DOCKET NO. CV20-5000443-S	STATE OF CONNECTICUT SUPERIOR COURT G.A. 19	SUPERIOR COURT
JOHAN BATISTA	2024 MAY 14 P 12: 29	JUDICIAL DISTRICT OF TOLLAND ---
V.		HABEAS DOCKET
COMMISSIONER OF CORRECTION		MAY 14, 2024

MEMORANDUM OF DECISION

The petitioner, Johan Batista, asserts in his amended petition that his trial counsel was ineffective for failing to properly communicate with him and that his prior habeas counsel was ineffective for failing to raise such a claim as to trial counsel. The respondent's return denies these claims. The return further asserts that the claim against trial counsel is barred by res judicata and because it is successive and an abuse of the writ.

For the reasons set forth below, the claim against trial counsel is dismissed and the claim against prior habeas counsel is denied.

I. FACTUAL AND PROCEDURAL BACKGROUND

Batista was arrested and charged with murder in violation of General Statutes § 53a-54a (a), felony murder in violation of General Statutes § 53a-54c, robbery in the first degree in violation of General Statutes § 53a-134 (a) (3), and arson in the first degree in violation of General Statutes § 53a-111. Represented by Attorney William Westcott, Batista proceeded to a jury trial. The jury convicted Batista on all charged offenses except arson. On June 7, 2013, the court, *Kavanewsky, J.*, merged the murder conviction with the felony murder conviction and imposed a total effective sentence of sixty years of incarceration.

The first habeas court summarized the underlying facts, which are not contested, as follows:

> The petitioner and Wanda Gonzalez, a known drug dealer in Bridgeport, were known to be well-acquainted. Gonzalez was known to wear a significant amount of jewelry at all times, including a God medallion. Gonzalez had a romantic partner for about two, Jessica Aviles, who had lived with her prior to August 2006. Gonzalez and Aviles were on a relationship break at that time. The petitioner also lived with Gonzalez prior to August 2006. Prior to August 2006, the petitioner moved out of Gonzalez' apartment and moved in with his romantic partner Nancy Santiago, who used crack cocaine.
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> On August 6, 2006, Gonzalez died from blunt force trauma to her head and her body was set on fire on her bed. Gonzalez' body was found inside the apartment by firefighters. During their investigation, Bridgeport detectives interviewed Santiago on multiple occasions. Ultimately, Santiago identified the petitioner as one of the two men involved in causing the death of Gonzalez. Santiago and the petitioner were smoking crack cocaine at Santiago's apartment. After exhausting their supply of crack cocaine, the petitioner and Santiago drove Gonzalez' car to Gonzalez' apartment to obtain more crack cocaine. Santiago remained in the car while the petitioner went into Gonzalez' apartment. After waiting for a period of time, Santiago went into the apartment for the petitioner. Inside the apartment, Santiago observed the petitioner and another man assault Gonzalez. During the assault, the petitioner held Gonzalez while the other man hit her in the head with a bat. Thereafter, the petitioner left the apartment with Santiago, but returned after a period of time. Upon returning with the petitioner, Santiago observed Gonzalez on her bed in her bedroom and not moving. The petitioner poured a substance on Gonzalez' body, ignited an incendiary item and threw it on Gonzalez body to set her body on fire. The petitioner and Santiago left the apartment, drove away in Gonzalez' car and smoked crack cocaine in the car. At some point, the petitioner took a significant amount of jewelry from Gonzalez' apartment and stored it in a sock that he hid in a drawer at Santiago's apartment. The petitioner was investigated and subsequently arrested for the murder of Gonzalez. The case proceeded to trial on March 25, 2013. Several witnesses testified, including Nancy Santiago. On April 8, 2013, the jury found the petitioner guilty of murder, felony murder and robbery in the first degree.

Batista v. Commissioner of Correction, Superior Court, judicial district of Tolland, Docket No. CV-16-4008370-S (November 13, 2019) (2019 Conn. Super. LEXIS 2903), at 2-3.[1]

Batista appealed from the judgment of conviction. His direct appeal (AC 38761) was withdrawn on April 13, 2016.

[1] The court takes judicial notice of this prior habeas matter, including the court file and the full exhibits. See Practice Book § 23-36; Carpenter v. Planning & Zoning Commission, 176 Conn. 581, 591, 409 A.2d 1029 (1979) ("The trial court has the power to take judicial notice of court files of other actions between the same parties.")

Batista filed his first habeas corpus petition challenging these convictions in 2016. Assigned counsel, Attorney Nicole Britt, investigated potential claims and amended the petition several times. In a fourth amended petition, Attorney Britt claimed that Batista's trial counsel, Attorney William Westcott, was ineffective for failing to consult with and/or hire a toxicology or related expert, failing to present toxicology expert testimony, failing to present the testimony of Jessica Aviles, and failing to request a third-party culpability instruction. The fourth amended petition also averred in a second count that there was a due process violation premised on the identical grounds alleged as grounds for ineffective assistance. The first habeas court denied theses claims and denied the petition for certification to appeal. Although Batista appealed from the denied petition for certification to appeal, the appeal (AC 43764) was withdrawn on July 21, 2023.

II. FACTUAL FINDINGS

1. Attorney Nicole Britt

Attorney Britt represented Batista in his first habeas, met with him on several occasions, and also had limited contact via phone calls and correspondence. Batista spoke Spanish but not English, which necessitated an interpreter. According to Attorney Britt, there was little communicated through phone calls and correspondence aside from Batista requesting an in-person visit or meeting with Attorney Britt. A Spanish interpreter was present for all in-person meetings.

Attorney Britt reviewed potential habeas claims with Batista. Although Batista complained that Attorney Westcott had not come to see him in person in the prison prior to the criminal trial, Attorney Britt did not raise a claim in the prior habeas premised on Attorney Westcott failing to communicate effectively with Batista. Attorney Britt had no recollection of asking Batista if Attorney Westcott hired a Spanish translator to assist in communications between them.

On cross-examination, Attorney Britt acknowledged that she considered a claim of ineffective assistance by Attorney Westcott premised on his failure to communicate effectively with Batista. However, Attorney Britt explained that there was no evidence regarding what Attorney Westcott failed to tell Barista, nor was there evidence of a failure to communicate that would have somehow impacted the outcome of the criminal case. Attorney Britt had no recollection of Barista providing her with any specific information that Attorney Westcott had failed to communicate. The lack of such evidence meant, in Attorney Britt's assessment, that Batista would be unable to prove how he was prejudiced. Attorney Britt focused instead on other claims that she concluded were supported by evidence.

2. Attorney William Westcott

Attorney Westcott replaced Attorney David Bothwell as trial counsel after Bothwell withdrew due to a conflict. Attorney Bothwell had represented Batista for a while, investigated the case, and prepared for trial. At the time Attorney Westcott took over the case, he and Attorney Bothwell had extensive discussions about the case, which essentially was ready for trial. It took several months for the case to go forward. Attorney Westcott described predecessor counsel's file as extensive because Attorney Bothwell had done significant work investigating and preparing for trial. These case materials were very helpful to Attorney Westcott.

Attorney Westcott met with Batista prior to trial to discuss trial strategy and legal defenses. These meetings occurred primarily, perhaps even exclusively, at the courthouse so that interpreter services provided by the court were available. Attorney Westcott did not separately hire an interpreter, which he would have needed had he met with Batista in prison or had they engaged in phone conversations. According to Attorney Westcott, he and Batista spoke frequently at the courthouse during the timeframe leading up to the trial, and court personnel were helpful in making time and space available to them for these discussions. Attorney Westcott noted that it was

uncommon for defense counsel to hire Spanish speaking interpreters; instead, attorneys relied on courthouse interpreters. Attorney Westcott would have made arrangements for additional time for discussions had he felt he needed more time to discuss matters with Batista. Attorney Westcott did not recall feeling he had insufficient time to discuss the case with Batista and did not think that his communications with Batista could have been better. Attorney Westcott also did not think that more communications would have led to Batista better assisting the defense in any meaningful way. The conversations he and Batista had were productive and addressed all the important issues they needed to discuss about the trial.

On cross-examination, Attorney Westcott reiterated that he and Batista, with the assistance of an interpreter, had "many, many" conversations about the weighty issues in the criminal case, the state's evidence, and the witnesses' statements. The state's most important witness, Nancy Santiago, had provided numerous statements to the police. Attorney Westcott discussed these statements with Batista and explained how they could be used to undermine her credibility with the jury. The trial strategy relied on attacking Santiago's credibility and raising doubt that she was present at the crime scene. Batista was an active participant in these discussions about the trial strategy, the evidence that would be presented against him, and the potential testimony from his brother, Ramiro Batista, that Batista had confessed the crimes to him. Attorney Westcott also engaged in plea discussions with the state, but Batista was adamant that he would not accept a plea offer.

3. Johan Batista

Batista testified that Attorney Bothwell always communicated with a translator when they met or had legal calls and that they also corresponded in Spanish. Attorney Westcott replaced Attorney Bothwell, and their communications were different. According to Batista, Attorney Westcott never communicated with him; never scheduled legal visits with him; never sent an investigator to meet with him; did not discuss the charges, the state's evidence, and any defenses

with him; and never discussed the trial strategy with him. Batista also testified that Attorney Westcott never informed him that his brother would be testifying against him. However, on cross-examination, Batista agreed that Attorney Bothwell went over the state's evidence and the charges with him.

Additional facts will be discussed below as necessary to address Batista's claims.

III. APPLICABLE LEGAL STANDARDS AND DISCUSSION

A. INEFFECTIVE ASSISTANCE OF COUNSEL

It is well established that a criminal defendant is constitutionally entitled to adequate and effective assistance of counsel at all critical stages of criminal proceedings. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This right arises under the sixth and fourteenth amendments to the United States constitution and article first, § 8, of the Connecticut constitution. Horn v. Commissioner of Correction, 321 Conn. 767, 775, 138 A.3d 908 (2016). Thus, because "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair;" (internal quotation marks omitted) Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, supra, 686.

1. Two-part test

To determine whether a defendant is entitled to a new trial due to a breakdown in the adversarial process caused by counsel's inadequate representation at trial, courts apply the familiar two part test adopted by the United States Supreme Court in Strickland. Skakel v. Commissioner of Correction, 329 Conn. 1, 30, 188 A.3d 1 (2018). A petitioner's claim that trial counsel's assistance was so defective as to require reversal of a conviction has two components. "First, the defendant

must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." (Internal quotation marks and citations omitted.) Skakel v. Commissioner of Correction, supra, 30. Without a showing as to both components, it cannot be said that the conviction resulted from a breakdown in the adversary process, rendering the result unreliable. Strickland v. Washington, supra, 466 U.S. 687. However, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice ... that course should be followed." Strickland v. Washington, supra, 697; State v. Brown, 279 Conn. 493, 525-26, 903 A.2d 169 (2006); Aillon v. Meachum, 211 Conn. 352, 362, 559 A.2d 206 (1989).

a. Performance Prong.

The sixth amendment "does not guarantee perfect representation, only a reasonably competent attorney. . . . Representation is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial." (Internal quotation marks omitted.) Skakel v. Commissioner of Correction, supra, 329 Conn. 30-31 (quoting Harrington v. Richter, 562 U.S. 86, 110, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)). With respect to the first part of the Strickland test, "the proper standard for attorney performance is that of reasonably effective assistance." Strickland v. Washington, supra, 466 U.S. 687. "Consequently, to establish deficient performance, the petitioner must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by

prevailing professional norms." Skakel v. Commissioner of Correction, supra, 31. "Moreover, strategic decisions of counsel, although not entirely immune from review, are entitled to substantial deference by the court." Id.

b. Prejudice Prong.

When defense counsel's performance is found to not be reasonable, a new trial is required only if there exists "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, supra, 466 U.S. 694. "The question, therefore, is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (Internal quotation marks omitted.) Skakel v. Commissioner of Correction, supra, 329 Conn. 38 (quoting Strickland v. Washington, supra, 466 U.S. 694-95).

However, "a [petitioner] need not show that counsel's deficient conduct more likely than not altered the outcome of the case . . . because the result of a criminal proceeding can be rendered unreliable, and thus the proceeding itself unfair, even if errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." (Citation omitted; internal quotation marks omitted.) Skakel v. Commissioner of Correction, supra, 329 Conn. 38 (quoting Strickland v. Washington, supra, 466 U.S. 693-94). The petitioner must establish, instead, that the deficient performance gives rise to a loss of confidence in the verdict. Id. The habeas court's inquiry must focus on the fundamental fairness of the proceeding and the court must be "concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Strickland v. Washington, supra, 466 U.S. 696.

2. Prior Habeas Counsel.

"The use of a habeas petition to raise an ineffective assistance of habeas counsel claim, commonly referred to as a habeas on a habeas, was approved by our Supreme Court in Lozada v. Warden, 223 Conn. 834, 613 A.2d 818 (1992). In Lozada, the court determined that the statutory right to habeas counsel for indigent petitioners provided in General Statutes § 51-296 (a) includes an implied requirement that such counsel be effective, and it held that the appropriate vehicle to challenge the effectiveness of habeas counsel is through a habeas petition.... In Lozada, the court explained that [t]o succeed in his bid for a writ of habeas corpus, the petitioner must prove both (1) that his appointed habeas counsel was ineffective, and (2) that his trial counsel was ineffective. ... Gerald W. v. Commissioner of Correction, 169 Conn. App. 456, 463–64, 150 A.3d 729 (2016), cert. denied, 324 Conn. 908, 152 A.3d 1246 (2017).

"As to each claim of ineffectiveness, the petitioner must satisfy the familiar two-pronged test set forth in Strickland v. Washington, supra, 466 U.S. at 687, 104 S. Ct. 2052. First, the [petitioner] must show that counsel's performance was deficient.... Second, the [petitioner] must show that the deficient performance prejudiced the defense.... Unless a [petitioner] makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.... In other words, a petitioner claiming ineffective assistance of habeas counsel on the basis of ineffective assistance of trial counsel must essentially satisfy Strickland twice.... Gerald W. v. Commissioner of Correction, supra, 169 Conn. App. at 464, 150 A.3d 729.

"The performance inquiry centers on whether counsel's assistance was reasonable considering all the circumstances.... Judicial scrutiny of counsel's performance must be highly deferential and courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the [petitioner] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial

strategy.... [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; [but] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.... With respect to the prejudice prong, the petitioner must establish that if he had received effective representation by habeas counsel, there is a reasonable probability that the habeas court would have found that he was entitled to reversal of the conviction and a new trial .... Id., at 464–65, 150 A.3d 729. Simply put, a petitioner cannot succeed as a matter of law ... on a claim that his habeas counsel was ineffective by failing to raise a claim against trial counsel or prior habeas counsel in a prior habeas action unless the petitioner ultimately will be able to demonstrate that the claim against trial or prior habeas counsel would have had a reasonable probability of success if raised. Lebron v. Commissioner of Correction, 178 Conn. App. 299, 320, 175 A.3d 46 (2017), cert. denied, 328 Conn. 913, 179 A.3d 779 (2018)." (Internal quotation marks omitted.) Harris v. Commissioner of Correction, 191 Conn. App. 238, 246–48, 214 A.3d 422, 427–28, cert. denied, 333 Conn. 919, 217 A.3d 1 (2019).

B. DISCUSSION

The first count of the amended petition avers that that Attorney Westcott was ineffective as trial counsel because he failed to effectively communicate with Batista. It is undisputed that Batista's first habeas petition raised and litigated a claim of ineffective assistance by Attorney Westcott. The respondent's return asserts that Batista is barred by res judicata from relitigating this claims, as well as that the claim is successive and that he is abusing the writ of habeas corpus. The court agrees with the respondent that the claim in count one is successive and barred by res judicata.

"'The doctrine of res judicata provides that a former judgment serves as an absolute bar to a subsequent action involving any claims relating to such cause of action which were actually made or which might have been made. . . . The doctrine . . . applies to criminal as well as civil proceedings and to state habeas corpus proceedings. . . . However, [u]nique policy considerations must be taken into account in applying the doctrine of res judicata to a constitutional claim raised by a habeas petitioner. . . . Specifically, in the habeas context, in the interest of ensuring that no one is deprived of liberty in violation of his or her constitutional rights . . . the application of the doctrine of res judicata . . . [is limited] to claims that actually have been raised and litigated in an earlier proceeding.' (Internal quotation marks omitted.) Carter v. Commissioner of Correction, 133 Conn. App. 387, 393, 35 A.3d 1088, cert. denied, 307 Conn. 901, 53 A.3d 217 (2012).

"'In the context of a habeas action, a court must determine whether a petitioner actually has raised a new legal ground for relief or only has alleged different factual allegations in support of a previously litigated claim.' Johnson v. Commissioner of Correction, [168 Conn. App. 294, 305, 145 A.3d 416, cert. denied, 323 Conn. 937, 151 A.3d 385 (2016)] 'Identical grounds may be proven by different factual allegations, supported by different legal arguments or articulated in different language. . . . They raise, however, the same generic legal basis for the same relief. Put differently, two grounds are not identical if they seek different relief.' (Citations omitted.) James L. v. Commissioner of Correction, 245 Conn. 132, 141, 712 A.2d 947 (1998).

"'[T]he doctrine of res judicata in the habeas context must be read in conjunction with Practice Book § 23-29 (3), which narrows its application. . . . Practice Book § 23-29 states in relevant part: The judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that . . . (3) the petition presents the same ground as a prior petition previously denied and fails to state new facts or to proffer new evidence not reasonably available at the time of the prior petition. . . . Thus, a

subsequent petition alleging the same ground as a previously denied petition will elude dismissal if it alleges grounds not actually litigated in the earlier petition and if it alleges new facts or proffers new evidence not reasonably available at the time of the earlier petition. . . . In this context, a ground has been defined as sufficient legal basis for granting the relief sought." (Citations omitted; internal quotation marks omitted.) Johnson v. Commissioner of Correction, supra, 168 Conn. App. 305-06. 'Simply put, an applicant must show that his application does, indeed, involve a different legal ground, not merely a verbal reformulation of the same ground.' (Internal quotation marks omitted.) Carter v. Commissioner of Correction, [133 Conn. App. 387, 394, 35 A.3d 1088, cert. denied, 307 Conn. 901, 53 A.3d 217 (2012)]. Further, this doctrine applies equally to claims litigated on direct appeal, not just to claims raised in prior habeas petitions. See Faraday v. Commissioner of Correction, 107 Conn. App. 769, 776-77, 946 A.2d 891 (2008); Fernandez v. Commissioner of Correction, 86 Conn. App. 42, 45-46, 859 A.2d 948 (2004)." Sanchez v. Commissioner of Correction, 203 Conn. App. 752, 762-764, 250 A.3d 731, cert. denied, 336 Conn. 946, 251 A.3d 77 (2021).

"When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ. The government satisfies this burden if, with clarity and particularity, it notes [the] petitioner's prior writ history, identifies the claims that appear for the first time, and alleges that [the] petitioner has abused the writ. The burden to disprove abuse then becomes [the] petitioner's. To excuse his failure to raise the claim earlier, he must show cause for failing to raise it and prejudice therefrom as those concepts have been defined in our procedural default decisions. The petitioner's opportunity to meet the burden of cause and prejudice will not include an evidentiary hearing if the district court determines as a matter of law that [the] petitioner cannot satisfy the standard. If [the] petitioner cannot show cause, the failure to raise the claim in an earlier petition may nonetheless be excused if he or she can show that a fundamental miscarriage of justice

would result from a failure to entertain the claim." Mejia v. Commissioner of Correction, 98 Conn. App. 180, 195, 908 A.2d 581 (2006), citing and quoting McCleskey v. Zant, 499 U.S. 467, 494-95, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991).

Batista previously raised a claim of ineffective assistance by trial counsel, in which he sought to vacate the convictions and sentences, and which was adjudicated by the first habeas court. The court concludes that the claim in count one is successive and barred by res judicata because it seeks to relitigate ineffective assistance by trial counsel on factual grounds previously available and seeking the same relief (i.e., vacating the convictions and sentences). Consequently, count one is dismissed.

Count two avers that Attorney Britt was ineffective as prior habeas counsel for not alleging that Attorney Westcott was ineffective because he did not effectively communicate with Batista. The credible evidence does not substantiate this claim. Attorney Britt considered such a claim but concluded that, even assuming deficient performance, she would not be able to prove that Batista was prejudiced thereby. Attorney Britt had no evidence to convince the prior habeas court that its confidence in the outcome of the jury trial verdict was undermined because Attorney Westcott did not effectively communicate with Batista. Attorney Westcott credibly testified that he used an interpreter or translator whenever he met with Batista because of the language barrier. Juxtaposed with the credible testimony from both Attorneys Britt and Westcott is Batista's wholly unbelievable testimony about Attorney Westcott's complete failures to perform basic and essential defense counsel functions. Further undermining Batista's credibility is the fact that he did not identify such abysmal failures to Attorney Britt in his prior habeas.

The court concludes, therefore, that Batista has failed to prove that Attorney Britt was deficient in her performance and that he was prejudiced thereby. The claim of ineffective assistance of prior habeas counsel in count two must be denied for lack of credible evidence.

IV. CONCLUSION

Batista is barred from relitigating his claim of ineffective assistance by trial counsel. Batista has not met his burden of proving that prior habeas counsel was ineffective. He has neither proven deficient performance nor shown that there is a reasonable likelihood of a different outcome in the criminal and prior habeas trials. The petition is dismissed in part and denied in part—that is, the claim against trial counsel is dismissed and the claim against prior habeas counsel is denied. Judgment shall enter for the respondent.

E/Wagner
Wagner, J.

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5/14/2024