STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: December 29, 2014]

ROBERT DOMINICK	:	
	:	
VS.	:	**NO. PM/14-2065**
	:	**(P2/06-2582)**
STATE OF RHODE ISLAND	:	

DECISION

KRAUSE, J. Petitioner Robert Dominick has brought before this Court an application for post-conviction relief pursuant to R.I.G.L. § 10-9.1-1, et seq. He claims that his February 2007 conviction after a jury trial for assault and battery upon Mrs. Glennis Beltram, his seventy-four-year-old neighbor, should be vacated and the charge dismissed because Mrs. Beltram hindered his right to a fair trial. Absent an outright dismissal, he says that her behavior, coupled with new evidence that he has uncovered, should at least clear a path for a new trial. The Court disagrees.

* * * *

While Mrs. Beltram was mowing the grass, Mr. Dominick accused her of straying onto his property. An argument ensued, and he shoved her into a raised granite boundary marker. Her arm was cut and bloodied. The jury needed only about forty minutes to convict him. Thereafter, this Court sentenced Dominick to a five-year suspended/probationary term, fined him $1000 and ordered him to contribute 700 hours of his time to community service. His motion for a new trial was denied, and the Supreme Court has affirmed his conviction. State v. Dominick, 968 A.2d 279 (R.I. 2009).

After that affirmance, Mrs. Beltram filed a civil action against him for monetary damages. In July of 2013, the jury in the civil case awarded her minimal compensatory damages of $100, along with $300 for punitive damages. The jury also credited Dominick's counterclaim that Mrs. Beltram had assaulted him (she spit at him during the confrontation), but determined that her conduct, although not an act of self-defense, warranted no monetary award because it caused him no harm.

Dominick now says that during the civil action he discovered new evidence which, he speculates, "could have exculpated him" at his criminal trial. (Apr. 18, 2014 Brief at 1.) He states that he found out that after the altercation, and prior to the criminal trial, that Mrs. Beltram discarded the lawn mower but kept a picture of it which she never shared with the police or the prosecutor. Dominick says he would have inspected the lawn mower for damage that Mrs. Beltram claimed had occurred to it during the event but couldn't because she had disposed of it. He claims that Mrs. Beltram thus deprived him of due process and engaged in impermissible destruction of evidence.

He also thinks that David Lohr, whose identity the state had disclosed as soon as the criminal Information had been filed, could have assisted him as a witness during the criminal trial in light of what Dominick later learned during the civil case. He now regrets not having presented Lohr in the criminal proceedings to impeach some of Mrs. Beltram's testimony. In a footnote to that pang of regret, Dominick also "suggests" that his trial attorney failed to provide him with effective assistance.

* * * *

Dominick relies upon § 10-9.1-1(a)(4) to pursue what he charitably denominates something other than a "garden variety" post-conviction case. (Sept. 2, 2014 Brief at 1.) That portion of the statute provides:

> "(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:
> * * *
>
> > "(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 . . . may institute . . . a proceeding under this chapter to secure relief."

That subsection covers petitions such as Dominick's which assert claims of newly discovered evidence. See Brown v. State, 32 A.3d 901, 910 (R.I. 2011). The well-settled test to determine whether evidence is newly discovered is reported in, e.g., State v. Quaweay, 89 A.3d 823, 827-28 (R.I. 2014):

> "We have described a trial justice's consideration of a motion for a new trial based on newly discovered evidence as essentially a two-pronged analysis. See State v. Price, 66 A.3d 406, 417 (R.I. 2013). On the first prong, the defendant bears the burden of proving that the proffered evidence is '(1) newly discovered since trial, (2) not discoverable prior to trial with the exercise of due diligence, (3) not merely cumulative or impeaching but rather material to the issue upon which it is admissible, [and] (4) of the type which would probably change the verdict at trial.' State v. Woods, 936 A.2d 195, 197 (R.I. 2007), quoting State v. Firth, 708 A.2d 526, 532 (R.I. 1998). Only if these four requirements are satisfied does the trial justice then proceed to the second prong of the analysis where he or she determines if the evidence is sufficiently credible to warrant a new trial. See id.
> ***
> "'[A]fter a defendant has had his [or her] day in court and has been fairly tried,' he or she 'has a heavy burden' when 'seeking a new trial on the ground of newly discovered evidence.' 3 Charles Alan Wright and Sarah H. Welling, Federal Practice and Procedure, § 583 at 445 (4th ed. 2011). For a defendant to satisfy his burden of showing that information could not have previously been discovered through a diligent search, we have ordinarily required the defendant to show that he made a reasonable investigation of evidence which was available to him prior to trial."

Nothing Dominick now offers earns the sobriquet "newly discovered." Save for his despondency for not presenting David Lohr as a witness, *infra*, Dominick's petition is principally

based upon Mrs. Beltram's statements at her deposition and/or during the civil trial. He says that they contradict her criminal trial testimony and offer new information about the removal of the lawn mower. The subjects she addressed during the civil action, however, could also have been examined during the criminal trial. She need only have been asked. In other words, the professed "new" evidence was just as accessible, upon diligent inquiry, when she testified in February of 2007 as it was during the later civil proceedings.

Furthermore, the asserted new proof is little more than potential impeachment material. More importantly, when juxtaposed to Dominick's own seriously flawed criminal trial testimony, his fresh offerings are, at best, only marginally of value. In denying his new trial motion, this Court assessed Dominick's credibility and found it significantly lacking. That sentiment is renewed here.

* * * *

Dominick also insists that he is entitled to relief because, he says, Mrs. Beltram denied him due process and deprived him of the opportunity to inspect evidence when she disposed of the lawn mower.[1] That contention is without merit.

Although the state has an obligation to preserve discoverable material over which it has custody or control, State v. Lewis, 467 A.2d 1387, 1388 (R.I. 1983), sanctions are not warranted when a private, nongovernmental individual or agency destroys evidence within its sole possession, custody and control. State v. Waite, 484 A.2d 887, 891 (R.I. 1984) (state was not responsible for destruction of records kept by rape crisis center, a private agency which

[1] Throughout his two briefs, Dominick asserts that Mrs. Beltram disposed of the lawn mower shortly after the altercation, even "within days of the incident." (Sept. 2, 2014 Brief at 6.) He misstates the record, which admits of no such finite period. When asked by Dominick's defense counsel during the civil case when she disposed of the mower, Mrs. Beltram replied: "It could have been two or three months later. I have no recollection when." Tr. 27, July 11, 2013.

destroyed its own records; at no time were the records in the state's possession, custody or control). See State v. Roberts, 841 A.2d 175, 178-79 (R.I. 2003) ("[U]nless a criminal defendant can show bad faith on the part of the [state], failure to preserve potentially useful evidence does not constitute a denial of due process of law,") (citing State v. Garcia, 643 A.2d 180, 185 (R.I. 1994) and quoting Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (emphasis in original text)).

Dominick acknowledges, indeed he decries, that Mrs. Beltram never told the state about her disposal of the lawn mower or that she had a photograph of it. "Ms. Beltram, although the complaining witness in this matter, was not a party to the case," Dominick, 968 A.2d at 284; and, no responsibility for the mower's loss can be imputed to the state simply because she decided, on her own, to take it to a junk yard. Roberts, 841 A.2d at 179 (no evidence indicated that the private towing company, which spoiled the vehicle's evidentiary value, was the agent of either the police or the prosecution).

Frankly, Dominick's excitement over the missing lawn mower is mystifying. The only issue before the jury was whether he assaulted Mrs. Beltram, not whether the mower had been dented, scratched or impaired during the altercation. Its presence or absence, in this Court's opinion, was not at all material to the case. Notably, Dominick never asked to inspect the mower before trial, and he never bothered to inquire about it during the trial. Its condition was inconsequential at trial, and it's not relevant or material now, either.

* * * *

Dominick also laments the absence at his criminal trial of David Lohr, a potential witness whose identity and written statement had been given to Dominick by the state when the charges were filed in the Superior Court. Dominick now thinks that Lohr may have been more beneficial than he first believed, and he regrets not having called him as a witness in an effort to

rebut some of Mrs. Beltram's testimony. This revelation occurred years after his conviction, when Lohr was deposed and testified during the civil case. Dominick's newly-found regret for not presenting him, however, scarcely qualifies as newly-found evidence. His bizarre proposal that Lohr's emerging importance somehow generates a claim for newly discovered evidence, in the requisite sense, is summarily rejected.

* * * *

In what appears to be an aside or, at most, an afterthought, Dominick casually "suggests" in a margin note that perhaps his privately retained trial attorney should be faulted for Lohr's absence at his criminal trial.[2] That barren, unsupported submission, relegated to footnote status in his brief, is "not legally competent evidence to establish a denial of effective assistance of counsel." Young v. State, 877 A.2d 625, 630 (R.I. 2005) (citing State v. Turley, 113 R.I. 104, 109, 318 A.2d 455, 458 (1974)). Even if Dominick sincerely presses that contention, the Court finds it wholly without substance.

The benchmark for a claim of ineffective assistance of counsel is Strickland v. Washington, 466 U.S. 668 (1984), which has been adopted by our Supreme Court. Brown v. Moran, 534 A.2d 180, 182 (R.I. 1987); LaChappelle v. State, 686 A.2d 924, 926 (R.I. 1996). Whether an attorney has failed to provide effective assistance is a factual question which petitioner bears the "heavy burden" of proving. Rice v. State, 39 A.3d 9, 17 (R.I. 2012). Strickland presents "a high bar to surmount." Padilla v. Kentucky, 559 U.S. 356, 371 (2010).

When reviewing a claim of ineffective assistance of counsel, the question is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Heath v. Vose, 747 A.2d 475, 478 (R.I.

[2] Sept. 2, 2014 Brief at 8, n.3. He includes another such oblique reference in footnote 1 at p. 4.

2000). A Strickland claim presents a two-part analysis. First, the petitioner must demonstrate that counsel's performance was deficient. That test requires a showing that counsel made errors that were so serious that the attorney was "not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687; Powers v. State, 734 A.2d 508, 521 (R.I. 1999). The Sixth Amendment standard for effective assistance of counsel, however, is "very forgiving," United States v. Theodore, 468 F.3d 52, 57 (1st Cir. 2006) (quoting Delgado v. Lewis, 223 F.3d 976, 981 (9th Cir. 2000)), and "a strong (albeit rebuttable) presumption exists that counsel's performance was competent." Gonder v. State, 935 A.2d 82, 86 (R.I. 2007).

Even if the petitioner can satisfy the first part of the test, he must still pass another sentry embodied in Strickland: He must demonstrate that his attorney's deficient performance "prejudiced" his defense. Thus, he must show that a reasonable probability exists that but for the deficiency the outcome of the trial would have been different. Strickland, 466 U.S. at 694; Crombe, 607 A.2d at 878. Dominick cannot clear either hurdle.

The record is silent as to whether Dominick's attorney or an agent on his behalf ever interviewed Lohr prior to trial, and Dominick offers nothing in that regard in any of his briefs. Thus, the Court is left to consider only Lohr's June 3, 2006 written statement, which the state had provided to Dominick's trial counsel at the inception of the case. It assists Dominick not at all. To the contrary, it incriminates him.

According to his written statement, Lohr saw no part of the physical altercation. He arrived right after it had occurred, but he did see Dominick and Mrs. Beltram arguing near the granite pillar. He also observed her holding her bloody arm as she walked up the driveway towards him. When he asked her about her injury, she exclaimed that Dominick had "shoved

me." At his deposition in the civil case, Lohr characterized his June 2006 statement "as probably the most accurate of what happened of what I experienced because I think four years later, it's difficult to remember exactly." (Lohr Deposition, Sept. 28, 2011 at 8.)

This Court is at a loss to understand how such observations, which Lohr characterized during his civil proceedings as reflecting his best memory, could have in any way buttressed Dominick's defense during the criminal trial. It would have been most unwise for his trial attorney to have called Lohr as a witness, and his judgment not to present him was a sensible tactical decision.

Dominick's present criticism of trial counsel, based upon hindsight, is of no assistance. "As the Strickland Court cautioned, a reviewing court should strive 'to eliminate the distorting effects of hindsight.'" Clark v. Ellerthorpe, 552 A.2d 1186, 1189 (R.I. 1989) (quoting Strickland, 466 U.S. at 689). "Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally-deficient representation under the reasonably competent assistance standard." United States v. Bosch, 584 F.2d 1113, 1121 (1st Cir 1978). As our Supreme Court said in Linde v. State, 78 A.3d 738, 747 (R.I. 2013):

> "'[T]actical decisions by trial counsel, even if ill-advised, do not by themselves constitute ineffective assistance of counsel.' Rivera v. State, 58 A.3d 171, 180–81 (R.I. 2013) (quoting Rice v. State, 38 A.3d 9, 18 (R.I. 2012)). 'This Court "will not meticulously scrutinize an attorney's reasoned judgment or strategic maneuver in the context of a claim of ineffective assistance of counsel."' Id. at 181 (quoting Rice, 38 A.3d at 17)."

It should also be noted that trial counsel, whom he now criticizes, was personally selected and retained by Dominick. Disparagement of one's retained attorney has generally not been met with approbation by our Supreme Court. "[C]hallenges to the performance of private counsel in postconviction relief proceedings rarely succeed, and when a person selects his or her own attorney, any alleged deficiencies seldom amount to an infringement of one's constitutional

rights." Hassett v. State, 899 A.2d 430, 434 n.3 (R.I. 2006) (citing State v. Dunn, 726 A.2d 1142, 1146 n.4 (R.I. 1999)); accord, Brown v. State, 964 A.2d 516, 527 n.15 (R.I. 2009); Vorgvongsa v. State, 785 A.2d 542, 549 (R.I. 2001).

In all, Dominick has utterly failed to present any evidence that sufficiently overcomes his "prodigious burden" of demonstrating that even if his attorney's efforts were somehow deficient (and this Court expressly holds that they were not), the result would have been different. Evans v. Wall, 910 A.2d 801, 804 (R.I. 2006). Dominick's suggestion that his privately retained trial attorney was ineffective is an empty allegation, entirely unsupported by fact or basis. A review of the record in this case leads to the same conclusion the Supreme Court reached in Anderson v. State, 878 A.2d 1049, 1050 (R.I. 2005): "The conviction in this case was not a result of petitioner's attorney but, rather, the weight of the credible evidence against [him]."

* * * *

For the reasons stated herein, the Court finds, unreservedly, that all of Dominick's self-styled new evidence is neither "new" in the requisite sense, nor would it in any way alter the verdict if another trial were ceded to him. The Court further finds that Dominick has completely failed to carry his burden to support his indifferent suggestion that his trial attorney rendered ineffective assistance of counsel.

Dominick's application for post-conviction relief is hereby denied. Judgment shall enter for the State of Rhode Island.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Robert Dominick v. State of Rhode Island
CASE NO:	PM/14-2065 (P2/06-2582)
COURT:	Providence County Superior Court
DATE DECISION FILED:	December 29, 2014
JUSTICE/MAGISTRATE:	Krause, J.
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