STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: June 7, 2019]

DANTE DUTRA	:	
	:	
v.	:	**C.A. No. PM-2019-0429**
	:	
STATE OF RHODE ISLAND	:	

DECISION

K. RODGERS, J. Before this Court is Dante Dutra's (Petitioner) Application for Post-Conviction Relief (Application). Petitioner asserts that his conviction should be vacated because the statute under which he was convicted in *State of Rhode Island v. Dante Dutra*, P2-2005-1785A[1] (the underlying criminal case) is unconstitutional in that it fails to describe a crime and prescribe a penalty therein.

This Court's jurisdiction is pursuant to G.L. 1956 § 10-9.1-1. Having reviewed the parties' memoranda, and for the reasons set forth below, this Court finds that Petitioner's conviction was not unconstitutional. Accordingly, Petitioner's Application is denied.

I

Facts and Travel

On June 16, 2005, Petitioner was charged by way of criminal information with one count of second degree sexual assault under G.L. 1956 §§ 11-37-4 and 11-37-5, and one count of possession of a controlled substance under G.L. 1956 § 21-28-4.01(c)(2)(i), both counts alleged to have occurred on April 21, 2005. On July 27, 2005, Petitioner pled *nolo contendere* to both counts.

[1] Petitioner filed a separate application for post-conviction relief seeking to vacate his conviction of second degree sexual assault in *State v. Dante Dutra*, W2-2001-0315A. That application is addressed in a separate decision in *Dante Dutra v. State*, WM-2019-0031.

As to the count of second degree sexual assault, he was sentenced to fifteen years, with forty-two months to serve at the Adult Correctional Institutions (the ACI), the balance of one hundred and thirty-eight months suspended, with probation and various other conditions. As to the count of possession of a controlled substance, he was sentenced to six years suspended with probation and various other conditions.

On September 22, 2010, Petitioner filed a previous application for post-conviction relief, which was denied on July 15, 2011. *Dante Dutra v. State*, PM-2010-5575.

On January 14, 2019, Petitioner filed a *pro se* Application for Post-Conviction Relief, together with a supporting memorandum asking this Court to vacate his conviction in the underlying criminal case for second degree sexual assault, alleging that his conviction is unconstitutional.[2] With the agreement of the Attorney General and by Order dated February 22, 2019, this Court limited all arguments[3] to "the constitutionality of a criminal statute which allegedly fails to state what constitutes the crime alleged and/or fails to provide for a penalty thereunder," without the State raising the affirmative defenses of *res judicata* and/or *laches*.

[2] Petitioner does not challenge his conviction for possession of a controlled substance.

[3] This Court has been tasked with adjudicating the largely identical arguments raised by approximately ninety defendants to date who are serving time at the ACI for offenses including, but not limited to, varying degrees of sexual assault and child molestation, murder, kidnapping, robbery, indecent solicitation, and assault with intent to commit specified felonies. Indeed, the large majority of the filings in each of the roughly ninety cases appear to be the same photocopies of Petitioner's original filing herein with spaces provided to "fill in the blank" for information pertinent to this Petitioner, or a similar argument with similar citations. In many instances, the trial justice presiding over the respective cases is still an active member of the bench, and there may be meritorious issues that said trial justice would be required to adjudicate outside this Court's purview. Accordingly, this Court—with the State's agreement—has carved out the constitutional issues raised by this Petitioner and others from other matters that have been or may be raised in an application for post-conviction relief. It is with this context in mind that this Court—with the State's agreement—ordered that each petitioner should be permitted to raise the constitutional issue addressed herein notwithstanding having previously had his one bite at the proverbial post-conviction relief apple.

On March 11, 2019, Petitioner's court-appointed counsel filed a Supplemental Memorandum in Support of Petitioner's Application for Post-Conviction Relief. The State filed an objection and supporting memorandum thereto on March 28, 2019.[4] On May 24, 2019, the Court provided notice to the State and Petitioner's court-appointed counsel that Petitioner's request for relief would be considered by this Court in the context of a summary disposition. The parties thereafter acknowledged that an evidentiary hearing was unnecessary to resolve the issues before this Court.

II

Standard of Review

Under § 10-9.1-1, any person who has been convicted of a crime may file an application for post-conviction relief to challenge the constitutionality of his or her conviction. Sec. 10-9.1-1(a)(1). Unlike the proceedings afforded to Petitioner for his underlying conviction, post-conviction relief motions are civil in nature. *Brown v. State*, 32 A.3d 901, 908 (R.I. 2011). Accordingly, the applicant bears "'the burden of proving, by a preponderance of the evidence, that such [postconviction] relief is warranted.'" *Motyka v. State*, 172 A.3d 1203, 1205 (R.I. 2017) (quoting *Anderson v. State*, 45 A.3d 594, 601 (R.I. 2012)). Additionally, because Petitioner challenges the constitutionality of his conviction, Petitioner has the heightened burden of demonstrating unconstitutionality beyond a reasonable doubt. *See State v. Beck*, 114 R.I. 74, 77, 329 A.2d 190, 193 (1974).

[4] The State filed a single memorandum to address both applications for post-conviction relief on March 28, 2019, yet the electronic file reflects that the memorandum was only filed in WM-2019-0031. This Court treats the same memorandum as having been filed on March 28, 2019, in the instant Providence County matter, PM-2019-0429.

When ruling on an application for post-conviction relief, if the court considers matters outside the pleadings, the court should "treat the [party's] motion as though it were a motion for summary disposition" as opposed to a motion to dismiss. *Palmigiano v. State*, 120 R.I. 402, 406, 387 A.2d 1382, 1385 (1978). As will be discussed, this Court has considered Petitioner's indictment and plea form, which are outside the pleadings in the instant civil action. Accordingly, this Court will review Petitioner's Application in the context of a summary disposition motion under § 10-9.1-6(c), which "'closely resembles' a grant of summary judgment under Rule 56 of the Superior Court Rules of Civil Procedure." *Reyes v. State*, 141 A.3d 644, 652 (R.I. 2016) (quoting *Palmigiano*, 120 R.I. at 405, 387 A.2d at 1384).

Under § 10-9.1-6(c), the court may grant summary disposition when it finds, based on "the pleadings, depositions, answers to interrogatories, and admissions and agreements of fact, together with any affidavits submitted, that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Sec. 10-9.1-6(c). The standard for granting summary disposition on an application for post-conviction relief is the same as in granting summary judgment under Super. R. Civ. P. 56(c)—the "trial justice must consider the affidavits and pleadings . . . in the light most favorable to the party against whom the motion is made." *Palmigiano*, 120 R.I. at 406, 387 A.2d at 1385. The trial justice may not resolve genuine issues of material fact or adjudge the weight or credibility of the evidence. *Reyes*, 141 A.3d at 653.

III

Analysis

Petitioner asserts that his conviction violated his due process rights under both the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 10 of the Rhode Island Constitution because the single statute of conviction, § 11-37-4, fails to state what conduct qualifies as a crime and fails to provide a penalty. In response, the State contends that Petitioner cannot prove that § 11-37-4 is unconstitutional beyond a reasonable doubt because Chapter 37 of Title 11 of the Rhode Island General Laws, when read as a whole, clearly and unambiguously provides a description of the criminalized conduct and states a penalty.

Petitioner was convicted of one count of second degree sexual assault in violation of § 11-37-4.[5] Section 11-37-4 provides:

> "A person is guilty of a second degree sexual assault if he or she engages in sexual contact with another person and if any of the following circumstances exist:
>
> > "(1) The accused knows or has reason to know that the victim is mentally incapacitated, mentally disabled or physically helpless.
> >
> > "(2) The accused uses force or coercion.
> >
> > "(3) The accused engages in the medical treatment or examination of the victim for the purpose of sexual arousal, gratification, or stimulation." Sec. 11-37-4.

The term "sexual contact" as used throughout Title 11, Chapter 37 has been defined in § 11-37-1 as:

[5] Section 11-37-4 has been amended since April 21, 2005, the date of the offense to which Petitioner pled *nolo contendere*. P.L. 2014, ch. 157, § 1, effective June 23, 2014; P.L. 2014, ch. 164, § 1, effective June 23, 2014. Thus, this Court will refer only to the earlier version of the statute in effect at that time.

> "the intentional touching of the victim's or accused's intimate parts, clothed or unclothed, if that intentional touching can be reasonably construed as intended by the accused to be for the purpose of sexual arousal, gratification, or assault." Sec. 11-37-1(7).

The penalty for second degree sexual assault is set forth in § 11-37-5, which at all material times has provided:

> "Every person who shall commit sexual assault in the second degree shall be imprisoned for not less than three (3) years and not more than fifteen (15) years." Sec. 11-37-5.

As previously noted, Petitioner was charged in Count one of the criminal information of violating both §§ 11-37-4 and 11-37-5.

A

Statutory Construction and Due Process

The due process clauses of both the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 10 of the Rhode Island Constitution provide that no person "shall . . . be deprived of life, liberty, or property" without being afforded due process of law. For a criminal statute to comply with constitutional due process requirements, "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *see also United States v. Lanier*, 520 U.S. 259, 265 (1997). The test to determine if a criminal statute provides sufficient notice is whether '"that law[] give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly."' *State v. Russell*, 890 A.2d 453, 460 (R.I. 2006) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). Thus, it falls upon the Legislature to adequately describe both '"the forbidden conduct and a prescribed

penalty."' *State v. Maxie*, 187 A.3d 330, 340 (R.I. 2018) (quoting 1 Wayne R. LaFave et al., *Substantive Criminal Law* § 1.2(d) at 18 (3d ed. Oct. 2018 update)).

This case is not a void for vagueness case. The issue before this Court is simply whether or not having a penalty provision in a statute following the statute setting forth the proscribed conduct is constitutional. To that end, our Supreme Court has made it clear that if a statute does not provide a penalty, a conviction under the statute cannot stand. *State v. DelBonis*, 862 A.2d 760, 768 (R.I. 2004) (dismissing a defendant's conviction because the statute failed to provide a penalty for specific conduct for which defendant was charged); *State v. Berberian*, 112 R.I. 745, 315 A.2d 743 (1974) (dismissing a defendant's conviction when the city never established a schedule of fines for parking violations); *State v. Tessier*, 100 R.I. 210, 211, 213 A.2d 699, 699 (1965) (dismissing a defendant's conviction for violating a city ordinance because "the ordinance as it appears on the record before [the court] d[id] not fix a penalty"). Additionally, the court may not step into the shoes of the Legislature to fill in gaps. *Maxie*, 187 A.3d at 341 ("This Court does not draft laws, it interprets and construes them. We simply cannot construe that which is not there to be construed."); *DelBonis*, 862 A.2d at 768 ("No authority exists for this Court or the trial court in a criminal case 'to supplement or to amend a statute enacted by the General Assembly.'"); *see also United States v. Evans*, 333 U.S. 483, 486 (1948) (holding that "[i]n our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions").

When interpreting a statute, the "ultimate goal [of the Court] is to give effect to the General Assembly's intent." *Olamuyiwa v. Zebra Atlantek, Inc.*, 45 A.3d 527, 534 (R.I. 2012); s*ee also Brennan v. Kirby*, 529 A.2d 633, 637 (R.I. 1987) (holding that the court's role is "to determine and effectuate the Legislature's intent and to attribute to the enactment the meaning most consistent

with its policies or obvious purposes"). Accordingly, if a statute is clear and unambiguous, this Court must construe the statute literally as to give effect to its plain meaning. *State v. Diamante*, 83 A.3d 546, 550 (R.I. 2014); *State v. Briggs*, 934 A.2d 811, 814 (R.I. 2007); *see also Martone v. Johnston Sch. Comm.*, 824 A.2d 426, 431 (R.I. 2003) ("The best evidence of [the General Assembly's] intent can be found in the plain language used in the statute."). However, if the statutory language is susceptible to more than one reasonable meaning and thus, is ambiguous, "'this Court will employ our well-established maxims of statutory construction in an effort to glean the intent of the Legislature.'" *Balmuth v. Dolce for Town of Portsmouth*, 182 A.3d 576, 580 (R.I. 2018) (quoting *In re Proposed Town of New Shoreham Project*, 25 A.3d 482, 505 (R.I. 2011)) (internal quotation marks omitted).

Unlike remedial statutes that must be liberally construed, "'penal statutes must be strictly construed in favor of the party upon whom a penalty is to be imposed.'" *State v. Carter*, 827 A.2d 636, 644 (R.I. 2003) (quoting *State v. Calise*, 478 A.2d 198, 200 (R.I. 1984)). Thus, a penal statute "'must be read narrowly . . . and [the] defendant must be given the benefit of any reasonable doubt as to whether the act charged is within the meaning of the statute.'" *Id.* at 643-44 (quoting *State v. Simmons*, 114 R.I. 16, 18, 327 A.2d 843, 845 (1974)).

It is well-settled that statutes related in subject matter and enacted by the same jurisdiction are considered *in pari materia* and should "be read in relation to each other." *Such v. State*, 950 A.2d 1150, 1156 (R.I. 2008). "[S]tatutes *in pari materia* should be considered together in order that they may be in harmony with each other and consistent with their general scope and purpose." *State v. St. Pierre*, 118 R.I. 45, 51, 371 A.2d 1048, 1051 (1977) (reading numerous possessory offenses in separate statutes as falling within the ambit of "larceny" when strictly construing statute of limitation for larceny in favor of defendant). The Court "'must consider the entire statute as a

whole; individual sections must be considered in the context of the entire statutory scheme, not as if each section were independent of all other sections.'" *State v. Briggs*, 58 A.3d 164, 168 (R.I. 2013) (quoting *Mendes v. Factor*, 41 A.3d 994, 1002 (R.I. 2012)); *State v. Poulin*, 66 A.3d 419, 423 (R.I. 2013) (considering consecutive statutes G.L. 1956 §§ 12-1-12 and 12-1-12.1 to determine eligibility for sealing a criminal sentence). "[U]nder no circumstances will this Court 'construe a statute to reach an absurd result.'" *Mendes*, 41 A.3d at 1002 (quoting *Generation Realty, LLC v. Catanzaro*, 21 A.3d 253, 259 (R.I. 2011)); *State v. Flores*, 714 A.2d 581, 583 (R.I. 1998).

Petitioner asserts that his statute of conviction, § 11-37-4, fails to provide a penalty and therefore, a conviction under that statute cannot stand. *See* Pet'r's Mem. at 6-9; Pet'r's Supp. Mem. at 10-18. The cases upon which Petitioner relies, however, are distinguishable from the case at bar.

In *Maxie*, the case upon which Petitioner principally relies, the defendant was convicted of sex trafficking of a minor pursuant to § 11-67-6. 187 A.3d at 331. The version of § 11-67-6 in effect on the date the crime allegedly occurred read, in pertinent part, as follows:

> "(b) Any person who:
>
> "(1) Recruits, employs, entices, solicits, isolates, harbors, transports, provides, persuades, obtains, or maintains, or so attempts, any minor for the purposes of commercial sex acts; or
>
> "(2) Sells or purchases a minor for the purposes of commercial sex acts; or
>
> "(3) Benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in subdivision (1) or (2); or
>
> "(c) Every person who shall commit sex trafficking of a minor, shall be guilty of a felony and subject to not more than forty (40) years

> imprisonment or a fine of up to forty thousand dollars ($40,000), or both." Sec. 11-67-6.[6]

The section describing the prohibited conduct, § 11-67-6(b), consisted of an incomplete sentence ending with what the parties and the court referred to as a "hanging or." *Maxie*, 187 A.3d at 338-39. The defendant asserted that his conviction under § 11-67-6 could not stand because, as a result of the "hanging or," the statute of conviction failed to state a crime. *Id.* at 339. Our Supreme Court agreed and concluded that the unambiguous language of § 11-67-6 failed to state a crime because "it [wa]s missing one of the two essential components of an effective criminal statute—the statement that the acts that it describes are crimes." *Id.* at 340. The court reasoned that the statute included a drafting error that could not be remedied by statutory construction because "[the court] simply cannot construe that which is not there to be construed." *Id.* at 341. The court also emphasized that "the power to define crimes rests not with [the] Court, but with the General Assembly." *Id.*

In *DelBonis*, the Supreme Court reversed the defendant's conviction for driving under the influence of drugs or alcohol because the applicable statute failed to state a penalty for the prohibited conduct the defendant was found to have violated. 862 A.2d at 769. The statute in effect at that time was § 31-27-2, as amended by P.L. 2000, ch. 264, § 1 (effective July 13, 2000), which provided for a penalty based upon the level of the operator's blood alcohol content (BAC). *Id*. at 765-66. The defendant, however, refused to submit to a Breathalyzer test and therefore his BAC was not determined. *Id.* at 762. The defendant was nonetheless accused of operating under the influence of drugs or alcohol "to a degree which rendered the person incapable of safely

[6] The Legislature has since repealed § 11-67-6. P.L. 2017, ch. 232, § 1, effective July 18, 2017; P.L. 2017, ch. 260, § 1, effective July 19, 2017.

operating a vehicle" as then set forth in § 31-27-2(b)(1).[7] *Id.* at 766. Recognizing the attempt by the Legislature to amend the statute, the court reasoned:

> "[T]he 2000 amendment was a comprehensive revision of the state's DUI statute. Not only were the elements of the offense redefined and classified according to the driver's blood alcohol level, but also the penalty provisions were amended significantly and were explicitly linked to the operator's BAC. Every penalty provision set forth in the amendment was based on the operator's BAC, but there was *no penalty* provision for a DUI offense in which the driver was found to be intoxicated 'to a degree which rendered the person incapable of safely operating a vehicle.' Section 31-27-2(b)(1). We deem this omission determinative to the case before this Court." *DelBonis*, 862 A.2d at 765 (emphasis added).

Thus, the court concluded that "[i]t is the obligation of the trial court and the duty of this Court to dismiss a criminal complaint based on a statute that does not contain a penalty provision." *Id.* at 770 (citing *Tessier*, 100 R.I. at 211, 213 A.2d at 700).

In *Tessier*, the defendant was convicted of violating a municipal ordinance for acting in a disorderly manner. 100 R.I. at 211, 213 A.2d at 699. Although not raised on appeal, the Supreme Court vacated the conviction and directed that the trial court dismiss the criminal complaint because "the [municipal] ordinance as it appear[ed] on the record before us [did] not fix a penalty" for the offensive conduct with which defendant was charged. *Id.* In *State ex rel. Campbell v. Fortier*, the court reaffirmed its holding in *Tessier* and "reverse[d] the defendants' convictions because no penalty provision appear[ed] in the record." 122 R.I. 559, 560, 409 A.2d 1223, 1224 (1980). In *Campbell*, the defendants were convicted of parking on a sidewalk in violation of a city traffic regulation that did not state a penalty within the same provision nor reference a separate penalty provision. *Id.* n.*. The court dismissed the defendants' convictions due to the state's failure to introduce the penalty provision of the regulation into evidence. *Id.*

[7] Section 31-27-2 has since been amended to rectify the issues raised in *DelBonis*.

This case is also distinguishable from *State of New Jersey v. Fair Lawn Service Ctr.*, upon which Petitioner relies. *See* Pet'r's Supp. Mem. at 7-8. In that case, the court held that a person could not be convicted under the state's disorderly conduct statute because the legislature failed to provide a penalty. 20 N.J. 468, 474, 120 A.2d 233, 236 (1956). After quoting the statute under which the defendant was convicted, the court noted that "[n]either this section *nor the ensuing sections* . . . contain any statutory penalty." *Id.* at 471, 120 A.2d at 235 (emphasis added). The court reasoned that "while it may be said that it is to be presumed that the Legislature would not denounce certain acts without providing a penalty, [] penal consequences cannot rest upon a mere presumption." *Id.* at 472, 120 A.2d at 235. Here, unlike in *Fair Lawn*, the penalty for violating § 11-37-4 is provided in the very next section. *See id.*; *cf.* § 11-37-5. Thus, there is no need to presume what penal consequences the Legislature intended to impose for a violation thereof.

Here, unlike in *Maxie, DelBonis*, *Tessier*, *Campbell* and *Fair Lawn*, § 11-37-4 contains no gap or drafting error that would require this Court to redraft the statute and thus exceed its powers, nor is the record before this Court bereft of a penalty provision. The prohibited conduct is plainly laid out in § 11-37-4, and the penalty for committing second degree sexual assault is clearly established in § 11-37-5. These two statutory provisions are part of the same statutory scheme, are closely related in subject matter inasmuch as they both address the crime of second degree sexual assault, and are considered *in pari materia* and therefore, must be read in relation to each other. *Such*, 950 A.2d at 1156. To read § 11-37-4 in isolation, as Petitioner would have this Court do, would be contrary to legislative intent as the criminal statute would have no force or effect and lead to an absurd result. *See Flores*, 714 A.2d at 583 (upholding trial judge's consideration of § 11-37-16 and § 11-37.1-18 in concluding that defendant must register as a sex offender). When

the two statutory sections are read together, as this Court is required to do, the Legislature's intent is clear as to the conduct that is proscribed and the penalty for such conduct.

Petitioner also argues that § 11-37-4 fails to indicate if the offense is a felony or misdemeanor and that it also fails to establish the criminal character of that crime. Pet'r's Supp. Mem. at 21, 26. As to Petitioner's first assertion, there is no requirement that a criminal statute identify the crime as a felony or misdemeanor. *See* 1 Wayne R. LaFave et al., *Substantive Criminal Law* § 1.6(a) (3d ed. Oct. 2018 update) ("[I]n the United States most criminal statutes defining specific crimes do not themselves label as felonies or misdemeanors the crimes which they describe, leaving the matter to be determined by reference to the punishment provided (according to the place or to the length of confinement)."); *see also State v. Wolford Corp.*, 689 N.W.2d 471, 473 (Iowa 2004) ("It is not essential for a criminal statute to include language that the violation of the statute constitutes a misdemeanor or felony."). In Rhode Island, crimes are classified as a felony, a misdemeanor or a petty misdemeanor based on the possible punishment, as set forth in § 11-1-2. It is unnecessary that each criminal statute under Rhode Island law further identify the offense as a felony, misdemeanor or petty misdemeanor. As to Petitioner's second assertion, the statutory phrase "is guilty of second degree sexual assault," as stated in § 11-37-4, clearly establishes the criminal nature of the crime. The word "guilty," means "justly chargeable with or responsible for a usually grave breach of conduct or a crime." *Guilty*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/guilty. A person of ordinary intelligence would clearly understand that the conduct described in § 11-37-4 is punishable as a crime. *See Russell*, 890 A.2d at 460. Accordingly, this Court rejects Petitioner's argument that § 11-37-4 fails to declare that a violation thereof constitutes a crime in general or a felony more specifically.

B

The Separate Penalty Provision Is Not Unconstitutional

Beyond the general premise that Petitioner would like this Court to ignore the existence of § 11-37-5, entitled "Penalty for second degree sexual assault," Petitioner contends that there are only three ways in which a penalty provision for a criminal offense passes constitutional muster: (1) within the same all-encompassing paragraph-like statute that defines the prohibited conduct; (2) within a single statute that has multiple subsections including the prohibited conduct and the penalty in different subsections; or (3) if cross-referenced in the statute identifying the criminal conduct. S*ee* Pet'r's Mem. at 2; Pet'r's Supp. Mem. at 18-21. There is no such hard and fast rule as Petitioner asserts. Instead, § 11-37-5, following § 11-37-4, is an acceptable structure of specifying the prohibited conduct and the prescribed penalty for a person of ordinary intelligence to understand both what is prohibited and what the penalty is so that he may act accordingly. *See Russell*, 890 A.2d at 460; *see also* 1 Wayne R. LaFave et al., *Substantive Criminal Law* § 1.2(d) (3d ed. Oct. 2018 update).

Indeed, the Supreme Court has recognized that a criminal penalty for specified conduct "may be provided by a separate enactment." *State v. Kalian*, 122 R.I. 443, 444, 408 A.2d 610, 611 (1979). The *Kalian* Court held: "Unquestionably a criminal statute is of no force and effect if no penalty whatsoever is provided for its violation, but there is no necessity that the penalty be included within the same proviso." *Id.*; *see also* 22 C.J.S. *Criminal Law: Substantive Principles* § 24 (March 2019 update) ("Generally, a criminal statute without a penalty clause is of no force and effect, so that no conviction may be had thereunder; however, it is not necessary that the same act which defines the crime also provides its penalty.").

There is also no legal authority for the proposition that a state criminal statute must cross-reference a separate penalty provision, as Petitioner repeatedly contends. *See* Pet'r's Mem. at 2; Pet'r's Supp. Mem. at 19-21. As recognized by the renowned Professor Wayne R. LaFave, to whom Petitioner also cites, *see* Pet'r's Supp. Mem. at 18-20, criminal statutes are formatted in various ways:

> "In many cases the section of the statute which describes the forbidden conduct concludes with a statement of the punishment*; or perhaps one section sets forth the forbidden conduct and the next section the punishment*. Sometimes, however, the statute forbidding the conduct may refer to another statute for the punishment, such as the rather common statute which provides that whoever commits embezzlement (defining it) shall be punishable as if he committed larceny, and the larceny statute provides for a certain penalty of fine or imprisonment. . . . *In all of these cases* there is little difficulty in concluding that, since the statutes set forth both forbidden conduct and criminal penalty, the legislature has created a crime." *See* 1 Wayne R. LaFave et al., *Substantive Criminal Law* § 1.2(d) (3d ed. Oct. 2018 update) (emphasis added).

Thus, Prof. LaFave, upon whom Petitioner relies, endorses the practice of identifying the forbidden conduct in one section of a statutory scheme and the punishment in the next section for the legislature to have properly created a crime. This is squarely the issue before this Court. It is wholly acceptable and proper for the General Assembly to describe the conduct in § 11-37-4 and set forth the penalty for such conduct in § 11-37-5.

C

Petitioner's Criminal Information and Plea Informed Him of the Penalty Provision

Importantly, Petitioner was charged in Count one of the criminal information of violating *both* §§ 11-37-4 *and* 11-37-5. Under article I, section 10 of the Rhode Island Constitution a person criminally accused has the right "to be informed of the nature and cause of the accusation." *See State v. Domanski*, 57 R.I. 500, 504, 190 A. 854, 857 (1937) (recognizing that "[t]he accused

undoubtedly has the constitutional right to be clearly informed of the accusation against him so that he may defend the same and later plead a conviction or acquittal in bar of a subsequent charge for the same offense"). As Petitioner's criminal information included both the statutory reference for the criminal conduct for which he was charged with committing and the statutory reference to the possible penalty, he received fair notice "of the nature and cause of the accusation" to enable him to defend his case. *See* R.I. CONST. art. I, § 10. A person of ordinary intelligence does not need to go on a hunt to find a penalty when it was expressly provided in one of the two statutes he was charged with violating in Count one of his criminal information.[8] *See Russell*, 890 A.2d at 460.

Petitioner entered into a *nolo contendere* plea to Count one of the criminal information. In doing so, a plea form was presented to and ultimately executed by the trial judge after finding that Petitioner's *nolo contendere* plea was a knowing, voluntary and intelligent waiver of his rights, that Petitioner understood the consequences of his plea, and that there was a factual basis to support the plea to Count one. The plea form reflects the maximum sentence of fifteen years in prison for the crime of second degree sexual assault. It is illogical to now assert that Petitioner was somehow unaware of the penalty he faced for the offense with which he was charged in Count one of the criminal information.

* * *

In sum, the Legislature provided fair notice of the consequences of committing the conduct proscribed in § 11-37-4 as the penalty for second degree sexual assault is clearly provided in the following section, § 11-37-5, which must be read together. *See Such*, 950 A.2d at 1156; *see also*

[8] This Court notes that Petitioner's criminal information complies with the requirements of Super. R. Crim. P. 7(c) and § 12-12-1.4.

Poulin, 66 A.3d at 423; *Briggs*, 58 A.3d at 166. Additionally, Petitioner's criminal information stated that he was being charged under both §§ 11-37-4 and 11-37-5, and the plea form which Petitioner executed further reveals the maximum penalty of fifteen years in prison for the offense of second degree sexual assault. For all the reasons discussed in Sections III.A-C, *supra*, this Court finds that Petitioner was afforded due process, that he acknowledged the maximum penalty he faced for the offense to which he pled *nolo contendere*, and that his conviction for one count of second degree sexual assault is constitutionally sound.

IV

Conclusion

For the reasons set forth herein, this Court finds that there are no genuine issues of material fact that exist, and that Petitioner has failed to prove by any standard—beyond a reasonable doubt as to the unconstitutionality of his conviction or by the preponderance of evidence that he is entitled to post-conviction relief—that his request for relief should be granted. Petitioner's conviction under § 11-37-4 was not rendered unconstitutional because the proscribed criminal conduct and penalty are stated in two separate statutory provisions. In any event, the criminal information charging him with second degree sexual assault expressly charged him with violating both §§ 11-37-4 and 11-37-5, and the plea form executed by Petitioner and entered by the trial judge acknowledged the maximum penalty for the offense to which he pled *nolo contendere*. Accordingly, Petitioner's request for post-conviction relief is denied.

Counsel for the State shall prepare an appropriate order and judgment.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Dante Dutra v. State of Rhode Island
CASE NO:	PM-2019-0429
COURT:	Providence County Superior Court
DATE DECISION FILED:	June 7, 2019
JUSTICE/MAGISTRATE:	K. Rodgers, J.
ATTORNEYS:	
For Plaintiff:	Glenn Sparr, Esq.
For Defendant:	Judy Davis, Esq.