizing that plea colloquy demonstrated that the defendant understood his rights and voluntarily relinquished them).

IV

Conclusion

Mr. Cicilline's advice concerning Petitioner's *nolo contendere* plea was competent. In addition, Petitioner knowingly, intelligently and voluntarily entered his *nolo contendere* plea. Accordingly, Petitioner's Application is denied. Counsel shall submit an appropriate order for entry.

[7] 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:	Stephen A. Sylvia v. State of Rhode Island
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COURT:	Kent County Superior Court
DATE DECISION FILED:	July 17, 2018
JUSTICE/MAGISTRATE:	Procaccini, J.

ATTORNEYS:

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