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STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 421-7-18 Wncv

Laura Hernandez,
Plaintiff

v.

State of Vermont,
Defendant

Opinion and Order on Petition for Post-Conviction Relief

Plaintiff Laura Hernandez has filed this claim for post-conviction relief (PCR) alleging ineffective assistance of her trial counsel. The State has opposed the petition. Plaintiff is represented by Annemarie Manhardt, Esq. The State is represented by Assistant Attorney General Earl Fechter. The parties filed competing motions for summary judgment. The Court held oral argument, after which, it permitted additional briefing regarding the motions.

Having reviewed the summary judgment record and considered the arguments of counsel, the Court makes the following determinations.

Factual and Procedural Background

The summary judgment record establishes that, in December 2016, Plaintiff was charged with two counts of selling or distributing heroin in a quantity of over 200 milligrams in violation of 13 V.S.A. § 4233(b)(2). Defense counsel was assigned for her in January 2017.

The parties executed a discovery stipulation that required affirmative defenses, which would include an entrapment defense, to be raised within ten days of the close of depositions.

In September 2007, Plaintiff's first counsel withdrew and Lauren Kolitch, Esq., was assigned to represent her.

In anticipation of a trial on January 20 and 21, 2009, Attorney Kolitch filed proposed jury instructions. Included within the instructions was a request for an entrapment defense instruction.

The trial was held over those two days. The State's evidence relied significantly on the testimony of a confidential informant ("CI"). Viewed most favorably towards Plaintiff, the evidence showed that: Plaintiff and the CI were good friends; they spoke frequently; the CI and Plaintiff "helped each other out" and often did favors for each other; the CI took both legal and illegal drugs to help with chronic pain; in the days leading up to the drug sale, the CI told Plaintiff that she was in extreme pain and was having trouble getting around; the CI called her multiple times each day; the CI left Plaintiff messages saying that it was "extremely important" and "urgent" that she get ahold of the CI to "help [her] out" and that Plaintiff "needed to come through" for her; during those conversations the CI was also taking methadone, a fact of which Plaintiff was aware; and the CI agreed that she may have said to Plaintiff: "You gotta help me out. You gotta get me something." The CI denied, however, that any statements she said to Plaintiff

amounted to “begging” or “pressuring” Plaintiff to provide her with illicit drugs. Such conduct would have been prohibited by her CI Agreement with the State.

During a charge conference at the close of the State’s case, the State objected to submitting the proposed entrapment defense to the jury. The State asserted that the defense had not been timely asserted under the scheduling order and that it was prejudiced by the late notice. It also maintained that there was insufficient evidence to submit the claim to the jury.

Attorney Kolitch admitted that notice had not been provided and that she was unaware of the deadlines in the scheduling order. She maintained that the State was not prejudiced and that the evidence submitted supported the instruction.

The Court agreed that the lack of adherence to the scheduling order and the prejudice to the State supported giving no entrapment instruction to the jury. It declined to give a ruling as to whether the evidence supported the defense because, at that time, only the State had rested. It indicated it would make a determination as to that issue after the defense had presented its evidence.

The defense chose not to present any additional evidence. When stating its ruling as to the entrapment defense, the Court merely said it was relying on its determination that the defense had provided tardy notice of the entrapment issue and that it prejudiced the State.

During deliberations, the jury asked a question: “Should the question of whether or not the defendant was pressured by the confidential informant to sell

heroin be a consideration in our deliberations?” The note referenced the CI Agreement. The Court responded that: “You may consider the evidence of whether or not the defendant was pressured by the confidential informant and terms of the [CI Agreement] the same as you consider all other evidence.”

The jury found Plaintiff guilty on both counts.

Plaintiff later filed a motion for new trial, again, raising the issue of entrapment.

On May 5, 2009, the Court denied the motion. The Court adhered to its conclusion that the failure timely to raise the issue was a significant violation of the scheduling order and resulted in prejudice to the State. It also went on to conclude that, even ignoring the notice issue, there was insufficient evidence in the case to support an instruction as to the entrapment defense.

Plaintiff was eventually sentenced. Soon after, she filed a motion for sentence reconsideration.

On December 8, 2009, while the motion for sentence reconsideration was pending, Plaintiff agreed to a global plea agreement to resolve a number of pending criminal dockets. As part of that deal, Plaintiff agreed to withdraw her motion for sentence reconsideration and give up all rights of appeal in connection with the criminal case that underlies this PCR petition. *See* Transcript of December 8, 2009 at 4–6, 13–14.

The PCR Claim

Petitioner's PCR filing focuses on the conduct of Attorney Kolitch. Plaintiff argues that Attorney Kolitch provided ineffective assistance of counsel in connection with the failure timely to raise the entrapment defense and with the failure to make constitutional arguments for asserting such a defense despite the notice violation. She also maintains that, given the jury's question concerning the conduct of the CI, she was prejudiced by Attorney Kolitch's failures. Her arguments are supported by the opinion of a legal expert. The State disagrees and also asserts that Plaintiff may not bring this PCR action because she "deliberately bypassed" raising the issue on direct appeal.

Standard of Review

On a petition for post-conviction relief, the petitioner has the burden of showing "by a preponderance of the evidence, that fundamental errors rendered his conviction defective." *In re Combs*, 2011 VT 75, ¶¶ 9-10, 190 Vt. 559, 561 (quoting *In re Liberty*, 154 Vt. 643, 644 (1990) (mem.)); accord *Strickland v. Washington*, 466 U.S. 668, 694 (1984). An ineffective assistance of counsel claim requires a two-pronged analysis that is the same under both the United States and Vermont Constitutions. *Id.* ¶ 9 (citing *In re Russo*, 2010 VT 16, ¶ 16, 187 Vt. 367). First, the petitioner must show that his counsel's performance "fell below an objective standard of reasonableness informed by prevailing professional norms." *In re James Burke*, 2019 VT 28, ¶ 18 (citing *In re Dunbar*, 162 Vt. 209, 212 (1994)). Second, the petitioner must further demonstrate "a reasonable probability that, but

for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Combs*, 2011 VT 75, ¶ 9 (internal quotation marks and citations omitted). In other words, the petitioner must show that defense counsel’s performance resulted in prejudice. *See Strickland*, 466 U.S. at 694.

The Vermont Supreme Court has also emphasized that:

Trial counsel is allowed much discretion in decisions regarding trial strategy, and we will not measure counsel’s competence based on the failure of that strategy. Instead, we must assess whether counsel’s decisions were within the range of competence demanded of attorneys in a criminal case at that time. Furthermore . . . fairly assessing counsel’s performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time. Due to the difficulties of making such an evaluation, a court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance

Combs, 2011 VT 75, ¶ 10 (internal citations and quotation marks omitted). The Vermont Supreme Court has made clear that the “petitioner’s burden in ineffective assistance of counsel cases ‘is a heavy one.’” *Id.* (quoting *Dunbar*, 162 Vt. at 212).

An additional limiting principle that is potentially important in this case is that PCR “is not a substitute for appeal.” *In re Nash*, 149 Vt. 63, 64 (1987). Absent extraordinary circumstances, matters that were raised at trial but not litigated on direct appeal are deemed waived and may not be asserted in a PCR action. *Id.*

Discussion

In this instance, if the State’s “deliberate-bypass” argument is successful, the Court need not consider the other two aspects of the *Strickland* standard.

Accordingly, the Court will examine that defense at the outset.

1. Whether to Consider the May 2009 Order

The State’s argument relies, in part, on the trial court’s May 5, 2009 Order (the “May 2009 Order”), denying Plaintiff’s request for a new trial. The State did not specifically raise and discuss the May 2009 Order until the hearing on the motion for summary judgment. At that point, the Court allowed the parties additional time to brief the impact of the Order. Plaintiff asserts that it is unfair to allow the State to rely upon the May 2009 Order.¹ The Court disagrees.

First, in its initial motion for summary judgment motion, the State asserted the defense of deliberate bypass. Second, it attached the docket sheet from the case that listed the May 2009 Order. Third, Plaintiff’s motion for summary judgment included the same docket sheet. Fourth, when specifically raised, the Court

¹ Plaintiff also suggests that the Court should ignore the May 2009 Order and focus on the statements made by the trial court during the trial, which expressly addressed only the failure to provide proper notice. In support of that argument, she asserts that there would have been no May 2009 Order had the jury been instructed on entrapment and Plaintiff been found not guilty. The Court is not persuaded. The May 2009 Order is part of the trial court proceeding and provides the trial court’s ruling as to the weight and substance of the evidence. Further, the suggestion that Plaintiff would have been found not guilty based on entrapment is belied by the May 2009 Order’s alternative conclusion that there was insufficient evidence to support the instruction. The upshot of the trial court’s determinations is that, even had Attorney Kolitch given proper notice of the entrapment defense, based on the evidence, no entrapment instruction would have been given.

afforded Plaintiff additional time to consider and brief the impact of the May 2009 Order. Lastly, the May 2009 Order exists. It is a fundamental part of the rulings made by the trial court. It cannot be ignored.

The Court will consider the effect of the May 2009 Order.

2. Whether Plaintiff Waived the Entrapment Defense Claim by Failing to Preserve it on Appeal

Relying upon *State v. Gabaree*, 149 Vt. 229, 232–33 (1988), Plaintiff asserts that ineffective assistance of trial counsel claims are typically not waived by failing to raise them on appeal. The Court agrees. Indeed, the Supreme Court has “held that the proper avenue of raising the issue of ineffective assistance of counsel is through a motion for post-conviction relief, and not through a direct appeal of a conviction.” *Id.* Such a rule makes sense, in the normal course, as the issues on appeal are whether the trial court erred, not whether defense counsel afforded Plaintiff ineffective assistance and whether she suffered prejudice as a result. This case is different.

Here, the claim of ineffective assistance is narrow: Plaintiff asserts that Attorney Kolitch fell below professional standards in not raising the defense in conformity with the scheduling order and in not making constitutional arguments that the late notice should be overlooked. The trial court, however, expressly ruled that, even were it to overlook the late notice, there was insufficient evidence to warrant an entrapment instruction to the jury.

The Court’s determination as to the sufficiency of the evidence as to an entrapment instruction is a legal determination that was subject to appellate

review. In fact, a review of the transcript of the December 8, 2009 plea change reveals that Attorney Kolitch may well already have filed a Notice of Appeal by that date. Either way, at that hearing, both Attorney Kolitch and Plaintiff acknowledged that, by agreeing to the terms of the global plea agreement, she would be dismissing her appeal regarding these trafficking convictions and waiving all right to appeal “*any issues*” relating to that docket. Transcript of December 8, 2009 Hearing, at 13 (emphasis added). The Court even afforded Plaintiff additional time to confer with counsel regarding that point. Plaintiff indicated that she needed no more consultation and agreed that she understood she was waiving those rights. *Id.*, at 13–14.

In the Court’s view, while the issue of ineffective assistance itself need not have been appealed, Plaintiff was required to appeal the Court’s determination regarding the sufficiency of the evidence to support the entrapment defense. Otherwise, she has deliberately bypassed her opportunity to contest that determination.

Where the issues raised in a petition for post-conviction relief were contested at trial and were not raised on direct appeal, they will not be addressed on post-conviction review unless it is demonstrated that the failure to raise them on direct appeal was inadvertent, that appellate counsel was ineffective, or that extraordinary circumstances excused the failure to raise the issues on appeal.

In re Carter, 2004 VT 21, ¶ 9, 176 Vt. 322, 326–27 (internal quotation omitted).

Plaintiff has not asserted that any of the above exceptions apply in this case. Instead, she argues that she is not contesting the entrapment ruling of the Court but the poor professional conduct that led to that ruling. There are two problems

with that contention. First, the only claim raised in the Amended PCR complaint concerning Attorney Kolitch's conduct has to do with the failure to comply with the scheduling order and overcoming that procedural error. There is no claim that she failed properly to cross-examine the CI or that her failure to adduce additional evidence by putting forth a defense case amounted to ineffective assistance of counsel. Second, Plaintiff's claim, and her expert opinion, is predicated on the notion that, but for the attorney error, an entrapment instruction would have been given and, in light of the evidence and the jury question, there is a fair chance that the instruction might have resulted in a different outcome. But the facts that the trial court concluded the evidence was legally insufficient to warrant an entrapment instruction and Plaintiff's failure to appeal that determination are fatal to those contentions. Even if Attorney Kolitch's conduct in connection with the notice defect was ineffective, the trial court's unappealed determination as to the insufficiency of the evidence for the entrapment defense is final and is not subject to attack in this proceeding.

The Court concludes that Plaintiff's claims are barred by the doctrine of deliberate bypass and, therefore, that the State is entitled to summary judgment on that basis.

3. Lack of Prejudice

The Plaintiff also contends that the trial court's insufficiency-of-the-evidence ruling is not a bar to this proceeding but a defense. Even if the Court's examination of the deliberate-bypass issue were incorrect, viewing the issue through that

analytical framework does Plaintiff little good. Her Amended Complaint and her expert's opinion focus solely on the lack-of-notice issue. On such a record, Plaintiff is unable to establish prejudice flowing from Attorney Kolitch's alleged ineffective assistance because the trial court concluded that the evidence did not support an entrapment instruction -- even ignoring the issue of improper notice. In other words, assuming Attorney Kolitch was ineffective with regard to the notice issue, an entrapment instruction still would not have been given. Accordingly, Plaintiff cannot show that actionable prejudice flowed from her counsel's alleged failures.

Conclusion

In light of the foregoing, Defendant's motion for summary judgment is granted, and Plaintiff's motion for summary judgment is denied.

Electronically signed on June 2, 2020, at 10:34 AM pursuant to V.R.E.F. 7(d).

Timothy B. Tomasi
Superior Court Judge