STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[Filed: November 7, 2018]

JOHN J. GREENE	**:**	
	:	
v.	**:**	**C.A. No. PM-2018-0041**
	:	**P2-2014-2733A**
STATE OF RHODE ISLAND	**:**	

DECISION

CARNES, J. Before this Court is John J. Greene's (Petitioner) application for postconviction relief (Application). Petitioner asserts two theories in support of his Application: (1) that his attorney rendered constitutionally ineffective assistance of counsel and (2) that his *nolo contendere* plea was in violation of his constitutional rights and Super. R. Crim. P. 11 (Rule 11). This matter is before this Court pursuant to G.L. 1956 § 10-9.1-1.

I

Facts and Travel

Petitioner was charged with and ultimately pled *nolo contendere* to a single count of possession of child pornography.[1] Many facts are not in dispute. In addition to the filings and arguments of counsel, this Court gleans facts from the transcripts of the jury trial[2] (occurring on April 24, 25 and 26, 2017); the Petitioner's plea of *nolo contendere*[3] *(*occurring on April 26, 2017*)*;

[1] The original judgment of conviction erroneously indicated that Petitioner had been convicted of "producing" child pornography in violation of G.L. 1956 § 11-9-1.3(1). That was rectified with a motion to correct said judgment of conviction heard on October 9, 2018. By agreement, said motion was granted to reflect a conviction for "possession" of child pornography in violation of § 11-9-1.3(4).

[2] Hereinafter, the jury trial transcript from April 24, 2017 will be referred to as "Trial Tr. vol. 1," and the transcript from April 25, 2017 will be referred to as "Trial Tr. vol. 2."

[3] Hereinafter, the transcript of the plea hearing will be referred to as "Plea Tr."

and the postconviction evidentiary hearing[4] (occurring May 31 and June 1, 2018). Certain facts are further developed herein.

Petitioner was employed as a paralegal at the law office of Higgins, Cavanagh & Cooney, LLP. (Trial Tr. vol. 1, 3:22-4:1; 7:2-3.) On February 21, 2014, the office administrator was approached by a female employee who reported that she saw an image of what she thought was a female in lingerie on Petitioner's computer screen. (Trial Tr. vol. 1, 5:5-7:3.) The office administrator then walked by Petitioner's office and observed an image of an elementary school female wearing "either a bikini or some type of bra and panties" on Petitioner's computer screen while Petitioner was seated at his desk. (Trial Tr. vol. 1, 16:2-23.) Following this incident, on February 25, 2014, the office administrator installed monitoring software on Petitioner's work computer. (Trial Tr. vol. 1, 19:17-21; 20:12-21:1.) On February 28, 2014, the office administrator reported the results to the police, and Petitioner was subsequently arrested and charged with one count of possession of child pornography. (Trial Tr. vol. 2, 17:13-15; 23:16-24:1; State's Ex. A, Arrest Report.) According to the Arrest Report, following his arrest but after receiving *Miranda* warnings, Petitioner admitted to police that he downloaded images of child pornography and child erotica to his work computer. (State's Ex. A, Arrest Report; PCR Tr. 90:5-91:2.)

Petitioner hired private counsel to represent him on the single charge. (PCR Tr. 10:17-25.) Defense counsel is an experienced criminal attorney; however, prior to Petitioner's case, he had never tried a child pornography case. (PCR Tr. 11:24-12:3; 79:17-23.) Defense counsel obtained a copy of the criminal information package prior to trial, but did not file for discovery. (PCR Tr. 23:23-24:17.)

[4] Hereinafter, the transcript of the postconviction relief hearing will be referred to as "PCR Tr."

However, defense counsel did attend an evidence view at the Rhode Island State Police Barracks in Scituate. (PCR Tr. 42:7-9.) At the evidence view, the State of Rhode Island (State) informed defense counsel that it recovered seven or 8000 images from Petitioner's work computer that it intended to use at trial. (PCR Tr. 50:5-10; 51:1-2; 92:1-2.) However, of the thousands of images, the State contended that only 11 of the images depicted child pornography. (PCR Tr. 50:5-51:18.) Defense counsel did not file any motions *in limine* to exclude any of the images. (PCR Tr. 51:21-52:1.) Defense counsel did not think the images of child erotica were harmful to Petitioner because he planned to argue that Petitioner downloaded the small number of allegedly pornographic images by accident and, therefore, Petitioner lacked the required intent. (PCR Tr. 51:7-12; 91:13-21; 92:7-16.) Additionally, defense counsel stated that he preferred to raise his objections at trial. (PCR Tr. 52:19-25.)

Prior to trial, Petitioner asked his attorney to investigate certain aspects of the monitoring software and the ability of others to access his computer. (PCR Tr. 44:7-45:13.) Petitioner also requested his attorney issue a subpoena for an office-wide email that issued new passwords for work computers. (PCR Tr. 30:9-31:6.) Defense counsel remembers receiving these requests, but admitted that he never pursued either. (PCR Tr. 31:18-32:4; 44:7-45:13.)

On April 24, 2017, Petitioner's jury trial began. Before the State presented the screenshots to the jury and out of the presence of the jury, defense counsel requested the Court give a limiting instruction to the jury explaining the difference between child erotica, which is legal to possess, and child pornography, which is not.[5] (Trial Tr. vol. 2, 29:19-30:16.) Next, the State introduced approximately 1400 of the 8000 screenshots downloaded from Petitioner's work

[5] The court then gave such limiting instruction in the presence of the jury, explaining the difference between child pornography and child erotica and for what purposes the jury may consider each type of image. (Trial Tr. vol. 2, 38:11-39:14.)

computer to the jury. (Trial Tr. vol. 2, 31:1-3.) The images depicted Petitioner's activities throughout the work day including: logging into his computer, using his work email and other work-related programs, and downloading and viewing child pornography and erotica. (Trial Tr. vol. 2, 45:19-128:20.)

On the morning of April 26, 2017, after two days of trial, Petitioner decided to change his plea of not guilty to *nolo contendere*. (PCR Tr. 61:10-18.) After reaching an agreement with the State, defense counsel explained to Petitioner the rights he would be giving up. (PCR Tr. 97:3-16.) Defense counsel also discussed the contents of the plea form with Petitioner, including the special conditions that would be imposed, such as the statutory requirement to register as a sex offender. (PCR Tr. 100:14-102:1.) Although Petitioner appeared anxious throughout the plea discussions, Petitioner was able to express to his attorney that he understood his rights. (PCR Tr. 97:10-16.)

At the plea proceedings, Petitioner, who was under oath, stated that he understood that if the Court accepted his plea, he could not withdraw the plea without the Court's permission. (Plea Tr. 3:3-6; 4:10-15.) The trial justice then asked Petitioner if he had reviewed the contents of the plea form carefully and discussed it with his attorney, to which Petitioner responded, "I did." (Plea Tr. 5:1-13.) The trial justice also ensured defense counsel explained the elements of the charge of possession of child pornography to Petitioner and that Petitioner did not have any questions. (Plea Tr. 5:14-20.) Next, the trial justice asked Petitioner if he had discussed the Special Conditions included in the plea form with his attorney. (Plea Tr. 5:21-6:9.) Petitioner confirmed that he had, and that he understood the consequences of violating such conditions. (Plea Tr. 6:10-25.)

The trial justice also asked Petitioner if he was satisfied with his attorney's representation of him, to which Petitioner responded, "I am." The trial justice then informed Petitioner that he was giving up his right to complete the trial and "to make the State prove all the elements of th[e] charge by proof beyond a reasonable doubt." In response, Petitioner stated, "I understand." (Plea Tr. 7:24-8:12.) Next, the trial justice asked Petitioner if he was "entering this plea both freely and voluntarily," to which, Petitioner responded, "I am." (Plea Tr. 12:5-7.) After the State placed their statement of the facts on the record, Petitioner conferred with his attorney for a moment. (Plea Tr. 13:19-25.) Petitioner then stated that he accepted those facts as true. (Plea Tr. 13:12-14:8.) The trial justice found Petitioner's plea to be knowing and voluntary and accordingly, "expressly accept[ed]" it. (Plea Tr. 14:9-17.)

Petitioner then asked the Court for less time to serve. (Plea Tr. 14:20-23.) In response, the Court offered to vacate the plea and continue with trial. (Plea Tr. 15:3-4.) Petitioner then inquired regarding what the sentence would be if he were found guilty at trial. (Plea Tr. 15:12-13.) The Court informed Petitioner that it could be around 18 months. (Plea Tr. 16:8-14.) After consulting with his attorney again, Petitioner decided to maintain his plea. (Plea Tr. 17:2.) In accordance with the plea agreement, the trial justice sentenced Petitioner to five years at the Adult Correctional Institutions (ACI) with 60 days to serve and four years and ten months of probation with special conditions.[6] (Plea Tr. 18:17-25.)

On January 3, 2018, Petitioner filed a *pro se* application for postconviction relief requesting this Court to vacate his plea of *nolo contendere* because he was denied effective assistance of counsel and his plea was not knowing and voluntary as required by Rule 11. (Application.) This Court appointed counsel for Petitioner, who then filed a verified application

[6] The trial justice then stayed Petitioner's 60-day sentence to serve for 30 days, but stated that all special conditions were in effect immediately. (Plea Tr. 18:17-19:5.)

for postconviction relief (Verified Application, Apr. 23, 2018) asserting the same allegations as Petitioner's Application. (Verified Application.) The State timely objected to both Applications.

On May 31, 2018 and June 1, 2018, this Court conducted an evidentiary hearing on Petitioner's Application. At the hearing, defense counsel, the only witness, testified that during his representation of Petitioner, he was experiencing physical and mental health issues that affected his memory. (PCR Tr. 77:10-79:4.) Defense counsel also stated that, "[i]n retrospect, [he] should have filed for discovery, given the nature of this case, and the fact that [he] had not tried another possession of child porn case . . . ." (PCR Tr. 93:21-23.) However, defense counsel also stated that not filing for discovery is sometimes a strategic decision. (PCR Tr. 93:23-25.) Additionally, defense counsel stated that, although he believed that his medical issues affected his representation of Petitioner, he did not believe that his medical issues affected his ability to advise Petitioner about his plea. (PCR Tr. 78:16-79:4; 111:13-24.)

II

Standard of Review

"'[T]he 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)) (further citation omitted); *see also* § 10-9.1-1. Postconviction relief motions are civil in nature and thus, are governed by all the applicable rules and statutes governing civil cases. *Ferrell v. Wall*, 889 A.2d 177, 184 (R.I. 2005). Thus, "[a]n 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)).

III

Analysis

Petitioner filed an Application asserting he was denied effective assistance of counsel as guaranteed by the Sixth Amendment and that, as a result of his attorney's alleged ineffective assistance, his plea of *nolo contendere* was not knowing, voluntary or intelligent.

A

Ineffective Assistance of Counsel

Petitioner asserts that he was denied effective assistance of counsel because his attorney failed to perform certain tasks in preparation for trial including, but not limited to, filing for discovery, filing pretrial motions, consulting a computer expert and investigating the software on Petitioner's computer. Additionally, Petitioner contends that his attorney should have informed him that he had the option of a bench trial in lieu of a jury trial. In response, the State asserts that Petitioner has not shown that the alleged ineffective assistance of counsel prejudiced him.

The United States Supreme Court case, *Strickland v. Washington*, 466 U.S. 668 (1984), which our Supreme Court has adopted, is the benchmark decision when the court is faced with a claim of ineffective assistance of counsel. *Navarro v. State*, 187 A.3d 317, 325 (R.I. 2018); *LaChappelle v. State*, 686 A.2d 924, 926 (R.I. 1996). A *Strickland* claim entails a two-part inquiry, and a petitioner must satisfy both requirements to prevail. First, a petitioner must prove that counsel's performance was deficient in such a way that counsel's errors 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; *Neufville v. State*, 13 A.3d 607, 610 (R.I. 2011).

Second, a petitioner must show that, even if counsel's performance was deficient, the attorney's shortcomings "prejudice[d]" [petitioner's] defense. *Strickland*, 466 U.S. at 687.

A petitioner claiming ineffective assistance of counsel must overcome a high burden in proving his claim. *See Rice v. State*, 38 A.3d 9, 17 (R.I. 2012); *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). In the case of a plea, "'the defendant must demonstrate a reasonable probability that but for counsel's errors, he or she would not have pleaded guilty and would have insisted on going to trial' and, importantly, that the outcome of the trial would have been different." *Neufville*, 13 A.3d at 610-11 (quoting *State v. Figueroa*, 639 A.2d 495, 500 (R.I. 1994)).

1

First Prong

The first prong of the *Strickland* analysis evaluates whether counsel's performance "fell below an objective standard of reasonableness." 466 U.S. at 688; *Reyes v. State*, 141 A.3d 644, 654 (R.I. 2016). However, the Sixth Amendment standard is "'very forgiving,"' *United States v. Theodore*, 468 F.3d 52, 57 (1st Cir. 2006) (quoting *Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000)), and there is a strong presumption that counsel performed competently. *Gonder v. State*, 935 A.2d 82, 86 (R.I. 2007). "As the *Strickland* Court cautioned, a reviewing court should strive 'to eliminate the distorting effects of hindsight.'" *Clark v. Ellerthorpe*, 552 A.2d 1186, 1189 (R.I. 1989) (quoting *Strickland*, 466 U.S. at 689).

Accordingly, an attorney's choice in trial tactics that appear imprudent "only in hindsight[] does not constitute constitutionally-deficient representation under the reasonably competent assistance standard." *United States v. Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978). "'[T]actical decisions by trial counsel, even if ill-advised, do not by themselves constitute

ineffective assistance of counsel."' *Rivera v. State*, 58 A.3d 171, 180-81 (R.I. 2013) (quoting *Rice*, 38 A.3d at 18). This Court is not in the business of '"meticulously scrutiniz[ing] an attorney's reasoned judgment or strategic maneuver in the context of a claim of ineffective assistance of counsel."' *Id.* at 181 (quoting *Rice*, 38 A.3d at 17).

This Court is satisfied that defense counsel considered the possible defenses presentable to the jury, and ultimately developed a strategy suggesting a defense of "accident." A review of the transcripts makes it clear that defense counsel pursued such strategy in Petitioner's defense. (PCR Tr. 51:7-12; 91:13-17; 92:7-16.) At the postconviction relief hearing, defense counsel stated that he chose not to file motions to exclude the thousands of images of child erotica—as compared to the 11 images of alleged child pornography—because he believed the large number of child erotica images supported his accident strategy. *Id.* Additionally, defense counsel asked the Court to provide a limiting instruction to the jury explaining the difference in child erotica and child pornography prior to the jury viewing the images.[7] (Trial Tr. vol. 2, 29:19-30:16.) Based on defense counsel's testimony and actions at trial, it is clear that he made conscious, strategic decisions that fall within the realm of reasonably competent representation. *See Rivera*, 58 A.3d at 181 (finding defense counsel's strategic decision not to move to suppress a photo array in order to point out the irregularities with the photo arrays at trial did not constitute ineffective assistance of counsel).

Additionally, defense counsel's failure to file for discovery did not constitute ineffective assistance of counsel. *See Rodrigues v. State*, 985 A.2d 311, 317 (R.I. 2009) (finding that "defense counsel's failure to review any discovery . . . did not amount to constitutionally deficient representation" when counsel obtained a criminal information package). Here, not only

[7] *See supra* n. 5.

was defense counsel given the criminal information package, but he also viewed the thousands of images obtained from Petitioner's work computer at an evidence view. (PCR Tr. 23:23-24:17; 42:7-12.) Therefore, defense counsel was aware of the evidence the State planned to use against Petitioner, and he was able to develop a defense strategy accordingly.

Defense counsel also stated that there are strategic reasons for not filing for discovery. (PCR Tr. 93:23-25.) Although he stated that "[i]n retrospect, [he] should have filed for discovery," (PCR Tr. 93:21-23), this type of after-the-fact assessment of a strategic decision does not render the attorney's representation ineffective. *See Rice*, 38 A.3d at 18 (finding an attorney's decisions to call two witnesses with potentially damaging testimony as defense witnesses in order to impeach the victim "were fathomably reasonable tactical choices for trial counsel to make in light of the evidence that had been presented"). This Court is satisfied that defense counsel had examined and explored various defenses prior to trial and acted reasonably in defending the case pursuant to that strategy.

This Court also finds that defense counsel's alleged failure to adequately investigate various computer programs and subpoena the office-wide email regarding new computer passwords did not constitute constitutionally deficient representation. A defense counsel's failure to investigate possible exculpatory evidence is not necessarily inappropriate, especially when the defendant has made incriminating statements to the police. *See LaChappelle*, 686 A.2d at 927 (finding counsel's failure to interview witnesses and obtain a medical report did not constitute ineffective assistance of counsel when defendant stated that "the victims were not lying and that he 'must have done it'"); *see also Rodrigues*, 985 A.2d at 317 (finding counsel's failure to review an allegedly exculpatory videotape did not constitute ineffective assistance as defendant admitted in court that she committed the crime). Similarly, here, Petitioner admitted

to police that he downloaded the images of child pornography. (*See* State's Ex. A, Arrest Report; PCR Tr. 90:5-91:2.) Thus, it was not objectively unreasonable for defense counsel not to investigate the computer programs and email further.

To reiterate, this Court will not "meticulously scrutinize an attorney's reasoned judgment or strategic maneuver in the context of a claim of ineffective assistance of counsel." *Rice*, 38 A.3d at 17. While this Court appreciates defense counsel's candid testimony regarding his representation of Petitioner, this Court is satisfied that given defense counsel's breadth of defense experience and detailed testimony regarding his determinations of the best theories to defend his client, his representation fell well within the constitutional bounds guaranteed by the Sixth Amendment.

2

Second Prong

At the same time, even assuming *arguendo* that Petitioner was successful on the first prong of the *Strickland* analysis, Petitioner also has to show he was prejudiced by counsel's constitutionally deficient representation. *Strickland*, 466 U.S. at 687. Essentially, a petitioner is required to show that a reasonable probability exists that without counsel's unprofessional misgivings, the proceeding would have come out differently. *Id.* at 694. Moreover, "when counsel has secured a shorter sentence than what the defendant could have received had he gone to trial, the defendant has an almost insurmountable burden to establish prejudice." *Neufville*, 13 A.3d at 614.

In this case, Petitioner did not present evidence sufficient to show that if his attorney had explored the various avenues he suggested then his outcome would have been different. During the first two days of trial, the State introduced over 1000 screenshots from Petitioner's computer

establishing that Petitioner downloaded eleven images that constituted child pornography. (Trial Tr. vol. 2, 31:1-3; 45:19-128:20.) Additionally, had the trial continued, the State would have introduced testimony that Petitioner admitted to downloading child pornography during a police interrogation following his arrest. (State's Ex. A, Arrest Report; PCR Tr. 90:5-91:2.) In light of the State's evidence against Petitioner, this Court concludes that Petitioner failed to show how his attorney's alleged shortcomings created a reasonable probability that the outcome at trial would have differed.

Petitioner further asserts that his counsel should have informed him of the option of waiving his right to a jury trial in lieu of a bench trial. This Court finds that even if failing to inform Petitioner of the option of a bench trial constituted inadequate representation, Petitioner has failed to show how the outcome of a bench trial would have been any different. *See Neufville*, 13 A.3d at 610-11.

Moreover, Petitioner was sentenced to 60 days to serve with four years and ten months probation. (Plea Tr. 18:17-25.) As the trial justice informed Petitioner during the plea colloquy, had Petitioner chosen to complete the trial and were to be found guilty, he could have faced up to 18 months to serve. (Plea Tr. 16:8-14.) Because defense counsel ultimately obtained a shorter sentence for Petitioner than he could have obtained had he completed the trial, Petitioner now faces an "almost insurmountable burden to establish prejudice." *See Neufville*, 13 A.3d at 614.

Consequently, Petitioner failed to provide evidence that the result of his trial would have differed and, thus, cannot satisfy the second prong of the *Strickland* analysis. In sum, this Court finds that Petitioner's conviction should not be vacated based on ineffective assistance of counsel because defense counsel provided constitutionally adequate representation and, even if not, Petitioner failed to show he was prejudiced by his attorney's alleged shortcomings.

B

Validity of Plea

Petitioner also alleges that, as a result of his alleged ineffective assistance of counsel, his plea of *nolo contendere* was not knowing and voluntary as required by Rule 11. According to Rule 11, the 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." *See also Njie v. State*, 156 A.3d 429, 434 (R.I. 2017). Pursuant to Rule 11, the trial justice must speak with the defendant to the extent necessary to establish that "'the defendant understood the nature of the charge and the consequences of the plea.'" *Njie*, 156 A.3d at 434 (quoting *State v. Frazar*, 822 A.2d 931, 935 (R.I. 2003)).

Based on Petitioner's responses during the plea colloquy and his high level of education, this Court is satisfied that the trial justice complied with Rule 11 and conducted a sufficiently detailed exchange with Petitioner to ensure that he "understood the nature of the charge and the consequences of the plea." *See Njie*, 156 A.3d at 434. During the plea proceedings, the trial justice questioned Petitioner thoroughly before accepting his plea as knowing and voluntary. First, the trial justice established that Petitioner has a bachelor's degree, can read and write English, and was not under the influence of any drugs or medications at the time of the plea.[8] (Plea Tr. 4:16-25.) Next, the trial justice verified that Petitioner had reviewed and understood the contents of the plea form, including the elements of the charge of possession of child pornography, the proposed sentence, and any special conditions that would be imposed as a

[8] This Court also notes that Petitioner had experience in the legal field as he was employed at a law firm at the time of the events that gave rise to his criminal charge. (Trial Tr. vol. 1, 3:22-4:1; 7:2-3.)

result of his plea. (Plea Tr. 5:1-20.) The trial justice also went over the constitutional rights that Petitioner was giving up by entering a plea of *nolo contendere*. (Plea Tr. 7:17-9:23.) Petitioner repeatedly stated that he understood the specific consequences of his plea. (Plea Tr. 8:12-9:14.)

Although Petitioner asked the court for less time to serve after the trial justice had already accepted his plea, the trial justice gave Petitioner the opportunity to vacate his plea and continue with trial. (Plea Tr. 14:20-16:23.) After further discussions with the trial justice and his attorney, Petitioner stated, "I'll accept the plea." (Plea Tr. 17:2.) Thus, this Court finds that Petitioner's plea of *nolo contendere* was knowing and voluntary.

IV

Conclusion

For the reasons stated herein, Petitioner failed to satisfy his burden in proving by a preponderance of the evidence that he is entitled to postconviction relief. Specifically, Petitioner did not present evidence sufficient to overcome the heavy burden imposed via the two-prong analysis imposed through *Strickland*. Furthermore, considering all of the evidence discussed herein, this Court finds that Petitioner has failed to demonstrate that his plea of *nolo contendere* was not made knowingly and voluntarily. Consequently, Petitioner's Application is hereby denied.

Counsel is instructed to prepare an appropriate judgment and order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	John J. Greene v. State of Rhode Island
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COURT:	Providence Superior Court
DATE DECISION FILED:	November 7, 2018
JUSTICE/MAGISTRATE:	Carnes, J.
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