STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
SUPREME COURT

STATE OF RHODE ISLAND	:	
	:	
vs.	:	SU-10-0218
	:	(PM-2009-0108)
RANDY ANDERSON	:	

ON APPEAL FROM A DENIAL OF POST CONVICTION RELIEF
ENTERED IN THE PROVIDENCE COUNTY SUPERIOR COURT

PREBRIEF OF APPELLEE
STATE OF RHODE ISLAND

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Travel and Statement of Relevant Facts

In 1981, defendant pled *nolo contendere* to three counts of robbery and breaking and entering (Ind. No. W1/81-138) and was sentenced to thirty years, twelve to serve and eighteen suspended with probation. *See* Criminal Docket Sheet Report (Attached Hereto as Exhibit A). He was found to have violated the terms and conditions of his probation after a violation hearing (Darigan, J., presiding) in June of 1995. He appealed that finding, but the hearing justice's decision was upheld by this court. State v. Anderson, 705 A.2d 996 (R.I. 1997).

Anderson was tried (Krause, J., presiding) on the two counts of first-degree child molestation (Ind. No. K1/95-0661A), which had already led to the probation violation hearing, in October of 1998. He was found guilty of Count I (fellatio) and not guilty of Count II (digital penetration). In January of 1999, the trial justice sentenced defendant to fifty years, thirty to serve and the remainder suspended with probation. Anderson was also sentenced to a consecutive ten year term for being a habitual offender. He appealed that conviction but this Court affirmed the jury's verdict. State v. Anderson, 752 A.2d 946 (R.I. 2000).

The defendant filed a motion for post conviction relief in 2000 (KM-00-498) alleging that his trial attorney was ineffective in part for failing to locate the medical records indicating no evidence of any physical injury to the complainant.[1] That motion was denied. And on appeal, this Court upheld the hearing justice's decision. State v. Anderson, 878 A.2d 1049 (R.I. 2005). With respect to the value of the medical records this Court agreed with the hearing justice who found that the "probative value of medical records prepared a month after the incident, offered to prove that no molestation had occurred, was 'highly speculative.'" State v. Anderson, 878 A.2d at 1050.

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[1] After initially being denied without a hearing, the matter was remanded by this Court and a hearing was held in June of 2003.

Anderson then filed for post conviction relief of the probation violation (WM-01-504) alleging that the attorney who represented him in the violation hearing, Attorney Bramley, was ineffective in failing to continue the matter to subpoena the medical records "rather than relying on the statement of the State's counsel at the time that the medical records indicated no apparent evidence of trauma." (Tr. 2/7/06, p. 4). The hearing justice found that there was no new evidence that would have affected the outcome of the case and that nothing defendant had alleged came anywhere near the level of ineffectiveness required by Strickland. (Tr. 2/7/06, p. 26). *See* Transcript of 2/7/06 (Attached Hereto as Exhibit B).

Anderson also pursued federal habeas corpus relief all the way to the First Circuit. The First Circuit Court of Appeals found that the claim regarding the medical records had been waived and moreover that they had little, if any, relevance considering the timing of the exam and the fact that defendant was acquitted of the charge of digital penetration. *See* Mandate of October 27, 2007 (Attached Hereto as Exhibit C).

The defendant then filed another petition for post conviction relief (PM-09-108), four years after the first one was denied, once again based upon the medical records. However, instead of alleging that his attorneys were ineffective for procuring them, he now claims for the first time that the state was at fault for not producing them. Following a hearing before the trial, and original post conviction motion, justice on May 17, 2010, the petition was denied. The instant appeal ensued.

Discussion

The defendant claims that the hearing justice erred in denying his post conviction motion. He argues that the hearing justice erred in ruling that the application was procedurally barred as a subsequent petition because Anderson claims that until he actually received the medical reports,

he "was in no position to allege prosecutorial misconduct and a violation of Rule 16." *Defendant's PreBrief*, p. 4. He asserts that since the information in the reports was not available to him at the time of his first petition, and because he now asserts that the prosecution failed to comply with Rule 16 and Brady at the time of his trial, he maintains that he did not waive his claims when he filed his first petition for post conviction relief. *Defendant's PreBrief*, p. 6. Anderson also claims that the hearing justice erred by substantively finding that the medical records would have been of "little or no value to the factfinder in the context of this trial." *Defendant's PreBrief*, p. 6 *quoting* (Tr. 5/17/10, p. 31).

Rhode Island General Laws § 10-9.1-8 entitled "Waiver of or failure to assert claims" provides:

> All grounds for relief available to an applicant at the time he or she commences a proceeding under this chapter must be raised in his or her original, or supplemental or amended, application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken to secure relief, may not be the basis for a subsequent application, unless the court finds that in the interest of justice the applicant should be permitted to assert such a ground for relief.

This Court has stated that this statute basically codifies the doctrine of *res judicata* for post conviction relief applications. Consecutive post conviction filings are procedurally barred with respect not only to issues that have been raised and finally decided but also with respect to issues that could have been raised. *See* Ramirez v. State, 933 A.2d 1110, 1112 (R.I. 2007) *and* Figueroa v. State, 897 A.2d 55, 56 (R.I. 2006).

In Carillo v. Moran, 463 A.2d 178, 182 (R.I. 1983), Carillo initially raised the issue of a benzidine test in a pretrial motion to suppress. He pursued only his theory that the test was improper since he alleged it was incident to an unlawful arrest. However, in a post conviction petition, he additionally claimed that the scope of the test was unreasonable and a violation of his

Fourth Amendment rights. In denying that post conviction motion on procedural grounds, this Court held that

> We think the language of this statute [§10-9.1-8] and the principles of res judicata preclude Carillo from raising this issue again in a postconviction-relief proceeding simply because he has formulated a new theory of Fourth Amendment violation.

Carillo v. Moran, 463 A.2d at 182.

Likewise in the case at bar, Anderson has once again challenged the fact that the complainant's medical records were not introduced at trial, but this time under a new theory. Rather than claim his attorney was ineffective in failing to procure them at his trial and/or probation violation hearing, as he has in the past, he now claims that the prosecutor violated his discovery obligations in failing to procure them. As was the case in Carillo, this new theory at this late date is procedurally barred.

The fact that the complainant underwent a physical exam, which indicated no sign of trauma, was known by defendant's counsel as early as Anderson's probation violation hearing in June of 1995. His criminal trial on the underlying charges took place in 1998. Those records were apparently not obtained by either party prior to trial. However, defendant was not foreclosed from claiming discovery violations, including a failure to procure and provide medical records, prior to trial, at the trial, on the direct appeal or in the first post conviction application. But he did not do so. Rather he claimed that his attorney was ineffective in failing to procure them, a claim that this Court has already rejected. Simply because he has developed a new theory with respect to the same medical records does not overcome the procedural hurtle. *See* Carillo v. Moran, 463 A.2d at 182.

The hearing justice, who had been the trial justice and was very familiar with the facts and long travel of this case, recognized that Anderson has been provided numerous opportunities to challenge every aspect of his conviction and sentence.

> Nobody has had more bites at the jurisdictional apple than Randy Anderson. I need not expand the pages of this record to enumerate the opportunities that this man has been afforded in his lame efforts to extricate himself from criminal liability.
>
> (Tr. 5/17/10).

He also refuted defendant's claim that the medical records constituted newly discovered evidence that would require a new trial in the interest of justice.

> I am totally convinced that, under no stretch of the most elastic and fertile imagination, would these records have had any substantial or significant bearing. For one, they don't even fall into the newly-discovered evidence test and four parts that need to be shown.[2] The evidence must have actually been newly discovered since trial. This stuff was around since 1995, and the defense, through different counsel and Smith, knew about it. Secondly, it had to have been - - the defendant had to have been diligent in attempting to discover it. Same result. Thirdly, the evidence must not be merely cumulative or impeaching. That's all this stuff was. Fourthly, and most importantly, it must be the kind that would probably change the verdict at a new trial, and I assure you, in my view, it would not have. This should have been raised a long time ago in a prior post-conviction relief application. These records are of little or no value to a factfinder in the context of this trial. The defendant was acquitted of the digital penetration, and he was convicted of the fellatio. Those facts don't bear on the gynecological results that were shown in the medical records. The request for postconviction application is denied.

(Tr. 5/17/10).

In support of the hearing justice's findings, the appellant himself conceded that the medical records "standing alone, would probably not have had an effect upon the outcome of the case." *See* Appellant's PreBriefing Statement of September 21, 2004 (Attached Hereto as Exhibit D). That statement is equally true today. The absence of injury nearly three months

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[2] *See* State v. Hazard, 797 A.2d 448, 463-64 (R.I. 2002).

after the incidents in question would not have affected the outcome of defendant's conviction for fellatio. The hearing justice's findings are sound and well supported by the applicable caselaw and the record in this case.

Conclusion

For the reasons stated in this prebriefing statement and for those that may be advanced during oral argument, the State would request that petitioner's appeal of the denial of post-conviction relief be denied and dismissed.

Respectfully Submitted,

STATE OF RHODE ISLAND
By Its Attorneys,

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Certificate Of Service

I hereby certify that on March 23, 2011, I served a copy of the within upon defendant's appellate counsel by depositing a copy of same in the box reserved for the Public Defender in the office of the Clerk of the Supreme Court of Rhode Island, at 250 Benefit Street, Providence, Rhode Island.