STATE OF RHODE ISLAND

KENT, SC. **SUPERIOR COURT**

[Filed: January 12, 2023]

ANTHONY SUDDUTH	**:**	
	:	
VS.	**:**	**KM-2019-1286**
	:	**WM-2019-0632**
STATE OF RHODE ISLAND	**:**	

DECISION

F. DARIGAN, J. (Ret.) This case is before the Court on Petitioner Anthony Sudduth's petition for postconviction relief resulting from dispositions made by the Petitioner in cases W2-2016-0189A, a criminal information filed in Washington County Superior Court, and from a plea to K2-2018-0596A on October 24, 2018. At the same time, Petitioner was declared a violator of probation in the W2-2016-0189A case by virtue of his plea to the K2-2018-0596A case.

Petitioner was represented in the Washington County case by Assistant Public Defender Joseph Dwyer. Prior to Petitioner's plea on May 17, 2017, Attorney Dwyer discussed the proposed disposition with the Petitioner. He explained the rights that the Petitioner was waiving by entering a plea to a felony assault charge and his right to appeal his sentence. The Petitioner never requested Mr. Dwyer to file a notice of appeal on the judgment of conviction.

On May 9, 2018, Petitioner was operating a motor vehicle in the City of Warwick when he struck a seven-year-old girl who sustained severe bodily injury. His blood alcohol level was .380. As a result of this incident, K2-2018-0596A was filed against Sudduth along with a violation of probation on W2-2016-0189A. Sudduth was charged on the Kent County case with driving under the influence of alcohol, etc. resulting in serious bodily injury, and one count of driving as to endanger, resulting in personal injury. This was filed by the State on July 25, 2018.

Petitioner Sudduth was represented in the Kent County case on the new charges and the violation by Kensley R. Barrett, Esq.

On October 24, 2018, Petitioner pled nolo contendere to both counts and as a result of the plea was determined to be a violator of the sentence in W2-2016-0189A. Sudduth received a five-year sentence to serve at the ACI and a six (6) year sentence to serve on his pleas to K2-2018-0596A. This six-year sentence was to be served consecutively to the five-year violation sentence for a total term to serve of eleven years.

According to Attorney Barrett's affidavit filed in this case, he counseled the Petitioner on the rights he was waiving if he entered a plea or going to a trial or violation hearing. Barrett met with Sudduth to review his change of plea form and review the rights he was waiving and the charges and sentences he would receive.

Attorney Barrett met with Sudduth on October 24, 2018 at the ACI. Petitioner at that time asked Barrett about filing an appeal. Attorney Barrett advised Sudduth that his appropriate remedy was a postconviction relief petition. Petitioner filed his application for postconviction relief on December 16, 2019. Petitioner, through his counsel Thomas M. Dickenson, Esq., filed a memorandum in support of this petition on July 21, 2021.

The Petitioner urges this Court to apply the standards of determining ineffective assistance of counsel as contained in *Strickland v. Washington*, 466 U.S. 668, 688 (1984) which holds that to prove ineffective assistance of counsel a petitioner must prove: (1) that counsel's representation fell below the objective standard of reasonableness; (2) that any such deficiency was prejudicial to the defendant. *Id.* at 692.

Petitioner also relies on *Roe v. Flores-Ortega*, 528 U.S. 470 (2000) which opined that if an attorney's failure costs a defendant an appeal that the defendant would otherwise have pursued,

prejudice to the defendant is presumed '"with no further showing from the defendant of the merits of his underlying claims.'" (quoting *Garza v. Idaho*, 139 S. Ct. 738, 742 (2019)).

In *Garza*, the Court held that the *Flores-Ortega* rule of per se prejudice applies even in cases where the defendant has executed a plea agreement which specifically waives the right to appeal of the plea being made. *Id.*

Petitioner also cites *Rojas-Medina v. United States*, 924 F.3d 9, 17 (1st Cir. 2019). The defendant in this case waived his right to appeal at the time of the plea and later indicated he would have appealed the case. Defendant sought postconviction relief in the United States District Court. After hearings, a magistrate judge found the defendant's attorney ineffective for failing to appeal. The District Court reversed the magistrate, holding the appeal waiver in the plea to be conclusive. On appeal to the First Circuit, the Court found per se ineffectiveness in defendant's counsel's failure to inform the defendant about his appellate rights and file an appeal on his behalf. In his opinion, Judge Selya indicated "[a]t a minimum, trial counsel was required to advise his client about the pros and cons of taking an appeal, and then to make a reasonable effort to ascertain his client's wishes."

Petitioner cites his affidavit in which he declared that neither of his counsel informed him of his appellate rights and as a result, were ineffective in their representation of Mr. Sudduth.

The State avers that Attorney Dwyer was never asked by the Petitioner to file an appeal and that Attorney Barrett subsequently counseled the Petitioner that his remedy lied in filing for postconviction relief, which the Petitioner did in December of 2019.

In a negotiated plea agreement, a defendant agrees to waive certain rights. In the instant case, the pleas entered into by Mr. Sudduth and his subsequent determination that his plea made him a violator of his probation, Mr. Sudduth was counseled by two experienced and competent

attorneys with extensive practice in the criminal laws of this state. Mr. Sudduth duly executed the plea forms in question in light of his legal representation afforded by counsel.

Our Supreme Court unequivocally agrees that relief sought regarding sentencing is properly pursued only through the statute which concerns postconviction relief—and not by direct appeal. Any rights a defendant may have which were not included in the negotiated plea agreement must be pursued via postconviction relief.

State v. Keohane, 814 A.2d 327, 329 (R.I. 2003) states:

> "[D]efendant's guilty plea acted as an effective waiver of his right of appeal; thus, the appeal is not properly before this Court . . . However, mindful that [the Defendant] may seek to challenge the validity of his plea by way of postconviction relief, [the Court] shall proceed to address the merits of this appeal." *See also State v. Vashey*, 912 A.2d 416, 418 (R.I. 2006); *State v. Desir*, 766 A.2d 374, 375 (R.I. 2001).

Our Supreme Court has indicated that as a general rule, "a plea of [nolo contendere] waives all non-jurisdictional defects, . . . [it] does not bar appeal of claims that the applicable statute is unconstitutional." *State v. Gibson*, 182 A.3d 540, 552-53 (R.I. 2018).

In *State v. Lee*, 502 A.2d 332, 335 (R.I. 1985), the Court held that there may be no direct appeal from a sentence imposed in Superior Court, that a Rule 35 motion is a prerequisite to an appeal regarding the propriety of a sentence. Only after the Superior Court considers issues involving a sentence's propriety or legality may further relief be sought.

The State argues that the Petitioner relies primarily on these cases, *Garza v. Idaho* and *Rojas-Medina v. United States*. The State avers that both cases are distinguishable and are contrary to Rhode Island law and precedent.

Flores-Ortega, 528 U.S. at 480 opines, "[C]ounsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either 1) that a rational

defendant would want to appeal . . . or 2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing."

The *Flores-Ortega* Court applied the *Strickland* test and held that failure to file the requested appeal was effectually per se ineffective assistance of counsel. *Id.* at 470.

The *Garza* Court extended the rule espoused in *Flores-Ortega* to defendants who entered into plea agreements stating counsel would be ineffective per se for failing to file an appeal upon request even if the defendant had waived most of his appellate claims by plea. *Garza*, 139 S. Ct. at 744.

The First Circuit in *Rojas-Medina*, 924 F.3d at 17 takes *Garza* a step further indicating that it is presumptively ineffective if counsel fails to consult regarding a potential appeal with a defendant who reasonably demonstrates a desire to appeal.

This Court, on the petition for postconviction relief filed by Petitioner Sudduth after careful consideration of the pleas entered at Superior Court by the Petitioner on two separate occasions, the affidavits of two counsel who represented the Petitioner on his Superior Court cases, and reviewing the extensive memoranda filed in this case by counsel for the Petitioner and the State, finds that the Petitioner's petition for postconviction relief has not sustained the Petitioner's burden of proof and is respectively denied.

This Court finds that the cases and precedents cited by counsel in their respective briefs from the United States Supreme Court and the First Circuit Court of Appeals are distinguishable from the instant *Sudduth* case, and that safeguards contained in the numerous Federal Court cases cited by the Petitioner have long been available for defendants in Rhode Island. The safeguards of their rights in appealing issues not objectively waived in the plea agreement, nolo contendere

form, used in essentially the same form for decades, are protected by the Rhode Island postconviction relief statute, reported cases and precedent.

Our Supreme Court in the cases submitted by the State, the existence and practice of the Rule 35 motion concerning sentencing and the postconviction relief statute G.L. 1956 §§ 10-9.1-1, *et seq.* in this Court's opinion contain the safeguard and appellate protection afforded by the *Garza, Flores-Medina* and other cases which have attempted to expand and articulate the rights of defendants who enter into negotiated pleas to end their cases.

The postconviction relief statute in Rhode Island, § 10-9.1-1, is as follows:

> "(a) Any person who has been convicted of, or sentenced for, a crime, a violation of law, or a violation of probationary or deferred sentence status and who claims:
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> (1) That the conviction or the sentence was in violation of the constitution of the United States or the constitution or laws of this state;
> (2) That the court was without jurisdiction to impose sentence;
> (3) That the sentence exceeds the maximum authorized by law, or is otherwise not in accordance with the sentence authorized by law;
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> (5) That his or her sentence has expired, his or her probation, parole, or conditional release unlawfully revoked, or he or she is otherwise unlawfully held in custody or other restraint; or
> (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief.
>
> "(b) This remedy is not a substitute for, nor does it affect any remedy incident to the proceedings of the trial court, or of direct review of the sentence or conviction. Except as otherwise provided in this chapter, it comprehends and takes the place of all other common law, statutory, or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them."

This Court finds that section (a) of this statute provides the relief sought in the cited federal cases.

State v. Mattatall, 947 A.2d 896, 901 n.7 (R.I. 2008) provides,

> "An applicant who files an application for postconviction relief bears the burden of proving, by a preponderance of the evidence, that such relief is warranted."

This Court finds that the Petitioner in this case has not met this burden of proof.

In addition, as previously mentioned, our Supreme Court has also held that there is no direct appeal from a sentence imposed in Superior Court.

It is well settled that a Rule 35 motion determination is a prerequisite to an appeal to this court as to the propriety of a sentence." *See State v. Tiernan*, 605 A.2d 1328, 1329 (R.I. 1992); *State v. Trepanier*, 600 A.2d 1311, 1315 (R.I. 1991); *Lee*, 502 A.2d at 335; *State v. Bucci*, 430 A.2d 746, 749 (R.I. 1981); *State v. McParlin*, 422 A.2d 742, 745 (R.I. 1980); *State v. Feng*, 421 A.2d 1258, 1273-74 (R.I. 1980); *State v. Ware*, 418 A.2d 1, 2 (R.I. 1980); *State v. Tessier*, 115 R.I. 372, 374, 346 A.2d 121, 122-23 (1975). "This court has unequivocally stated that the appropriate procedure for challenging an improperly or illegal sentence is . . . to seek revision of the sentence in the Superior Court imposed under Super. R. Crim. P. 35." *See, e.g.*, *Lee*, 502 A.2d at 335; *Bucci*, 430 A.2d at 749; *McParlin*, 422 A.2d at 745. "Only after the Superior Court has made a determination concerning the Rule 35 motion will this court consider issues involving a sentence's propriety or legality." *Lee* 502 A.2d at 335; *Bucci*, 430 A.2d at 749; *McParlin*, 422 A.2d at 745; *State v. Baptista*, 632 A.2d 343, 345 (R.I. 1993).

In the instant case, Petitioner Sudduth in both cases and in the violation received exactly the sentence he had negotiated for—not so in the federal cases cited by the Petitioner.

In *Rojas-Medina*, 724 F.3d at 13, a revised presentence investigation report (PSI Report) was published which substantially increased defendant's recommended guideline range and received a 70-month sentence over his objection. No motion of appeal was filed by defendant's counsel in that case despite the defendant's protestation that there "has to be a way." *Id.* at 14.

The Supreme Court in *Garza*, *supra*, had grave concerns about a defendant's right to counsel in postconviction relief petitions citing that the postconviction relief statute in *Idaho* clearly did not provide a right to counsel in postconviction relief cases.

In Rhode Island, in addition to case law protecting defendants' rights after a plea is made, provided protection to defendants through the postconviction relief statute found in § 10-9-1.1 as well as the right to counsel afforded to all postconviction relief petitioners if they are unable to afford to hire counsel on their own.

This benefit long available to all defendants in Rhode Island is another important difference between practice and precedent in Rhode Island and that available in the cases on a federal level cited by the Petitioner.

Petitioner has extensively briefed the question of whether or not the cited federal cases in this matter may be applied retroactively. The Court need not reach that question in light of this Court's Decision in the instant case.

For all of the stated reasons contained in this Decision, the Court finds as a matter of fact and a conclusion of law that the Petitioner has failed to prove his claim of ineffective assistance of counsel by a fair preponderance of the evidence, and his petition is respectfully denied.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Anthony Sudduth v. State of Rhode Island**
CASE NO:	**KM-2019-1286; WM-2019-0632**
COURT:	**Kent County Superior Court**
DATE DECISION FILED:	**January 12, 2023**
JUSTICE/MAGISTRATE:	**F. Darigan, J. (Ret.)**

ATTORNEYS:

For Plaintiff:	**Thomas M. Dickinson, Esq.**
For Defendant:	**Judy Davis, Esq.**