STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: December 1, 2014)

YARA CHUM	**:**	
	:	
VS.	**:**	**NO. PM/13-1919**
	:	**(P2/09-3192 BG)**
STATE OF RHODE ISLAND	**:**	

DECISION

KRAUSE, J. Petitioner Yara Chum has filed an application for post-conviction relief pursuant to R.I.G.L. § 10-9.1-1 et seq., claiming that his convictions after a jury trial for felony assaults with a firearm should be vacated. He contends that the jury's adverse verdict resulted from prejudicially deficient efforts by his trial attorney. The Court disagrees.

The factual underpinnings of the criminal case are fully set forth in the Supreme Court's decision affirming Chum's convictions. State v. Chum, 54 A.3d 455 (R.I. 2012). To the extent necessary, some of those facts will be referenced herein. Counsel in this application have waived a hearing and oral argument, submitting the case to the Court on the pleadings and the record below. For the reasons stated herein, the Court finds Chum's petition without merit.

* * *

The benchmark for a claim of ineffective assistance of counsel is Strickland v. Washington, 466 U.S. 668 (1984), which has been adopted by our state Supreme Court. Brown v. Moran, 534 A.2d 180, 182 (R.I. 1987); LaChappelle v. State, 686 A.2d 924, 926 (R.I. 1996). Whether an attorney has failed to provide effective assistance is a factual question which petitioner bears the "heavy burden" of proving. Crombe v. State, 607 A.2d 877 (R.I. 1992) (citing Pope v. State, 440 A.2d 719, 723 (R.I. 1982)); Ouimette v. State, 785 A.2d 1132, 1139

(R.I. 2001). Strickland presents "a high bar to surmount." Padilla v. Kentucky, 599 U.S. 356, 371 (2010).

When reviewing a claim of ineffective assistance of counsel, the inquiry is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Heath v. Vose, 747 A.2d 475, 478 (R.I. 2000). A Strickland claim presents a two-part analysis. First, the petitioner must demonstrate that counsel's performance was deficient. That test requires a showing that counsel made errors that were so serious that the attorney was "not functioning as the counsel guaranteed the defendant by the Sixth Amendment." Strickland, 466 U.S. at 687; Powers v. State, 734 A.2d 508, 521 (R.I. 1999). The Sixth Amendment standard for effective assistance of counsel, however, 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 "a strong (albeit rebuttable) presumption exists that counsel's performance was competent." Gonder v. State, 935 A.2d 82, 86 (R.I. 2007).

Even if the petitioner can satisfy the first part of the test, he must still pass another sentry embodied in Strickland by demonstrating that his attorney's deficient performance "prejudiced" his defense. Thus, he is obliged to show that a reasonable probability exists that but for the deficiency the outcome of the trial would have been different. Strickland, 466 U.S. at 694; Crombe, 607 A.2d at 878. Chum cannot clear either hurdle.

I. Failure to Request Mistrial or Curative Instruction

Chum's principal complaint targets his trial attorney's failure to request a mistrial or a curative instruction when the prosecutor completed the state's case without having presented evidence he had referenced in his opening statement to the jury. The state's attorney told the

jurors that a Cranston detective would recount Chum's statement after he had been arrested. The prosecutor said:

> "[W]e'd also prove it with the defendant's words himself, because, when the detectives came to the Cranston Police Department, they read him his rights and sat down and talked to him. And the defendant told him that he was contacted by Erin Peterson and told that she needed him to take care of something; that she wanted them to take care of some kid named Frankie for smashing her windows; that he drove down to Peach Avenue with Matthew DePetrillo and Erin Peterson so that they could point out the house; that he approached the house with a friend, Vang Chhit; that he approached some guys on the porch; that he ordered Chhit to shoot the guys; that Erin Peterson, Matthew DePetrillo and Samnang Tep were in a different car waiting around the corner; and that he and Chhit fled in separate cars, one red, and one white. You'll hear that. You'll hear about the defendant giving that statement to the Providence Police." Tr. II at 204-205.

The state concluded its case without offering Chum's statement. He now complains that in the absence of that evidence trial counsel's failure to request a mistrial or a curative instruction constituted such ineffective assistance of counsel that he is entitled to a new trial. He is mistaken.

If the prosecutor's reference to the defendant's statement had been made without any basis or in bad faith, Chum's claim might have some merit. See State v. Ware, 524 A.2d 1110, 1112 (R.I. 1987) (prosecutor must have a good faith and reasonable basis that the evidence referred to in the opening statement is admissible). Here, however, no bad faith exists. The admissibility of the defendant's statement was the subject of a pretrial suppression motion which he litigated without success. That evidence was therefore fully available to the state if it decided to use it. In State v. Usenia, 599 A.2d 1026, 1032 (R.I. 1991), the Court said:

> "The prosecutor is entitled, during opening statements, to comment on evidence the prosecutor believed in good faith will be available and admissible. See ABA Standards for Criminal Justice, ch. 3, standard 3-5.5 (1979). The incriminating evidence mentioned was a metal-tipped stick and a roll of pennies from the Pizza

> Man Restaurant that were recovered in the car. The prosecutor was justified at that time in believing that these relevant items would be admitted into evidence. The prosecutor is entitled to tell the jury what he intends to prove. If the prosecution is unable to prove what has been promised, it will lose credibility with the jury and defendant will benefit."

The record is silent as to the reason the state decided not to present Chum's inculpatory statement. In any event, the state's case unfolded with compelling force without it. Chum elected not to testify, and he did not present a defense.

Although Chum's attorney could have made requests for a mistrial or a curative instruction, failure to have done so in the face of overwhelming evidence of guilt is not fatal error. State v. Perry, 779 A.2d 622, 627-28 (R.I. 2001). In Perry, the prosecutor announced to the jury that Perry "couldn't keep his mouth shut" and had told a jailhouse informant, whom the state would present during the trial, how he had "smoked that nigger, how he shot him with his automatic." The state rested without presenting that witness. It did, however, present other significant evidence of Perry's guilt, including an eyewitness to the shooting.

So too, in the instant case the state presented three witnesses who positively identified Chum and who testified that after having had sharp words with one of several men on a house porch only fifteen feet away, Chum had ordered his cohort, Samnang Tep, to shoot them. In response to Chum's command, Tep immediately drew his weapon and fired at them, striking the porch railing but none of the people. Both Chum and Tep then fled on foot but were apprehended together later in the evening.

The eyewitness identifications were never challenged in any pretrial motion, and those witnesses were firm and convincing during trial. In assessing their credibility at Chum's motion for a new trial, this Court found their testimony entirely credible. The Court renews that sentiment here.

The evidence of Chum's complicity in this joint venture was overwhelming. The prosecutor's unfulfilled promise to present Chum's incriminating statement was, in this Court's view as a front-row observer, of no moment at all. No mistrial would have been granted if requested, and the Court admonished the jury on several occasions that statements of counsel were not evidence. At the very outset of the trial, prior to the prosecutor's opening statement, the Court stated:

> "We begin the case, ladies and gentlemen, with the opening statement of [the prosecutor]. It's an opportunity for him to give you a bit of an overview of the trial and the case that will be unfolding. . . . I tell you now, and I probably will remind you before this case is over, the statements of lawyers are not evidence. The only evidence you consider is that which comes in from the witness stand or any exhibits that may be marked as full exhibits." Tr. II at 196.

On three more occasions, the Court did remind the jurors of that admonition. (Tr. II at 214-15, 307, 344) Those cautionary instructions were deemed fully satisfactory by the Supreme Court when it affirmed Chum's conviction:

> "To be sure, the prosecutor referred to defendant's statement in his opening statement to the jury. Although defendant desperately clings to this fact, it affords him no harbor because statements of counsel are not evidence. See State v. Tevay, 707 A.2d 700, 702 (R.I. 1998). The record discloses that the trial justice instructed the jury before the opening statements and again at closing arguments that statements of counsel were not evidence. It is well settled that this Court presumes that the jury follows a trial justice's adequate cautionary instruction. . . . The trial justice's instructions in this case plainly were adequate." Chum, 54 A.3d at 461. (Citation omitted.)

Given the overwhelming other evidence of Chum's guilt, coupled with this Court's repeated cautionary admonitions to the jury, trial counsel's purported error, if it was error at all,

does not satisfy the high Strickland standard.[1] A review of the record in this case leads to the same conclusion the Supreme Court reached in State v. Anderson, 878 A.2d 1049, 1050 (R.I. 2005): "The conviction in this case was not a result of petitioner's attorney but, rather, the weight of the credible evidence against [him]." See Perry, 779 A.2d at 628 ("Thus, wholly apart from [the witness'] failure to testify . . ., the independent evidence pointing to Perry's guilt was both compelling and overwhelming."); Ware, 524 A.2d at 1113 ("ample independent evidence to find defendant guilty").

II. The Rule 29 Motion

A. Trial Counsel's Misstatement of the Law

Chum also criticizes his trial attorney for his mistaken explication of a motion for judgment of acquittal pursuant to Rule 29, Super. R. Crim. P. Although trial counsel recited an incorrect basis for such a motion, the Court nonetheless exercised its prerogative under Rule 29(a)(1) and, on its own motion, granted Chum a judgment of acquittal on the conspiracy count. Plainly, no prejudice inured to Chum when the Court sua sponte accorded him that benefit regardless of his lawyer's misstatements. As Chum concedes, "[T]he Court covered the attorney." (Brief at p. 12.)

B. Aiding and Abetting

Chum further complains that he was unfairly subjected to criminal liability without fair notice when, after jettisoning the conspiracy count, the Court purportedly "added" a count of aiding and abetting. (Brief at p. 14.) That contention is without basis. No extra count was "added;" rather, a well-recognized theory of liability was simply applied to the case. State v.

[1] Chum offers no suggestion as to the nature or content of the cautionary instruction which he claims his trial attorney failed to request. Presumably, any such caveat would be akin to the one this Court gave four times during the trial and which was met with approbation by the Supreme Court. Chum, 54 A.3d at 461.

Graham, 941 A.2d 848, 857-58 (R.I. 2008) (instruct on aiding and abetting and conspiracy). Indeed, even if the conspiracy count had survived the Rule 29 motion, the aiding and abetting theory would still have been properly included in the final jury charge. State v. Diaz, 654 A.2d 1195 (R.I. 1995).

It is permissible, indeed commonplace, to include an aiding and abetting instruction even though the defendant was charged as a principal. State v. McMaugh, 512 A.2d 824, 831 (R.I. 1986); Graham, supra; see United States v. Marino, 277 F.3d 11, 29 (1st Cir 2002) (aiding and abetting liability is always inherent in a substantive offense); United States v. McKnight, 799 F.2d 443, 445 (8th Cir. 1986) ("Aiding and abetting is 'an alternative charge in every . . . count, whether explicit or implicit,'" quoting United States v. Walker, 621 F.2d 163, 166 (5th Cir.1980)). See State v. Davis, 877 A.2d 642, 648 (R.I. 2005) ("Because defendant's manner of participation is not an element of the crimes charged in the indictment, the state need not persuade a unanimous jury beyond a reasonable doubt that defendant was a principal or an aider or abettor."); State v. Delestre, 35 A.3d 886, 895-96 (R.I. 2012) (jury need not be unanimous as to whether defendant was an aider and abettor, a principal, or a co-conspirator, so long as unanimous in guilt).

Chum also complains that there was insufficient evidence to sustain his conviction as an aider and abettor. (Brief at p. 17.) That argument—and, indeed, the entirety of his aiding and abetting complaint—should have been raised on direct appeal. Failure to have done so forecloses any such contention in this proceeding, as it runs afoul of the post-conviction statute itself as well as the doctrine of res judicata. As set forth in Jaiman v. State, 55 A.3d 224, 232 (R.I. 2012):

> "Section 10-9.1-8, entitled '[w]aiver of or failure to assert claims,' provides in pertinent part:
>
> > Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds that in the interest of justice the applicant should be permitted to assert such a ground for relief.
>
> "This Court has held that § 10-9.1-8 'codifies the doctrine of res judicata as applied to petitions for post-conviction relief.' State v. DeCiantis, 813 A.2d 986, 993 (R.I. 2003). Res judicata bars the relitigation of any issue that could have been litigated in a prior proceeding, including a direct appeal, that resulted in a final judgment between the same parties or those in privity with them."

Even if Chum could somehow engraft a sufficiency of evidence claim to his application, it would fail. The credible evidence unquestionably demonstrated that Chum and Tep approached the house together. When ordered by Chum to shoot the people on the porch, Tep instantly pulled a gun and fired at them. To suggest that Chum's express directive did not fall within the scope of aiding and abetting is meritless. Section 11-1-3, R.I.G.L. provides: "Every person who shall aid, assist, abet, counsel, hire, command, or procure another to commit any crime or offense, shall be proceeded against as a principal or as an accessory before the fact . . . " (Emphasis added.) See Rosemond v. United States, ___ U.S. ____, 134 S. Ct. 1240, 1245 (2014) ("accomplice is liable as a principal when he gives 'assistance or encouragement . . . with the intent thereby to promote or facilitate commission of the crime.'" (Citation omitted; emphasis added.) [2]

[2] Defendant's suggestion (Brief at p. 14.) that aiding and abetting can be done "after the fact" is simply wrong. The statute admits of no such liability for accessories *after* the fact. See LaFave Substantive Criminal Law, § 13.6(a) at 404 (2d ed. 2003) (accessory after the fact has "no part in causing the crime"); State v. Rundle, 500 N.W.2d 916, 925 (Wis. 1993) (accessory after the fact is not deemed a participant in the felony).

III.

IV. Rule 35 Motion

Chum also complains that his trial attorney did not file a motion to reduce his sentence under Rule 35, Super. R. Crim. P. He concedes, however, that such an omission does not by itself constitute ineffective assistance of counsel. Burke v. State, 925 A.2d 890, 893 (R.I. 2007). See Silano v. United States, 621 F. Supp. 1103, 1105 (E.D.N.Y. 1985).

In any event, Chum's previous attorney was appointed as his *trial* counsel, not for any post-conviction or post-sentencing matters. See State v. Chase, 9 A.3d 1248, 1253-54 (R.I. 2010) (a Rule 35 motion is not a "stage of the proceeding" to which the procedural right to counsel under Rule 44, Super. R. Crim. P. attaches).

Even if a Rule 35 motion had been filed, this Court would not have ceded a sentence reduction to Chum. His sentence was the same term imposed upon co-defendant Tep after his separate trial, who fired the shot Chum had ordered. No reason existed to impose disparate penalties for their concerted criminal misconduct.

* * *

In all, Yara Chum has failed to present any evidence that sufficiently overcomes his "prodigious burden" of demonstrating that even if his attorney's efforts were deficient, the result would have been different. Evans v. Wall, 910 A.2d 801, 804 (R.I. 2006). Accordingly, his application for post-conviction relief is denied. Judgment shall enter for the state.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Yara Chum v. State of Rhode Island**
CASE NO:	**PM/13-1919 (P2/09-3192 BG)**
COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**December 1, 2014**
JUSTICE/MAGISTRATE:	**Krause, J.**
ATTORNEYS:	
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For Defendant:	**Jeanine P. McConaghy, Esq.**