

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

NEWPORT, SC.

SUPERIOR COURT

[FILED: August 23, 2016]

JOSE RIVERA,

Petitioner,

VS.

STATE OF RHODE ISLAND,

Defendant.

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Case No. WM-2011-0764A

DECISION

NUGENT, J. Before the Court is Petitioner Jose Rivera’s (Rivera or Petitioner) Application for Post-Conviction Relief. In essence, Petitioner claims that he was deprived of the effective assistance of counsel because his trial attorney failed to inform him of a plea bargain offer from the State of Rhode Island (State or Defendant). Based on this claim, he now requests that this Court vacate his earlier conviction by a jury and order a new trial. Jurisdiction is pursuant to G.L. 1956 § 10-9.1-2.

I

Facts & Travel

On February 10, 2006, a grand jury returned an indictment charging Rivera with having committed several crimes against developmentally disabled adult women while he was employed as a Rhode Island Public Transit Authority driver, and the women rode his bus to and from the Adeline LaPlante Memorial Center in Wakefield, Rhode Island. On June 4, 2007, a jury found Rivera guilty on two counts of first degree sexual assault (Counts 2 and 4), four counts of second degree sexual assault (Counts 3, 5, 6, and 7), and one count of simple assault or battery—the lesser included offense of Count 1. On August 7, 2007, the Court sentenced Petitioner to life

imprisonment for Counts 2 and 4 and fifteen years to serve on Counts 3 and 5, all such terms to run concurrently. Further, Petitioner was sentenced to two concurrent terms of fifteen years on Counts 6 and 7, said terms to run consecutively to Counts 2, 3, 4, and 5. Finally, Rivera was sentenced to one year, consecutive to all other counts for the simple assault conviction. In total, the sentence was life imprisonment plus sixteen years.

Subsequently, Rivera appealed the merits of his conviction to the Supreme Court which affirmed the jury's verdict. See State v. Rivera, 987 A.2d 887, 908 (R.I. 2010). Similarly, following a motion to reduce his sentence that was denied by this Court, the Supreme Court affirmed Petitioner's sentence in State v. Rivera, 64 A.3d 742, 749 (R.I. 2013) (noting that "the offenses of which the defendant stands convicted irrefutably were horrific").

Presently, Petitioner is before the Court on a Petition for Post-Conviction Relief. On November 23, 2011, Rivera filed a Petition with this Court seeking post-conviction relief based on various grounds. On September 18, 2015, with the assistance of court-appointed counsel, Rivera amended his Petition to include a claim that his trial counsel was ineffective by failing to inform him of a plea offer from the State. Prior to the hearing, Petitioner chose to proceed solely on the amended claim that counsel was ineffective because he failed to inform him of a plea offer from the State in violation of Missouri v. Frye, --- U.S. ---, 132 S. Ct. 1399, 1410, 182 L. Ed. 2d 379 (2012) .

The Court held hearings on March 9, 2016 and on April 27, 2016. Over the course of two days, the Court heard testimony from four witnesses: 1) Craig Montecalvo (Montecalvo), lead prosecutor in the original trial; 2) Mark Trovato (Trovato), co-counsel with Montecalvo; 3) Lucinda Avelino (Avelino), Rivera's wife; and 4) Rivera. Both Montecalvo and Trovato testified that no formal offer was ever made regarding Rivera's case. (Hr'g Tr. (Tr.) 7:13-14;

22:2-5, Mar. 9, 2016 and Apr. 27, 2016.) The State chose not to make an offer to Rivera because he was adamant in maintaining his actual innocence. Id. at 12:3–13; 22:2–5; see also id. at 38:16–18 (Rivera admits that he was not willing to admit to any of the charges against him).

Rivera seemingly rested his argument that an offer was communicated from the State to his trial attorney based on an email between his present attorney and Montecalvo.¹ In the email, Montecalvo quotes an email exchange between him and Trovato discussing why they had not given Rivera a plea offer. Id. at 9:9–21. It states, in relevant part, that “[w]e recalled talking about something in the range of ten to twelve years to serve.” Id. at 9:14–15. However, they both agree that the conversation discussing “ten to twelve years” was one that they had with one another and, importantly, did not include defense counsel. Id. at 12–13; 21:10–17. Rivera’s trial counsel was never called to testify at the Post-Conviction Hearing.

In turn, Avelino testified that she had participated heavily in her husband’s defense by attending—as she recalled—“all” of the meetings between him and his trial lawyer. See id. at 24:12–19. As it relates to Rivera’s present claim, she testified that she never heard his trial attorney inform Rivera that there was a plea bargain, or proposed plea bargain, being offered by the State. Id. 24:20–25:2.

Rivera also testified before the Court on April 27, 2016. He testified that his trial counsel failed to discuss all the options that he had available to him and merely told him that his case was a winnable one. In pertinent part, Rivera stated that he was never advised of any offer from the State by his trial attorney. On cross-examination by the State, he further noted that he did not know what type of offer he would have expected to receive and that he would not have been willing to admit to any of the charges against him.

¹ That email was admitted in full at the hearing as Petitioner’s Exhibit 1.

Following the hearing, on July 7, 2016 and July 17, 2016, the State and Petitioner respectively submitted memoranda on the issues presented. The Court then took the matter under advisement. For the reasons that are set forth herein, the Court finds that Petitioner has failed to establish by a preponderance of the evidence that he is entitled to post-conviction relief and, therefore, his Petition is denied.

II

Standard of Review

In Rhode Island, “[p]ursuant to the provisions of G.L. 1956 § 10–9.1–1, ‘the 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) (quoting Page v. State, 995 A.2d 934, 942 (R.I. 2010)); see also Brown v. State, 32 A.3d 901, 907 (R.I. 2011). “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.” Tempest v. State, --- A.3d ---, No. 2015-257-M.P., 2016 WL 3755461, at *3 (R.I. 2016) (quoting Rivera v. State, 58 A.3d 171, 179 (R.I. 2013)).

The Court reviews an allegation of ineffective assistance of counsel under the criteria set forth by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). See also Merida v. State, 93 A.3d 545, 549 (R.I. 2014); Neufville v. State, 13 A.3d 607, 610 (R.I. 2011). Initially, “the applicant must establish that counsel’s performance was constitutionally deficient; [t]his requires [a] showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the Sixth Amendment.” Linde v. State, 78 A.3d

738, 745 (R.I. 2013) (quoting Bido v. State, 56 A.3d 104, 110–11 (R.I. 2012)). In making that determination, the Court conducts a “highly deferential” review, and it affords counsel a “strong presumption that [his or her] conduct falls within the permissible range of assistance.” Merida, 93 A.3d at 549 (internal quotation marks omitted).

Only if the assistance of counsel is deemed to have been constitutionally deficient will this Court proceed to the second prong of the analysis. Id.; see also Hazard v. State, 968 A.2d 886, 892 (R.I. 2009). Pursuant to the second prong, an applicant for postconviction relief “must show that the ‘deficient performance was so prejudicial to the defense and the errors were so serious as to amount to a deprivation of the applicant’s right to a fair trial.’” Linde, 78 A.3d at 745–46 (quoting Guerrero v. State, 47 A.3d 289, 300–01 (R.I. 2012)). More specifically, when a defendant’s claim is that counsel’s deficient performance caused him to reject a plea offer and proceed to trial, he must show that there was an offer and a reasonable probability that the plea offer would have been accepted. Lafler v. Cooper, --- U.S. ---, 132 S. Ct. 1376, 1387, 182 L.Ed. 2d 398 (2012); see Frye, --- U.S. ---, 132 S. Ct. at 1410 (holding that, to demonstrate prejudice resulting from counsel’s deficient performance that caused a defendant to forgo a favorable plea offer, a defendant must show that “he would have accepted the offer to plead” and that “there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented”).

III

Analysis

Rivera asks this Court to grant his application for post-conviction relief because, allegedly, his trial counsel failed to convey a plea offer from the State which deprived him of the effective assistance of counsel—as guaranteed by the Rhode Island and United States

Constitutions. The State argues that Rivera’s position fails for two reasons: 1) there was never any plea offer made to Rivera’s trial counsel; and 2) even assuming that an offer had been made, the evidence does not show that Rivera would have accepted it because he consistently maintained his actual innocence. He testified at trial that he did not commit any of the crimes charged.

To establish a claim for ineffective assistance of counsel regarding a plea bargain, a defendant must first demonstrate that the State made an offer of the material terms required for a plea agreement. “If no plea offer is made . . . the [ineffective assistance] issue . . . simply does not arise.” Lafler, 132 S. Ct. at 1387; see also Herrera-Genao v. U.S., 641 F. App’x 190, 192 (3d Cir. 2016) (finding that no sufficiently definite plea offer had been made by the government in upholding the district court’s denial of defendant’s claim for ineffective assistance of counsel).

Here, Rivera claims that—based on the language in the email from Montecalvo—an offer was made by the State for ten to twelve years to serve that his attorney failed to communicate to him. However, Montecalvo and Trovato, the prosecutors at the trial, maintained that any mention of ten to twelve years to serve was in reference to conversations that they had with one another and not with defense counsel. This initial inquiry, as to the existence of an offer, is dispositive of Rivera’s claim. See Lafler, 132 S. Ct. at 1387. Indeed, if no offer was made, then there can be no ineffective assistance claim against Rivera’s trial attorney because it would fail under both prongs of the Strickland test. See Kingsberry v. U.S., 202 F.3d 1030, 1032 (8th Cir. 2000) (“[T]o establish . . . prejudice, the petitioner must begin by proving that a plea agreement was formally offered by the government.”); see also Herrera-Genao, 641 F. App’x at 192; State v. Bharadwaj, 184 Wash. App. 1016 (2014), review denied, 347 P.3d 459 (2015) (finding that

“without an actual offer that [defendant] could have accepted, his ineffective assistance claim cannot succeed”).

In analyzing Rivera’s claim, this Court remains keenly aware that an applicant for post-conviction relief bears the burden of establishing his or her claim by a preponderance of the evidence. See Rivera, 58 A.3d at 179. The Court finds the testimony of Montecalvo and Trovato that they never communicated any offer to defense counsel to be credible. With that, the Court is left with no evidence to suggest that any offer was ever communicated by the State to counsel for Rivera. Accord Kingsberry, 202 F.3d at 1032 (“The record before this Court is sufficient to show conclusively that a formal plea offer never materialized.”). This finding is consistent with the testimony of Rivera and Avelino because—if there was no formal offer ever made—there would be nothing for Rivera’s trial counsel to communicate to him during their meetings.

As the Court has found that no plea offer was ever made, Rivera cannot establish either that his trial counsel’s performance was deficient or that he was prejudiced by any alleged deficiency. See Merida, 93 A.3d at 549. Moreover, failure to establish either—let alone both—of these elements is fatal to Rivera’s instant claim. Id. Initially, without an offer, there was nothing for counsel to convey to Rivera, and, accordingly, the Court cannot conclude that his performance was in any way below the permissible range of assistance. See id. This is especially true when one considers that the Court affords trial counsel a “strong presumption that [his or her] conduct falls within the permissible range of assistance.” Id. (internal quotation marks omitted). Therefore, the Court finds that Rivera has failed to meet his burden of establishing that counsel’s performance fell outside the permissible range of assistance guaranteed by the Rhode Island and United States Constitutions.

Additionally, the Court notes that, even if Rivera had been successful in establishing that his trial attorney's performance was deficient, the evidence does not establish that he would have been prejudiced by counsel's failure to advise him of a plea offer. To establish prejudice in the plea bargaining context, "a defendant must show the outcome of the plea process would have been different with competent advice." Lafler, 132 S. Ct. at 1384; see also Strickland, 466 U.S. at 694. Specifically, "defendants must demonstrate a reasonable probability both that they would have accepted the [earlier] plea offer had they been afforded effective assistance of counsel." Frye, 132 S. Ct. at 1409.

At the hearing, Rivera testified that he was unsure of what type of offer he would have expected to receive from the State. He went on to state that he was not prepared to admit to any of the charges against him. See Frye, 132 S. Ct. at 1407 (it is axiomatic that a basic tenant of plea bargaining is "for defendants to admit their crimes"). Without admitting to the charges against him, Rivera could not have afforded himself of the benefits of any hypothetical plea offer. As such, he could not "show the outcome of the plea process would have been different with competent advice," Lafler, 132 S. Ct. at 1384, or that he "would have accepted the earlier plea offer had [he] been afforded effective assistance of counsel." Frye, 132 S. Ct. at 1409. Therefore, even assuming he could overcome the initial burden of showing that counsel's performance was deficient, Rivera could not show that he was prejudiced. Based on the forgoing, Rivera's application for post-conviction relief is denied.

IV

Conclusion

As stated, this Court finds that Rivera has failed to meet his burden of proving that he was denied effective assistance of counsel during plea negotiations. Therefore, Rivera's Application for Post-Conviction Relief is denied. Counsel shall submit an appropriate judgment for entry.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: Jose Rivera v. State of Rhode Island

CASE NO: WM-2011-0764A

COURT: Newport County Superior Court

DATE DECISION FILED: August 23, 2016

JUSTICE/MAGISTRATE: Nugent, J.

ATTORNEYS:

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