

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: September 27, 2016)

NAPOLEON ANDRADE

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VS.

PM/13-6365
(P2/03-2386 AG)

STATE OF RHODE ISLAND

DECISION

KRAUSE, J. In this postconviction relief (PCR) application, Napoleon Andrade claims that Assistant Public Defender Richard A. Brousseau mistakenly advised him to plead nolo contendere to a felony firearm offense, along with a misdemeanor driving infraction, in 2003, instead of pursuing what Andrade now proclaims was a meritorious motion to suppress evidence. He says that had he known that such a suppression motion could have been advanced, he never would have offered the nolo plea and would have insisted on a trial. He claims that because of trial counsel’s substandard advice he was deprived of his Sixth Amendment constitutional right to effective assistance of counsel. The Court disagrees.

The record which the Court is obliged to review is thin. No hearing on Andrade’s PCR application was held because he is presently imprisoned in a federal penitentiary in Otisville, New York, serving a lengthy sentence on a subsequent offense, and returning to Rhode Island for a PCR hearing was not feasible. Instead, he agreed to offer a sworn telephonic deposition in support of his PCR application. That deposition, which was not audio or video taped, was conducted on November 2, 2015 by counsel without this Court’s presence.

The record before the Court consists of the parties’ memoranda, a transcript of petitioner’s deposition, the February 23, 2015 affidavit of Pawtucket Police Detective David

Silva, and the September 24 and 29, 2003 transcripts of Andrade's nolo contendere plea and sentencing before the late Associate Justice William A. DiMitre, Jr. (This Court did not receive those transcripts until August 17, 2016.) No testimony or affidavit from Attorney Brousseau was presented because he has unfortunately lost his cognitive abilities after suffering a debilitating stroke in August of 2013. The parties have agreed to submit this matter to the Court for a decision without convening further proceedings.

* * *

Andrade was charged with three counts on February 14, 2013: (1) carrying a pistol in a motor vehicle without a duly issued license or permit, (2) possessing a loaded handgun in a motor vehicle, and (3) driving a vehicle when his operator's license had expired. The first two offenses are felonies and carry maximum jail terms of ten and five years, respectively. The driving infraction is a misdemeanor with a maximum sentence of one year.

On September 24, 2003, Andrade pled nolo contendere to counts 1 and 3. The state dismissed count 2, and Andrade agreed to serve six months of a five-year sentence on the felony firearm charge in count 1, with the remaining four and one-half years suspended with probation, along with six concurrent months on the misdemeanor charge.

During the plea colloquy, the state's attorney recounted, *inter alia*, that Andrade's fingerprints had been identified on the firearm. Tr. at 4, Sept. 24, 2003. Andrade readily conceded that damning fact and acknowledged the prosecutor's additional rendition of other incriminating evidence supporting the charges. *Id.* at 5. Execution of sentence was postponed for a short time, and on September 29, 2003 he surrendered himself, waived his right of allocution, and commenced serving his sentences. Tr. at 1, Sept. 29, 2003.

* * *

The suppression motion which Andrade laments trial counsel did not pursue is based upon his belief that on February 14, 2003, the Pawtucket Police impermissibly arrested him in Providence while he was driving a Crown Victoria (with no other occupants) on North Main St. in Providence, just as he crossed over the jurisdictional line separating Providence from Pawtucket. In his affidavit, Det. Silva (then a patrolman, along with his partner Ptm. Duhamel) avows that they observed Andrade commit a driving infraction (ignoring a stop sign) in Pawtucket, just short of the Providence line.

Det. Silva activated the cruiser's lights and signaled Andrade to stop. Andrade subsequently halted the Crown Victoria after entering Providence. He could not produce proof of insurance, and the vehicle was unregistered. A radio check confirmed Silva's suspicion that Andrade's license had expired. He was arrested, and because no one was present to take lawful custody of the Crown Victoria, it was removed to the Pawtucket Police station. There, according to Det. Silva, Officer Stephen Ricco performed a routine inventory search of the car. A loaded 9 mm. semiautomatic with a chambered round was found secreted within the front passenger's armrest.

* * *

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, 38 A.3d 9, 17 (R.I. 2012); Padilla v. Kentucky, 559 U.S. 356, 371 (2010) (noting that Strickland presents a "high bar" to surmount).

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. 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, 522 (R.I. 1999) (quoting Strickland, 466 U.S. at 687). Even if the petitioner can satisfy the first part of the Strickland test, he must still demonstrate that his attorney's deficient performance was prejudicial. Thus, he is required to show that a reasonable probability exists that but for counsel's unprofessional errors the result of the proceeding would have been different. Strickland, 466 U.S. at 694; accord Hazard v. State, 968 A.2d 886, 892 (R.I. 2009).

* * *

Andrade's deposition testimony assists him not at all. His answers regarding knowing, or not knowing, that the firearm was in the car, and his awareness, or his professed lack of awareness, that his license had expired are so capriciously inconsistent and erratic that not even a casual reader could accord him any credibility. For example, at page 23, Andrade testified that he didn't think his license had expired; at page 33 he conceded that he did, in fact, know that it had expired.

With respect to the firearm, at pages 28 and 29 of his deposition, Andrade disclaimed any knowledge of the gun's presence in the car, but at page 26 he acknowledged that the gun (which he said at page 27 belonged to his friend "Marcos") was always in the car and that he

knew where it was hidden (page 28). And, as noted earlier, during the plea colloquy Andrade unhesitatingly acknowledged that his fingerprints were on the weapon, and at the deposition he initially admitted that his fingerprints were on the gun (page 29), but he thereafter expressed ignorance of ever touching it (page 30).

With no “live” or taped testimony having been presented, this Court must, perforce, assess Det. Silva’s unchallenged affidavit (Andrade opted not to request a hearing and cross-examine him) - juxtaposed against the cold record of Andrade’s wildly inconsistent and unreliable deposition assertions, as well as his blatantly incriminating admissions at his plea colloquy - to determine whether his PCR claims are at all reliable.¹ The Court finds that they are not. Put plainly, it is apparent that Andrade has little regard for the truth.

Frankly, Andrade’s criticism of his trial attorney’s performance merits little discussion. The flimsy suppression motion, which is the centerpiece of his claim, is entirely baseless. This Court, even with the minimal record presented, has no difficulty finding that the stop of Andrade’s vehicle, just beyond the Providence line, was a lawful stop during a permissible pursuit of the car.

It is settled that “[i]n the absence of a statutory or judicially recognized exception, the authority of a local police department is limited to its own jurisdiction.” State v. Ceraso, 812 A.2d 829, 833 (R.I. 2002). However, a police officer who is in “close pursuit” of a suspect may

¹ Andrade has unequivocally stated that his nolo contendere pleas were offered knowingly and voluntarily. At page 34 of his deposition, the following dialog is reflected:

“Q. [By the prosecutor] Nobody forced you to go in and plead to these charges, right?”

“A. No.

“Q. You made the decision to do that yourself, right?”

“A. Yes.

“Q. After you had a conversation with Mr. Brousseau, your lawyer, that day, right?”

“A. Yeah, I believe, yeah.”

cross into another jurisdiction in order to arrest that person. State v. Morris, 92 A.3d 920, 925 (R.I. 2014). See G.L. 1956 § 12-7-19.²

On the record submitted, this Court is well satisfied that the Pawtucket Police officers lawfully stopped Andrade's vehicle just beyond the Providence line at the conclusion of a close pursuit which had commenced on the Pawtucket side of North Main Street. Because no other occupant was available to drive the unregistered car away, the officers, who properly arrested Andrade for driving an unregistered vehicle on an expired license, had no option but to impound the car. The record reflects absolutely no evidence discounting what Det. Silva asserts was a routine inventory search of the vehicle by Officer Ricco, who found the gun. State v. Grant, 840 A.2d 541, 550-51 (R.I. 2004).

* * *

For all of Andrade's criticism of his trial attorney for not discussing the suppression motion with him - a baseless motion, in any event - he secured for Andrade an abbreviated sentence: a mere six months to serve on a serious firearm offense (concurrently with a minor infraction), as well as the outright dismissal of another felony gun offense, all in the face of an assured conviction after trial and, unquestionably, a jail term certainly in excess of the extremely lenient term which his veteran trial attorney was able to obtain for him.

It is also noteworthy that Andrade did not bother to file the instant PCR application until December 16, 2013, long after his 2003 five-year sentence had expired. It is the view here that thirteen years later, it is not at all the extremely modest, agreed-upon sentence which Andrade

² Section 12-7-19 states: "Any member of a duly organized municipal peace unit of another city or town of the state who enters any city or town in close pursuit and continues within any city or town in such close pursuit of a person in order to stop him or her for a suspected violation of any provision of the motor vehicle code committed in the other city or town, shall be vested with all of the same authority as a member of a duly organized municipal peace unit of the city or town."

regrets; rather, it is the use by the federal government of that old 2003 conviction to enhance his federal sentence which Andrade now laments. “Hindsight has clearly revealed the far-reaching collateral consequences of his nolo contendere pleas.” Lipscomb v. State, ___ A.3d ___, 2016 WL 4433710, at *8 (R.I. June 24, 2016). There is no question that Andrade’s lengthy federal sentence is, in part, premised on the 2003 conviction, and this Court is of the firm belief that his PCR application is merely a contrivance to diminish or undo his federal privations. See Beagen v. State, 705 A.2d 173, 175 (R.I. 1998); Carpenter v. State, 796 A.2d 1071, 1073-74 (R.I. 2002).³

Quite apart from Andrade’s shambolic credibility lapses during his deposition, which this Court has already earmarked as ample grounds to disbelieve him, the Court also finds that his untimely PCR is further evidence of Andrade’s attenuated link to the truth. Courts have often been burdened with PCR petitions which are aimed more at lessening sentence enhancements by other courts rather than sincerely alleging material missteps in the underlying case. See Armenakes v. State, 821 A.2d 239, 241 n.1 (R.I. 2003); Beagen, supra; Carpenter, supra.

Where, as here, a state court conviction which is based upon an agreed-upon sentence is later used as a basis for a sentence enhancement in another court; and where that enhancement is obviously the impetus to challenge the underlying state conviction many years later – indeed, long after the term of the conviction has expired - through the ever-convenient apparatus of a PCR petition, which is allowed to be filed pursuant to a statute which is limned by no statute of

³ At the deposition, notwithstanding Andrade’s professed ignorance of the suppression motion and his complaint that he had not spent enough time discussing the case with Mr. Brousseau, he acknowledged that he had spoken about the case with attorneys Joseph Patriarca, Paul DiMaio, and John (“Jack”) Cicilline, who was representing him in his federal prosecution. According to Andrade, Mr. Cicilline told him not to be concerned about it because he was going to get such minimal time on it that it would not matter. Deposition at 17-18. The 2003 state case did affect a subsequent federal prosecution in which Mr. DiMaio represented Andrade. Deposition at 19.

limitations whatsoever, the petitioner's credibility and the genuineness of the PCR allegations may invite a modicum of skepticism by a reviewing court.

The recent Lipscomb v. State, case, supra, is not dissimilar to the instant matter. There, defense counsel did not discuss with Lipscomb filing a suppression motion, and instead negotiated a favorable disposition. The Court held that the defendant failed to demonstrate that his attorney provided substandard representation, as Lipscomb could not show that the outcome of the trial would have been different. The Court said:

“[W]hen a conviction follows from a negotiated plea, in order to ‘demonstrate prejudice emanating from the attorney’s deficient performance such as to amount to a deprivation of the applicant’s right to a fair trial,’ *** the applicant ‘must show that he would have insisted on going to trial and that the outcome of that trial would have been different. *** This burden is almost insurmountable when, as in the case at bar, the attorney negotiated a shorter sentence than the sentence applicant could have received if he had gone to trial.’” Lipscomb, ___ A.3d at ___, 2016 WL 4433710, at *7 (citations omitted).

Accord, Perkins v. State, 78 A.3d 764, 769 (R.I. 2013) (citing Neufville v. State, 13 A.3d 607, 614 (R.I. 2011)).

This Court is frank to say that had the defendant pursued the doomed suppression motion and opted for a trial, ignoring trial counsel's sound advice to accept the indulgent plea offer, the results would most certainly have been far worse for him. In sum, the defendant has utterly failed, by any measure, to demonstrate either prong of Strickland's test.

The circumstances of this case bring to mind the prophetic admonishment of McKinney v. State, 843 A.2d 463, 472 (R.I. 2004): “Both the state and the Superior Court are expected to live with their respective plea agreements and so are defendants.”

The within application for postconviction relief is denied. Judgment shall enter in favor of the State of Rhode Island.



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: **Napoleon Andrade v. State of Rhode Island**

CASE NO: **PM-13-6365**

COURT: **Providence County Superior Court**

DATE DECISION FILED: **September 27, 2016**

JUSTICE/MAGISTRATE: **Krause, J.**

ATTORNEYS:

For Plaintiff: **Stefanie DiMaio-Larivee, Esq.**

For Defendant: **Jeanine McConaghy, Esq.**