

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2016-320

MAY TERM, 2017

In re William Nichols, Jr.	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 420-11-14 Bncv
		Trial Judge: John W. Valente

In the above-entitled cause, the Clerk will enter:

Petitioner William Nichols, Jr. appeals from the trial court's denial of his petition for post-conviction relief (PCR). He contends that the trial court (1) erred by denying his post-trial motion to amend his petition to add new claims and (2) improperly evaluated his claim of ineffective assistance of counsel. We affirm.

The PCR court made the following findings, which petitioner does not challenge on appeal. In July 2011, petitioner went to his parents' house in an angry emotional state and confronted his brother, who was speaking with their mother at the time. A fight ensued in which petitioner struck his brother multiple times. When petitioner's mother attempted to intervene, she was pushed into the counter, causing her arm to break. Petitioner's mother, brother, and father spoke to police at the scene but refused to give sworn statements. Petitioner was arrested and charged with first-degree aggravated domestic assault for recklessly causing serious bodily injury to his mother and domestic assault for striking his brother.

Attorney Frederick Bragdon was assigned to represent petitioner. He spoke with petitioner twice in August 2011. Petitioner told Bragdon that his main concerns were avoiding a felony conviction and preserving his gun rights. Bragdon also reviewed two letters written by petitioner's mother, which were apparently sent to the victim advocate at the State's Attorney's Office. In one letter, petitioner's mother stated that she thought her son would stop fighting rather than hurt her and that she was afraid of her son. In the other, she stated that petitioner pushed her out of the way which caused her to break her arm. In November 2011, Bragdon deposed petitioner's mother, brother, and father, who confirmed that petitioner initiated the fight and that mother broke her arm when she tried to stop it.

At some point during the fall of 2011, petitioner fled to France, where he unsuccessfully attempted to join the French Foreign Legion. He eventually returned to Vermont where he was arrested on February 13, 2012, and taken into custody.

Petitioner entered his guilty plea on February 16, 2012. During the plea colloquy, when the court asked whether petitioner admitted to the facts, he responded, "No, Your Honor. I didn't touch my mother." The court took a recess during which attorney Bragdon told petitioner that if

the case went to trial, petitioner would likely be convicted of domestic assault based on the fight with his brother, and that he might be acquitted of aggravated domestic assault but could also lose. The plea agreement allowed petitioner to have no felony conviction after three years and to retain his firearms if he abided by the conditions. Petitioner felt he had no choice but to plead guilty as he did not want a felony on his record and his gun rights were very important to him. Following this discussion, the court resumed the colloquy. Attorney Bragdon and the court explained the element of recklessness as it applied to the facts. Petitioner then admitted to the facts.

Petitioner pleaded guilty to one felony count of aggravated domestic assault and one misdemeanor count of simple assault. Sentencing was deferred for three years for the felony and petitioner was placed on probation. He received a sentence of fifty-nine to sixty days to serve for the misdemeanor. In December 2014, he was found to be in violation of probation and was sentenced to twelve to thirty months, all suspended, on the felony charge. Petitioner subsequently filed a PCR petition in which he sought to vacate his felony conviction based on ineffective assistance of counsel. Following an evidentiary hearing in May 2016, the trial court denied the petition in a written decision.

At the PCR hearing, attorney Dan Sedon testified as an expert on behalf of petitioner. Sedon opined that attorney Bragdon's performance fell below an objective standard of performance because Bragdon: (1) should have filed a V.R.Cr.P. 12(d) motion to dismiss the aggravated domestic assault count for lack of admissible evidence; (2) failed to conduct an investigation prior to deposing the victims and failed to take meaningful depositions; and (3) failed to build a meaningful attorney-client relationship with petitioner, which led to a plea agreement that was ill-suited to petitioner's needs.

During Sedon's direct testimony, petitioner's PCR counsel asked Sedon if he had an opinion about whether the court's explanation of recklessness during the plea colloquy was accurate. The State objected that this was irrelevant. Petitioner's counsel responded that after meeting with Sedon the week before and learning his opinion on this topic, he intended to amend the petition to add claims that petitioner's plea was not entered knowingly and voluntarily and lacked a factual basis. When asked by the court why he had waited until the day of trial to bring up these new claims, petitioner's counsel stated that there was no prejudice to anyone and that he had come home the previous night at ten o'clock from a vacation. The court indicated that it would deny any motion to amend and sustained the objection. Petitioner filed a post-hearing motion to amend, which the court denied on the grounds of undue delay and prejudice.

In its decision on the merits, the PCR court determined that petitioner had failed to meet either prong of the two-prong test established in Strickland v. Washington, 466 U.S. 668 (1984), for a claim of ineffective assistance of counsel. The court accepted Bragdon's explanation that he decided not to file a V.R.Cr.P. 12(d) motion because that would have alerted the State to a deficiency in its case that it could have cured. Instead, he decided to wait to see if he could make the same argument in a motion to acquit at trial, when the State would not have been able to cure the defect and jeopardy would have attached. The court also found that it was a tactical decision to depose the victims after mother wrote her letters to the State, and that the depositions sufficiently tested the evidence. Further, it was reasonable for Bragdon not to solicit detailed testimony regarding causation from mother so that he would have some leeway to argue about that element if the case went to trial. Although petitioner now claims that he felt under pressure to enter his guilty pleas, the court found that Bragdon's decision to encourage petitioner to plead guilty in February 2012 was a reasonable strategic decision based on his experience with the local prosecutor's office and petitioner's stated goals of avoiding a felony conviction and maintaining

his gun rights. The court concluded that attorney Bragdon's performance was competent as measured by prevailing standards.

The PCR court went on to determine that even if Bragdon's performance fell below prevailing standards, petitioner had failed to show that his alleged errors affected the outcome of the proceeding. The court found that Bragdon had no opportunity to consult with petitioner before deciding not to file a motion to dismiss because petitioner fled the jurisdiction for several months. Although Bragdon could have raised the issue in February 2012, the court found it unlikely that a consultation would have made a difference at that point. The court also found it unlikely that a reviewing judge would have granted such a motion to dismiss, or that filing such a motion would have led to a better plea deal for petitioner in Bennington County. Finally, the court disagreed with Sedon's opinion that going to trial would have led to a better outcome for petitioner, because the plea deal gave petitioner an equal or better opportunity to achieve his stated goals of avoiding a felony and keeping his gun rights. It therefore denied the petition.

Petitioner's first argument on appeal is that the PCR court ought to have allowed him to amend his petition. In general, leave to amend a pleading "shall be freely given when justice so requires." V.R.C.P. 15(a). The trial court's denial of a motion to amend is reviewed for abuse of discretion. First Nat'l Bank of Boston v. Silberdick, 146 Vt. 209, 211 (1985).

We find no abuse of discretion here. The court's decision was based on both undue delay and prejudice to the State. Pursuant to the parties' stipulated discovery order, amendments to the pleadings were due over a year before the PCR hearing. Attorney Sedon was disclosed as an expert eleven months before the hearing. Petitioner first informed the State of his intention to add new claims during the middle of the hearing, while his own expert witness was testifying, and did not actually file his motion to amend until more than a month afterward. Petitioner did not explain why he was unable to discover these claims earlier, given that they were based on the plea colloquy at which petitioner was present and the transcript of which was readily available to petitioner. As the court noted, once petitioner did discover the claims, he could have notified the State at any time up to the beginning of the trial, including on the morning of the PCR hearing, but failed to do so. At that point, the State "had already marshaled its resources to respond to the allegations made in the existing complaint," and had no time to prepare a defense to petitioner's new claims. Gauthier v. Keurig Green Mountain, Inc., 2015 VT 108, ¶ 46, 200 Vt. 125 (concluding trial court did not err in denying motion to amend filed almost one year after initiation of suit and several weeks after defendant moved for summary judgment). Petitioner argues that the State would not have needed to hire its own expert witness to respond to the newly raised claims and, therefore, would not have been prejudiced by the amendment. This argument is contradicted by the fact that Petitioner raised these claims while seeking an opinion on them through questioning of his own expert witness.

Petitioner's second argument is that his attorney's performance was so lacking that it constituted ineffective assistance under Strickland and the exception to that standard set forth in United States v. Cronin, 466 U.S. 648 (1984). The PCR court concluded otherwise, and its conclusions are supported by its findings. Petitioner does not challenge any of the court's findings as erroneous. Rather, he reiterates the arguments he made below, asking the Court to reweigh the evidence and come to a different conclusion. We decline to do so. In re Grega, 2003 VT 77, ¶ 8, 175 Vt. 631 (explaining that higher court will yield to judgment of trial court where there is conflicting evidence at a post-conviction relief petition hearing).

A party seeking to reverse a conviction based on ineffective assistance of counsel ordinarily must prove that (1) counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) but for counsel’s errors, a different outcome would have resulted. Strickland, 466 U.S. at 687. In reviewing the denial of an ineffective assistance claim, we will uphold the trial court’s judgment “if there is any credible evidence to support the court’s findings and its conclusions follow from those findings.” In re Plante, 171 Vt. 310, 313 (2000). The trial court’s determination that petitioner did not meet either prong of the Strickland test is supported by credible evidence. Essentially, the court was presented with competing testimony from two experienced criminal defense attorneys. The court found attorney Bragdon’s explanations for his actions to be credible and found that his alleged errors were actually strategic decisions which were reasonable in light of the facts of the case, his experience with the local prosecutor, and his client’s stated preferences. The court further found that petitioner was not prejudiced by his attorney’s alleged errors. Where, as here, the court’s conclusion is supported by its findings, which in turn are supported by the record, the court’s decision must be upheld.

Finally, we reject petitioner’s assertion that his counsel “entirely fail[ed] to subject the prosecution’s case to meaningful adversarial testing,” such that prejudice should be presumed. Cronic, 466 U.S. at 659. We have previously recognized that “the Cronic exception is a very narrow one and applies only in cases where counsel completely fails to provide representation.” In re Williams, 2014 VT 67, ¶ 32, 197 Vt. 39. This is not such a case. The record shows that attorney Bragdon met with petitioner on at least three occasions, during which he learned that petitioner’s primary goals were to avoid a felony conviction and preserve his gun rights, and discussed with petitioner the difference between intent and recklessness; reviewed two letters from petitioner’s mother to the prosecutor which supported the State’s allegations; deposed the three witnesses as well as the three Vermont State Police officers who were involved; and negotiated a favorable plea deal which would have met both of petitioner’s goals if he had complied with his probation conditions. The alleged errors identified by petitioner are specific failings that are more appropriately analyzed under the traditional Strickland standard. Id. ¶ 33. The court applied that standard and found that petitioner failed to meet it. We find no error in the court’s conclusion.

Affirmed.

BY THE COURT:

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice