STATE OF VERMONT

SUPERIOR COURT **CIVIL DIVISION**
Orleans Unit **Docket No. 92-4-20 Oscv**

DYLAN COTE,
Plaintiff,
v.

STATE OF VERMONT,
Defendant

PETITION FOR POST CONVICTION RELIEF

Decision on Petitioner's Motion for Summary Judgment, and Order

Dylan Cote petitions for post-conviction relief from a criminal conviction on grounds of ineffective assistance of counsel, and now seeks summary judgment on that claim. Mr. Cote is represented by Attorney David C. Sleigh and the State is represented by State's Attorney Jennifer Barrett.

Facts

There are some disagreements on some facts, but the court has reviewed each disputed fact carefully and has found that some disputed facts are unnecessary to the decision and not material. Others are based on inferences and characterization and have been disregarded. The facts set forth below are facts set forth by the parties that are not disputed.[1]

On April 14, 2017, Dylan Cote was a passenger in a vehicle driven by his friend and soon-to-be co-defendant Trevor Letourneau. As the pair traveled up I-91, they were observed by two Orleans County Sheriff's Department law enforcement officers. The officers had received a tip that the two were transporting drugs. The officers conducted a traffic stop purportedly based on observation of two minor traffic violations, specifically failure to use turn signal and failure to equip vehicle with mud flaps.

While stopped, a Deputy Sheriff deployed his drug-sniffing canine, Jonah, to search the car for drugs. Ultimately, after the dog had signaled the presence of drugs, Mr. Cote and Mr. Letourneau were arrested and charged with felony drug offenses.

The next day, on April 18, 2017, each applied for representation by a public defender. Each application was approved and each of them was assigned a lawyer. Mr. Cote pled not guilty and denied a simultaneously filed probation revocation charge, and was held without bail.

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[1] The State disputes some of Plaintiff's proposed findings on the ground that they are conclusory overstatements or not supported by the record cited for them. Where the court has found either of those circumstances to be accurate, the court has excluded and not considered such proposed facts. The court has resolved all reasonable doubts and inferences in favor of the State. Plaintiff has not disputed additional proposed undisputed facts submitted by the State.

Attorney Jill E. Jourdan of NEKLaw, public defender, was assigned to represent Mr. Cote. Given the inherent conflict between the two defendants, Mr. Letourneau was assigned conflict counsel Trudy Miller.

Ultimately, Ms. Miller filed on behalf of Mr. Letourneau a Motion to Suppress the evidence obtained as a result of the dog sniff, arguing that under the Vermont Constitution, the expansion of the stop initiated by the officers exceeded what was necessary to address the observed traffic violations and was unreasonable, and that all evidence obtained as a result of the search should be suppressed. The court granted Ms. Miller's Motion to Suppress in July of 2018. Thereafter, the court also granted Ms. Miller's subsequent Motion to Dismiss the charges against Mr. Letourneau, citing a lack of sufficient remaining evidence. The State did not appeal either of those orders.

Attorney Jill Jourdan was the owner and principal attorney at NEKLaw, which had a contract to provide primary public defender services in Caledonia, Essex, and Orleans counties, and had two offices, one in St. Johnsbury and one in Newport. At the time a public defender was assigned to Mr. Cote, the Newport NEKLaw office was staffed by two attorneys, Jill Jourdan and Dan Harnick. Ms. Jourdan had been admitted to practice in Vermont in 2002. Mr. Harnick had practiced for a short time in Missouri before joining NEKLaw, and was not yet admitted in Vermont. He was later admitted in September 2017, during the pendency of Mr. Cote's case.

Once Jill Jourdan of NEKLaw was assigned to Mr. Cote, the two attorneys shared representation of him. Both attorneys were responsible for the cases in the office and they consulted, worked on and talked about every case. Ms. Jourdan had no direct contact or communication with Mr. Cote from the time of the arraignment on April 18, 2017, until a pretrial conference on January 2, 2018. Mr. Harnick talked with him several times during that period but does not remember if he ever visited Mr. Cote in jail. Mr. Harnick's notes of his periodic conversations with Mr. Cote reflect that the discussions involved possible pleas. Mr. Cote consistently planned on fighting the charges and not accepting plea offers.

Ms. Jourdan knew that search and seizure law under Article 11 of the Vermont Constitution was different from the law interpreted by the United States Supreme Court under Article 4 of the United States Constitution. She was aware of the current case law surrounding the legal issue in Mr. Cote's case. The specific issues raised in the Motion to Suppress in the Letourneau case had not been addressed or decided by the Vermont Supreme Court. In June of 2017, Mr. Harnick made the following notation on the outside of Mr. Cote's file: "Reviewed File → Suppress?"

At some point, probably between June and August, Ms. Jourdan and Mr. Harnick discussed the suppression issue and the viability of a motion to suppress. The two attorneys agreed that the traffic stop was a constitutionally valid stop.[2] Mr. Harnick believed the suppression analysis was "a different suppression analysis between the two individuals, to some extent, at least." The deadline for filing motions in Mr. Cote's case was September 18, 2017.

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[2] Absent from the statements of undisputed facts and from the record is any indication that the two attorneys discussed whether the expansion of a stop made for traffic offenses to an investigation that included a warrantless dog sniff was constitutionally valid.

No motion to suppress was filed. Ms. Jourdan does not remember conducting any legal research in connection with Mr. Cote's case. Mr. Harnick did some legal research. He does not recall any specific case that he reviewed. He probably first became aware of the difference between federal Fourth Amendment jurisprudence and Vermont Article 11 law regarding search and seizures, and also of a split of authority between the states as to whether a dog sniff constitutes a search under their various state constitutions, when he read the Decision of Judge Bent granting the Motion to Suppress in the Mr. Letourneau case, which did not take place until July of 2018, months after Mr. Cote's case had been resolved by a plea agreement. Thus, during his work on behalf of Mr. Cote while Mr. Cote's case was pending, he was unaware of Vermont Article 11 jurisprudence.

There is no dispute that the following are required standards for criminal defense attorneys:

1. Counsel should interview their client as many times as necessary for effective representation, which in all but the most simple and routine cases will mean more than once. Defense counsel should make every reasonable effort to meet in person with their client. Consultation with the client regarding available options, immediately necessary decisions, and next steps, should be a part of every meeting.
2. As early as practicable in the representation, defense counsel should discuss legal options likely available to their client, such as motions.
3. For each matter, defense counsel should consider what motions to file and not simply follow rote procedures learned from prior matters.
4. Defense counsel should adequately prepare the defense of their client and conduct relevant legal research.
5. Strategic and tactical decisions should be made by defense counsel after consultation with their client. Such decisions include how to craft and file motions.

On January 2, 2018, Attorney Jourdan was present in court with Mr. Cote at a pretrial conference two days before the scheduled jury draw. This was her first conversation with him since the arraignment in April. Although a plea agreement had been tentatively reached, during the colloquy with the court Mr. Cote said he could not admit to the facts described by the State and no plea was made or accepted that day.

There is a dispute of fact on one point concerning the conversation between Ms. Jourdan and Mr. Cote that day. Ms. Jourdan responded to the following deposition question, "[s]o you discussed with Mr. Cote in January whether it was advisable to file a Motion to Suppress?" with the response, "[m]e personally, yes." She testified that she "would have" explained the basis for a possible motion to suppress to Mr. Cote, but she does not recall the actual conversation she had with him.

She testified that she speaks to her clients as follows: "I talk to them about what they can do in their case, about sometimes – he was incarcerated at the time. So it would have factored in for him how long it would have taken me to file the Motion, get it to a hearing, and then wait for a decision. He would have been incarcerated potentially all of that time."

Mr. Cote states in his affidavit that at no time during the pendency of his case did either lawyer discuss with him the possibility of filing a motion to suppress on his behalf.

Regardless of what actually occurred during the January conversation between Ms. Jourdan and Mr. Cote, the deadline for filing a motion to suppress had passed more than three months earlier, and jury draw was scheduled in two days. It is a reasonable inference from undisputed facts that no conversation about the possibility of filing a motion to suppress took place between Mr. Cote and either of his attorneys prior to the deadline for filing motions.

On the scheduled jury draw day, January 4, 2018, Mr. Cote entered a plea to a felony pursuant to a plea agreement and, consistent with the agreement negotiated by Ms. Jourdan, he was sentenced to 2 to 7 years to serve. At that time he had 255 days of credit for time served on pretrial detention. He was released on furlough on June 4, 2018, five months after his plea.

Six weeks later, on July 28, 2018, Judge Bent issued his Decision in Mr. Letourneau's case, granting the Motion to Suppress. After reviewing decisions from other states and conducting an Article 11 analysis, Judge Bent wrote, "[t]he seizure of the Defendant's motor vehicle was for a specific and limited purpose and that was to follow up on Defendant's failure to use a turn signal. Using that stop to conduct an illegal search of the vehicle via a canine sniff exceeded the scope of the allowable purpose of the seizure thus rendering the fruits of the search illegal." Mr. Harnick read the decision and discussed it with Ms. Jourdan. They decided not to tell Mr. Cote anything about it.

There is no dispute that a required standard for criminal defense attorneys is that when, after conviction, counsel becomes aware of newly discovered information that creates a reasonable likelihood that a former client was wrongfully convicted, counsel has a duty to act. This duty applies even after counsel's representation has ceased.

Mr. Cote's expert witness, Daniel Sedon, is a criminal defense attorney with 28 years of experience in Vermont. His affidavit sets forth his opinions about the standard of practice to be met by an attorney under the circumstances of this case. He states that the NEKLaw attorneys fell below the standard of practice in Vermont. His opinion is that the attorneys performed below the standard of practice expected of assigned counsel in criminal cases when individually and collectively they failed to:

1. Adequately research the viability of a motion to challenge the search and seizure of critical evidence
2. File a Motion to Suppress the fruits of the search which lead to the seizure of evidence
3. Meaningfully discuss with Mr. Cote the viability of a Motion to Suppress when representing the strength of the State's case to him
4. Failed to inform Plaintiff of the dismissal of his co-defendant's case following Ms. Miller's successful Motion to Suppress and Motion to Dismiss, and
5. Failed to make any remedial efforts on behalf of Plaintiff after learning of the dismissal of the co-defendant's case.

His opinion is also that as a result of the failure to research the viability of a motion to suppress and discuss it with him, Mr. Cote was deprived of the opportunity to make an informed decision about whether to pursue a motion that could have resulted in avoidance of a felony conviction, or whether to waive rights and take a plea bargain, or whether to go to trial.

The State's response to the expert opinions of Daniel Sedon is to describe them as "genuine issues of material fact and depend on the specific findings of fact. The State expects its expert to reach a different conclusion." However, the State did not offer a different expert opinion on either the standard of practice or whether Mr. Cote's attorneys failed to meet required standards, or whether the outcome would have been affected if standards had been met. Where a plaintiff provides support for its proposed undisputed facts, a defendant cannot rely on a general denial. *Kelly v. Town of Barnard,* 155 Vt. 296, 583 A. 2d 614 (1990).

While the court is not obligated to accept an expert opinion, the court finds that Attorney Sedon's opinions are substantiated and credible, as well as uncontradicted, and accepts them as facts.

Analysis

Mr. Cote asserts he was denied effective assistance of counsel to his prejudice because of NEKLaw's failure to file a motion to suppress, or at least adequately discuss with him the option to do so. He requests that the court grant summary judgment in his favor and order his conviction vacated.

On a motion for summary judgment, the movant must show that "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." V.R.C.P. 56(a). "Accordingly, [t]he nonmoving party is entitled to all reasonable doubts and inferences regarding those facts." *Zullo v. State*, 2019 VT 1, ¶ 4, 209 Vt. 298, 306 (internal quotation removed).

A petitioner seeking post-conviction relief has the burden of establishing by a preponderance of the evidence that "fundamental errors rendered his conviction defective." *In re Combs*, 2011 VT 75, ¶ 9, 190 Vt. 559, 561 (quoting *In re Liberty*, 154 Vt. 643, 644 (1990)).

When the PCR claim is for ineffective assistance of counsel, Vermont courts apply a two-part test that is "essentially equivalent under the United States and Vermont Constitutions." *In re Russo*, 2010 VT 16, ¶ 16, 187 Vt. 367, 373 (citing and comparing to standard applied in *Strickland v. Washington*, 466 U.S. 668, 687 – 88 (1984)). Under the first prong of the test, the petitioner must show "by a preponderance of the evidence that defense counsel's performance fell below an objective standard of reasonableness informed by prevailing professional norms." *In re Combs*, 2011 VT 75, ¶ 9 (internal quotations removed); see *Strickland*, 466 U.S. at 687 – 88. The measurement of an attorney's conduct against prevailing professional norms should not be influenced by hindsight. *In re Russo*, 2010 VT 16, ¶ 16.

If the first burden is met, petitioner must establish prejudice under the second prong with a showing of a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *In re Combs*, 2011 VT 75, ¶ 9.

Applying the first prong of the two-part test to the undisputed facts, the court concludes that NEKLaw's performance fell below the standard of practice expected of assigned counsel in criminal cases. Central to Mr. Cote's ineffective assistance of counsel claim is NEKLaw's failure to adequately analyze the facts of the case with respect to Article 11 of the Vermont Constitution, resulting in the failure to file a motion to suppress challenging the fruits of the drug

investigation, or at least to meaningfully consult with Mr. Cote about the opportunity and option of filing such a motion.

Criminal defense attorneys in Vermont have understood for many years that Article 11 of the Vermont Constitution provides greater protection to citizens from warrantless searches and seizures than the Fourth Amendment of the U.S. Constitution. By the time NEKLaw began representing Mr. Cote in 2017, the Vermont Supreme Court had "long held that our traditional Vermont values of privacy and individual freedom – embodied in Article 11 – may require greater protection than that afforded by the federal Constitution." *State v. Bauder*, 2007 VT 16, ¶ 10, 181 Vt. 392, 396. The Court has "consistently held that Article 11 provides greater protections that its federal analog, the Fourth Amendment," *State v. Cunningham*, 2008 VT 43, ¶ 16, 183 Vt. 401, 410, and has demonstrated its willingness to apply this construction of Article 11 to warrantless searches and seizures in numerous cases, including in the context of traffic stops. See e.g., *Bauder*, 2007 VT 16, ¶¶ 1, 13 – 14, 22 (holding warrantless search of vehicle after occupant was arrested and secured to be illegal under Article 11 absent reasonable need to protect officer safety or preserve evidence, rejecting federal jurisprudence and emphasizing Article 11's protection of warrant requirement); *State v. Sprague*, 2003 VT 20, ¶¶ 13, 16, 175 Vt. 123, 128 – 129 (diverging from U.S. Supreme Court interpretation of Fourth Amendment to hold Article 11 does not permit routine exit orders following stop for traffic violation and police must have reasonable basis to believe safety of officer or others at risk or that a crime was committed); *State v. Savva*, 159 Vt. 75, 90 – 91 (1991) (holding that warrantless search of the closed paper bag found inside car during traffic stop was not supported by exigent circumstances so as to be allowable under Article 11, and that mobility in the context of a vehicle is not an exigent circumstance per se).

Because of the consistency and clarity with which the Vermont Supreme Court has differentiated between Article 11 and the Fourth Amendment, it is incumbent on Vermont criminal defense lawyers to analyze searches and seizures with respect to Article 11 jurisprudence as standard practice.

NEKLaw's failure to file a motion to suppress challenging the evidence seized from the vehicle, or even to discuss the option with Mr. Cote, fell below the standard of practice because the decision not to file was not based on an informed analysis of the relevant legal issues. The expansion of the traffic stop into a drug investigation and warrantless deployment of a drug-sniffing canine resulted in the seizure of significant evidence implicating Mr. Cote. Despite the critical nature of this evidence to the State's case, neither Ms. Jourdan nor Mr. Harnick adequately analyzed whether Mr. Cote's rights had been violated under the relevant Article 11 standard during that stop such that the fruits of the investigation could be suppressed. Mr. Harnick conducted some research, but not enough to learn of the critical difference between Fourth Amendment jurisprudence and the way the Vermont Supreme Court has interpreted Article 11. He was consequently unreasonably unaware of the law most applicable to the issues involved in a potential motion to suppress.

While Ms. Jourdan knew of the difference between Article 11 and Fourth Amendment jurisprudence, she did not conduct any research, and her awareness did not prompt adequate or timely consideration of the Article 11 issues in Mr. Cote's case. Ms. Jourdan and Mr. Harnick discussed the suppression issue enough to determine that the traffic stop was constitutionally valid but there is no indication that they discussed the issues surrounding the validity of the

expansion of the stop into a drug investigation and the warrantless use of the dog sniff, nor the opportunity to test the constitutionality of such conduct, which was a recognized open question in Vermont. See *State v. Alcide*, 2016 VT 4, ¶ 17, fn, 201 Vt. 103, 111 ("we have not yet ruled whether a drug dog can be used to sniff out drugs without reasonable suspicion of criminal activity under Article 11") (citing *Cunningham* 2008 VT 43, where issue was raised but not decided).

While the Vermont Supreme Court had not ruled on the specific issue of the dog sniff, NEKLaw attorneys had reason to be aware of the need for reasonable suspicion prior to expanding a traffic stop premised on a traffic violation to a drug investigation, and on the Vermont Supreme Court's reluctance to make exceptions to the warrant requirement and its jurisprudence construing Article 11 to provide greater protections than the Fourth Amendment. See *Cunningham*, 2008 VT 43, ¶ 30 ("expansion is an additional seizure under Article 11, and therefore must-like an initial stop-be supported by a reasonable, articulable suspicion of wrongdoing"); *Savva*, 159 Vt. 75, 86 (1991) (warrantless searches are per se unreasonable and "[i]n dealing with the difficult problem of automobile searches, we do not believe this principle can be sacrificed for the sake of law enforcement convenience").

Ms. Jourdan either failed to analyze the expansion of the stop and the dog sniff under Article 11 or she did apply Article 11 jurisprudence to the facts but failed to bring it up with Mr. Harnick when discussing the possibility of a suppression motion, nor did she discuss it with Mr. Cote in a timely manner as an option before the motions deadline. Regardless of which occurred, she erred by either failing to analyze substantial legal arguments potentially in Mr. Cotes' favor or by failing to raise the issue with Mr. Harnick and/or Mr. Cote so that strategic decisions could be made.

The State has not set forth facts or circumstances sufficient to raise doubt on the issue of whether NEKLaw's representation of Mr. Cote fell below the standard of practice. The failure to file a motion to suppress cannot be justified as a tactical choice as it was not informed by appropriate research or analysis under Article 11. The legal issues were never sufficiently developed to create the opportunity to make a tactical choice. Additionally, as Mr. Cote's motion and expert argue, it would be hard to understand the tactical advantage of a decision not to bring the challenge even if NEKLaw had given enough attention to these issues.

While there is a dispute of fact as to whether NEKLaw ever discussed the possibility of filing a motion to suppress with Mr. Cote, the State has not presented facts showing that either attorney did so meaningfully, even resolving all inferences in favor of the State. Taking Ms. Jourdan's claim that she "would have" discussed the basis for a possible motion with Mr. Cote at the final pretrial conference on January 2, 2018 as true, a single poorly-recalled conversation that occurred more than three months after the filing deadline and at a pretrial conference immediately prior to jury draw does not show adequate advice or consultation. Mr. Harnick communicated with Mr. Cote more frequently than Ms. Jourdan did, but he could not have given Mr. Cote an accurate assessment of the viability of a motion to suppress without knowing the relevant Article 11 law that the facts show he did not know at the relevant time.

Compounding the severity of these errors, the NEKLaw attorneys failed to inform Mr. Cote, or to take remedial action, after Judge Bent's grant of Mr. Letourneau's Motion to Suppress and dismissal of charges.

In sum, the undisputed facts show that the burden on the first prong of the test for ineffective assistance of counsel has been met.

Failure to adequately investigate the viability of a motion to suppress and failure to meaningfully discuss with Mr. Cote the possibility of filing a motion prejudiced him to the extent that is required by the second prong of the ineffective assistance of counsel analysis. The errors deprived him of the right to make an informed decision about his plea because, prior to agreeing to enter a plea, he did not understand his options or the strength of his ability to challenge the State's evidence against him.

Although the Vermont Supreme Court had not ruled specifically on the issue of whether a dog sniff at a traffic stop amounts to a search within the meaning of Article 11, the prejudice standard on the second prong of the test only requires reasonable probability. See *Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome"). From what little information officers had to support the expansion of the traffic stop to a drug investigation combined with Article 11 jurisprudence, it was reasonably probable that a trial court could grant a motion to suppress the fruits of the dog sniff, which is what happened in Mr. Letourneau's case.

Moreover, even without knowing what the outcome of a motion to suppress might be, Cote was prejudiced by not having the opportunity to make a choice between an uncertain but potentially viable motion, a trial, and a plea. Mr. Cote had been consistent in his desire not to accept plea offers and to fight the charges, and had he understood the option, it is reasonably probable that he would have chosen to pursue the motion and reasonably probable that he could have avoided his current felony conviction. The State cannot justify NEKLaw's failure to consult and inform Mr. Cote about the motion option on the basis that the outcome of the plea bargain was "favorable" to him, presumably because he did not spend a lengthy period of time incarcerated after the plea. Even if Mr. Cote spent less time incarcerated by not pursuing suppression or by taking the plea bargain, he was still under sentence and had a felony conviction. NEKLaw did not have the authority to weigh options on his behalf and make choices without his involvement.

In sum, the undisputed material facts show that the performance of Mr. Cote's attorneys fell below the required standard of practice, and the errors prejudiced Mr. Cote. It is reasonably probable that the outcome would have been different if there had not been ineffective assistance of counsel.

Order

The Motion for Summary Judgment is granted. Mr. Cote's conviction on Count 2 (Felony Conspiracy to Sell, Deliver, Manufacture, or Cultivate a Regulated Drug), Docket 210-4-17 Oscr based on his plea of January 4, 2018 is hereby vacated.

The case is remanded to the Criminal Division for further proceedings.

Electronically signed pursuant to V.R.E.F. 9(d)

Mary Miles Teachout

Mary Miles Teachout
Superior Court Judge

July 19, 2021