STATE OF VERMONT

SUPERIOR COURT
Orange Unit

CIVIL DIVISION
Docket No. 257-12-09 Oecv

In re: Stacey Colson

DECISION ON MOTION FOR SUMMARY JUDGMENT

This post-conviction review case is before the court on the State's motion for summary judgment. Petitioner Stacey Colson, proceeding pro se, contends that he received ineffective assistance of counsel before he was convicted of various felonies and incarcerated. The State, represented by William Porter, Esq., disputes this and has filed the instant motion. For the reasons below, the State's motion is GRANTED.

Facts

On September 24, 2009, Mr. Colson pleaded no contest to aggravated domestic assault, burglary, unlawful restraint, and violation of an abuse prevention order. See *State v. Colson*, No. 102-4-08 Oecr (Vt. Dist. Ct. Sept. 24, 2009). As a result, he received a suspended sentence of 8–22 years and was required to serve 66 months with credit for time served. He is currently serving this sentence at the Southern State Correctional Facility in Springfield. In exchange for his plea, the State dismissed a charge of aggravated sexual assault. Mr. Colson claims that his criminal attorney provided him with ineffective assistance of counsel.

Mr. Colson's criminal attorney, Orange County Public Defender Daniel Sedon, was deposed for this action. Mr. Sedon indicated that his main strategy was to defend against the most serious charge, aggravated sexual assault. Mr. Colson told Mr. Sedon that the sex he had with the victim was consensual. In his deposition, Mr. Sedon indicated that he could substantially defend Mr. Colson against this charge because of discrepancies between the victim's account and the circumstantial evidence. However, Mr. Sedon stated that he expressed his firm belief to Mr. Colson that Mr. Colson would be convicted on the other charges. Mr. Sedon believed that, if Mr. Colson had gone to trial and been convicted of every charge except sexual assault, Mr. Colson would have received at least a ten-year minimum sentence because the facts in the case were so disturbing. Mr. Colson was actively involved in the plea negotiation and agreed with Mr. Sedon's assessment. Furthermore, Mr. Sedon testified that Mr. Colson repeatedly told Mr. Sedon that Mr. Colson did not want to have a trial. Mr. Colson has offered no evidence to contradict this point.

After the victim was deposed in Mr. Colson's criminal action, the defense received medical evidence that contradicted the testimony given by the victim. Mr. Colson then waived his speedy trial right and requested a continuance in order to depose the victim again and ask about the discrepancy. Specifically, Mr. Sedon hoped to impeach the victim and show that the sex was consensual. "[T]he entire purpose of taking her additional deposition would have been [

to better prepare . . . to defend the sexual assault charge at trial." Sedon Dep. 23–24, Oct. 22, 2010. However, the victim was not deposed again.

Once the criminal court granted Mr. Sedon's motion to further depose the victim, plea negotiations began in earnest. After the State agreed to a plea deal dismissing the sexual assault charge, Mr. Sedon stated that it was unnecessary to depose the victim again because he did not want to further upset the victim. Mr. Sedon stated that it was important not to upset the victim because "the State was ultimately going to need her consent to get an agreement past the judge." *Id.* at 24. Mr. Sedon believed that once the State dismissed the sexual assault charge, there was little need for an additional deposition, which would have done more harm than good. Furthermore, despite the victim's prior inconsistent statements after the assault, Mr. Sedon believed that the jury would find the victim to be generally likeable and creditable. The attorney believed that the victim's testimony would not bode well for Mr. Colson if the criminal case was brought to trial.

Mr. Colson claims that if his attorney had deposed the victim a second time, the evidence would have resulted in a more favorable outcome in the criminal case. Mr. Colson argues that his attorney's failure to depose the victim a second time constituted ineffective assistance of counsel. Mr. Colson also contends that if he had known his attorney would not depose the victim a second time, then Mr. Colson would not have waived his speedy trial rights. He has not submitted any evidence, expert or otherwise, to support this claim.

Mr. Colson also claims that his attorney did not give him all of the evidence collected in the criminal case, despite numerous requests. Mr. Colson argues that if he had known all the evidence against him, he would not have pleaded no contest in the criminal proceeding. He argues that his attorney's failure to share all the evidence with him constitutes ineffective assistance of counsel. Alternately, he claims that if he knew all of the evidence, and that evidence was presented at his sentencing hearing, he would have received a shorter sentence. Thus, he argues that his sentence was excessive in violation of the prohibition against cruel and unusual punishments.

In his amended petition, Mr. Colson further contends that his attorney failed to request a mental evaluation and that Mr. Colson's mental condition prevented him from understanding the proceedings against him and the consequences of his decision to plea nolo contendere. Mr. Colson argues that this failure by his attorney constitutes ineffective assistance of counsel. The mental evaluation Mr. Colson submitted to this court indicates that he has post-traumatic stress disorder and major depressive disorder. However, none of the medical or psychiatric evidence Mr. Colson submitted indicates that he did not understand the criminal proceedings against him. There is no evidence that he was mentally incapacitated at the time he entered his plea. The transcript of the change-of-plea hearing does not indicate that Mr. Colson was impaired, and Mr. Colson's statements at that hearing indicate that he understood what was happening and what he was doing. Mr. Sedon's observations of Mr. Colson on that day confirm that Mr. Colson was coherent at the change-of-plea hearing. Even if Mr. Colson was on medication, as he contends, Mr. Sedon did not observe any behavior indicating that Mr. Colson did not understand the proceeding. There is no evidence in the record of the medications Mr. Colson was using on the day of the change-of-plea hearing.

The amended petition also suggests Mr. Colson's defense attorney should have filed a motion to suppress, and this failure constitutes ineffective assistance of counsel. No argument or evidence was presented on this point by either party.

Standard of Review

The State has filed for summary judgment. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . referred to in the statements required by Rule 56(c)(2), show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3). The party moving for summary judgment has the burden of demonstrating that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. *Price v. Leland*, 149 Vt. 518, 521 (1988). The non-moving party has the burden of setting forth specific facts showing a genuine dispute for trial. V.R.C.P. 56(e). The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (citation omitted). Summary judgment is mandated where the non-moving party fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

Conclusions of Law

Mr. Colson seeks to vacate his sentence. The superior court may vacate an inmate's sentence if he shows that it was imposed in violation of the constitution. See 13 V.S.A. § 7131. If an inmate claims to have received ineffective assistance of counsel, in violation of the Sixth Amendment of the United States Constitution, he is entitled to post-conviction relief (PCR) if he can show that "(1) his counsels' performance fell below an objective standard of performance informed by prevailing professional norms; and (2) there is a reasonable probability that, but for counsels' unprofessional errors, the proceedings against him would have turned out differently." *In re Plante*, 171 Vt. 310, 313 (2000).

Mr. Colson did not have a criminal trial. Instead, he pleaded no contest to three felonies and a misdemeanor. "In the context of a guilty plea," a petitioner seeking post-conviction relief under a claim of ineffective assistance of counsel must "show that counsel's deficient performance affected the outcome of *the plea process* and that there is a reasonable probability that, but for counsel's errors, *he would not have pleaded guilty* and would have insisted on going to trial." *United States v. Clingman*, 288 F.3d 1183, 1186 (10th Cir. 2002) (internal quotations omitted); see also *Tezak v. United States*, 256 F.3d 702, 712 (7th Cir. 2001) (in the context of a guilty plea, a petitioner must show that, but for the deficient advice of counsel, he would have insisted on going to trial). Furthermore, "a petitioner's 'mere allegation' that he would have insisted on trial but for his counsel's errors, although necessary, is ultimately insufficient to entitle him to relief. Rather, we look to the factual circumstances surrounding the plea to determine whether the petitioner would have proceeded to trial." *Miller v. Champion*, 262 F.3d 1066, 1072 (10th Cir. 2001) (citation omitted).

In this case, Mr. Sedon's undisputed deposition indicates that there is a reasonable probability that Mr. Colson would have pleaded guilty and avoided trial in any event, despite his attorney's alleged errors. Mr. Colson repeatedly told his attorney that he did not want to go to trial. Thus, despite Mr. Colson's mere allegation to the contrary, he has failed to present any factual circumstances surrounding the plea that would indicate that he would have proceeded to trial but for Mr. Sedon's ineffective advice and assistance. "A plaintiff in an action for postconviction relief is bound by his plea unless he can prove serious dereliction on the part of counsel to show that his plea was not a knowing and intelligent act." *Magoon v. Smith*, 130 Vt. 603, 606 (1972). Mr. Colson has failed to present any evidence indicating that his plea was not a knowing and intelligent act.

Furthermore, Mr. Colson has failed to present any evidence to suggest that his counsel's performance fell below an objective standard of performance informed by prevailing professional norms. "The appropriate standard for reviewing claims involving ineffective assistance of counsel is whether a lawyer exercised that degree of care, skill, diligence and knowledge commonly possessed and exercised by reasonable, careful and prudent lawyers in the practice of law in this jurisdiction." *In re Grega*, 2003 VT 77, ¶ 7, 175 Vt. 631 (mem.). "Only in rare situations will ineffective assistance of counsel be presumed without expert testimony." *Id.* ¶ 16. In this case, Mr. Colson has offered no evidence, expert or otherwise, to indicate that his criminal attorney failed to exercise the minimum degree of skill necessary to effectively represent him. Although expert testimony is unnecessary "[w]here a professional's lack of care is so apparent that only common knowledge and experience are needed to comprehend it," *id.*, the evidence presented here, when viewed in a light most favorable to Mr. Colson, is not "so apparent" that this court can conclude that Mr. Sedon's performance fell below the standard of care possessed and exercised by other attorneys in Vermont. Thus, Mr. Colson needs expert testimony to support his claims, and his failure to present such evidence forecloses his Sixth Amendment claims.

For instance, Mr. Colson complains that his attorney did not depose the victim a second time despite Mr. Colson's request. However, this decision is generally within the judgment and strategy of trial counsel and is not a proper ground for post-conviction relief. See *Ferby v. State*, 404 So. 2d 407, 408 (Fla. Dist. Ct. App. 1981). Likewise, Mr. Colson has presented no evidence to suggest that his attorney's failure to share all of the evidence with him prejudiced him. Although Mr. Colson generally claims that the outcome of his criminal case would have been different if he had reviewed all of the evidence possessed by his attorney, he fails to explain exactly how or why the outcome would have been different. "Conclusory allegations of prejudice are insufficient" when a petitioner "fails to describe *specifically* how" his attorney prejudiced his defense. *United States v. Mohammad*, 999 F. Supp. 1198, 1204 (N.D. Ill. 1998) (emphasis added). Thus, Mr. Colson is not entitled to post-conviction relief on this ground.

As for Mr. Colson's conclusory allegation that Mr. Sedon should have moved to suppress evidence, no specific evidence was presented on this point. "Generally, a showing that defense counsel failed to make a particular pretrial motion does not, in itself, establish ineffective assistance of counsel." *People v. Gil*, 729 N.Y.S.2d 121, 126 (N.Y. App. Div. 2001). The same can be said of Mr. Colson's suggestion that his attorney should have raised mental competency

as an issue. The psychiatric evidence presented by Mr. Colson does not suggest that he was incompetent or incapacitated at the time of the crime or during the subsequent criminal proceedings. Thus, there is no evidence raising a genuine dispute for trial on this issue.

Lastly, Mr. Colson vaguely suggests in his pleading that the Eighth Amendment was violated somehow because he was denied an opportunity to review all the evidence. He contends that if he had had such an opportunity, he would have presented this evidence to the criminal court judge who would have ordered a lower sentence. This claim, which was not argued or briefed by Mr. Colson in his memo in opposition to summary judgment, is wholly speculative and without evidentiary support. A petitioner in a post-conviction relief proceeding is not entitled to relief on the basis of unsupported conjecture that the sentence pronounced by the criminal trial judge was greater than it would have been if the petitioner had offered different evidence in the criminal proceeding. See *Barton v. State*, 614 S.W.2d 766, 768 (Mo. Ct. App. 1981). "[A] bare claim of excessiveness of a sentence is not cognizable on a motion to vacate a judgment where the sentence, as here, is well within the authorized statutory limit." *Id.* Thus, the State is entitled to judgment as a matter of law on Mr. Colson's Eighth Amendment claim. See also *Satcher v. Univ. of Ark.*, 558 F.3d 731, 735 (8th Cir. 2009) ("[F]ailure to oppose a basis for summary judgment constitutes waiver of that argument.").

Order

For the reasons above, the State's motion for summary judgment is GRANTED.

Dated at Chelsea, Vermont on August 5, 2011.

Harold E. Eaton, Jr.
Superior Court Judge

VERMONT SUPERIOR COURT
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