STATE OF MAINE

AROOSTOOK, SS.

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
DOCKET #: ARO-21-312

DENNIS WINCHESTER
APPELLANT

V.

STATE OF MAINE
APPELLEE

ON APPEAL FROM THE SUPERIOR COURT

AROOSTOOK COUNTY

BRIEF OF APPELLEE

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Statement of Facts and of Procedural History

The Appellee accepts the Superior Court's recitation and findings of fact as they appear in the Appellant's appendix, pages 19-43, as being supported by the testimony and does not challenge those findings of fact or application of law.

Standard of Review

The standard of review on appeal for a denial of a PCR is a highly deferential one. Because "the Defendant bore the burden of proof at the hearing, the PCR Court's determination that he failed to satisfy his burden will not be disturbed unless the evidence compelled the court to find to the contrary." *Laferriere v. State, 697 A.2d 1301 (ME 1997).*

"In appellate review of a post-conviction court's findings, the facts underlying the trial and post-conviction hearing are viewed in the light most favorable to the post-conviction court's judgment. Further, we will not overturn a post-conviction court's determination as to the effectiveness of trial counsel unless it is clearly erroneous and there is no competent evidence in the record to support it. Likewise, the finding of whether the petitioner was prejudiced by his attorney's error is a factual finding reviewed for clear error. Thus, unless unsupported in the record . . . we must accept the facts as the post-conviction court found them and construe them most favorably to the post-conviction court's decision." *Theriault v. State*, 2015 ME 137, ¶¶ 66-67, (Alexander, J. *dissenting,* internal citations omitted).

"The analysis of a speedy trial claim is identical under both the Federal and the State Constitutions." *State v. Joubert*, 603 A.2d 861, at 863 (ME 1992).

"The mere lapse of time, however, does not establish a *per se* violation of that right. The

threshold inquiry in evaluating a speedy trial claim is whether the length of time between the indictment and the trial is sufficiently long to raise an inference of prejudice to the defendant thereby requiring further analysis." *State v. Beauchene*, 541 A.2d 914, at 918 (ME 1988).

"Once that presumption is raised, we apply the balance required by *Barker v. Wingo*, to determine whether a due process violation existed. The *Barker* test is a delicate balancing test that takes into account all of the circumstances of the case at hand. The *Barker* Court identified four factors that should be considered: 1) the length of the delay; 2) the reasons for the delay; 3) the defendant's assertion of his right to a speedy trial; and 4) the prejudice to the defendant caused by the delay." *State v. Rippy*, 626 A.2d 334, at 339 (ME 1993) (internal citations and punctuation omitted).

Issues Presented

1) **Whether the evidence presented at the hearing compelled the PCR Court to make a finding contrary to its determination that the Defendant failed to establish either ineffective assistance of counsel or sufficient prejudice to a fair trial?**
2) **Whether the PCR Court should have found an independent basis for granting the PCR based on a *per se* violation of the appellant's right to a speedy trial?**

Argument

1) **The PCR Court's findings that the appellant was neither the object of ineffective assistance of counsel nor prejudiced as a result are supported by the evidence and should not be disturbed.**

The standard of review on appeal for a denial of a PCR is a highly deferential one. Because "the Defendant bore the burden of proof at the hearing, the PCR Court's determination that he failed to satisfy his burden will not be disturbed unless the evidence compelled the court to find to the contrary." *Laferriere v. State, 697 A.2d 1301 (ME 1997).*

In every PCR claim, a Court must determine 1) whether the petitioner's trial attorney was in fact ineffective and if so, 2) whether the reliability of the guilty verdict rendered by the finder of fact against the petitioner for his crime has been compromised to the point where confidence in the verdict has been undermined. *Theriault*, at ¶25. The first "prong" of the *Strickland* test is generally known as the "ineffectiveness" standard; and the second "prong" is generally known as the "prejudice" standard. The burden is on the petitioner to clearly establish *both* the ineffectiveness of trial counsel *and* prejudice standards; moreover, the petitioner's failure to positively establish either that the trial attorney's assistance at trial was "manifestly unreasonable" or that the deficient performance of counsel (if it so proven, and not merely alleged) deprived the petitioner of a substantial ground of defense, or that counsel's clearly established deficient performance likely affected the outcome of the trial. See *Levesque v. State*, 664 A.2d 849 (Me. 1995), and *McGowan v. State*, 2006 ME 16. The Court may not speculate or resort to conjecture on either the issue of ineffectiveness or prejudice. *Francis v. State,* 2007 ME 148, ¶8.

"To establish deficient performance, a person challenging a conviction must show that 'counsel's representation fell below an objective standard of reasonableness.' A court considering a claim of ineffective assistance must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance. The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Harrington v. Richter*, 131 S. Ct. 770, 787-88 (internal citations omitted) (2011).

"Caution must be used in evaluating the performance of the trial attorney so that results based solely on hindsight are avoided. Deference to strategic or tactical decisions of the trial attorney is substantially heightened; these decisions are reviewable only for manifest unreasonableness." *Levesque v. State*, 664 A.2d 849 (Me. 1995) (internal citations omitted), at 851.

The appellant fails to demonstrate that his trial attorney's performance was "manifestly unreasonable" and amounted to incompetence under the prevailing professional norms and/or that any resulting consequence of the alleged misconduct rises beyond that of speculative harm and to level of demonstrable prejudice "[that rises] to the level of compromising the reliability of the conviction and undermining confidence in it." *Theriault*, at ¶ 25.

The appellant's sole contention on appeal is that both trial and appellate counsel failed to assert a speedy trial claim. In the present case, the PCR Court systematically analyzed the circumstances of the claim of alleged ineffective assistance by trial and appellate counsel on the issue of speedy trial. See, *Order*, Appendix pages 38-43.

The PCR Court applied the appropriate speedy trial analysis required by both the Federal and the Maine Constitutions – see, *Barker, Joubert, Beauchene, and Rippy, supra*. Notably, the PCR Court did not find, nor did the appellant assert otherwise at the PCR evidentiary hearing, that the State bore *any* responsibility for *any* of the delay from indictment through trial. Rather the appellant was primarily responsible for that delay. *Order, generally*, Appendix 19-43. The appellant wanted his counsel to both fully litigate pretrial issues like motions to suppress and complete pretrial investigations to challenge DNA evidence and to personally inspect physical evidence while simultaneously advocating a near-mutually exclusive assertion to a speedy trial. The petitioner's attorneys walked this delicate balance by filing multiple motions to suppress, motions for reconsideration, hiring experts and issuing subpoenas for physical objects when legally permissible. Once the pretrial matters had been fully resolved, the petitioner's cases were promptly set for trial;

he had one trial and lost. He was set for another trial within a matter of days from his first trial.

The PCR court determined that the Defendant failed to prove *both* prongs of the *Strickland* standard necessary to trigger a PCR remedy. *Order,* Appendix, at 42-43. Those findings of fact and conclusions of law are supported by the evidence and should stand, especially where the appellant does not establish or even assert that the findings of the PCR Court are clearly erroneous. See, *Laferriere* and *Theriault, supra*.

The appellant concedes that there is not a viable speedy trial claim under the Federal Constitution. *Brief of the Appellant,* at 14. Because "[t]he analysis of a speedy trial claim is identical under both the Federal and the State Constitutions," the PCR Court correctly ruled that there had not been a speedy trial violation, even under the Maine Constitution. *Joubert, supra*. Likewise, the appellant's trial counsel and appellate counsel can not be faulted for making the same assessment. See, *Butler v. Mitchell*, 815 F.3d 87 at 92 (MA 2016), "[the defendant's] direct-appeal counsel was not ineffective for failing to make what would have amounted to a losing speedy-trial argument."

2) <u>The PCR Court correctly did not create a new "per se" rule into the speedy trial clause of the Maine Constitution; nor should the Law Court.</u>

The Defendant raises in this appeal the issue of "presumptive prejudice," for the first time, and claims that the Maine Constitution *should* be interpreted consistent with his novel theory. "No principle is better settled than that a party who raises an issue for the first time on appeal will be deemed to have waived the issue, even if the issue is one of constitutional law." *Cyr v. Cyr*, 432 A.2d 793, 797-98 (ME 1981). The Defendant's assertion for the first time on appeal that a standard of "presumed prejudice" is controlling has been waived because he failed to raise it initially with the

PCR Court. "Finally, [the Defendant] argues in the alternative that his trial counsel's performance was so substandard that he should not have been required to show prejudice in order to secure post-conviction relief. . . Because this issue was neither raised before nor addressed by the post-conviction court, we will not consider it on appeal." *State v. Jurek*, 594 A.2d 553, at 556 (ME 1991). It is inconceivable that trial counsel, appellate counsel, and a PCR Court *all* should have reasonably anticipated *this* argument and applied this new standard of review to their legal analyses.

Even if the Defendant is somehow persuasive that the matter of "presumed prejudice" has been properly preserved for appeal, the PCR Court's denial of the petition should nonetheless remain undisturbed. Presuming some unidentified quantum of harm to the 4th *Barker* factor, prejudice to the defendant, and adding it to the equation does not change the outcome of the PCR Court's analysis.

In *Dogget v. United States,* 505 US 647 (1992), a 6-year delay from indictment to trial which was solely attributable to the government and "inexcusable" was deemed to be sufficiently prejudicial to warrant a violation of the speedy trial clause when weighed in conjunction with the other required factors.

In *Butler v. Mitchell*, *supra*, the First Circuit reviewed a denial of habeas relief by the Massachusetts Supreme Judicial Court. *Butler* contended that the delay between the filing of a complaint against him and his trial violated his Federal speedy trial right. He alleged a delay of more than 10 years. "*Dogget* explained that affirmative proof of particularized prejudice is not essential to every speedy trial claim and that excessive delay presumptively compromises the reliability of a trial. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria. . . its importance increases with the length of the delay." *Id.,* (internal citations omitted).

The *Butler* Court determined that the delay for his Federal speedy-trial claims was not ten years, but 4. *Id.*, at 90. Even more discretely, the Court in *Butler* noted that "indeed only 310 days

of those four years are attributable to the Commonwealth." *Id*., at 91. The *Butler* Court then applied the holding of *Dogget* to its findings, "[g]iven *Dogget's* finding of presumptive prejudice from an inexcusable six-year delay, the case is no authority for inferring such prejudice from a chargeable delay of 310 days . . ." *Id.*

"We have in several previous cases made clear that even though a decision of the Supreme Court of the United States is the supreme law of the land on a federal constitutional issue, in the interests of existing harmonious federal-state relationships it is a wise policy that we accept, so far as reasonably possible, a decision on a federal constitutional issue rendered by the United States Court of Appeals for the First Circuit." *State v. Gardner*, 509 A.2d 1160, 1163 (ME 1986) (internal citations omitted).

The appellant did not establish, nor did the PCR court determine that the State bore any responsibility for the delays associated with any of the appellant's cases. Applying *Butler* to the current appeal, since no part of the alleged delay is attributable to the State, there is no "presumptive prejudice" to weigh in the appellant's favor. *Dogget* is no authority for inferring such prejudice from a chargeable delay of zero days. Because "presumed prejudice" has no weight in this case, adding that nullity to the equation does not change the results and the PCR court's analysis still holds.

It is crucial to note that prejudice under a *Dogget* analysis is only "presumptive," it is a "finding" of prejudice under similar circumstances and is simply a permissible inference in the absence of other evidence and should always be a rebuttable by the State – "When the Government's negligence thus causes a delay six times as long as that generally sufficient to trigger judicial review, and when that prejudice, albeit unspecified, is neither extenuated as by the defendant's acquiescence, nor persuasively rebutted, the defendant is entitled to relief." *Dogget*, at 658. Prejudice should not be given, in effect, a "per se" weight or finding as suggested by the

appellant. *Brief*, at 14. Delay can inure to the benefit of the defendant in a variety of ways: in the form of improved mental health, time to get evaluations, and requests for "time served" especially when held at a County jail pretrial in lieu of the DOC after a conviction. See, *Smith v. State*, 432 A.2d 1246, at 1249 (ME 1981) (FN4 – the speedy trial motion was merely a procedural step made for the purpose of technically protecting the record. *It was trial strategy not to file a more specific motion and not to seriously press the issue* since, by tradition, trial delay usually benefits a criminal defendant.) (emphasis in the original). "Furthermore, both client and counsel could always hope that during the months that would elapse . . . key prosecution witnesses might become ever less available. Having no need to prove any case of his own, counsel could reasonably have concluded that he and his client had nothing to lose and possibly much to gain from as much delay as possible." *Id.*, at 1250 (internal citations omitted).

Finally, because "[t]he analysis of a speedy trial claim is identical under both the Federal and the State Constitutions," *Dogget* and its progeny, including *Butler*, are already part of the legal landscape for speedy trial analysis of the Maine Constitution. Consequently, there is no need for the Law Court to separately create a doctrine that already exists.

CONCLUSION

The PCR Court properly denied the Defendant's Motion for Post Conviction Review. The holding of the lower court should be upheld.

08/09/2022
Date

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CERTIFICATION OF SERVICE

I hereby certify that 2 copies of the foregoing Brief for Appellee have been forwarded this date to Lawrence Winger, Counsel for the Appellant.

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