Amended Ruling 10/5/20, aff'd on appeal

STATE OF VERMONT

SUPERIOR COURT
ESSEX UNIT

CIVIL DIVISION
Docket # 34-8-15 Excv

FILED

JUL - 2 2020

Vermont Superior Court
Essex Unit

In re BRIAN SHANNON

Petition for Post Conviction Relief

DECISION

This matter came before the court on December 5, 2019 and January 27, 2020 for hearing on Brian Shannon's Petition for Post Conviction Relief. Mr. Shannon was present and represented by Attorney Mark Furlan. The State was represented by State's Attorney Vincent Illuzzi. The attorneys have submitted post-trial memoranda. Assistant Judges Hodgdon and Colby heard the evidence at trial, but have since recused themselves without having had any discussion of the evidence with the undersigned.

Petitioner seeks to vacate convictions in two dockets that were based on pleas. Mr. Shannon claims ineffective assistance of counsel in connection with the advice he received prior to entering the pleas, which were all entered on the same day.

Based on the credible evidence, the court finds the following facts by a preponderance of the evidence:

Findings of Fact

In June of 2012, Mr. Shannon was charged with three counts of aggravated domestic assault stemming from family fights involving his brothers, father, and niece. Docket 66-6-12 Excr (hereinafter "2012/Willhoit"). These were three felony charges. At the time, he had two prior felony convictions which arose from similar circumstances. Attorney Jansen Willhoit was assigned to represent him after his first assigned attorney, Douglas Willey, died. Mr. Shannon and Mr. Willhoit prepared for trial on these charges.

In June of 2013, while the 2012 case was awaiting trial, Mr. Shannon was charged with new crimes based on a new incident with family members: two new counts of aggravated domestic assault, a felony DUI #3, and seven misdemeanors. Docket 53-6-13 Excr (hereinafter "2013/Davis"). Attorney Christopher Davis was assigned to represent him in this docket.

The most serious charges, the felony aggravated domestic assault charges, were similar in the two cases, and there were overlapping witnesses. The two attorneys communicated with each other and with Mr. Shannon. The 2012/Willhoit case was scheduled for trial in January of 2014.

On January 6, 2014, the State's Attorney sent Attorney Davis a letter stating that if Mr. Shannon were convicted of the 2012/Willhoit charges, the State would seek sentence

enhancement in connection with the 2013/Davis charges. This was an indirect suggestion that if Mr. Shannon got a felony conviction at trial on the 2012 case, then the State would amend the charge in the 2013 case to add a request for "habitual offender" sentence enhancement. This constituted a threat to dramatically increase the possible penalty exposure on the 2013/Davis case, because habitual offender status can mean up to life imprisonment. There was nothing in the letter that stated that the State would seek life imprisonment—only that it would seek sentence enhancement. "If convicted of a felony in Docket No. 66-6-12 Excr, the State intends to proceed with sentencing enhancement on your pending docket." Exhibit H.

In fact, the law did not permit a habitual offender claim to be added to the 2013/Davis case because a person can only be charged as a habitual offender if he or she commits a felony *at a time when he or she already has 3 felony convictions*. 13 V.S.A. § 11. The conduct of both the 2012 and 2013 cases occurred when Mr. Shannon had only 2 felony convictions. Thus, he was not subject to being charged as a habitual offender in either of those two cases because he had not yet reached the status of a habitual offender. *State v. Carpenter*, 2013 VT 28, ¶ 8, 193 Vt. 484, 487 ("once the status of habitual criminal is achieved the penalty for each subsequent crime is subject to such enhancement") (internal citations removed). The actual risk was that if he received even one felony conviction out of the five charged felonies in the two cases, and then *subsequently* committed a new felony, then he could be charged as a habitual offender.

Mr. Willhoit met with the three significant witnesses for the State in the 2012/Willhoit case, who were Mr. Shannon's family members, and determined that there was not a sufficient basis to file a motion to dismiss the charges. He instead filed notice of a defense of self-defense, and gave notice that he would seek to impeach the witnesses.

On January 19, 2014, the jury was drawn for the 2012/Willhoit case. The trial was to be held February 6, 2014. The State's plea offer at that time was a sentence of 8-15 years to serve on all charges. Mr. Shannon did not wish to enter a plea.

Between the jury draw and trial date, both attorneys met together with Mr. Shannon to discuss the State's global offer of 8-15 years to serve on all charges in both cases. Mr. Willhoit knew that the State's Attorney was threatening to add habitual offender sentencing enhancement to the 2013 case if there was no plea in the 2012 case. Mr. Shannon also knew about it. There is no evidence about what was actually said to Mr. Shannon by either attorney on the subject, but the evidence is that Mr. Willhoit erroneously believed that habitual offender enhancement could be added to the 2013/Davis case. Transcript December 5, 2019, pages 7 and 10.

Attorney Davis thought that of the 10 charges in the 2013/Davis case, two were triable and defensible before a jury: the witness in the DUI count had compromised credibility, and in an aggravated assault with a deadly weapon count, he believed the State would have a difficult time proving that Mr. Shannon had an intent to threaten with a knife (as opposed to simply acting out of anger). Nonetheless he also thought it possible that Mr. Shannon could be convicted on those counts. The evidence supports the finding that the two attorneys and Mr. Shannon discussed the substance of the charges in the 2013/Davis case, including the defensibility of

these two counts such that Mr. Willhoit had a reasonable understanding of the charges and the their strengths.

On February 1, 2014, Mr. Shannon rejected the plea agreement offered by the State in the 2013/Davis case and the trial in the 2012/Willhoit case was about to proceed. Attorney Davis does not recall that anything was discussed at that time about habitual offender sentence enhancement.

On February 6, 2014, the day of trial in the 2012/Willhoit case, the jurors were present, but one of the State's witnesses, a family member of Mr. Shannon, did not show up. Discussions began between Mr. Illuzzi and Mr. Willhoit about possible resolution of the case by plea. The State's offer had dropped. The two attorneys met in chambers with the presiding judge, Judge Morris. While the jury waited, discussions continued back and forth and in and out of chambers over the next two hours in which both cases were addressed. Judge Morris introduced the topic of habitual offender during those discussions. The evidence supports a finding that Judge Morris also had a misunderstanding about the risk of habitual offender enhancement for Mr. Shannon in the 2013/Davis case as indicated by the Judge's attempts to facilitate negotiations that would "alleviate that concern." *Id.* at 10.

Global Plea Agreement

Mr. Shannon was initially clear that he had not wanted to plea to a felony and that he was there ready for trial. However, when his family member did not show up, he came to understand that his family member could be arrested and charged criminally with contempt of court, and he was concerned about that. The circumstances show that his concern over that issue, plus the significant drop in the State's plea offer, gave him motivation to consider entering a plea. He told his attorney Mr. Willhoit that if he was going to plead to the 2012/Willhoit case, he wanted to simultaneously resolve the 2013/Davis case. His attorney on the 2013/Davis case, Mr. Davis, was not present in the courthouse in Guildhall as there was nothing scheduled that day for the 2013 case. Mr. Davis was busy with criminal cases in St. Johnsbury that day.

Mr. Willhoit reached Mr. Davis by telephone and told him of the possibility of a plea agreement that would include the 2013 charges. Mr. Davis stated that if Mr. Shannon wanted to resolve the 2013 case by plea agreement that day, that was all right with him and he authorized Mr. Willhoit to go ahead and do it as long as it was what Mr. Shannon wanted to do. There is no evidence that they discussed the issue of a habitual offender threat as a factor in plea terms. Mr. Willhoit then proceeded with plea discussions.

Mr. Shannon testified at the PCR hearing that he 'was promised that he could speak with Chris Davis.' The court does not find it credible that he stated that he wanted to talk with Mr. Davis, was promised that he could, and then was denied the opportunity. There is no testimony, even from him, that he asked to be able to talk with Mr. Davis. In the subsequent plea colloquy between Mr. Shannon and Judge Morris, Mr. Shannon told Judge Morris that he was willing to enter the pleas without Attorney Davis present. Exhibit 1, page 12.

The claim in this petition is that Attorney Willhoit induced Mr. Shannon to enter a plea that he might not otherwise have entered based on allegations that Attorney Willhoit (a) was not familiar with the strengths and weaknesses of the ten counts in the 2013/Davis case, and (b) did not advise Mr. Shannon that there was no risk of habitual offender life-in-prison sentencing if he went to trial on the 2013/Davis case.

Mr. Shannon's own testimony, at the hearing on this petition, as to what he knew and what he was told on February 6, 2014 by Attorney Willhoit is inconsistent. His first statement was that on the day of trial, he was threatened with a life sentence, and that caused him to have motivation to enter a plea. At another point, he testified that the issue of habitual offender was not brought up on the day he changed his plea. On cross examination his testimony was not clear about what he did and didn't recall from that day. At one point he testified to an incorrect fact: he testified that there were two letters, presumably from the State's attorney, suggesting the State would pursue habitual offender sentencing, one related to the 2012 case and one related to the 2013 case. There is no evidence that there was ever a letter relating to the 2012 charges. Finally, the events of the morning of February 6, 2014 were almost 6 years prior to the hearing. Mr. Shannon volunteered in his PCR hearing testimony that he had memory problems related to health issues that gave him "diminished capacity" in remembering what happened that day.

Mr. Willhoit testified on June 19, 2014 at a later Motion to Withdraw Plea hearing (described below) about the visit he and Mr. Davis made to the jail pre-trial to talk with Mr. Shannon about resolution: ". . .when you have that many charges, there's obviously – you're rolling the dice. And so we both strongly encouraged him to consider a resolution in lieu of being subject to a potential habitual offender." Exhibit 4, page 26, lines 19-21. This strongly suggests that both attorneys believed at that time that there was a risk of habitual offender sentencing in connection with at least the 2013/Davis case and did not tell him that such a risk did not exist.

Mr. Davis clearly did not speak with Mr. Shannon on February 6, 2014, so did not communicate anything to him on that day about the risk of habitual offender sentencing. There is no evidence that either Mr. Davis or Mr. Willhoit ever clearly told Mr. Shannon that the State's Attorney's letter about seeking "sentence enhancement" was in error and that there was no chance of life imprisonment in either case. The fact of the written letter from a person with as much presumable knowledge of the law and power to bring criminal charges as the State's Attorney is something that, unless clearly corrected by his attorneys, would likely be in Mr. Shannon's mind. Mr. Shannon's testimony that he thought there had been two letters demonstrates that this threat was very much in his mind.

Mr. Willhoit testified that he was aware that the habitual offender issue did not affect any sentence related to the 2012 charges, but there is no evidence that he ever advised Mr. Shannon about the correct law on habitual offender eligibility as it applied to the 2013/Davis case. The evidence, particularly Mr. Shannon's testimony that he thought there were two letters, shows that Mr. Shannon did not know that the law prohibited the State's Attorney from seeking habitual offender sentence enhancement on any of the pending charges. The evidence shows that during the two most recent communications to Mr. Shannon (the conference with the two attorneys before February 6 and during the plea negotiations on February 6), Mr. Willhoit was under the

impression that if Mr. Shannon went to trial on the 2013/Davis case, he could potentially face habitual offender sentencing.

Mr. Willhoit, having been told by Mr. Shannon that he wanted to resolve both cases that day and having received authorization from Mr. Davis to do so, engaged in plea negotiations for both the 2012 and 2013 charges. Mr. Shannon was willing to enter a plea with a sentence of 1-5 years and made clear to Mr. Willhoit that upon release from prison he was willing to do alcohol programming, but not willing to do domestic violence programming. Mr. Willhoit succeeded in reaching an agreement with the State on an overall result capped at 2-10 years to serve with Mr. Shannon free to argue for less at sentencing, deferred sentences that offered the opportunity for the convictions to be expunged, and conditions that did not include domestic violence programming:

2012/Willhoit
1 count aggravated domestic assault–no contest → felony; cap of 1-5 years, can argue for less
2 counts aggravated domestic assault–no contest→ deferred sentences (no DV programming)

2013/Davis
1 count aggravated domestic assault–no contest→ felony; cap of 1-5 years, consecutive to above
1 count DUI #3 – no contest → felony; cap of 1-5 years, concurrent
1 count aggravated domestic assault-no contest→ deferred sentence (no DV programming)
7 misdemeanors-various pleas → deferred sentences

Actual sentences were to be determined at sentencing but the overall maximum sentence would be capped at 10 years with Mr. Shannon free to argue for less. Mr. Willhoit planned to argue for an overall maximum of 1-5 years, which the terms of the agreement offered the opportunity to do. The deferred sentences required alcohol programming but not domestic violence programming.

Mr. Shannon entered pleas pursuant to these terms. Judge Morris conducted a thorough plea colloquy that lasted an hour and fifteen minutes. With respect to habitual offender sentencing, Judge Morris had the following interchange with Mr. Illuzzi and Mr. Shannon:

> THE COURT: Mr. Illuzzi, is it agreed in this case or these cases that as a result of these convictions there will be no habitual offender charge?
>
> MR. ILUZZI: Yes
>
> THE COURT: Okay. You've heard Mr. Illuzzi say you're not going to get a habitual offender charge by pleading to these charges. Do you understand that?
>
> THE DEFENDANT: Yes, sir.

Exhibit 1, page 37.

The most reasonable inference from this interchange is that Judge Morris, Attorney Willhoit, and Mr. Shannon all thought that there was a possibility of habitual offender sentencing

on the 2013/Davis felony charges if Mr. Shannon went to trial, and that the possibility was avoided by the terms of the plea agreement. Judge Morris did not clarify on the record that Mr. Shannon would *not* be subject to habitual offender sentence enhancement if he decided to go to trial rather than plea on the 2013/Davis charges. Judge Morris went on to clarify that after the convictions based on the pleas of that day, if Mr. Shannon committed a "brand new felony," he could be charged as a habitual offender on the basis of his record of convictions resulting from that day's pleas. It was clearly an important factor in the overall situation.

Judge Morris accepted the pleas, and a presentence investigation report (PSI) was ordered.

Motion to Withdraw Plea

On March 25, 2014, both Mr. Willhoit and Mr. Davis met with Mr. Shannon in jail to prepare him for the interview he would have with the Department of Corrections official conducting the PSI investigation. They sought to impress upon him the importance of taking responsibility for his conduct, despite his no contest pleas, in order to get a favorable sentencing recommendation.

Prior to sentencing, Mr. Shannon's father died. The attorneys were able to arrange a special furlough so that Mr. Shannon could attend his father's funeral.

Mr. Shannon then fired Mr. Willhoit, and Mr. Davis became Mr. Shannon's attorney for both cases.

Mr. Shannon subsequently wanted to withdraw his plea. While in prison he had learned that because of DOC scoring and classification, he would be required to do domestic violence programming in prison prior to release and that as a result he was not likely to be released at his minimum. He felt that he had been misled as he had understood that domestic violence programming would not be required at all. While Mr. Willhoit had been able to negotiate terms of deferred sentences that did not include domestic violence programming, neither Mr. Willhoit nor the Judge nor the State's Attorney had control over what the Department of Corrections might require as a condition of timing of release from prison. Mr. Shannon had apparently not understood that there was a distinction, although Mr. Willhoit testified that he described this fact to Mr. Shannon prior to the pleas. Exhibit 4, pages 28 line 23 to 29 line 11. Judge Morris also reviewed this with Mr. Shannon at the change of plea hearing. Exhibit 1, pages 51-52.

Mr. Davis filed a Motion to Withdraw Plea on Mr. Shannon's behalf. An evidentiary hearing was held on the motion in the spring of 2014, and the motion was denied. The transcript of the hearing, Exhibit 4, shows that the basis for the motion was learning after the plea hearing that he would have to do programming in prison that would delay his release beyond his minimum.[1] In order to qualify to do programming in prison that would allow him a favorable

[1] Mr. Shannon testified that he was "ecstatic" at the time he entered his pleas because he expected that the result would be release 30 days or so after sentencing.

release date, he would have to admit to the domestic violence conduct. On Mr. Shannon's behalf. Mr. Davis filed an appeal of the denial of the Motion to Withdraw Plea. The habitual offender issue did not come up as a basis for the Motion to Withdraw Plea. Apparently Mr. Shannon had not yet learned that he had never been subject to risk of habitual offender sentencing in the 2013/Davis case.

Mr. Shannon filed professional conduct complaints against both Mr. Willhoit and Mr. Davis and wanted Mr. Davis to withdraw.

In July of 2014, Mr. Davis filed a Motion to Withdraw as Mr. Shannon's attorney, and the motion was granted. Mr. Shannon was eventually sentenced to 1-5 years for the aggravated domestic assault in the 2012/Willhoit case with a consecutive sentence of 1-5 years (2 concurrent sentences of 1-5 years each for the aggravated domestic assault and the DUI #3 in the 2013/Davis case) for a controlling sentence of 2-10 years, plus the deferred sentences on the remaining counts in the two dockets.

Attorney Kelly Green testified as an expert witness about the standard required of an attorney under the circumstances of this case. The court finds credible her testimony that it is substandard practice for an attorney to allow her client to believe that he faces the risk of habitual offender/life imprisonment sentencing if he has only two felony convictions at the time of conduct for which he is charged. The court finds credible and persuasive her testimony that the standard of conduct required of Attorneys Davis and Willhoit was to inform Mr. Shannon that the State's Attorney's letter contained an error of law and that he did not face the risk of habitual offender sentencing with respect to any of the 2012 and 2013 charges. The court also finds credible her testimony that if a client agrees to the terms of a plea agreement and enters pleas believing that he is thereby avoiding a life sentence based on the charges, then he is prejudiced thereby, and moreover, his pleas have not been entered voluntarily.

Attorney Kelly Green also testified that it is substandard attorney practice for an attorney representing a client who enters guilty pleas pursuant to a plea agreement not to become familiar with the strengths and weaknesses of the State's charges as well as the terms of prior plea negotiations on those charges.

Conclusions of Law

Post-conviction claims of ineffective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, as interpreted by the Supreme Court of Vermont, a petitioner must first show by a preponderance of the evidence that his trial counsel's assistance "fell below an objective standard of performance informed by prevailing professional norms." *In re Hyde*, 2015 VT 106, ¶ 17, 200 Vt. 103, 111 (citing *In re Plante*, 171 Vt. 310, 313 (2000)). The petitioner must then also prove by preponderance that there is "a reasonable probability that, but for counsel's errors, the proceedings would have resulted in a different outcome." *Id.* "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *In re Allen*, 2014 VT 53, ¶ 20, 196 Vt. 498, 506 (quoting *Strickland*, 466 U.S. at 694).

In addition, pleas that are not made on a voluntary basis cannot stand. See *In re Mossey*, 129 Vt. 133, 139 (1971) (a conviction based on a guilty plea is valid only when the plea "represents a voluntary and intelligent choice of the alternative course available to him"); see also, *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) ("The longstanding test for determining the validity of a guilty plea is 'whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant'") (quoting *North Carolina v. Alford*, 400 U.S. 25, 31 (1970)).

Petitioner claims that Attorney Willhoit's performance on behalf of Mr. Shannon on February 6, 2014 fell below the required standard in two ways: (1) that he did not sufficiently familiarize himself with the contents of the affidavits regarding the 10 counts in the 2013/Davis case and did not become familiar with the strengths and weaknesses of the various counts, and (2) that he advised Mr. Shannon to accept the plea agreement terms when Mr. Shannon had a misunderstanding about the possibility of a life sentence if he did not stipulate to plea terms. Petitioner claims prejudice in that if Mr. Willhoit had more information about the weaknesses in two of the felony counts in the 2013/Davis case, he would not have entered all the pleas he did that day.

Claim that Mr. Willhoit fell below the required standard by not familiarizing himself sufficiently with the facts of the claims in the 2013/Davis case and the strengths and weaknesses of the various counts.

The findings of fact set forth above show that Mr. Willhoit was familiar with the charges in the 2013/Davis case and the facts related to them and the strengths and weaknesses of those counts. He had met with Mr. Shannon and Mr. Davis together in order to go over them in a discussion prior to February 6, 2014 about whether or not to take enter a global plea agreement. Mr. Willhoit had interviewed the witnesses for the 2012 case, some of whom were involved in the 2013 case. He knew that the aggravated domestic assault and DUI #3 cases had weaknesses. At the change of plea, he was sufficiently familiar with the facts of the counts that he assisted in clarifying them as needed during the colloquy. Mr. Davis, when contacted by telephone about the proposal to resolve the 2013/Davis case together with the 2012/Willhoit case, was sufficiently confident that Mr. Willhoit understood the charges well enough to negotiate a plea agreement that he authorized Mr. Willhoit to do so without further conversation, as long as the outcome was what Mr. Shannon wanted.

Even if the court were to find that the standard of required attorney conduct is as advocated by Petitioner on this issue, the court does not find that Petitioner has proven facts showing that Mr. Willhoit's conduct was substandard according to that standard. *In re Hyde*, 2015 VT 106, ¶ 17 (burden is on petitioner). Therefore, it is unnecessary for the court to make a determination as to the required standard of performance on this claim because the facts do not support a finding of conduct that would be substandard. Petitioner has not met his burden to show ineffective assistance of counsel by a preponderance of the evidence based on this reason.

Claim that Mr. Willhoit's representation fell below the required standard by not informing Mr. Shannon that as a matter of law, he could not be sentenced as a habitual offender on the 2013/Davis charges and thus did not face up to life imprisonment.

The court has found as fact that the standard of performance requires an attorney to advise a client that even if a State's Attorney is threatening habitual offender enhanced sentencing, it would not be allowed by law if the legal requirements for habitual offender enhancement do not exist. The court has also found as fact that Mr. Willhoit did not tell Mr. Shannon at any time on February 6, 2014 that there was no risk of habitual offender sentence enhancement if he chose to go to trial on the 2013/Davis charges and was convicted, despite the State's Attorney's letter. Thus, Petitioner has proved ineffective assistance of counsel on that issue.

Prejudice/ Voluntariness

Post conviction relief requires not only proof of ineffective assistance of counsel, but proof that the Petitioner was prejudiced by the substandard performance, or proof that the plea was not entered voluntarily. See *id.*; *In re Mossey*, 129 Vt. 133 at 139.

Mr. Shannon, in entering his pleas on February 6, 2014, was acting on the basis of information given to him by his lawyer that was inaccurate as to what his choices were. Mr. Shannon was unaware that there was no risk of habitual offender sentencing, and consequently no risk of life imprisonment, on the 2013/Davis charges because no lawyer had told him so. The result of the ineffective assistance of counsel was that Mr. Shannon believed that his choice involved choosing an alternative that would avoid life imprisonment. The threat of a State's Attorney seeking enhanced sentencing, up to life imprisonment, is an extremely powerful and important factor in the decision concerning which terms to agree to in a plea agreement. Mr. Shannon did not have all the information he should have had on this highly important issue because he did not know that the sentencing risk was limited by statutory maximums and could not be increased up to life imprisonment. Thus, the likelihood is significant that if he was fully and correctly informed, he would have made a different choice. See *In re Hyde*, 2015 VT 106, ¶¶ 17 (prejudice shown if there is a "reasonable probability"). Accordingly, Petitioner has proved that he was prejudiced by the ineffective assistance of counsel.

For the same reasons, the court cannot conclude that his plea was made on a voluntary basis. Mr. Shannon did not have accurate information that could enable him to make a "voluntary and intelligent choice among the alternative courses of action," *Hill*, 474 U.S. at 56, including going to trial on the 2013/Davis charges which is what he had intended to do until February 6, 2014.

Summary

For the foregoing reasons, the Petitioner has met the burden of proof on both necessary elements of a petition for post conviction relief and his petition is *granted*. A separate judgment is issued vacating all convictions to which he entered pleas on February 6, 2014.

Dated this 1st day of July, 2020.

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge