STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
ADDISON UNIT **Docket # 21-1-19 Ancv**

In re REIN KOLTS

Petition for Post Conviction Relief

DECISION
Pending Motions, including
Cross Motions for Summary Judgment

Petitioner Rein Kolts is serving a mandatory prison sentence of 25 years to life following a conviction, after trial, for aggravated sexual assault on his young niece. In this case he seeks post-conviction relief.

He represents himself as to multiple claims of ineffective assistance of counsel, as itemized in paragraphs 5-7 of his Second Amended Petition, and one claim that the prosecution failed to disclose exculpatory evidence related to DNA and serology testing in violation of *Brady v. Maryland*, 373 U.S. 83 (1963).

As to one claim of ineffective assistance relating to criminal defense counsel's alleged failure to provide effective assistance with regard to plea negotiations (paragraph 4 of Second Amended Petition), he is represented by Attorney Annie Manhardt.

Attorney Manhardt and the State, represented by Attorney Kim McManus, have filed cross-motions for summary judgment. Also pending are two motions filed by Mr. Kolts related to the claims on which he represents himself: a motion to depose several people and a motion seeking an order requiring the parties to proceed immediately with discovery. In addition, the State has a pending motion to stay discovery until the determination of its summary judgment motion. Attorney Manhardt has not taken a position on any of these discovery motions. The court rules on all motions as follows.

Summary judgment standard

Summary judgment is appropriate if the evidence in the record, referred to in the statements required by Rule 56(c)(1), shows that the record has been developed sufficiently, there is no genuine issue as to any material fact, and that the movant is entitled to judgment as a matter of law. V.R.C.P. 56(a); Wright & Miller et al., 10A Federal Practice & Procedure: Civil § 2725 (4th ed.). The court derives undisputed facts from the parties' statements of fact and supporting documents. *Boulton v. CLD Consulting Engineers, Inc.*, 2003 VT 72, ¶ 29, 175 Vt. 413. A party opposing summary judgment may not simply rely on allegations in the pleadings to establish a genuine issue of material fact. Instead, it must come forward with deposition excerpts, affidavits, or other evidence to establish such a dispute. *Murray v. White*, 155 Vt. 621, 628 (1991). Speculation is insufficient. *Palmer v. Furlan*, 2019 VT 42, ¶ 10, 210 Vt. 375.

Ineffective assistance claims for which Mr. Kolts represents himself

The State argues that it is entitled to summary judgment on the ineffective assistance claims for which Mr. Kolts represents himself because they require support from an expert witness, and he has not provided any expert witnesses. The State also briefly addresses the substance of each claim.

The general standard for evaluating post-conviction claims of ineffective assistance of counsel is longstanding and well known.

> The appropriate standard for reviewing claims involving ineffective assistance of counsel is whether a lawyer exercised "that degree of care, skill, diligence and knowledge commonly possessed and exercised by reasonable, careful and prudent lawyers in the practice of law in this jurisdiction." To demonstrate ineffective assistance of counsel, a petitioner must show by a preponderance of the evidence that: (1) his counsel's performance fell below an objective standard of performance informed by prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the proceedings would have resulted in a different outcome. Unless petitioner is able to satisfy both prongs of the test, "it cannot be said that the conviction or . . . sentence resulted from a breakdown in the adversary process that renders the result unreliable." In making this showing, petitioner cannot rely on the distorting effects of hindsight, and must surpass the strong presumption that counsel's performance fell within the wide range of reasonable professional assistance.

In re Grega, 2003 VT 77, ¶ 7, 175 Vt. 631 (citations omitted). As one treatise explains, "Professional canons or ethical standards, such as the American Bar Association (ABA) Standards for Criminal Justice, may be valuable measures of the prevailing professional norms of effective representation, although they are 'only guides' and not 'inexorable commands.'" Brian R. Means, Postconviction Remedies § 35:4 (footnote omitted). Experts also supply the standards by which deviations may be measured. *Grega*, 2003 VT 77, ¶ 16 ("Only in rare situations will ineffective assistance of counsel be presumed without expert testimony."); see also, e.g., *In re Russo*, 2010 VT 16, ¶ 12, 187 Vt. 367 ("Petitioner's attorney expert witness testified as to the performance of petitioner's trial attorney relative to the professional standards for criminal defense attorneys in Vermont."). "[I]t is important to remain cognizant that [counsel's] performance, *viewed as a whole*, is what matters." *Atkens v. Zenk*, 667 F.3d 939, 945 (7th Cir. 2012) (emphasis in original).

Mr. Kolts was required to disclose any expert witnesses by February 1, 2021. See Stipulated Scheduling Order (filed Jan. 4, 2021). He did not do so. The court has reviewed each of Mr. Kolts' ineffective assistance claims. None is so obvious that expert support would be unnecessary to establish that his criminal counsel made errors that caused his conviction to be defective. The State is entitled to summary judgment on these claims.

The alleged* Brady *violations for which Mr. Kolts represents himself

Mr. Kolts alleges that the State withheld exculpatory DNA and serology testing from him in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). However, the State has come forward with evidence showing that these disclosures were made to Mr. Kolts' criminal counsel, and Mr. Kolts has not come forward with any countervailing evidence showing that these facts are genuinely disputed. The State is entitled to summary judgment on this basis.

Separately, Mr. Kolts appears to argue that this testing in fact was exculpatory, implying that his criminal counsel should have pursued it differently. The evidence is not clear on its face that it has any exculpatory value, and the State urges that it does not. This, however, would be a claim of ineffective assistance that was not alleged and, in any event, would require expert support that Mr. Kolts did not produce.

The ineffective assistance claim for which Attorney Manhardt represents Mr. Kolts

The ineffective assistance claim on which Attorney Manhardt represents Mr. Kolts is that his criminal counsel failed to effectively advise him with regard to a generous plea agreement offered by the State shortly after charges were filed and again on the eve of trial. If he had accepted the offer, he might not be serving the mandatory sentence of 25 years to life that he is serving now and might have been required to serve only 5 years in prison. In retrospect, the plea offer looks to have been very favorable, although it may have required a plea of guilty (not nolo contendere) and the record is clear that Mr. Kolts is deeply attached to his claim of innocence.

Mr. Kolts was entitled to the effective assistance of counsel with regard to the plea-bargaining process. While the performance prong of the *Strickland* test is the same in this context, the prejudice prong, in the circumstance of a plea rejection, has been elaborated as follows:

> In these circumstances a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

Lafler v. Cooper, 566 U.S. 156, 164 (2012); see also *Missouri v. Frye*, 566 U.S. 134, 147–48 (2012). "Counsel's conclusion as to how best to advise a client in order to avoid, on the one hand, failing to give advice and, on the other, coercing a plea enjoys a wide range of reasonableness." *Purdy v. U.S.*, 208 F.3d 41, 45 (2d Cir. 2000).

Mr. Kolts was charged with egregious conduct: repeatedly sexually assaulting his young niece (starting when she was 11). He clearly admitted it twice. The charge had a mandatory 25 years to life sentence. Despite his admissions, once the criminal case began in earnest, he consistently maintained his innocence. Near the beginning of his criminal case, the State offered

him an extremely generous deal: plead guilty to a reduced charge in exchange for an agreed split sentence with only 5 years to serve. The offer was rejected, although Mr. Kolts now claims that he has no recollection that it was ever relayed to him. The State renewed the offer on the eve of trial, after Mr. Kolts' suppression motions had been denied and his experts excluded from testifying. He did not accept it. He did not testify at trial. It is not clear that he proceeded through trial with anything other than an unrealistic hope of acquittal. The jury quickly convicted him, and he got the only sentence he could because it was mandatory, all the while protesting his innocence.

Mr. Kolts claims that, in proceeding to trial: (1) he was extremely confident that he had a great defense and was certain that the jury would find him not guilty; (2) he had no idea that the charge carried a severe mandatory sentence; and (3) if he had only known that he had such grim prospects at trial and faced such a severe sentence, he would have taken the plea even though he is really innocent. He faults Attorney Furlan, his criminal counsel by the time of trial, for not advising him of the reality he faced when presenting the second plea offer to him or at any time previously and for not more urgently encouraging him to accept the offer. He alleges that Attorney Furlan gave him no guidance at all.

Mr. Kolts has the burden of production and persuasion. He has come forward with affidavits from himself and his wife, an affidavit from his expert, Attorney Richard Rubin, and an affidavit from Attorney Furlan himself. The State appears to have done little to develop countervailing facts, and it offers no expert of its own. It argues the law and urges the court to draw inferences in its favor.

At issue factually is (1) whether and how Mr. Furlan and any of Mr. Kolts' 3 previous attorneys ever educated him as to the nature of the charge and mandatory sentence he was facing; (2) whether and how they ever explained to him that his prospects at trial were bleak; and (3) whether they ever advised him that he should at least strongly consider the extremely generous plea offer under these circumstances. In addition, there are the factual issues of whether he would have actually agreed to the terms of the plea offer and whether the court would have accepted the terms.

Mr. Kolts' and his wife's affidavits focus largely on what they now purport to have known and believed in the past. They only make the vaguest of allegations as to how any of the lawyers, including Attorney Furlan, ever advised Mr. Kolts, who claims essentially to have gotten no advice at all. Mr. Kolts' and his wife's subjective beliefs (which are all retrospective and self-serving) are not the fundamental issue. The primary issue is the content of the advice that Mr. Kolts actually was given. Mr. Kolts must prove that he was given ineffective advice before proving that he would have accepted effective advice. Merely claiming to have had unrealistic expectations for trial, and then blaming Attorney Furlan for that after the fact is insufficient. See *U.S. v. Hodges*, 259 F.3d 655, 658 (7th Cir. 2001) ("Defendants must 'identify the acts or omissions of counsel' that are unreasonable, and courts must then 'determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.'" (citation omitted)).

Attorney Rubin's affidavit faults Attorney Furlan for incompetence in failing to engage in

plea negotiations or revisit the State's offer with Mr. Kolts during the two years the case was pending, failing to ensure that Mr. Kolts understood his sentence exposure, failing to ensure that Mr. Kolts grasped the reality of his prospects at trial, and failing to counsel Mr. Kolts as to the advisability of accepting the State's offer. He apparently has not reviewed the attorneys' criminal case files (it is not clear that anyone has), which presumably would be the most likely repository for written advice, or notes of oral advice, given to Mr. Kolts concerning possible plea agreements. In Attorney Furlan's affidavit, he acknowledges that he was aware of a State's plea offer prior to his involvement and that he had a "limited discussion" with Mr. Kolts about it. He further simply states that he communicated the State's renewed offer to Mr. Kolts on the morning of the first day of trial, that Mr. Kolts "was clear that the idea of going to jail at all was a complete 'non-starter' for him," and that Mr. Kolts did not ask for his advice so he did not recommend accepting the offer.

An important issue in the case is determination of the standard of performance; specifically, according to Attorney Rubin, *how* and when Attorney Furlan should have counselled Mr. Kolts as to the advisability of accepting the State's offer given the countervailing duty of criminal counsel to not be overbearing in that regard because the ultimate decision as to a plea must remain with the defendant regardless of criminal counsel's beliefs about the wisdom of things, and given Mr. Kolts' persistent claim of innocence. See *Purdy v. U.S.*, 208 F.3d 41, 45 (2d Cir. 2000) ("[T]he ultimate decision whether to plead guilty must be made by the defendant. See Model Rules of Professional Conduct Rule 1.2(a) (1995) ('In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered. . . .'). And a lawyer must take care not to coerce a client into either accepting or rejecting a plea offer."); *State v. Bristo*l, 159 Vt. 334, 338 (1992) (noting difficulty of claim of "a failure to aggressively pursue a plea bargain with petitioner after the latter rejected it").

Mr. Rubin states in his affidavit that there was "no excuse for Attorney Furlan's failure to advise Mr. Kolts that accepting the State's offer was clearly in his best interest." Rubin Affidavit, State's Exhibit 21, ¶ 44. This appears to be a generalized statement related to the required standard of performance of defense counsel in a case such as the one Mr. Kolts faced. It does not address the specifics of how or when the standard of practice would have required that to have happened within the context of Mr. Kolts's case, particularly given the fact that the decision was ultimately for Mr. Kolts to make and he persisted in claiming innocence despite the evidence against him. More detailed factual context would be required to make findings of fact on the standard of performance applicable to Mr. Furlan in this case on this issue and whether or not that standard was met.

There is also a significant dispute of material fact: Mr. Furlan states that he had a discussion about the State's offer early on in his involvement and communicated the State's renewed offer the morning of trial, whereas Mr. Kolts states that the first time he remembers hearing anything about a plea offer was the morning of trial. Kolts Affidavit, State's Exhibit 11, ¶ 13. Both statements are generalizations that do not detail the substance of any conversations that took place either early in Mr. Furlan's representation or on the morning of trial.[1]

[1] Missing from the record is any evidence of written advice that may have been given to Mr. Kolts over the years or some allegation that it does not exist from someone who reviewed his

Mr. Kolts would have the court determine all the material facts in his favor largely based on incomplete facts. The State has attempted to seek summary judgment but without providing specific facts. Mr. Kolts has the burden of production, and he is trying to persuade the court to vacate a criminal judgment, and presumably to give him a second chance at accepting the offer he twice refused, because fundamental error "caused a breakdown in the adversary process." So far, the record is sparse as to specific facts of what conversations or communications actually took place and therefore does not provide detailed objective evidence of any such breakdown. There is an insufficient body of material facts, and some dispute as to important facts. "An ineffective assistance of counsel claim cannot stand on a blank record, peppered with the defendant's own unsupported allegations of misconduct. [Petitioner's] claims may in fact be true; we fault him not for making the allegations, but for his failure to support them." *U.S. v. Hodges*, 259 F.3d 655, 660 (7th Cir. 2001).

Mr. Kolts must also prove that the court would have approved the plea agreement offered by the State if Mr. Kolts had accepted it. Mr. Kolts has not come forward with any evidence to the effect that the criminal court would have accepted the 5 years to serve plea in a case like this. The facts were egregious, the statutory sentence mandatory and severe, no viable defense was apparent, the plea offer was extraordinarily lenient, and the victim's family was apparently highly motivated. The court cannot simply assume that any plea would have been accepted by the court in these circumstances, particularly given Mr. Kolts' protestations of innocence. See *State v. Hunt*, 145 Vt. 34, 41–42(1984) ("We are mindful that one of the functions of judges, in accepting or rejecting a plea bargain agreement, 'is to insure the appropriateness of the correctional disposition reached by the parties and to guard against any tendency of the prosecutor to overcharge or to be excessively lenient.'" (citation omitted).

Moreover, even outside the PCR context, litigation based on affidavits when other, better evidence is available is not a good practice:

> The use of affidavits rather than other forms of proof on a summary-judgment motion is left to the discretion of each of the parties. Furthermore, affidavits may be used in conjunction with other types of evidence. *But because an affidavit is an ex parte statement by a witness whose demeanor cannot be observed, more reliable forms of proof should be used in place of or to supplement an affidavit when that is possible and appropriate.*

Wright & Miller et al., 10B Federal Practice & Procedure: Civ. § 2738 (4th ed.) (emphasis added; footnotes omitted); see also *id*. ("Of course, because an affiant is not subject to cross-examination, the judge deciding the motion must exercise considerable care in assigning weight

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case files. Also missing is a transcript of depositions of Mr. Kolts or Mr. Furlan, if either were deposed (the appearance is that neither was), which presumably would provide facts about what actually happened in any communications, or opportunities for communications, between Mr. Furlan and Mr. Kolts concerning the State's plea offer. Also missing are facts as to what advice Mr. Kolts received from his three lawyers prior to Attorney Furlan. In addition, there are no facts explaining the basis for Mr. Kolts' purported subjective beliefs.

to the affidavits presented."). As one court has said,

> Under the circumstances, we are unable to say that the affidavits leave us without doubt as to the absence of a genuine issue of fact. Summary judgment should not be granted where contradictory inferences may be drawn from undisputed evidentiary facts.
>
> Nor is it appropriate where a trial, with its opportunity for cross-examination and testing the credibility of witnesses, might disclose a picture substantially different from that given by the affidavits.

U.S. v. Perry, 431 F.2d 1020, 1022 (9th Cir. 1970) (citations omitted).

Mr. Kolts' factual showing is vague, limited, and self-serving, and the State has failed in its own motion and response to help develop the facts. There are simply not sufficient specific facts to be able to make findings of undisputed facts on all the necessary elements of the claim, either for or against the Petitioner. The court cannot resolve it on summary judgment. A trial will be needed.

Mr. Kolts's motions to depose and to proceed immediately, and the State's motion to stay

Mr. Kolts' motion to proceed with discovery immediately and his motion to depose several witnesses is moot as summary judgment has been granted to the State on all claims for which he represents himself. Attorney Manhardt did not join that motion or express any opposition to its denial.

In light of the above rulings, the State's motion to stay discovery is denied. Discovery may proceed only on the claim on which Attorney Manhardt represents Mr. Kolts: ineffective assistance of counsel in relation to plea negotiations.

Order

For the foregoing reasons:
(1) Mr. Kolts' motions to depose (#10) and to proceed immediately (#9) are denied;
(2) the State's motion for a stay (#8) is denied;
(3) the State's motion for summary judgment (#7) is granted in part and denied in part;
(4) Mr. Kolts' motion for summary judgment (#12) is denied.

Attorneys Manhardt and McManus shall submit a revised and updated proposed pretrial scheduling order by October 22, 2021.

Electronically signed pursuant to V.R.E.F. 9(d) on October 4, 2021 at 2:14 PM.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge