Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-170

APRIL TERM, 2021

In re Joseph R. Lampman, Jr.*	}	APPEALED FROM:
	}	
	}	Superior Court, Windsor Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 115-3-18 Wrcv
		Trial Judge: Robert P. Gerety, Jr.

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

Petitioner, who pled guilty to sexual assault on a minor, appeals the civil division's denial of his petition for post-conviction relief (PCR). We affirm.

In February 2009, petitioner was charged with aggravated sexual assault, sexual assault, and lewd and lascivious conduct with a child. The State's affidavit of probable cause alleged, in part, that: (1) in December 2008, a case worker for the Department for Children and Families (DCF) reported to the Chief of Police of the Norwich Police Department that she was investigating a complaint that petitioner had sexually assaulted his wife's younger sister, M.D., who was born in November 1999; (2) the complaint to DCF was made by M.D.'s adoptive mother[1]; (3) during a video-recorded interview in December 2008, M.D. stated that petitioner sexually assaulted her on multiple occasions when she and her younger brother were alone with him at his and her sister's apartment, which the interviewer surmised was in Norwich, Vermont; (4) M.D. told the DCF interviewer that the assaults occurred one or two years before in the spring and summer; (5) at the time of M.D.'s interview, petitioner was incarcerated, having been arrested on March 27, 2008 for first-degree aggravated domestic assault; (6) the Chief of Police had petitioner's wife write petitioner a letter asking him to contact her to talk about M.D.'s allegations; (7) during telephone calls from prison in late January 2009, petitioner admitted to his wife that he sexually assaulted M.D. on several occasions; and (8) in a February 2009 interview with the Chief of Police, petitioner made the same admissions. See In re Torres, 2004 VT 66, ¶ 8, 177 Vt. 507 (mem.) ("The PCR proceeding and the underlying criminal case, the case referred to in [13 V.S.A. § 7133], are parts of the same 'case' for purposes of the record.").

At the time the February 2009 charges were filed, petitioner was serving a sentence of six-and-one-half-to-twenty-eight-years for grand larceny, providing false information to a police officer, aggravated assault, and aggravated domestic assault. At a January 27, 2010 change-of-plea hearing, the trial court rejected a proposed plea agreement, which called for petitioner to serve a sentence of ten-to-twenty years, concurrent with the sentence petitioner was then serving. The

[1] M.D.'s mother also adopted petitioner's former wife years earlier, as well as other children.

court concluded that the proposed sentence would not accomplish anything because petitioner was already going to spend the next decade in prison on the sentence he was currently serving. After consulting with his attorney during a break at the hearing, petitioner agreed to enter a guilty plea on revised terms. The revised agreement called for a sentence of nineteen-to-twenty years based on a single charge of sexual assault, concurrent with the sentence he was already serving. The agreement dismissed two of the charges against petitioner and reduced the remaining charge from aggravated sexual assault, which carries a maximum penalty of life imprisonment, to sexual assault, which carries a maximum sentence of twenty years. See 13 V.S.A. §§ 3252(f)(2), 3253(b). Petitioner acknowledged at the hearing that he had read and understood the revised agreement, that he had a chance to speak to his attorney, that he was satisfied with his attorney's advice, that no threats or promises were made to get him to plead guilty to the amended charge, and that his plea was voluntary. He admitted to the court that on or about the spring or summer of 2007, he sexually assaulted M.D., a minor under the age of sixteen. Satisfied that petitioner's plea was voluntary and that there was a factual basis for the plea, the trial court accepted petitioner's guilty plea and imposed the nineteen-to-twenty-year sentence.

In March 2018, petitioner filed a PCR petition, claiming that his trial counsel was ineffective and that his conviction and sentence were unlawful and based on his uninformed guilty plea because his former wife, at the State's bequest, got him to falsely confess to sexually assaulting M.D. to save his marriage. He stated that he could not have assaulted M.D. at the Norwich apartment because he and his wife did not live there until February 2008. He further stated that a man who moved in with his former wife shortly after he was incarcerated in March 2008, and who was later convicted of sexually assaulting M.D. and two of her siblings,[2] likely assaulted M.D. in the spring and summer of 2008, after which his former wife targeted him as the perpetrator.

Petitioner's request for appointment of counsel was rejected when the Defender General and conflict counsel declined to represent petitioner after reviewing the case, as permitted under 13 V.S.A. § 5233(a)(3) (providing that needy person is entitled to be represented in PCR proceedings when claims are warranted by existing law or nonfrivolous arguments and have evidentiary support). Petitioner entered a pro se appearance, and at an October 30, 2019 PCR hearing, he represented himself.

He testified at the hearing that his trial attorney did not give him a copy of M.D.'s DCF interview, did not depose his former wife or the man who moved in with her after petitioner was incarcerated in March 2008, and did not inform him that his former wife and that man had failed to show up for a scheduled deposition in petitioner's case. He claimed that he falsely acknowledged to his former wife in telephone calls from prison that he sexually assaulted M.D. because he believed he had to tell her that to save his marriage. He stated that he could not have assaulted M.D. in the spring or summer of 2007 because he and his former wife did not move into the Norwich apartment until February 2008. He further stated that he could not have assaulted M.D. in the spring or summer of 2008 because there was still snow on the ground when he was incarcerated in March, and, as M.D.'s mother stated in her deposition, she did not allow petitioner to be around the children during that time period. He alleged that the real culprit was the man who moved in with his former wife after he was incarcerated in March 2008. Petitioner also stated that

[2] In a February 4, 2019 order, the civil division noted the State's acknowledgement that years after the allegations in petitioner's case, M.D. alleged that the man who moved in with her sister after petitioner was incarcerated, and whom her mother later married, sexually assaulted her. In October 2011, that man pled guilty to sexually assaulting M.D. and two of her siblings based on conduct occurring in late summer 2010.

his guilty plea was involuntary because his attorney did not disclose to him potential evidence in his favor and advised him that a jury would likely convict because it would not believe his claim of a false confession to save his marriage.

After petitioner testified and the defense rested, the State moved for "summary judgment," arguing that petitioner was required to present expert testimony in support of his claim of ineffective assistance of counsel and that no reasonable factfinder could conclude that petitioner's plea was involuntary. When the court asked the prosecutor if she wanted to present any evidence, she responded that if the court was not prepared to rule on her motion at that time, the State was prepared to present the testimony of petitioner's trial attorney. The court indicated that it did not intend to enter a decision from the bench at that time. The court then allowed petitioner to respond to the prosecutor's motion before calling a short recess to give the prosecutor an opportunity to contact petitioner's trial attorney. After petitioner summarized his arguments, he answered affirmatively when the court asked him if he had had a full and complete opportunity to present his case. Following the recess, the prosecutor informed the court that it would not need to call petitioner's trial attorney if petitioner would stipulate to admission of the transcript of the change-of-plea hearing. When petitioner indicated that he had no objection to admission of the transcript, the State rested.

In its May 2020 decision, the PCR court concluded that petitioner failed to carry his burden of showing either that his trial attorney's performance was ineffective or that his guilty plea was involuntary. The court first noted, as petitioner's attorney indicated at the January 27, 2010 change-of-plea hearing, that petitioner's trial attorney reviewed with petitioner in multiple prison visits the evidence against him and gave petitioner his honest opinion that a jury was not likely to believe his proposed defense—that he repeatedly confessed to sexually assaulting M.D. to his former wife and police because he wanted to save his marriage. Citing the absence of any expert testimony that petitioner's trial attorney breached the prevailing professional standard in defending petitioner, the court concluded that petitioner had failed to meet his burden of proving ineffective assistance of counsel. The court further concluded that petitioner failed to meet his burden of proving that his guilty plea was involuntary. The court cited petitioner's multiple admissions to having committed the charged offense and noted that, as far as it could tell, the exhibits that petitioner proffered in support of his petition—namely, M.D.'s DCF interview, her mother's deposition, and emails between his trial attorney and the prosecutor—actually supported the facts he acknowledged at the change-of-plea hearing. The court stated that the exhibits did not include information about allegations of which petitioner was unaware at the time he pled guilty and did not support the notion that petitioner was in a location that prevented him from having access to M.D. during the time frame of the alleged criminal conduct. Further, the court found unpersuasive petitioner's claim that his attorney pressured him into pleading guilty.

On appeal, petitioner argues that the PCR court erred in concluding that he needed expert testimony to meet his burden of proving that his trial attorney provided ineffective assistance of counsel. In petitioner's view, even a lay person could see that his trial attorney failed to investigate possible defenses, particularly his alibi defense. He also argues that the court erred by not examining all the emails between defense counsel and the prosecutor and by not concluding that his guilty plea was involuntary because his former wife was used as an agent of the State. Petitioner contends that his exhibits—the emails between his trial attorney and the prosecutor, M.D.'s DCF interview, and her mother's deposition—demonstrate that his trial attorney was ineffective and that his guilty plea was involuntary.

"On a petition for post-conviction relief, the petitioner has the substantial burden of proving by a preponderance of the evidence, that fundamental errors rendered [the] conviction defective."

In re Grega, 2003 VT 77, ¶ 6, 175 Vt. 631 (mem.) (quotation omitted). We will not disturb the civil division's judgment if "the findings are supported by any credible evidence, and the conclusions reasonably follow therefrom." Id. "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." Id. ¶ 7 (quotation omitted). To show ineffective assistance of counsel, "a petitioner must show by a preponderance of the evidence that: (1) [the] 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." Id.; see also Hill v. Lockhart, 474 U.S. 52, 59 (1974) (explaining that where individual pleads guilty, second requirement "focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process," that is, petitioner "must show that there is a reasonable probability that, but for counsel's errors, [petitioner] would not have pleaded guilty and would have insisted on going to trial"). "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." Grega, 2003 VT 77, ¶ 7. "Only in rare situations will ineffective assistance of counsel be presumed without expert testimony." Id. ¶ 16. Expert testimony is not required when "a professional's lack of care is so apparent that only common knowledge and experience are needed to comprehend it." Id. (quotation omitted).

Regarding alleged involuntary pleas in the context of a PCR proceeding, "we will inquire into the circumstances surrounding a guilty plea to determine that the trial court discharged its responsibility to assure itself, before accepting the plea, that it was offered voluntarily, after proper advice, and with full understanding of its consequences." In re Quinn, 174 Vt. 562, 563 (2002) (mem.) (quotation omitted). If credible evidence supports the PCR court's findings, even if there is conflicting evidence, "this Court will uphold the [civil division's] decision." Id. "[M]ere advice regarding which plea to enter or pressure upon a client to elect one alternative over the other based on the prosecution's case generally does not constitute undue coercion by the attorney." Id. at 564 (alteration and quotation omitted). "Generally, a petitioner's assertions in open court of voluntariness and lack of coercion, while not binding on a post-conviction proceeding, are cogent evidence against later claims to the contrary." Id. (alteration and quotation omitted).

We find no basis to disturb the civil division's denial of petitioner's PCR petition. Expert testimony was plainly required here. Whether his trial attorney's advice and representation fell short of the prevailing standard depends, in part, on an assessment of the negotiations that led to the plea agreement, and on the reasonableness of the agreement in light of the State's evidence and the potential defenses.

The PCR court's finding that the exhibits petitioner submitted "do not support the notion that [petitioner] was in a location that prevented him from having access to the victim during the time frame of the alleged criminal conduct" is not clearly erroneous. To be sure, the State's case against petitioner was not airtight. There appear to be inconsistencies in the statements made by the then-nine-year-old M.D. to the DCF interviewer in December 2008. Her statements suggest that petitioner assaulted her in the spring and summer of 2007 but describe an apartment that her sister and petitioner apparently did not move into until February 2008. It is possible that M.D. was referring to assaults in the spring of 2008, but petitioner was incarcerated early in the spring of 2008. In her December 3, 2009 deposition, M.D.'s mother testified that she met petitioner approximately four years earlier and that for the first year, because of concerns about his criminal history, he was not allowed to come to the house. She further testified, however, that after petitioner and her daughter got married about a year after they began a relationship, her family saw

him a lot more. Although she testified that he knew he was not supposed to be alone with the children and that she was not aware of him being alone with the children until January or February of 2008 when her daughter and petitioner got their own apartment, nothing in her deposition testimony demonstrated that he did not have any opportunity to commit the charged offense in the spring and summer of 2007, or even early in the spring of 2008. As for the emails between petitioner's trial attorney and the prosecutor upon which petitioner relies, they show only that his trial attorney felt that the State had significant problems of proof and that the prosecutor downplayed those problems.

In short, none of petitioner's exhibits demonstrated ineffective assistance of counsel without expert testimony evaluating his attorney's performance, considering the discrepancies in the child's testimony weighed against the significant evidence against petitioner, including his repeated admissions to sexually assaulting M.D.

By the same token, expert testimony was necessary to evaluate his attorney's advice regarding whether to plead guilty in light of the circumstances surrounding petitioner's admissions to sexually assaulting M.D.—namely, the State's role in asking his former wife to talk to him about his alleged sexual assaults on M.D., as well as his claimed false confession to save his marriage. Petitioner's counsel was aware of these facts but advised petitioner that a jury would not likely believe his assertion that he confessed to his wife and police to save his marriage. Considering the circumstances of this case and the State's evidence against petitioner, his attorney's advice regarding his plea was not plainly ineffective assistance of counsel in the absence of expert testimony evaluating the circumstances and the evidence against petitioner. Nothing in the record suggests that petitioner's guilty plea was involuntary. At the change-of-plea hearing, in an effort to convince the trial court to accept the initial plea agreement, petitioner's attorney noted the failure of petitioner's wife and her new husband to appear for their depositions, which he claimed was important to petitioner's defense,[3] and emphasized significant hurdles that the State had to overcome to obtain a conviction, including Miranda and suppression issues and the fact that petitioner's wife was used as an agent of the State. Knowing all this, petitioner nonetheless elected to enter his guilty plea, informing the court that he had read the plea agreement, understood it, was happy with his attorney's advice, and was not coerced into accepting it.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice

[3] Petitioner's attorney informed the court that he had new subpoenas and had set a date to depose petitioner's former wife and her husband. Petitioner acknowledged at the PCR hearing that he and his attorney discussed the issue of his former's wife's husband.