

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(FILED: May 5, 2016)

SEBASTIAN WELLS ATRYZEK

:

v.

:

C.A. No. PM-2015-04499

:

STATE OF RHODE ISLAND

:

:

DECISION

CARNES, J. Before this Court is Sebastian Wells Atryzek’s (Mr. Atryzek) Application for Post Conviction Relief (Application) from three pleas of nolo contendere entered before this Court, P2-2009-2042A, P2-2010-0740A, and P2-2012-0425A. Also before this Court is an appeal of a Special Magistrate’s decision denying a preceding Application for Post Conviction Relief from a plea of nolo contendere entered before the Magistrate, P2-2013-1293A. Mr. Atryzek requests that this Court vacate and set aside all of his convictions for failure to register as a sex offender in violation of G.L. 1956 §§ 11-37.1-9 and 11-37.1-10. Mr. Atryzek alleges that he had no duty to register as a sex offender and that his decision to plead nolo contendere to the charged violations was prejudiced by the deficient performance of his counsel. Jurisdiction is pursuant to G.L. 1956 § 10-9.1-2(a).

I

Facts and Travel

On February 18, 1993, at the age of seventeen years old, Mr. Atryzek pled guilty to and was convicted in the Commonwealth of Massachusetts of “Rape and abuse of child” under M.G.L.A. 265 § 23 (1993 Mass. Conviction). (Appl. for Post Conviction Relief at 2.) Mr. Atryzek was assessed as a Level I Sex Offender, the lowest assessment level, and was sentenced

to probation and supervision, terminating on June 19, 2000.¹ Id. Shortly after his conviction, Mr. Atryzek moved with his adoptive parents to live in Rhode Island (State). Id. On April 11, 2005, a Justice of the Massachusetts Superior Court ordered the destruction of records relating to Mr. Atryzek's 1993 Mass. Conviction. Id. at 4.

On or about June 18, 2009, the State filed a one count criminal information charging Mr. Atryzek with failure to register as a sex offender in violation of §§ 11-37.1-9 and 11-37.1-10 (P2-2009-2042A). Id. at 2. On both March 4, 2010 and February 2, 2012, the State, again, charged Mr. Atryzek with "Failure to Register" (P2-2010-0740A, P2-2012-0425A). Id.

Before this Court on February 2, 2012, represented by attorney Judith Crowell, Mr. Atryzek pled nolo contendere to P2-2009-2042A, P2-2010-0740A, and P2-2012-0425A (collectively, 2012 Convictions). Id. at 3. Mr. Atryzek received a sentence of five years at the Adult Correctional Institute (ACI), ten months to serve, fifty months suspended/probation. Id. The 2012 Convictions stemmed from the 1993 Mass. Conviction, despite the destruction of Mr. Atryzek's records in 2005.

On or about May 6, 2013, the State filed its fourth criminal information charging Mr. Atryzek with "Failure to Register" in violation of §§ 11-37.1-9 and 11-37.1-10 (P2-2013-1293A). Id. On August 16, 2013, represented by attorney Kenneth Shea, Mr. Atryzek pled nolo contendere to P2-2013-1293A. A Special Magistrate sentenced Mr. Atryzek to seven years at the ACI, five years to serve, two years suspended/probation (2013 Conviction). Id. Mr. Atryzek is currently being held in the custody of the ACI, having served over two years of the 2013 Conviction.

¹ Mr. Atryzek was sentenced to fifteen years suspended sentence, five years of probation, sexual offender treatment, and continued enrollment in an education program. Mr. Atryzek's probation terminated on June 19, 2000. See Appl. for Post Conviction Relief, Ex. 1.

Mr. Atryzek previously filed an Application for Post Conviction Relief in the matter of Sebastian Wells Atryzek v. State of Rhode Island, No. PM-2014-2239 (filed May 5, 2014) (2014 PCR Application). Id. at 3-4. The 2014 PCR Application alleged that because Mr. Atryzek's records from his 1993 Mass. Conviction had been destroyed in 2005, he no longer had a duty to register in any jurisdiction. On November 20, 2014, Special Magistrate McBurney denied Mr. Atryzek's request for relief, and an appeal was taken. Id. at 4. On October 15, 2015, counsel for Mr. Atryzek withdrew the arguments made in the 2014 PCR Application.

Subsequently, Mr. Atryzek filed an Application for Post Conviction Relief in the matter of Sebastian Wells Atryzek v. State of Rhode Island, No. PM-2015-5345 (2015 PCR Application). In the 2015 PCR Application, Mr. Atryzek requested relief from his plea of nolo contendere to P2-2013-1293A. The Special Magistrate denied Mr. Atryzek's request and Mr. Atryzek timely filed this appeal of the Special Magistrate's decision.

Coinciding with that appeal, Mr. Atryzek filed this Application for Post Conviction Relief from his pleas of nolo contendere that occurred before this Court on February 2, 2012—P2-2009-2042A, P2-2010-0740A, and P2-2012-0425A.

Mr. Atryzek argues that his duty to register as a sex offender in Rhode Island stemmed from § 11-37-16, the statute in effect at the time of his 1993 Mass. Conviction. Sec. 11-37-16 has been nominally repealed by § 11-37.1-4. Mr. Atryzek argues that § 11-37-16 is silent as to the duration of the registration requirement and thus ambiguous. In claiming that § 11-37-16 is ambiguous, Mr. Atryzek submits that this Court should apply the Rule of Lenity to find that his duty to register is controlled by § 11-37.1-4, which imposes a duty on sex offenders to register for ten years subsequent to the date of conviction. Consequently, Mr. Atryzek argues that applying the Rule of Lenity leads to the conclusion that his duty to register expired in February

of 2003, and therefore, the subsequent charges and convictions for failure to register were erroneous and must be set aside.

Subsequent to filing this Application, Mr. Atryzek amended the Application to add the claim of ineffective assistance of counsel. Mr. Atryzek maintains that his duty to register as a sex offender expired in February of 2003 and counsel should have argued this point, but instead, advised him to plead guilty to the charges. Mr. Atryzek submits that counsel was so deficient in advising him to plead to the charged violations that he was, effectively, denied his right to a fair hearing. This Court held an evidentiary hearing concerning Mr. Atryzek's claim of ineffective assistance of counsel on April 18, 2016. Further facts will be discussed as needed, infra.

II

Standard of Review

“[P]ostconviction 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.” Page v. State, 995 A.2d 934, 942 (R.I. 2010); see also § 10-9.1-1. “An applicant for such relief bears ‘[t]he burden of proving, by a preponderance of the evidence, that such relief is warranted’ in his or her case.” Brown v. State, 32 A.3d 901, 907 (R.I. 2011) (quoting State v. Laurence, 18 A.3d 512, 521 (R.I. 2011)). Postconviction relief motions are civil in nature and thus governed by all the applicable rules and statutes governing civil cases. Ferrell v. Wall, 889 A.2d 177, 184 (R.I. 2005).

III

Analysis

Mr. Atryzek files this Application on four bases: (1) the Rhode Island Superior Court has no jurisdiction to impose the sentences relating to the 2012 and 2013 Convictions; (2) the registration statute in effect at the time of Mr. Atryzek's conviction is ambiguous, and the Rule of Lenity dictates that this Court resolve the ambiguity in Mr. Atryzek's favor by concluding that the duration of registration under the statute is not for life; (3) Mr. Atryzek had no duty to register under Rhode Island law, and thus, charges should never have been brought; and (4) Mr. Atryzek's decision to plead nolo contendere to the charged violations was prejudiced by ineffective assistance of counsel.

A

Jurisdiction

The instant matter, in part, involves an appeal from a decision of a Special Magistrate. Rule 2.9(h) of the Superior Court Rules of Practice governs the standard to be applied by a Justice of the Superior Court to an appeal from a decision of a Special Magistrate. The Rule sets forth, in pertinent part:

“[t]he Superior Court Justice shall make a de novo determination of those portions to which the appeal is directed and may accept, reject or modify, in whole or in part, the judgment, order or decree of the master. The justice, however, need not formally conduct a new hearing and may consider the record developed before the master, making his or her own determination based on that record whether there is competent evidence upon which the master's judgment, order or decree rests. The justice may also receive further evidence, recall witnesses or recommit the matter with instructions.” R.P. 2.9(h).

This appellate process has long been recognized by our Supreme Court, originating from Superior Court Administrative Order 94-12. See Moniz v. State, 933 A.2d 691, 694 (R.I. 2007)

(appealing a Special Magistrate’s decision to a Superior Court justice based on Superior Court Administrative Order No. 94-12). In recognizing this process, our Supreme Court has stated that a Superior Court justice has “broad discretion in his or her review of the master’s decision.” Paradis v. Heritage Loan and Inv. Co., 678 A.2d 440, 445 (R.I. 1996). In reviewing a Special Magistrate’s decision, a Superior Court justice is not required to conduct a new hearing; rather, the justice is only obligated to make a de novo determination of those portions to which the appeal is directed and may accept, reject, or modify, in whole or in part, the judgment, order, or decree of the Master. R.P. 2.9(h).

This Court will conduct a de novo review of the Special Magistrate’s decision rejecting Mr. Atryzek’s Application. In its discretion, this Court will accept, reject, or modify the decision as it deems appropriate in light of its review of the entire record.

B

Ambiguity and the Rule of Lenity

Mr. Atryzek argues that § 11-37-16, the registration statute in effect on the date of Mr. Atryzek’s 1993 Mass. Conviction, is ambiguous. This alleged ambiguity is created by the fact that there are two statutes requiring sex offender registration, §§ 11-37-16 and 11-37.1-4. Section 11-37.1-4 became effective on July 24, 1996. See P.L. 1996, ch. 104, § 3, eff. July 24, 1996. Mr. Atryzek argues that § 11-37-16 does not contain a time limit and therefore does not answer the questions of crucial importance in this case: what the duration of registration is for someone convicted of an offense prior to the 1996 enactment of § 11-37.1-4, and additionally, which statute controls a sex offender’s duty to register. Mr. Atryzek submits that this ambiguity should be construed in favor of the party upon whom the penalty is to be imposed, that party being Mr. Atryzek. Mr. Atryzek maintains that this Court should construe the alleged ambiguity

in his favor and conclude that the duration of registration under § 11-37-16 is not for a lifetime, but rather, is no more than the duration of § 11-37.1-4, the registration statute currently in effect as of July 24, 1996. Sec. 11-37.1-4 dictates that a sex offender's duty to register expires ten years from the date of conviction.

The State counters that § 11-37-16 is not ambiguous and therefore § 11-37.1-4 does not apply. The State maintains that § 11-37-16 is silent as to the duration of registration and this silence cannot be interpreted as ambiguity. Rather, the State suggests, the silence indicates that the legislative intent when drafting § 11-37-16 was to impose upon sex offenders a lifetime duty to register. See § 11-37-16 (emphasis added).

Ambiguity exists when a word or phrase in a statute is susceptible of more than one meaning. See State v. Hazard, 68 A.3d 479, 492 (R.I. 2013). However, of critical importance is the distinction between silence and ambiguity. Where there is no ambiguity, and a statute is merely silent, the court is not privileged to legislate, by inclusion, words which are not found in the statute. See Olamuyiwa v. Zebra Atlantek, Inc., 45 A.3d 527, 536 (R.I. 2012) (internal citations omitted). It is not the court's role to contort the language of an unambiguous statute in order to include within its reach a situation which the statute plainly does not encompass. Id. However, statutory provisions may be broadened by the principle of necessary implication only where the absence of some provision would render impossible the accomplishment of the clear purposes of the legislation. New England Die Co. v. Gen. Prods. Co., 92 R.I. 292, 298, 168 A.2d 150, 153 (1961).

Mr. Atryzek pled nolo contendere to, and was convicted of, the underlying offense in February 1993. It is uncontested that by virtue of an explicit savings clause, § 11-37-16 controls

Mr. Atryzek's duty to register.² At the time of Mr. Atryzek's conviction, § 11-37-16 imposed a registration duty on:

“[a]ny person who since July 1, 1992, has been, or shall hereafter be, convicted of any offense in violation of [a sexual assault as defined in Chapter 37], or convicted in another state of first degree sexual assault which if committed in this state would constitute a violation of this chapter” Sec. 11-37-16 (emphasis added).

Mr. Atryzek pled guilty in the Commonwealth of Massachusetts on February 18, 1993. At that time, the above section of law governed any duty imposed upon Mr. Atryzek to register as a sex offender.

On its face, § 11-37-16 is not ambiguous, as there is no word or phrase that is susceptible of more than one meaning. See Hazard, 68 A.3d at 492. Section 11-37-16 plainly defines the class of sex offenders required to register and does not impose any restrictions on that obligation. It is only when reading § 11-37-16 alongside § 11-37.1-4 that the potential for ambiguity arises. See Horn v. S. Union Co., 927 A.2d 292, 294 n.5 (R.I. 2007) (stating that statutes relating to the same subject should be read in relation to each other).

Section 11-37.1-4, effective July 24, 1996, imposes a ten year limitation on a sex offender's duty to register. That is, the duty to register expires ten years subsequent to the date of the conviction. See § 11-37.1-4(a). Unlike § 11-37.1-4, § 11-37-16 is silent as to the duration of the obligation to register. However, this silence cannot be construed as ambiguity. See State v. Santos, 870 A.2d 1029, 1034 (R.I. 2005) (stating “[t]he absence of such words does not,

² Section 11-37-16, although nominally repealed, is still effective with respect to a limited class of individuals. That is because § 11-37.1-18 of the subsequently enacted registration statute contains a savings clause stating that “[n]othing in this section shall be construed to abrogate any duty to register which exists or existed under the provisions of former § 11-37-16.” See also State v. Flores, 714 A.2d 581, 583-84 (R.I. 1988) (holding that the defendant was required to register as a sex offender pursuant to registration requirements in effect at the time he committed the offense, despite registration requirements that came into effect after the date of offense).

however, render the statutory language ambiguous; the addition of such words would simply have made clear language read even more clearly”); see also Santana v. Holder, 731 F.3d 50, 58 (1st Cir. 2013) (stating “relying so heavily on extra-statutory sources to read silence or ambiguity into seemingly clear text runs counter to well-settled modes of interpretation”).

In the past, courts have construed the silence in § 11-37-16 to indicate legislative intent that a sex offender register for life. See United States v. Stevens, 598 F. Supp. 2d 133, 142-44 (D. Maine 2009); see also State v. Gibson, P2-2012-2199A (R.I. Super. Jan. 27, 2014) (ruling in the Superior Court that “§ 11-37-16 imposed a lifetime duty to register”). This Court is inclined to take a similar approach.

For the purpose of discussion, this Court will also examine the statute in its entirety in order to “glean the intent and purpose of the Legislature.” See Flores, 714 A.2d at 583 (citing In re Advisory to the Governor (Judicial Nominating Comm’n), 668 A.2d 1246, 1248 (R.I. 1996)). Examining § 11-37-16 in its entirety reveals that the Legislature did include a registration termination provision for juveniles required to register as sex offenders under that particular statute. See § 11-37-16(d)(3)(A) (stating “[t]he duty to register under this section for offenses adjudicated by a juvenile court shall terminate when a person reaches the age of twenty-five”). Including a termination provision in one area of the statute, for a specific class of offenders, indicates that the Legislature contemplated the lifetime obligation that the statute would impose on all other offenders. A fair reading of the statute leads to the conclusion that the Legislature declined to extend this termination provision to any class of offenders other than juveniles. Where there is no termination provision for adult offenders in the statute, this Court is not empowered to legislate, by inclusion, words of limitation, which are not found therein. See Olamuyiwa, 45 A.3d at 536 (stating “[i]f the General Assembly desired to extend the attestation

. . . to a situation such as the instant case presents, we do not doubt that it could have done so; but the blunt fact is that it did not do so”) (internal citations omitted).

Consequently, this Court interprets § 11-37-16 to unambiguously impose a lifetime registration duty on sex offenders convicted prior to the enactment of § 11-37.1-4 on July 24, 1996. This Court will not, as Mr. Atryzek suggests, read both statutes together to create an ambiguity that does not exist in the plain language of § 11-37-16. See Santana, 731 F.3d at 58.

Where there is no ambiguity in the plain language of the statute, Mr. Atryzek’s argument—that the Rule of Lenity applies—is unavailing. The Rule of Lenity is a principle of statutory construction which requires that the Court “adopt the less harsh of two possible meanings when faced with an ambiguous criminal statute.” See Such v. State, 950 A.2d 1150, 1158 (R.I. 2008). Therefore, when the meaning of a criminal statute is ambiguous, “the policy of lenity . . . requires that the less harsh of two possible meanings be adopted.” See State v. Anthony, 422 A.2d 921, 925 (R.I. 1980). The Rule of Lenity applies only when the meaning of a criminal statute is ambiguous; it is inapplicable where “the legislative statute is clear.” Id. at 926. (quoting State v. Robalewski, 418 A.2d 817, 826 (R.I. 1980)).

As this Court interprets § 11-37-16 to be devoid of ambiguity, the Rule of Lenity is inapplicable. Besides, the Rule of Lenity applies where there is ambiguity in a criminal statute. See Such, 950 A.2d at 1150 (emphasis added). Sex offender registration requirements have consistently been held to be regulatory rather than punitive. See State v. Germane, 971 A.2d 555, 593 (R.I. 2009) (stating “[a]lthough it follows as a consequence of a criminal conviction, sexual offender registration and notification is a civil regulatory process”); see also In re Richard A., 946 A.2d 204, 213 (R.I. 2008). This Court recognizes that the Superior Court has applied the Rule of Lenity to sex offender registration cases in the past. See State v. Leon, C.A. No. PM 12-

1859 (R.I. Super. Mar. 12, 2013) (Gibney, PJ) (applying the Rule of Lenity to a provision of the Sex Offender Registration Notification Act); see also State v. Gibson, P2-2012-2199A (R.I. Super. 2014) (stating “there is no ambiguity in this provision [§ 11-37-16]; the Legislature clearly intended to maintain the lifetime registration requirement for offenders convicted prior to the enactment of the new statute”). However, finding § 11-37-16 is not ambiguous, this Court declines to apply the Rule of Lenity here.

C

Prosecutorial Discretion and Waiver by Plea

Mr. Atryzek argues that the State’s criminal informations charging him with failure to register as a sex offender are invalid. Specifically, Mr. Atryzek contends that the failure to register charges are baseless and the State did not have jurisdiction to bring the charges in the first place. This Court finds Mr. Atryzek’s arguments unpersuasive.

Section 11-37-16 explicitly applies to offenders “convicted of any offense in violation of this chapter, or convicted in another state of first degree sexual assault which if committed in this state would constitute a violation of this chapter” Sec. 11-37-16 (emphasis added). In Rhode Island, a person is guilty of a “first degree sexual assault” if he or she “engages in sexual penetration with another person, and if any of the following circumstances exist:

“(1) The accused, not being the spouse, knows or has reason to know that the victim is mentally incapacitated, mentally disabled, or physically helpless.

“(2) The accused uses force or coercion.

“(3) The accused, through concealment or by the element of surprise, is able to overcome the victim.

“(4) The accused engages in the medical treatment or examination of the victim for the purpose of sexual arousal, gratification, or stimulation.” See § 11-37-2.

Massachusetts does not have a “first degree sexual assault” statute. Rather, Massachusetts has multiple statutes that forbid rape or assault with attempt to commit rape. See M.G.L.A. 265 “Crimes Against the Person.” These statutes differ based on, among other factors, the age of the victim, weapons used during the commission of the offense, and penalties imposed. Id. The Massachusetts statute most similar to § 11-37-2 is M.G.L.A. 265 § 22, “Rape, generally.” This statute forbids sexual intercourse with an individual where the aggressor,

“compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury and if either such sexual intercourse or unnatural sexual intercourse results in or is committed with acts resulting in serious bodily injury, or is committed by a joint enterprise, or is committed during the commission or attempted commission of [a felony].” See M.G.L.A. 265 § 22.

Mr. Atryzek was not convicted of “Rape, generally,” he was convicted of “Rape and abuse of child,” pursuant to M.G.L.A. 265 § 23. This statute forbids the “sexual intercourse or unnatural sexual intercourse, and abuses [of] a child under 16 years of age.” See M.G.L.A. 265 § 23. This statute is separate and apart from “Rape, generally.” Furthermore, the unlawful act in “Rape and abuse of child” is not one of the enumerated circumstances that would qualify the act as a “first degree sexual assault” in Rhode Island. Therefore, this Court cannot determine that Mr. Atryzek was convicted in Massachusetts of a first degree sexual assault, or alternatively, convicted in Massachusetts of a crime that if committed in Rhode Island would constitute sexual assault in the first degree.

As Mr. Atryzek’s 1993 Mass. Conviction was not determined to be sexual assault in the first degree, the registration requirements of § 11-37-16 did not appear to apply to him. Mr. Atryzek’s duty to register stemmed only from Massachusetts law. Massachusetts law imposed

upon Mr. Atryzek a duty to register in the State of Rhode Island. See M.G.L.A. 6 § 178C-178P.³ Therefore, because Massachusetts law imposed a duty upon Mr. Atryzek to register in Rhode Island, it was within the prosecutor’s discretion to charge Mr. Atryzek with “Failure to Register” in the State of Rhode Island. See State v. Gadson, C.A. No. P2-2010-3033A (R.I. Super. 2013) (citing U.S. v. Batchelder, 442 U.S. 114, 124 (1979)) (finding that whether to prosecute and what charge to file falls within a prosecutor’s discretion).

This Court concludes that the charges of “Failure to Register” were properly brought pursuant to prosecutorial discretion. However, even assuming Mr. Atryzek’s argument that “charges should not have been brought” was meritorious, Mr. Atryzek waived this argument by pleading nolo contendere to the charges.⁴ Mr. Atryzek submits that he should be able to contest the viability of the charges “in the interest of justice.” This Court disagrees.

Our Supreme Court has held that when a criminal defendant has “solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.” See Torres v. State, 19 A.3d 71, 77-80 (R.I. 2011) (citing Miguel v. State, 774 A.2d 19, 22 (R.I. 2001) (quoting State v. Dufresne, 436 A.2d 720, 722 (R.I. 1981)); see also State v. Figueroa, 639 A.2d 495, 498 (R.I. 1994) (“[a] plea of nolo contendere is the [same as] a guilty plea”). Regardless of an alleged defect in the original indictment, a plea

³ See M.G.L.A. 6 § 178G (stating “[t]he duty of a sex offender required to register pursuant to this chapter and to comply with the requirements hereof shall . . . end 20 years after such sex offender has been convicted or adjudicated or has been released from all custody or supervision, whichever last occurs”) (emphasis added); see also § 178E(i) (stating “[a] sex offender required to register pursuant to sections 178C to 178P, inclusive, who intends to move out of the commonwealth shall notify the board not later than ten days before leaving the commonwealth . . . the board shall notify such sex offender of the duty to register in the new jurisdiction”).

⁴ Mr. Atryzek’s pleas are subject to further analysis on whether counsel’s advice was competent and effective and whether such pleas were entered into knowingly and voluntarily. This is discussed in section III D, infra.

waives any “prior [c]onstitutional infirmity” as long as defense counsel’s advice to accept the plea was competent and effective, and the defendant voluntarily entered the plea. Torres, 19 A.3d at 76. Thus, in the case of a defendant who has pled guilty, “[t]he sole focus of an application for post-conviction relief . . . is ‘the nature of counsel’s advice concerning the plea and the voluntariness of the plea. If the plea is validly entered, [the court] [does] not consider any alleged prior constitutional infirmity.’” Id. (citing Gonder v. State, 935 A.2d 82, 87 (R.I. 2007)) (quoting Miguel, 774 A.2d at 22).

Thus, this Court will not consider any alleged prior constitutional infirmity. Dufresne, 436 A.2d at 722. Notwithstanding this Court’s statutory construction of § 11-37-16 and contemplation of Mr. Atryzek’s duty to register in Rhode Island, Mr. Atryzek has waived, by virtue of his plea, the bulk of the claims set forth in his Application.

D

Ineffective Assistance of Counsel

The final claim before this Court for consideration is the nature of counsel’s advice concerning the plea and the voluntariness of the plea. Gonder, 935 A.2d at 87. This Court will address each issue in turn.

The Plea

Mr. Atryzek does not explicitly claim that his pleas of nolo contendere were entered into unwillingly. However, this Court must consider the voluntary nature of his pleas in relation to his ineffective assistance of counsel claim.

Rule 11 of the Superior Court Rules of Criminal Procedure states, in relevant part, that a Court “shall not accept . . . a plea of nolo contendere without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of

the charge and the consequences of the plea.” Moniz, 933 A.2d at 695. Pursuant to Rule 11, the Court must conduct “an on-the-record examination of the defendant before accepting [the] plea [in order] to determine if the plea is being made voluntarily with an understanding of the nature of the charge and the consequences of the plea.” State v. Frazar, 822 A.2d 931, 935 (R.I. 2003) (quoting Quimette v. State, 785 A.2d 1132, 1136 (R.I. 2001)). The record must demonstrate that the defendant understood the nature of the charges and the consequences of his plea. See State v. Feng, 421 A.2d 1258, 1267 (R.I. 1980). Although Rule 11 does not specify the extent or content of the colloquy, “the record and the circumstances in their totality must demonstrate to a reviewing court that the defendant’s plea was voluntary and intelligent.” Moniz, 933 A.2d at 695 (citing Feng, 421 A.2d at 1267).

The record of the 2012 Convictions reflects that Mr. Atryzek entered his plea of nolo contendere knowingly and voluntarily. (Ex. 6, Tr. at 6, Feb. 2, 2012.) This Court established that Mr. Atryzek understood the nature of the charges and the consequences of entering a plea of nolo contendere. Id. at 4-6. This Court ascertained that Mr. Atryzek had completed high school and did not have any difficulty reading or writing in English. Id. at 6. This Court then directed the prosecutor to recite the facts that the state was prepared to prove if the matter went to trial. Id. at 16-20. Mr. Atryzek accepted the facts as true and then acknowledged on the record that he had an obligation to register as a sex offender and failed to do so, stating,

“I have regrets for what I did. It is just that I made bad choices . . . I do have a responsibility to register as a sex offender and to make good on my probation and . . . I am satisfied with the plea that I received today.” Id. at 21-22.

The record of Mr. Atryzek’s 2013 Conviction similarly reflects that Mr. Atryzek entered the 2013 plea intelligently and voluntarily. The Special Magistrate enumerated the rights that Mr. Atryzek was giving up by pleading nolo contendere. (Ex. 7, Tr. at 3, Aug. 26, 2013.) The

Special Magistrate asked Mr. Atryzek, “[y]ou give [these rights] up freely and voluntarily?” Id. To which Mr. Atryzek responded, “[c]orrect, your Honor.” Id. at 4. The prosecutor recited the facts underlying the charged violations and Mr. Atryzek confirmed that the facts were true and accurate. Id. at 6-7. Lastly, the Special Magistrate asked Mr. Atryzek, “[a]nd in this case, sir, are you satisfied with the representation of your lawyer?” Id. at 6. Mr. Atryzek responded, “[y]es, your Honor.” Id.

Indeed, “an intelligent plea does not necessarily mean that the plea is wise. Rather, it indicates that defendants are aware of the consequences of their pleas.” Moniz, 933 A.2d at 696. Having reviewed the records of both the 2012 Convictions and the 2013 Conviction, this Court is satisfied that Mr. Atryzek was aware of the consequences of his pleas and entered into the pleas voluntarily.

Counsel’s Advice

In assessing a claim of ineffective assistance of counsel, this Court employs the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984). See Chapdelaine v. State, 32 A.3d 937, 941 (R.I. 2011). The Strickland standard requires that the defendant show ““(1) that the counsel’s performance was so deficient and the errors so serious that they violate a defendant’s Sixth Amendment guaranty of counsel; and, (2) that this deficient performance prejudiced his or her defense and deprived the defendant of his or her right to a fair trial.”” Pierce v. Wall, 941 A.2d 189, 193 (R.I. 2008) (quoting Quimette, 785 A.2d at 1139). “To sufficiently show a deficiency under the first criterion, the defendant must demonstrate ‘that counsel’s representation fell below an objective standard of reasonableness.’” Rice v. State, 38 A.3d 9, 17 (R.I. 2012) (internal citation omitted). The second prong of the Strickland test requires that the defendant “provide proof of prejudice emanating from the attorney’s deficient performance such as ‘to

amount to a deprivation of the [defendant's] right to a fair trial.” Id. (internal citation omitted). To establish this prejudice prong, a defendant must show that “the outcome of the plea process would have been different with competent advice.” Lafler v. Cooper, 132 S.Ct. 1376, 1384 (2012).

This Court recognizes that “effective representation is not the same as errorless representation.” State v. D’Alo, 477 A.2d 89, 92 (R.I. 1984). A defendant asserting a postconviction claim of ineffective assistance of counsel is “saddled with a ‘heavy burden,’ in that there exists ‘a strong presumption, [recognized] by [the Supreme Court], that an attorney’s performance falls within the range of reasonable professional assistance and sound strategy.’” Rice, 38 A.3d at 17 (quoting Quimette, 785 A.2d at 1138-39).

This Court held an evidentiary hearing on April 18, 2016 to evaluate Mr. Atryzek’s claim that ineffective assistance led to the improvident acceptance of the nolo contendere pleas. At the hearing, this Court heard testimony from attorneys Kenneth Shea (Mr. Shea) regarding the plea entered into on August 26, 2013 and Judith Crowell (Ms. Crowell) regarding the pleas entered into on February 2, 2012, respectively.

Mr. Shea represented Mr. Atryzek in the course of the 2013 Conviction. At the hearing, Mr. Shea testified that during his representation of Mr. Atryzek, he spoke with Mr. Atryzek about the failure to register as a sex offender charge “[s]everal times.” (Tr. at 4, Apr. 18, 2016.) Mr. Shea recalled Mr. Atryzek raising concerns as to “whether or not he had to register.” Id. Specifically, Mr. Atryzek expressed concern that his “case in Massachusetts fell below the State of Rhode Island’s legislative act, and that the timeframe had passed for him to register.” Id. at 7. Due to Mr. Atryzek’s concerns, Mr. Shea met with a member of the State Sex Offender Board to relay his client’s concern and to discuss whether Mr. Atryzek had a duty to register. Id. at 4.

The Board member “indicated that clearly . . . [Mr. Atryzek] had an absolute duty . . . to register in the State of Rhode Island.” Id. at 6. Mr. Shea testified that he discussed Mr. Atryzek’s duty to register with Ms. Crowell prior to the 2013 Conviction. Id. at 4. Ms. Crowell “was adamant that he needed to register.” Id. Mr. Shea testified that he also discussed Mr. Atryzek’s duty to register with Mr. John Krollman, attorney for the State. Id. Mr. Shea recalled that Mr. Krollman’s position “was very adamant, again, that [Mr. Atryzek] had previously pled, that there was no change in the situation, and he wasn’t buying [Mr. Atryzek’s claim that he did not have to register].” Id.

After speaking with Ms. Crowell, Mr. Krollman and the State Sex Offender Board member, Mr. Shea consulted with Mr. Atryzek. Mr. Shea conveyed his concerns to Mr. Atryzek that “possibly the timeframe had passed” but explained that “based on [Mr. Atryzek’s] previous pleas, [and] previous record,” the Attorney General was extending a plea offer of a seven year sentence with five years to serve at the ACI. Id. at 8. Mr. Shea critically testified, “[i]f you don’t want to do this, this is your decision. I’m doing the best I can for you.” Id. (emphasis added). Mr. Shea indicated to Mr. Atryzek, “you’re walking a fine line here. You may have a valid point; you may not . . . [h]owever, at this point in time we’re running a tight schedule here, to either work this thing out or not work it out, one way or the other.” Id. at 15-16. Mr. Atryzek decided to accept the plea offer. Id. at 25.

After Mr. Shea’s testimony, Ms. Crowell was questioned regarding her representation of Mr. Atryzek during the 2012 Convictions. Ms. Crowell testified that she spoke with Mr. Atryzek’s prior counsel, attorney Steven DeLuca. Id. at 36. Mr. DeLuca “had investigated . . . Mr. Atryzek’s claim that he should not be required to register.” Id. Ms. Crowell reviewed the materials that Mr. DeLuca had gathered about the charge, including materials related to the 1993

Mass. Conviction, the Sex Offender Registration statute, and prior versions of the statute. Id. at 36-37. Ms. Crowell stated that “Mr. DeLuca believed that Mr. Atryzek had a duty to . . . register.” Id. at 37. Ms. Crowell agreed with Mr. DeLuca, concluding “it looked to me like at the time that the statute . . . carried a lifetime obligation to register.” Id. Ms. Crowell spoke with Mr. Atryzek and “discussed with him the fact that in my view he had an obligation to register.” Id. at 40. Ms. Crowell recollected, “I’m not even sure that we discussed what I believe the duration of his obligation to register was. I think my discussion with him was, yes, you have a duty to register.” Id. at 43. Ms. Crowell testified that she could not remember whether Mr. Atryzek reacted to or contested to her advice, stating “I have no specific recollection of what he said.” Id. at 45. However, Ms. Crowell made clear that Mr. Atryzek did not fire her, but rather, accepted her advice and pled nolo contendere to the charged violations. Id.

This Court finds the testimony of Mr. Shea and Ms. Crowell to be credible. Mr. Shea testified that he investigated whether or not Mr. Atryzek had a duty to register and was told by the State Sex Offender Board that Mr. Atryzek “had an absolute duty . . . to register in the State of Rhode Island.” Id. at 6. The Sex Offender Board is responsible for reviewing and enforcing the registration requirements of sex offenders in the state of Rhode Island. See State v. Dennis, 29 A.3d 445, 451 (R.I. 2011). Accordingly, Mr. Shea’s reliance on the advice of the State Sex Offender Board was not erroneous. See Town of Richmond v. R.I. Dep’t. of Env’tl. Mgmt., 941 A.2d 151, 157 (R.I. 2008) (stating “an administrative agency will be accorded great deference in interpreting a statute whose administration and enforcement have been entrusted to the agency”). In addition to investigating Mr. Atryzek’s claim that he did not have a duty to register, Mr. Shea clearly indicated to Mr. Atryzek that the decision to accept or reject the plea offer was his alone to make. See Tr. at 8, Apr. 18, 2016 (stating “[i]f you don’t want to do this, this is your decision.

I'm doing the best I can for you") (emphasis added). Based on Mr. Shea's testimony, and the lack of contradictory evidence, this Court cannot conclude that his "representation fell below an objective standard of reasonableness." Rice, 38 A.3d at 17. Even if Mr. Atryzek had satisfied the first prong of Strickland by establishing that Mr. Shea's representation fell below an objective standard of reasonableness, the record is devoid of any evidence that Mr. Shea's deficient performance was prejudicial. Mr. Atryzek has failed to show that "a reasonable probability [exists] that absent [Mr. Shea's] deficient performance, the result of the [plea] would have been different." Gonder, 935 A.2d at 86 (citing Strickland, 466 U.S. at 687). Accordingly, this Court is not persuaded that Mr. Atryzek was denied effective assistance of counsel in relation to his 2013 Conviction.

In regard to Mr. Atryzek's contention that he was deprived of the effective assistance of counsel during his 2012 Convictions, this Court, again, finds no error in counsel's representation. This Court recognizes that Ms. Crowell does not recall exactly what she said to Mr. Atryzek regarding the extent of his duty to register. However, Ms. Crowell's precise statements are not essential to this Court's analysis because, at the time of the 2012 Convictions, Mr. Atryzek believed that he had a duty to register as a sex offender. (Ex. 6, Tr. at 22, Feb. 2, 2012) (stating "I do have a responsibility to register as a sex offender"). Ms. Crowell shared in this belief. See Tr. at 37, Apr. 18, 2016 (Ms. Crowell testifying that in her opinion, "at the time . . . the statute . . . carried a lifetime obligation to register"). Ms. Crowell advised Mr. Atryzek according to their mutual belief. Id.

Mr. Atryzek's assertion that this advice was unreasonable, and constituted ineffective assistance of counsel, is belied by the colloquy in the transcript. See Tr. at 4-22, Feb. 2, 2012. The transcript reflects that this Court ensured Mr. Atryzek understood the consequences of his

plea and understood that he could reject the plea offer and proceed to trial. Id. at 5. This Court confirmed that Mr. Atryzek could read and write in English and had signed the plea documents after carefully reading them. Id. at 6-7. This Court established that Mr. Atryzek had heard the facts as set forth by the State and accepted those facts as true. Id. at 17, 20. Finally, and perhaps most significantly, Mr. Atryzek acknowledged that he had a duty to register as a sex offender. Id. at 22. Consequently, Mr. Atryzek has failed to demonstrate that Ms. Crowell’s advice “was not within the range of competence demanded of attorneys in criminal cases” as required under the first prong of Strickland. See Gonder, 935 A.2d at 87.

Even assuming, for purposes of discussion, that Mr. Atryzek had established deficient performance under the first prong of Strickland, Mr. Atryzek has failed to show that Ms. Crowell’s performance prejudiced his decision to plead nolo contendere. See Strickland, 466 U.S. at 687; see also Rodrigues v. State, 985 A.2d 311, 315 (R.I. 2009) (stating “[t]he Court will reject an allegation of ineffective assistance of counsel ‘unless a defendant can demonstrate that counsel’s advice was not within the range of competence demanded of attorneys in criminal cases’”) (internal citation omitted). Mr. Atryzek has not presented any evidence to establish that Ms. Crowell’s assistance was deficient or prejudicial in any way; consequently, his claim of ineffective assistance of counsel in the course of his 2012 Convictions fails.

Mr. Atryzek has failed to establish that, but for the alleged errors of Mr. Shea and Ms. Crowell, he would not have entered a plea of nolo contendere, but rather would have proceeded to trial. See Gonder, 935 A.2d at 87. Accordingly, this Court finds Mr. Atryzek’s ineffective assistance of counsel claim to be without merit.

IV

Conclusion

In conclusion, this Court rejects Mr. Atryzek's contention that § 11-37-16 is ambiguous. The duration of registration under that specific statute is for life. This Court finds that pursuant to Massachusetts law, Mr. Atryzek did have a duty to register as a sex offender in Rhode Island.⁵ Furthermore, it was within the sound discretion of the prosecutor to charge Mr. Atryzek for "Failure to Register." In addition, this Court determines that Mr. Atryzek has waived, by virtue of his plea, the non-jurisdictional challenges set forth in his Application. Finally, this Court concludes that Mr. Atryzek's claims of ineffective assistance of counsel are unsubstantiated. Consequently, this Court affirms the ruling of the Special Magistrate and denies all applications for post conviction relief. Counsel will submit appropriate orders for entry.

⁵ M.G.L.A. 6 § 178G sets forth that the duty of a sex offender to register shall end "20 years after such sex offender has been convicted or adjudicated or has been released from all custody or supervision, whichever last occurs." Mr. Atryzek was convicted in 1993, he was released from probation in 2000, and the records relating to his conviction were destroyed in 2005. Ostensibly, in light of the statute, Mr. Atryzek's duty to register could expire twenty years after either 2000 or 2005, as these dates are when Mr. Atryzek was "released from all custody or supervision." Nevertheless, this Court does not have to decide this issue because Mr. Atryzek waived the matter by virtue of his pleas.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Atryzek v. State of Rhode Island

CASE NO: PM-2015-04499

COURT: Providence County Superior Court

DATE DECISION FILED: May 5, 2016

JUSTICE/MAGISTRATE: Carnes, J.

ATTORNEYS:

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For Defendant: Jeanine McConaghy, Esq.