VERMONT SUPERIOR COURT
CHITTENDEN UNIT
CIVIL DIVISION

In re: MICHAEL LEWIS	Docket No. 21-CV-3040

RULING ON STATE'S MOTION TO DISMISS

In this post-conviction relief (PCR) case, petitioner Michael Lewis seeks to vacate his 2009 habitual offender sentence of 22 years to life in Docket No. 4216-10-08 Cncr. The State moves to dismiss the petition.

Background

The relevant history was recited in the court's earlier ruling on this same motion to dismiss (Dec. 9, 2022). In short, the amended petition alleges that Lewis's trial counsel in the habitual offender case (4216- 10-08 Cncr), in the underlying cases for the predicate offenses (2354-5-04 Cncr and 4672-904 Cncr), and in the 2017 PCR case (306-3-17 Cncv; In re Lewis, 2021 VT 24, 214 Vt. 451) all provided ineffective assistance in various ways. Lewis alleges that but for trial counsel's errors he would not have pled guilty to being, and could not have been sentenced as, a habitual offender. He asserts that had PCR counsel properly asserted those claims regarding criminal trial counsel, he would have succeeded in having his habitual offender sentence vacated.

The State moved to dismiss, arguing that this case is barred under 13 V.S.A. § 7134 as a successive petition and abuse of the writ because it raises claims already addressed

or that should have been addressed in the prior PCR case, and because the claims were waived by Lewis's guilty pleas. In its earlier ruling, this court rejected the argument that dismissal of the ineffective assistance claims was required because of Lewis's guilty pleas, but deferred a ruling on the abuse of the writ argument so that Lewis could submit expert evidence.[1]

Discussion

The State contends that this petition is barred by 13 V.S.A. § 7134 ("The court is not required to entertain a second or successive motion for similar relief on behalf of the same prisoner."). That statute bars relitigation of claims actually raised and decided on the merits in an earlier PCR, as well as claims that constitute an "abuse of the writ" of habeas corpus. In re Laws, 2007 VT 54, ¶¶ 16–17, 182 Vt. 66 (citing Sanders v. United States, 373 U.S. 1, 17 (1963). "[A] petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice." Id., 2007 VT 54, ¶ 18, 182 Vt. 66 (citing McCleskey v. Zant, 499 U.S. 467, 489 (1991)). "[T]he government bears the burden of pleading abuse of the writ, setting forth a petitioner's writ history, identifying the claims that appear for the first time, and alleging the petitioner has abused the writ. Then the burden shifts to the petitioner to show cause for failing to raise the claim previously and actual prejudice from the default." In re Towne, 2018 VT 5, ¶ 25, 206 Vt. 615 (citations and quotations omitted).

Ordinarily, "negligence on the part of a prisoner's post-conviction attorney does not qualify as 'cause' to excuse compliance with state procedural rules." In re Towne, 2018

[1] The court erroneously issued a ruling on this motion on May 23, 2023, before the State had an opportunity to reply to Petitioner's opposition. The court vacated that ruling on May 25th, and the State filed its reply and a supporting affidavit on July 28th.

VT 5, ¶ 32 (citing Coleman v. Thompson, 501 U.S. 722, 752–53 (1991)). The U.S. Supreme Court, however, has established an exception to that general rule in the context of federal habeas review: "*Inadequate assistance of counsel* at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." Martinez v. Ryan, 566 U.S. 1, 9 (2012)(emphasis added).[2]

The State is correct that the analysis of Martinez is not directly applicable to state PCR proceedings, because it was based upon principles of comity and federalism. *See* Ex parte Preyor, 537 S.W.3d 1, 2–3, 2017 WL 3379283, at *2–3 (Tex. Crim. App. 2017) (Newell, J., concurring) (collecting cases). However, the underlying rationale for allowing claims of ineffective assistance of PCR counsel to proceed was this:

> A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an "obvious truth" the idea that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Gideon v. Wainwright, 372 U.S. 335, 344 (1963). Indeed, the right to counsel is the foundation for our adversary system.

Martinez, 566 U.S. at 12.

Some courts bar claims of ineffective assistance of PCR counsel because there is no constitutional or statutory right to such counsel. *See*, *e.g.*, Sweet v. State, 293 So. 3d 448, 453 (Fla. 2020); Murphy v. State, 327 P.3d 365, 371 (Idaho 2014); Smith v. State, 135 Nev. 719, 433 P.3d 267 (2019) (unpub.). Others, however, allow such claims where there is—as in Vermont[3]—a statutory right to PCR counsel. *See*, *e.g.*, Johnson v. State, 531 P.3d 599

[2] The "collateral proceeding" in Vermont is referred to as a post-conviction relief proceeding (such as this one).

[3] *See* 13 V.S.A. § 5233(a)(3).

(Nev. 2023) (unpub.); Lozada v. Warden, State Prison, 613 A.2d 818, 821 (Conn. 1992); Stovall v. State, 800 A.2d 31, 37 (Md. App. 2002); Jackson v. Weber, 637 N.W.2d 19, 22–23 (S.D. 2001); Brown v. State, 101 P.3d 1201, 1203 (Kan. 2004). Others appear to permit such claims without analysis. *See*, *e.g.*, Walker v. State, 303 So. 3d 720, 723 (Miss. 2020).

While the right to PCR counsel is not mandated by the federal or Vermont constitutions, it is mandated by Vermont statute. To hold that there is a statutory right to counsel, but that it does not matter whether counsel is effective, would make a mockery of the right. "It would be absurd to have the right to appointed counsel who is not required to be competent. . . . When counsel is so appointed [in post conviction matters] he must be effective and competent. Otherwise, the appointment is a useless formality." Lozada, 613 A.2d 818, 821–22 (quotation omitted) (alterations in original). Vermont prides itself in providing access to the courts, and protecting the rights of its citizens. It is for this reason that this court predicts that our Supreme Court would find that our incarcerated brothers and sisters have the right to assert claims that prior PCR counsel were ineffective.

Here, Lewis has shown cause for his failure to assert the claim of ineffective assistance of trial counsel: his PCR counsel dropped the ball by amending the PCR petition and (allegedly inadvertently) deleting that previously-asserted claim. *See* Aff. of Robert Appel ¶¶ 7–8. However, to defeat the State's motion, Lewis must still present evidence that (1) trial counsel was ineffective, and (2) Lewis was prejudiced as a result.

Lewis has provided an affidavit from attorney Frank Twarog that asserts that both Lewis's PCR counsel and his criminal trial counsel were ineffective. Twarog Aff. at 2, 6–7, 10.

Lewis next must demonstrate prejudice. "Actual prejudice requires more than merely showing that the alleged errors during the underlying trial 'created a possibility of prejudice,' but rather that they worked to the petitioner's 'actual and substantial disadvantage,' poisoning the 'entire trial with errors of constitutional dimensions.'" In re Towne, 2018 VT 5, ¶ 25 (quoting In re Laws, 2007 VT 54, ¶ 22). Lewis must demonstrate that, if PCR counsel had been effective and raised the ineffective assistance of trial counsel claim, "it would have made a difference." Id. ¶ 38. Similarly, Lewis must also "make some showing" that if trial counsel had rendered effective assistance, "it would have helped [his] defense." Id. ¶ 39, 206 Vt. 615.

In his affidavit, Twarog asserts prejudice directly as to one of Lewis's predicate offenses, the false pretenses conviction: "Attorney Smith failed to fully brief [the prosecutor] on the evidence of recantation that she had at that time, which likely would have resulted in an amendment, if not a dismissal, of this felony charge." Twarog Aff. at 6. If not for that felony charge, Lewis could not have been sentenced as a habitual offender because he would not have had three prior felonies. *See* 13 V.S.A. § 11 ("A person who, after having been three times convicted . . . of felonies or attempts to commit felonies . . . commits a felony other than murder . . . , may be sentenced upon conviction of such fourth or subsequent offense to imprisonment up to and including life.").

While Twarog could have stated more directly that PCR counsel's deficient performance also prejudiced Lewis, such prejudice is obvious from the context. Plainly, if the court had had the opportunity to consider the ineffective assistance of trial counsel claim during the PCR, and an expert had credibly testified as Twarog does now, the evidence could establish a "reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different." Towne, 2018 VT 5, ¶ 38 (quotation omitted).

The State contends that Lewis has failed to meet his burden because "his assertions of cause and prejudice are unsupported by the record and based on speculation and hindsight." State's Reply at 5. As to the false pretenses predicate conviction, the State argues that Lewis "presents no evidence, but only unwarranted speculation, that his attorney could have obtained a better outcome if she had used the letters [of recantation]." Id. at 11. The States accuses Lewis's expert of "speculat[ing]" that the letters of recantation would have convinced the prosecutor to reduce or dismiss the charge, and argues that the affidavit of forgery, signed by a witness, might have been admissible to prove that Lewis forged the checks. Id. The State's arguments seemingly mistake this for a summary judgment motion. It is not, of course. While a petitioner must "make some showing" to support his claim of prejudice, In re Towne, 2018 VT 5, ¶ 39, he need not establish prejudice as an undisputed fact on a motion to dismiss. While Attorney Twarog's assertions might not be sufficient to survive summary judgment or succeed at trial, they are enough to survive this stage of the case.

The State also contends that Lewis has not met his burden because he "fails to explain how his trial counsel [in the habitual offender case] could have 'challenged' his predicate convictions in the criminal case where she was appointed." State's Reply at 7. The State's expert points out that there is no specific procedure to challenge prior convictions in a pending criminal case, and that such challenges must be pursued in a PCR petition under 13 V.S.A. § 7131. Williams Aff. ¶¶ 109–12. That is true, but had Attorney Jansch investigated and identified the issues with the predicate convictions, she could have preserved a challenge to them. *See* In re Benoit, 2020 VT 58, ¶¶ 17–18, 212 Vt.

507. In any event, whether Attorney Jansch's alleged ineffectiveness resulted in prejudice is immaterial for purposes of this motion. If the predicate false pretenses conviction was wrongful, that would necessarily invalidate the habitual offender conviction.[4]

Order

The court denies the State's motion to dismiss for abuse of the writ. The parties shall file a proposed discovery schedule within 30 days thereafter.

Electronically signed on October 31, 2023 pursuant to V.R.E.F. 9(d).

Helen M. Toor
Superior Court Judge

[4] The State further argues that Lewis does not present an expert opinion that his representation for his escape conviction (docket # 2354-5-04 Cncr) was deficient for the reasons claimed in the Amended Petition, nor has he shown that prejudice resulted from any alleged ineffective assistance regarding that conviction. The court agrees. However, given that Lewis must show that only one of his predicate convictions was defective to invalidate the habitual offender plea, the false pretenses conviction by itself is sufficient.