Judge Eaton

STATE OF VERMONT
WINDSOR COUNTY

IN RE: ERIC DALEY	)	**Windsor Superior Court**
	)	**Docket No. 261-4-07 Wrcv**
	)	

FINAL JUDGMENT

The petition for post-conviction relief is *dismissed.*

Dated at Woodstock, Vermont this 27 day of March, 2009.

Hon. Harold E. Eaton, Jr.
Presiding Judge

FILED

MAR 27 2009

WINDSOR COUNTY CLERK

STATE OF VERMONT
WINDSOR COUNTY

IN RE: ERIC DALEY	)	**Windsor Superior Court**
	)	**Docket No. 261-4-07 Wrcv**
	)	

DECISION
State's Motion for Summary Judgment (MPR #6), filed Jan. 14, 2009

Petitioner Eric Daley pleaded guilty in June 2004 to seven counts of criminal conduct related to a high-speed police pursuit in which he struck and killed a state police trooper with his vehicle. He was later sentenced to an aggregate sentence of twenty-six to thirty-three years to serve; the sentence was affirmed on direct appeal, *State v. Daley*, 2006 VT 5, 179 Vt. 589, and again following denial of Mr. Daley's motion for sentence reconsideration, *State v. Daley*, No. 2007-210 (Vt. May 2008) (unpublished mem.). In the present petition for post-conviction relief, Mr. Daley seeks to have his sentence and conviction vacated because his defense counsel allegedly provided ineffective assistance during the plea negotiations.

In particular, Mr. Daley contends that his defense counsel (1) failed to advise him that he should not have been charged with, and could not have been convicted for, the "multiplicitous" charges of second-degree murder, gross negligent operation, and leaving the scene of an accident; and (2) coerced his guilty plea by stating that it would be impossible to receive a fair trial in Vermont, and that his only alternative was to accept the plea offer. In the present motion for summary judgment, the State of Vermont contends that the undisputed material facts establish that, as a matter of law, Mr. Daley will not be able to meet his burden of proving that either allegation constituted ineffective assistance of counsel. Mr. Daley has not filed a response to the summary-judgment motion.

Mr. Daley is represented by Attorney Lamar Enzor. The State of Vermont is represented by Windsor County State's Attorney Robert Sand.

Summary judgment in a post-conviction-relief proceeding is appropriate when the pleadings and the portions of the trial record referred to in the statements required by Rule 56(c)(2) "show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." V.R.C.P. 56(c)(3); *In re FitzGerald*, 2007 VT 51, ¶ 6, 182 Vt. 639 (mem.). The party moving for summary judgment bears the burden of demonstrating that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. *Price v. Leland*, 149 Vt. 518, 521 (1988). Summary judgment is mandated where the non-moving party fails to make a showing sufficient to establish the existence of an element essential to his or her case, and on which he has the burden of proof at trial. *Poplaski v. Lamphere*, 152 Vt. 251, 254–55 (1989); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The following undisputed facts are derived from the portions of the trial record referred to in the Rule 56(c)(2) statement filed by the State of Vermont. In June 2003, Mr. Daley struck and killed a state police trooper while operating a vehicle during a high-speed police pursuit. He was subsequently charged with seven counts of criminal conduct, including second-degree murder, three motor-vehicle offenses (grossly negligent operation with death resulting, 23 V.S.A. § 1091(b); leaving the scene of an accident in which death resulted, 23 V.S.A. § 1128(c); and attempting to elude, 23 V.S.A. § 1133(a)), and three drug offenses.

Defense attorneys Matthew Harnett and Kate Moore were assigned to represent Mr. Daley in connection with the charges. Both attorneys have extensive criminal law experience.

In June 2004, the parties entered into a plea agreement in which Mr. Daley admitted guilt to the three original motor-vehicle offenses, the amended charge of involuntary manslaughter, and three drug offenses. The plea agreement set forth maximum exposure for each of the seven criminal counts, provided that the sentences for some counts would run concurrently, and further contained promises from the federal government (not to pursue federal charges arising out of the incident) and from the government of the State of New Hampshire (to seek a concurrent sentence on an unrelated cocaine charge). The total maximum exposure under the plea agreement was thirty-three years to serve.

The change-of-plea hearing was held on June 7, 2004. During the hearing, the Windsor District Court (Teachout, J.) directly addressed Mr. Daley in order to determine whether he was entering into the plea agreement knowingly and voluntarily. The following exchanges occurred during the hearing:

> THE COURT: Mr. Daley, first of all, have you had enough opportunity to work with your attorney to review all the things that you need to—to have the information you need to make a decision for yourself today?
>
> MR. DALEY: Yes, Your Honor.
>
> THE COURT: And have you had the chance to have all of your questions answered?
>
> MR. DALEY: Yes, Your Honor.
>
> THE COURT: Have you been satisfied with their work on your behalf?
>
> MR. DALEY: Yes, Your Honor.

THE COURT: I have before me this Notice of Plea Agreement. It's a paper of three pages that appears to have been signed by you. Did you sign this Agreement?

MR. DALEY: Yes, Your Honor.

THE COURT: And before signing it did you have a chance to go over everything in it with your attorney?

MR. DALEY: Yes.

THE COURT: Do you feel you have a complete understanding of it?

MR. DALEY: Yes.

THE COURT: And did you have the opportunity to have all of your questions about it answered?

MR. DALEY: Yes.

THE COURT: Other than anything that may be included in this Agreement, have there been any promises made to you or any threats or any statements or anything that—that you've relied on about anything connected with this case that might have affected your ability—your—desire, your decision to sign this Plea Agreement?

DEFENSE COUNSEL: Do you mean other than the contents of the plea agreement, Your Honor?

THE COURT: Other than the contents of the plea agreement.

MR. DALEY: No, Your Honor.

* * * *

THE COURT: Are you satisfied that you've had enough time to consider [the plea agreement], enough advice from your attorneys and nothing that would interfere with your ability to understand and make choices today?

MR. DALEY: Yes, Your Honor.

THE COURT: And do you feel that you're being somehow pressured into doing this or are you making a decision on your own?

MR. DALEY: No, Your Honor, it's my own.

The court then reviewed each criminal count with Mr. Daley and accepted his guilty pleas after ascertaining that he understood his right to remain to silent and the rights associated with jury trial, and that he was knowingly and voluntarily waiving those rights. Following the subsequent three-day sentencing hearing, the court sentenced Mr. Daley to an aggregate sentence of twenty-six to thirty-three years to serve; the sentence was affirmed on appeal. *Daley*, 2006 VT 5; *Daley*, No. 2007-210.

Issue #1: Failure to Object to Charge of Second-Degree Murder

Mr. Daley contends first that he received ineffective assistance of counsel because his defense attorneys did not advise him that he could not have been convicted for the "multiplicitous" charges of second-degree murder, grossly negligent operation, and leaving the scene of an accident. He asserts that if he had known this, he would not have accepted the plea offer because there was no benefit in doing so.

Claims for ineffective assistance of counsel require the petitioner to show that his "counsel's performance fell below an objective standard of reasonableness informed by prevailing professional norms" and that "counsel's deficient performance prejudiced the defense." *In re Dunbar*, 162 Vt. 209, 212 (1994) (quoting *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)). The petitioner bears the burden of establishing the elements of ineffective assistance by a preponderance of the evidence. *In re Shaimas*, 2008 VT 82, ¶ 8 (mem.); *In re FitzGerald*, 2007 VT 51, ¶ 11.

A defendant may be charged, convicted, and sentenced in a single criminal proceeding for two or more statutory offenses arising out of the same conduct so long as doing so is consistent with the legislative intent. *State v. Wiley*, 2007 VT 13, ¶ 8, 181 Vt. 300; *State v. Hazelton*, 2006 VT 121, ¶ 24, 181 Vt. 118; *State v. Grega*, 168 Vt. 363, 383 (1998). If the plain language of the statutes does not reflect an express legislative intent, courts must determine whether the two offenses are the same for double-jeopardy purposes by asking whether "each provision requires proof of a fact that the other does not." *State v. Ritter*, 167 Vt. 632, 632–33 (1998) (mem.) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). "The same act may constitute two separate crimes, and, if they are not so related that one of them is a constituent part, or necessary element, in the other, so that both are in fact one transaction, a prosecution and conviction may be had for each offense." *State v. Poirier*, 142 Vt. 595, 598 (1983) (quoting *State v. Parker*, 123 Vt. 369, 371 (1963)).

The Legislature has expressly stated that a person may be prosecuted for gross negligent operation and manslaughter in connection with the same incident. 23 V.S.A. § 1091(c). However, there is no express legislative statement answering the question of whether a person may be prosecuted for second-degree murder, gross negligent operation, and leaving the scene of an accident when each count arises out of the same occurrence. The court must accordingly examine the elements of the offenses to determine whether each requires proof of a fact that the other does not.

1. Second-Degree Murder. The offense of second-degree murder requires proof that the defendant caused the unlawful killing of the victim, and that the defendant acted either with an intent to kill, an intent to do great bodily harm, or a wanton disregard of the likelihood that death or great bodily harm would result. *State v. Sexton*, 2006 VT 55, ¶ 12, 180 Vt. 34; *State v. Hatcher*, 167 Vt. 338, 343–44 (1997).

2. Gross Negligent Operation. The offense of gross negligent operation requires proof that the defendant operated a vehicle on a public highway in a manner that "involved a gross deviation from the standard of care that a reasonable person would have exercised in that situation." 23 V.S.A. § 1091(b)(2); *State v. LaBounty*, 2005 VT 124, ¶ 6, 179 Vt. 199. The statute defining the offense of gross negligent operation additionally contains a sentencing enhancement that applies when the defendant's grossly negligent operation of a vehicle results in the serious bodily injury or death of another person. 23 V.S.A. § 1091(b)(3). The sentencing enhancement, however, exists only for the purpose of determining the appropriate level of punishment for the offense. The actual criminal conduct that constitutes the offense of gross negligent operation does not include any element of serious bodily injury or death. *LaBounty*, 2005 VT 124, ¶¶ 6–8; *State v. Martin*, 2007 VT 96, ¶ 56, 182 Vt. 377.

3. Leaving the Scene of an Accident. The offense of leaving the scene of an accident requires proof that the defendant was operating a motor vehicle, that he was involved in an accident resulting in injury to any person other than the operator, that the defendant knew about the accident and knew or should have known that the accident resulted in injury or damage, and that the defendant failed to immediately stop. 23 V.S.A. § 1128(a); *State v. Keiser*, 174 Vt. 87, 92–93 (2002). Again, the statute contains a sentencing enhancement that applies when the defendant's violation of the statute results in serious bodily injury or death to any person. 23 V.S.A. §§ 1128(b), (c). As above, the sentencing enhancements exist only for the purpose of determining the appropriate penalty; the actual criminal conduct that constitutes the offense of leaving the scene of an accident does not include any element of serious bodily injury or death.

The elements of the foregoing offenses are vastly different. There is nothing about second-degree murder that necessarily includes any element involving motor vehicles, public highways, the standard of care associated with the operation of motor vehicles, or the duty of individuals to stop their vehicles and render assistance to any person in need following an automobile accident. And there is nothing about the offenses of gross negligent operation or leaving the scene of an accident that include any element of "malice aforethought." *Hatcher*, 167 Vt. at 344 (internal quotation omitted). For these

reasons, the charged offenses of second-degree murder, gross negligent operation, and leaving the scene of an accident are separate and distinct offenses; they were not "multiplicitous," and there were no double-jeopardy problems presented by the original information. Cf. *Poirier*, 142 Vt. at 599 (concluding that manslaughter and driving under the influence with a fatal accident resulting were separate offenses).

It follows that Attorneys Harnett and Moore did not provide ineffective assistance of counsel by failing to "object" to the information or by failing to advise Mr. Daley that the charges were "multiplicitous." If that advice had been provided, it would have been wrong. Mr. Daley has not met his burden of proving that the advice he received from his defense counsel represented a failure to communicate "not only the terms of a plea bargain offer, but also its relative merits compared to the client's chances of success at trial." *State v. Bristol*, 159 Vt. 334, 338 (1992).

Furthermore, the record demonstrates that Mr. Daley received benefits from accepting the plea bargain. His overall exposure was limited by agreements to have several components of the sentence run concurrently, as well as by concessions from the federal government and the State of New Hampshire. For these reasons, the State of Vermont is entitled to summary judgment as a matter of law on Mr. Daley's claim that he received ineffective assistance from his counsel prior to accepting the plea bargain.

Issue #2: Coercion of Guilty Plea

Mr. Daley's second claim of ineffective assistance is that his attorneys coerced his guilty plea by stating that it would be impossible to receive a fair trial in Vermont, and that his only alternative was to accept the plea offer.

Even if Mr. Daley's allegations are taken at face value, an attorney's advice regarding whether or not to enter into a plea agreement does not normally amount to coercion, even if the attorney pressures the client into electing one alternative over another. *In re Quinn*, 174 Vt. 562, 564 (2002) (mem.).

Moreover, and more importantly, the transcript of the change-of-plea hearing shows that Mr. Daley stated unequivocally that he had not been influenced by any promises, threats, or statements that were not contained within the plea agreement itself, and that he was not "being somehow pressured into doing this." He also stated clearly that the decision to plead guilty was his own. As "assertions in open court of voluntariness and lack of coercion," these statements are "cogent evidence" against Mr. Daley's present claims of involuntariness. *In re Raymond*, 137 Vt. 171, 181 (1979). Mr. Daley has not come forward with any contrary evidence in response to the properly-supported motion for summary judgment. *Poplaski*, 152 Vt. at 254–55.

It is the responsibility of the trial court to ensure that guilty pleas are offered by criminal defendants voluntarily, after proper advice, and with full understanding of their consequences. *Quinn*, 174 Vt. at 563; *Raymond*, 137 Vt. at 180. In this case, the trial court met this responsibility by accepting Mr. Daley's guilty pleas only after carefully

and thoroughly determining whether the pleas and associated waivers were being entered knowingly and voluntarily. The transcript shows that the judge engaged Mr. Daley in a long colloquy designed to determine whether Mr. Daley understood the terms and consequences of the bargain, and whether he felt any pressure or coercion to enter into the agreement. He said that he understood, that there was no coercion, and that the decision to plead guilty was his own. On this record, the evidence does not support Mr. Daley's present claim that his guilty plea was coerced. *In re Hall*, 143 Vt. 590, 596–97 (1983). Summary judgment is appropriate as a matter of law.

ORDER

The State of Vermont's Motion for Summary Judgment (MPR #6) is *granted*, and the petition for post-conviction relief is *dismissed.*

Dated at Woodstock, Vermont this 27 day of March, 2009.

Hon. Harold E. Eaton, Jr.
Presiding Judge

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