STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: September 13, 2019)

GABRIEL SANTIAGO	:	
	:	
V.	:	**C.A. No. PM-2014-3010**
	:	
STATE OF RHODE ISLAND	:	

DECISION

MCGUIRL, J. This matter is before the Court on the Amended Verified Petition of Gabriel Santiago (Petitioner) for Post Conviction Relief (Amended Petition). Petitioner asserts defense counsel denied him effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution, and article I, section 10 of the Rhode Island Constitution, and that as a result, he was convicted of the crime with which he had been charged. He also maintains his innocence of the charge. Jurisdiction is pursuant to G.L. 1956 § 10-9.1-3.

I

Facts and Travel

On November 22, 2011, a jury found Petitioner guilty of second degree child molestation sexual assault pursuant to G.L. 1956 § 11-37-8.3. *See State v. Santiago*, P2/09-0972A. Thereafter, the Court sentenced Petitioner to a term of twenty-five years imprisonment at the Adult Correctional Institutions, with nine years to serve and sixteen years suspended, with probation. *See State v. Santiago*, 81 A.3d 1136, 1137 (R.I. 2014). The Rhode Island Supreme Court affirmed his conviction on January 15, 2014. *Id.* at 1141.

The following facts are taken from the Supreme Court opinion:

> "In August 2008, defendant met a woman named Chely on the internet.[1] During the course of their burgeoning online relationship, Santiago invited Chely to relocate to Rhode Island from Texas, and she eventually moved into defendant's Central Falls apartment with two of her daughters, then ages six and seven.
>
> "On February 5, 2009, defendant was home alone with Chely's daughters while their mother attended night classes. Doreen, the older of Chely's daughters, asked defendant for permission to play a video game. Doreen said that Santiago told her that, to play the video games, she would have to 'do something,' specifically, to 'take a shower with him or touch his private part.' According to Doreen, defendant made her touch 'his private part' under his clothes and move her hand back and forth. The defendant instructed Doreen to cover her eyes with her other hand so that she would not see. While recounting the events of that night, Doreen also said that after about a minute, defendant told her to go wash her hands because she had 'white things around her hands.' She said that she did not know the source of the substance but that it had not been on her hand before she touched defendant. She also said that Santiago instructed her not to tell anyone what had occurred.
>
> "Despite that admonition, however, the following day Doreen informed her mother about what had happened. Chely and her daughters quickly vacated the apartment, and, a few days later, Chely reported the incident to the Central Falls Police Department. Chely and Doreen were referred by the police to the Child Advocacy Center (CAC) for an interview, and a trained CAC counselor interviewed the young girl on February 11, 2009. The interview was transcribed and recorded on videotape. During the CAC interview, Doreen provided details of the events of February 5, including the fact that when she touched defendant's body part it felt hard. Santiago subsequently was arrested and charged with second-degree child molestation sexual assault." *Santiago,* 81 A.3d at 1138.

On June 13, 2014, Petitioner, *pro se*, filed an Application for Post Conviction Relief (PCR). He later obtained counsel who then filed an Amended Petition on Petitioner's behalf.[2] The Court

[1] The Supreme Court used only the mother's first name and a fictitious name for the complaining witness in order to protect her identity. *Santiago*, 81 A.3d at 1138 n.1. Accordingly, this Court will use the same names as did the Supreme Court.

[2] It is the amended petition that is before the Court. *See DiBattista v. State*, 808 A.2d 1081, 1088 n.6 (R.I. 2002) (stating that "the filing of the amended complaint supercede[s] the original pleading . . .").

conducted a hearing on the Amended Petition on February 5, 2017. Petitioner and his former attorney, Jeffrey D. Peckham, testified at the hearing. Additional facts will be supplied in the Analysis section of this Decision.

II

Standard of Review

It is well-settled that '"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 Lyons v. State*, 43 A.3d 62, 64 (R.I. 2012) ("[O]ne who has been convicted of a crime may seek collateral review of that conviction based on alleged violations of his or her constitutional rights"). The action is civil in nature and governed by all rules and statutes applicable in civil proceedings. *See* § 10-9.1-7 ("All rules and statutes applicable in civil proceedings shall apply . . . ."); *see also Lyons*, 43 A.3d at 64 (stating "[a]pplication[s] for postconviction relief [are] civil in nature"). The "applicant for postconviction relief bears the burden of proving, by a preponderance of the evidence, that such relief is warranted in his or her case." *DeCiantis*, 24 A.3d at 569.

III

Analysis

The Petitioner contends that the defense counsel was ineffective because he failed to satisfy Petitioner's tactical demands during the trial. He asserts three ineffective assistance of counsel arguments; namely, that his counsel failed (a) to engage a medical expert; (b) to cross-examine the victim's mother regarding her alleged motive to make false allegations against Petitioner; and (c) to

utilize notes about witnesses that Petitioner took during the trial at counsel's request. Petitioner also maintains that he is innocent of the crime.

In Rhode Island, "[i]t is well established that . . . ineffective-assistance-of-counsel claims are assessed under the familiar two-pronged test announced by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984)." *Millette v. State*, 183 A.3d 1124, 1129 (R.I. 2018). Under the *Strickland* test,

> "an applicant for postconviction relief must first establish that counsel's performance was constitutionally deficient by demonstrating that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the Sixth Amendment. Second, the applicant must demonstrate that he or she was prejudiced by counsel's performance by showing that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Millette*, 183 A.3d at 1129 (internal citations and quotations omitted).

In making his claim, Petitioner "is saddled with a 'heavy burden,' in that there exists 'a strong presumption [recognized by this Court] that an attorney's performance falls within the range of reasonable professional assistance and sound strategy . . . .'" *Rice v. State*, 38 A.3d 9, 16-17 (R.I. 2012) (quoting *Ouimette v. State*, 785 A.2d 1132, 1138-39 (R.I. 2001)). *See also Jaiman v. State*, 55 A.3d 224, 238 (R.I. 2012) ("Recognizing the difficulties inherent in [an ineffective assistance of counsel claim,] 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" (quoting *Strickland*, 466 U.S. at 689). The "Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim." *Engle v. Isaac*, 456 U.S. 107, 134 (1982).

A

Failure to Engage a Medical Expert

The Petitioner maintains that defense counsel's failure to engage a medical expert to testify against the findings of a medical report issued by Hasbro Children's Hospital (Hasbro) constituted ineffective assistance of counsel. The record reveals that the State did not introduce any medical evidence for a defense medical expert to counteract.

Section 11-37-8.3 provides: "A person is guilty of a second degree child molestation sexual assault if he or she engages in *sexual contact* with another person fourteen (14) years of age or under." (Emphasis added.) Unlike first degree child molestation sexual assault, this provision does not require penetration; rather, only sexual contact is required for a conviction. *See id.* § 11-37-8.1 ("A person is guilty of first degree child molestation sexual assault if he or she engages in *sexual penetration* with a person fourteen (14) years of age or under.") (Emphasis added.)

At the PCR hearing, defense counsel testified that "it wasn't a medical case." (Postconviction Relief Hr'g Tr. (PCR Tr.) 30:23, Feb. 15, 2017.) He further testified that:

> "[t]here is nothing that any kind of medical expert I think would have been able to provide the jury with that would have been relevant. There was no allegation of any injury to the complainant. It was basically a relevance issue. There was no need to call a doctor because there was nothing either legally or factually in the case where a medical expert or a doctor would have been of assistance to the jury." *Id.* at 31:3-10.

He later reiterated that the reason he did not introduce any medical evidence was because he did not think it relevant. *Id.* at 36:17-20 ("I don't know that a judge would allow me to call an expert in this case, and I didn't think that it was – I just didn't think it would be relevant for the jury").

Rule 401 of the Rhode Island Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination

of the action more probable or less probable than it would be without the evidence." R.I. R. Evid. 401. Given that there were no allegations of penetration or injury, the fact that the Hasbro medical report may have found that "[t]he girl was fine" (PCR Tr. 10:19) several days after the incident was not relevant to the charge of second degree child molestation sexual assault. Indeed, the fact that there may have been no physical symptoms of sexual abuse would not have made any difference, as a medical expert "would not have been able to testify that, in his expert opinion, no sexual abuse had occurred." *Toole v. State*, 748 A.2d 806, 810 (R.I. 2000).

Considering that a medical expert's opinion in this case would not have been relevant to the issue of second degree child molestation sexual assault, the Court finds that defense counsel's tactical decision not to engage any such expert did not amount to ineffective assistance of counsel. As a result, the Court concludes that Petitioner's allegation of ineffective assistance of counsel with respect to this issue fails.

B

Failure to Cross-Examine Victim's Mother Regarding Her Alleged Motive to Make False Allegations Against Petitioner

The Petitioner maintains that Chely had a motive to falsely accuse him of the crime but that defense counsel refused to question her about her motive. Specifically, Petitioner asserts that he and Chely entered into an agreement allowing Petitioner to claim one of her daughters as a deduction on his tax returns in exchange for his paying Chely $500. He claims that Chely became impatient when he did not immediately pay her the money, and that she retaliated two days later by filing false charges against him with the police.

At the PCR hearing, Petitioner testified that Chely called him and demanded payment of the $500 on the same day he prepared his taxes. (*See* PCR Tr. 7:11-16.) When he told her that she had to wait until he actually received the money, she then "just said that if she didn't get the

money to be ready for what she was about to do." *Id.* at 8:4-5. He then testified that she called him two days later and asked him to come to her house where he was arrested by Central Falls police officers for various offenses, including child molestation. *See id.* at 8:12-19; 7:3-7.

The Petitioner testified that he told defense counsel about this incident, but that defense counsel refused to explore it further, telling Petitioner that the jury would never believe his story and that defense counsel's theory of the case was that the child made the whole thing up. *See id.* at 8:22-9:8. Defense counsel's testimony confirmed this point.

Defense counsel testified that during the trial, he focused on the unreliability of the complainant and that the retaliation allegation was inconsistent with his theory of the case. *Id.* at 32:1-10. Specifically, counsel testified that he did discuss financial-related issues but it was his belief that calling the credibility of the complainant was the proper theory of the case based upon the evidence he expected to come out at trial. *Id.* He also stated that Chely's behavior right after learning of the incident was inconsistent with her trying to frame Petitioner because, although Doreen reported the incident to her mother on a Friday, Chely waited three to four days before reporting it to the police. *Id.* at 32:12-22.

The Court does not find credible Petitioner's allegation regarding Chely's alleged motive to file false charges against him. He testified that the day of his arrest was the first time he ever heard about the allegation of child molestation. *Id.* at 17:5-22. However, at his trial, he testified that he moved out of the apartment "when the child, [Doreen], started accusing me of having done something to her." (Trial Tr. at 115, Nov. 18, 2011.) The record reveals that he moved out of the apartment at least one day before his arrest. His credibility is further undermined by the fact that he claimed to have filed a false tax return (which, interestingly enough, he did not produce as evidence in Court). *See Wilder v. State*, 696 S.E.2d 587, 588-89 (S.C. 2010) (holding that a trial

judge committed "an error when he held that preparing false tax returns was not conduct probative of [defendant's] credibility").

Notwithstanding the Court's finding that Petitioner is not credible, it nevertheless concludes that defense counsel's actions were legitimate tactical decisions. *See State v. D'Alo*, 477 A.2d 89, 92 (R.I. 1984) ("Thus, a choice between trial tactics, which appears unwise only in hindsight, does not constitute constitutionally-deficient representation under the reasonably competent assistance standard"). Furthermore, in order "[t]o state and prove a claim under this standard, a defendant must allege and demonstrate that his counsel's error clearly resulted from neglect or ignorance rather than from informed, professional deliberation." *Id.* (internal quotations omitted).

Defense counsel's theory of the case was that Doreen's allegations against Petitioner were unreliable. In support of this theory, he highlighted the fact that Chely waited several days before reporting the incident because, according to his theory, even she was unsure whether to believe Doreen. Accordingly, it was not unreasonable for defense counsel to decide that asking Chely about her alleged motive to file false allegations against Petitioner would undermine his theory of the case. Moreover, counsel indicated his choice to not pursue this false filing assertion was tactical and done because he did not believe the jury could be persuaded. Specifically, counsel testified that:

> "As I said before, the idea of trying to convince a jury that a mother would put her daughter through ultimately what the daughter had to go through to exact some sort of revenge over whatever it was, four or five hundred dollars, seemed to me not only somewhat difficult to persuade a jury, but also . . . I didn't think that presenting that sort of a theory would make the jury feel very good about themselves, and I thought that it would be much easier to convince a jury that a seven-year-old simply imagined things." (PCR Tr. 35:16-36:1.)

Consequently, the Court finds that defense counsel's refusal to ask Chely about her alleged motive constituted a legitimate trial tactic and did not amount to constitutionally-deficient representation. Thus, the Court concludes that Petitioner has failed to prove by a preponderance of the evidence that this refusal amounted to ineffective assistance of counsel.

C

Failure to Employ Petitioner's Notes to Help Impeach Witnesses

The Petitioner contends that defense counsel asked him to take notes during Chely and Doreen's testimony, and to alert defense counsel when these witnesses were lying. He then asserts that when he showed his notes to defense counsel, defense counsel informed Petitioner that the notes were of no use. Petitioner maintains that defense counsel should have used the notes as the basis for further questioning of the witnesses and that defense counsel's failure to do so amounted to ineffective assistance of counsel.

At the PCR hearing, the following colloquy took place between the Petitioner and the State:

> "[Prosecutor] Sir, can you tell us specifically what [defense counsel] didn't cross-examine either of those witnesses on that you had written down?
> "[Petitioner] I don't know what to say about that right now.
> . . . .
> "[Prosecutor] You remember specifically that you wrote down questions that you wanted [defense counsel] to ask those witnesses and he didn't do so, correct?
> "[Petitioner] Yes.
> "[Prosecutor] What were they?
> "[Petitioner] I don't know. I don't know. I would have to review that again. I don't know.
> "[Prosecutor] Do you have those papers still?
> "[Petitioner] Which ones?
> "[Prosecutor] The notes that you wrote that you're talking about?
> "[Petitioner] No.
> . . . .
> "[Prosecutor] And as you stand here today, you have no independent recollection of what those questions were that you wanted him to follow up on?

[Petitioner] No. (*Id.* at 23:21-24; 24:15-25; 25:16-19.)

The Petitioner also testified that defense counsel kept the notes and that because they were not in his possession, he wanted to review the transcript instead. *Id.* at 25:1-15. The Prosecutor properly pointed out that reviewing the transcript would not be the equivalent of reviewing the notes. *Id.* at 25:3-5.

Defense counsel testified on cross-examination that his general practice is to ask his clients to take notes about anything that the client may think is important, and that when there's a break in the proceedings, he would touch base with his client. *Id.* at 37:23-38:9. He also testified that he tells his clients to pass a note to him if the client thinks the issue needs immediate attention; whereupon, he usually requests a break in the proceedings so that he can confer with his client. *Id.* at 38:7-9. Although he did not specifically recall what he told Petitioner, he testified that it is not his practice to direct clients to take notes about specific witnesses. *Id.* at 38:13-16.

Defense counsel then suggested that in this case it was possible that there was a miscommunication between Petitioner, a Spanish-speaking man, and his interpreter. *Id.* at 38:17-24. He testified:

> "I'm assuming that, you know, she was properly translating what I said, but it's possible somewhere in the translation Mr. Santiago took away that I was suggesting that he take notes of a specific witness, but that's not my policy and I don't remember doing that in this case." *Id.* at 38:19-24.

Defense counsel further testified:

> "My practice generally is to – if the clients want to talk about something, I listen to them, and, again, I have a general conversation with clients before a trial or hearing, basically explaining, 'Look, you might want me to ask questions. I will listen to you, but if I decide not to ask the question, I'm the lawyer, you have to leave that up to me. You may disagree with what my decision is, but there is a reason which I will explain to you. Whether you will accept it or not, is another thing, but I have reasons for the questions I ask and

> the questions I don't ask. Again, I don't specifically remember having that conversation with Mr. Santiago, but it's my practice that I do that, and I'm assuming that I did."' *Id.* at 39:4-17.

After reviewing the record, the Court is unable to determine the basis of this particular claim of ineffective assistance of counsel because Petitioner has not given the Court any factual support for the allegation. *See* § 10-9.1-4 ("The application shall . . . specifically set forth the grounds upon which the application is based, and clearly state the relief desired. Facts within the personal knowledge of the applicant shall be set forth separately from other allegations of facts and shall be verified as provided in § 10-9.1-3"). A similar standard also applies to claims for ineffective assistance of counsel. *See State v. Turley*, 113 R.I. 104, 109, 318 A.2d 455, 458 (1974) ("The question of whether defense counsel has failed to fulfill his [or her] duty to render 'reasonably effective assistance' . . . *is a question of fact which must be established by legally competent evidence*.") (Emphasis added.) Thus, "[m]ere unfounded claims and unsupported charges of ineffectiveness are of no avail." *Id.*

The Court finds that the alleged refusal by the attorney of record not to utilize Petitioner's notes would have constituted a legitimate trial tactic and would not have amounted to representation that was constitutionally deficient. *See D'Alo*, 477 A.2d at 92. Accordingly, the Court concludes that Petitioner has failed to prove by a preponderance of the evidence that any such refusal would have amounted to ineffective assistance of counsel.

D

Claim of Innocence

Finally, Petitioner maintains that he should be granted postconviction relief because he is innocent of the charge. Apart from declaring his innocence, however, Petitioner does not provide any reason to support this claim.

As previously stated, postconviction relief is only available to convicted individuals who demonstrate a constitutional violation of their rights, or who can demonstrate the existence of newly discovered material facts that require the conviction to be vacated in the interest of justice. *See DeCiantis*, 24 A.3d at 569. Considering that Petitioner has not produced any newly discovered material facts that might necessitate vacation of his conviction, and considering that he has not prevailed on any of his ineffective assistance of counsel claims, his claim of actual innocence necessarily must fail.

IV

Conclusion

In view of the foregoing, the Court concludes that Petitioner has not satisfied his burden of proving by a preponderance of the evidence that postconviction relief is warranted. Furthermore, the Court is satisfied that defense counsel provided competent and professional services in defense of the charge against Petitioner. Accordingly, the Amended Verified Petition for Post Conviction Relief is denied and dismissed.

Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

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DATE DECISION FILED:	September 13, 2019
JUSTICE/MAGISTRATE:	McGuirl, J.

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