In The

Supreme Court of Virginia

RECORD NO.: 141239

JUDY GAYLE DESETTI,

Appellant,

v.

FRANCIS CHESTER; CHESTER-CESTARI LAW, P.C.,

Appellees.

BRIEF OF APPELLEES

Sabrina N. Chester, Esquire VSB# 86576
LAW OFFICE OF SABRINA CHESTER
20 Bobby's Way, Ste. 105
Staunton, VA 24401
(540) 280-2791 - Telephone
(540) 904-4723 - Facsimile
lawofficeofsabrinachester@yahoo.com

Counsel for Appellees
Francis Chester and Chester-Cestari Law, P.C.

Gibson Moore Appellate Services, LLC
421 East Franklin Street ♦ Suite 230 ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

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TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT

COUNTERSTATEMENT OF THE CASE

This matter concerns an action for legal malpractice filed in the Augusta County Circuit Court of Virginia by Judy Gayle Desetti ("Desetti") against her former criminal defense attorney, Francis Chester and his law practice, Chester-Cestari Law, P.C. (collectively, "Chester").

Because Desetti's Complaint alleged that she pled guilty to misdemeanor assault after her felony assault conviction was vacated, she failed to set forth a viable cause of action for malpractice, and Chester's Demurrer was granted. Desetti appeals this ruling.

For the reasons stated below, Desetti's Appeal should be denied and Chester's Demurrrer should be sustained.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED CHESTER'S DEMURRER BECAUSE DESETTI FAILED TO ALLEGE IN HER COMPLAINT FOR LEGAL MALPRACTICE THAT SHE OBTAINED POST CONVICTION RELIEF, THAT SHE WAS ACTUALLY INNOCENT OF THE UNDERLYING CRIMINAL CHARGE, AND THAT HER CRIMINAL ATTORNEY'S MALPRACTICE WAS THE PROXIMATE CAUSE OF HER HARM, BASED ON THE FACT THAT AFTER DISMISSAL OF HER CHARGE OF ASSAULT AND BATTERY ON A LAW ENFORCEMENT OFFICER ON THE GROUNDS OF INEFFECTIVE ASSISTANCE OF COUNSEL, DESETTI THEN PLED GUILTY TO MISDEMEANOR ASSAULT FOR THE SAME UNDERLYING FACTUAL INCIDENT, AND SHE THEREFORE DID NOT OBTAIN POSTCONVICTION RELIEF, SHE WAS NOT INNOCENT OF THE UNDERLYING CRIMINAL CHARGE, AND HER GUILT WAS THE PROXIMATE CAUSE OF HER HARM.

Standard of Review

A demurrer tests the legal sufficiency of a complaint, taking all facts and inferences fairly drawn from stated facts in the complaint as true, as to whether or not the complaint alleges a viable cause of action upon which the specific relief may be granted under extant Virginia law. Because a demurrer presents an issue of law, an appeal of the trial court's grant of a demurrer is subject to *de novo* review by this Court. *See, Code § 8.01-273*; *Jared & Donna Murayama 1997 Trust v. NISC Holdings, LLC*, 284 Va. 234, 727 S.E.2d 80 (2012).

Applying these principles here, the order appealed from should be affirmed.

A. In an action for legal malpractice regarding the representation of a criminal defendant, a plaintiff must allege and prove that she has obtained post-conviction relief, that she actually is innocent of the underlying criminal charge, and that her criminal attorney's malpractice was the proximate cause of her harm.

Issue

The first series of questions presented in this case are: 1) whether Desetti's plea of guilty to misdemeanor assault after dismissal of her criminal charge of assault and battery on a law enforcement officer on the grounds of ineffective assistance of counsel invalidates post-conviction relief; 2) whether Desetti's plea of guilty to misdemeanor assault after dismissal of her criminal charge of assault and battery on a law enforcement officer on the grounds of ineffective assistance of counsel removes her right to a claim of innocence; 3) whether Desetti's guilt of assault is the proximate cause of her harm. All three questions are tied intricately together and discussion of one independent of the others is not effectively possible. For the reasons stated below, Chester answers yes to all three questions.

Rule

In *Adkins v. Dixon*, 253 Va. 275, 482 S.E.2d 797 (Va. 1997), a case with similar facts to the case at hand, a criminal defendant was represented by court-appointed counsel and was found guilty of criminal charges. On

appeal, his attorney raised the speedy trial defense to 10 of his 16 charges to which the Court reversed the lower court's conviction and discharged him from further prosecution on those 10 charges. An attempt to raise the speedy trial defense to the remaining 6 charges was made to the Virginia Supreme Court but denied accordingly.

After exhausting his appellate rights, Adkins filed a Writ for Habeas Corpus alleging ineffective counsel on the grounds that his attorney failed to properly raise the speedy trial defense to the remaining 6 charges. His Writ was denied. He then filed a malpractice claim against his attorney.

The *Adkins* Court stated, "[a]s, we said in *Zysk v. Zysk*, 239 Va. 32, 34, 404 S.E.2d 721, 722 (1990), 'courts will not assist the participant in an illegal act who seeks to profit from the act's commission.' Therefore … a post-conviction ruling <u>adverse</u> to the defendant will prevent a recovery for legal malpractice." *Id.* at 801. The Court also stated that "[A] plaintiff in a case like the present should have the burden of alleging and proving as a part of his cause of action that he has obtained post-conviction relief." *Id*.

Because the plaintiff had not obtained post-trial conviction for those 6 charges and did not allege his innocence, and because the Court believed that his guilt, rather than his attorney's alleged failure to assert the speedy

trial defense, was the proximate cause of his convictions, the Court upheld the lower court's dismissal of his malpractice claim.

In a more recent Virginia Supreme Court case, *Taylor v. Davis*, 265 Va. 187, 576 S.E.2d 445 (Va. 2003), another case involving a criminal defendant and subsequent malpractice claim, the Court reaffirmed what it stated in *Adkins* stating, "[P]laintiff is required to plead that he was actually innocent."

In Taylor's case, however, his conviction was overturned because, while he was charged with driving a moped with a suspended license, such an action was not in fact a crime. After conviction, and a subsequent Motion to reopen his case, endorsed by the Commonwealth's Attorney, the Court dismissed the charge upon which Taylor was convicted; therefore, he was able to proceed with his malpractice claim because the underlying act was never illegal. Allegations in his Motion for Judgment if true would establish that the plaintiff was actually innocent as a matter of law; therefore, the Court stated that such a plaintiff does not have to plead that he sought and obtained post-conviction relief.

The *Taylor* Court reiterated its ruling in *Adkins*, stating, "[w]e also concluded in Adkins that the plaintiff in that case was required to plead that he was actually innocent, and we held that his guilt, not counsel's alleged

failure to asset the speedy trial defense, was the proximate cause of his convictions." *Id.* at 289, 576 S.E.2d at 447.

Application

Applying this standard to the facts at hand, clearly Desetti's Complaint for legal malpractice was without merit and was rightfully dismissed on the grounds that she failed to set forth a viable cause of action upon which relief may be granted under extant Virginia law.

Certain facts are of importance to the Court on this case. The first fact of importance and the most pertinent fact of all—the fact upon which this entire case is hinge—is the fact that on July 8, 2004, Judy Desetti committed assault at her home in Augusta County. Secondly, because this assault incident at her home involved a law enforcement officer, Desetti was charged with assault and battery of a law enforcement officer and obstruction of justice for which Desetti retained Francis Chester to represent her. (Complaint at ¶5; R. 2).[1] This matter then proceeded to trial wherein Desetti was found guilty by a jury of her peers of assault and battery on a law enforcement officer. (Complaint at ¶12, 19, and 20; R. 3-5).

[1] Citations to pages of the trial court's record appear as: "(R. __)"

After exhausting her appellate rights with no success, Desetti filed a Writ of Habeas Corpus alleging that Mr. Chester provided ineffective assistance of counsel. (Complaint at ¶24; R. 5). This Writ was granted on August 30, 2013, and her conviction was vacated accordingly. (Complaint at ¶25; R. 5-6).

The final fact of importance—as important as the first fact, is that the Commonwealth elected to retry Desetti for assault—this time for simple assault, for the same July 8, 2009 incident. Desetti pled guilty. (Complaint at ¶26; R. 6).

Admittedly, Desetti's conviction of June 2, 2010 for assault and battery of a law enforcement officer was vacated after her Writ of Habeas Corpus was granted on August 20, 2013; however, she then pled guilty to misdemeanor assault for the same incident of July 8, 2009 for which she originally was convicted. The fact that the Commonwealth gave her leniency and only charged Desetti with misdemeanor assault for the incident in question does not remove the fact that Desetti was guilty of the underlying assault; therefore, she is a guilty party, and her Complaint fails to allege that, in the end, she obtained post-conviction relief.

The underlying concept noted in *Adkins* is that a plaintiff in a case such as the one at hand is required to plead that she is actually innocent.

Desetti does not allege in her Complaint that she is innocent. She does not allege that she is innocent because she is not actually innocent. She pled guilty to the underlying crime of assault. She is a guilty party. She cannot now reap profit from her illegal act.

Further, Desetti's guilt of committing assault was the proximate cause of her convictions. Clearly, Desetti was guilty of the assault as originally convicted, and assault is an illegal act. If Desetti were to profit through abuse of the judicial system in the form of her Complaint for malpractice, she would be rewarded for her illegal act of assault, and she would profit from her commission of an illegal act.

Desetti was given her due for any alleged malpractice on the part of Chester through her Writ of Habeas Corpus. Her Writ was granted and accordingly her original conviction was vacated—that was her due; however, her due also included being recharged for assault to which she pled guilty. This was her opportunity for a new hearing, for vindication, but it was her decision to plead guilty to this charge. By pleading guilty, Desetti now is precluded from seeking financial gain/profit for this guilty act. Her due for committing an illegal act does not include obtaining a civil judgment for malpractice.

If Desetti had not committed assault at her home on July 8, 2009, she would not have had the opportunity to file a complaint for malpractice against Chester. Desetti—a guilty party, should not be rewarded for her illegal act.

1. For purposes of determining actual innocence for legal malpractice actions, a guilty plea to a plea offer of a lesser included offense of the original charge is equivalent to being convicted of the original charge.

Issue

Another question presented in this case is whether Desetti's subsequent plea of guilty to misdemeanor assault removes her actual innocence of the original criminal charge of assault and battery on a law enforcement officer. For reasons stated below, Chester answers yes to this question.

Rule

As per the 5th Amendment of the U.S. Constitution and as per *Blockburger v. United States*, 284 U.S. 209 (1932), under the *Blockburger* analysis, a lesser-included offense is one which "requires no proof beyond that which is required for conviction" of the greater offense. *Brown v. Ohio*, 432 U.S. 161 (1971) at 168. Accordingly, one may not be convicted separately of both a greater and lesser-included offense because the lesser offense is included within the greater offense. A defendant may be

charged and convicted of one or the other offense for the same incident—but not both, because in a way they are the same.

As such, for purposes of determining *actual* innocence of a defendant, if a defendant pleads guilty to a lesser-included offense after being charged with the higher offense, she is a guilty party—actual innocence is removed, and as stated in *Taylor v. Davis*, 265 Va. 187, 576 S.E.2d 445 (Va. 2003), wherein the Virginia Supreme Court reiterated its innocence requirement as established in *Adkins v. Dixon*, 253 Va. 275, 482 S.E.2d 797 (Va. 1997), a plaintiff in a legal malpractice action must allege actual innocence.

Application

Desetti's argument that because her habeas petition was granted and her felony conviction was vacated and because she later pled guilty to misdemeanor assault, that she is actually innocent of the crime as originally charged is without merit. While her charge of felony assault and battery on a law enforcement officer was vacated, the underlying assault incident remained, for which she was recharged and subsequently pled guilty. If Desetti's argument is valid, then the Prosecution could not have charged her with simple assault as per the 5th Amendment of the U.S. Constitution and as per *Blockburger v. United States*, 284 U.S. 299 (1932).

In the case at hand, Desetti was not found innocent of assault of a law enforcement officer. Instead, her conviction by a jury of her peers at the Circuit Court was vacated by the Court upon its granting of her Habeas Corpus Petition on the grounds of ineffective assistance of counsel. The prosecution was free to recharge her. They chose to recharge her for the same underlying incident but reduced the charge to simple assault, which is a lesser-included offense of assault of a law enforcement officer. Desetti pled guilty to assault for the same underlying incident as she was originally charged. She is not an innocent party. She is guilty of the crime of misdemeanor assault—a lesser-included offense of assault of a law enforcement officer, and thus, under the *Blockburger* analysis, she is not, as she argues, innocent of the crime charged. As such, the Court did not err by concluding that a guilty plea to a lesser-included offense is equivalent to being convicted of the original charge for purposes of the innocence requirement in an attorney malpractice claim.

2. An error by a criminal attorney to adequately convey a plea offer for a reduced criminal charge to his client is not equivalent to a sentencing error.

Issue

Another question presented in this case is whether an alleged error by criminal counsel, Chester, to adequately convey a plea offer to Desetti is

equivalent to a sentencing error. For reasons stated below, Chester answers no to this question.

Rule

According to Black's Law Dictionary, 2d Ed, plea bargaining is "[a]n agreement set up between the plaintiff and the defendant to come to a resolution about a case, without ever taking it to trial." Basically, a plea is offered prior to trial where innocence or guilt has yet to be adjudged. If a defendant accepts a plea offer, usually the consequence is a reduced sentence, and the defendant enters a plea of guilty without the matter ever going before the factfinder.

Sentencing, on the other hand, occurs after the trial and conviction of the defendant. Guilt has already been established, and the only issue remaining is the consequence of said guilt.

Clearly, sentencing is not equivalent to a plea bargain, and thus, as established in *Adkins v. Dixon*, 253 Va. 275, 482 S.E.2d 797 (Va. 1997), innocence is a requirement in a legal malpractice action regarding a criminal defense matter even in a case where an allegation is raised that criminal defense counsel failed to adequately convey a plea offer.

Desetti, however, contends that the case of *Jones v. Link*, 493 F. Supp. 2d 765 (2007) loosened the "actual innocence" requirement

established in *Adkins v. Dixon*, 253 Va. 275, 482 S.E.2d 797 (Va. 1997); however, Desetti fails to note the distinction between *Jones* and *Adkins*. Jones involved an error by counsel at the Sentencing Hearing, not at the actual trial of guilt or innocence. In that case, counsel's ineffective assistance caused his client to suffer an increased sentence. As such the Court found that Plaintiff's guilt of the underlying charge, in itself, did not preclude him from filing a malpractice action against his attorney for ineffective assistance of counsel due to a sentencing error.

In no way did the *Jones* court attempt to overturn *Adkins*. In fact, the *Jones* court acknowledged and reaffirmed *Adkins* but noted the distinction between the facts of *Jones* and the facts of *Adkins*. The *Jones* court restated the *Adkins* court holding. "[W]here a plaintiff complains that his attorney's negligence resulted in his wrongful conviction, plaintiff has obviously met his initial burden for pleading proximate causation if he alleges (i) that he was actually innocent of the crimes charged, (ii) that defendant's negligence resulted in his wrongful conviction, and (iii) that he was exonerated by means of postconviction relief. *See Adkins*, 253 Va. At 281-82, 482 S.E.2d 797." (*Id.* at 669).

After reiterating precedent established by *Adkins*, the *Jones* court stated, "It is not clear, however, how these initial burdens apply to a plaintiff

who alleges that his attorney's negligence resulted in a sentencing error, rather than an error related to his conviction." *Jones v. Link*, 492 F. Supp. 2d 765, at 769 (2007). The Court further stated, "[T]he issue of guilt or innocence is relevant, if the client's complaint is the fact of conviction, rather than the severity of the sentence or other consequences." *Id.* at 770. "Actual innocence is 'not relevant if the attorney's error concerns the extent or severity of the sentence.'" *Id.* at 771.

Application

In the case at hand, Desetti's malpractice claim, unlike Jones' malpractice claim, was based on her allegations that her attorney failed to properly defend her at her actual trial of innocence or guilt—not at a sentencing hearing, and therefore, she was wrongfully convicted. She specifically alleges that the cause of her original felony conviction was Defendants' malpractice. This is not a claim that her counsel's ineffective assistance caused her to receive an increased sentence. While her allegations include a claim that counsel failed to adequately convey a plea offer, which Defendants vehemently deny, the fact that she alleges that she was not aware of a plea offer does not equate a sentencing error. Such a claim is a stretch.

Desetti was guilty of the underlying crime of assault. Pure and simple. Because this is not a case regarding a sentencing error, innocence is required; therefore, the trial court was correct in granting Defendants' demurrer.

CONCLUSION

For reasons stated above, Defendants respectfully request that this Honorable Court sustain the Order of the Augusta County Circuit Court of May 18, 2014 and sustain Defendants' Demurrer, together with such other and further relief to Defendants as this Court deems just and proper.

Respectfully submitted,

FRANCIS CHESTER
CHESTER-CESTARI LAW, P.C.
By Counsel

/s/Sabrina N. Chester

Sabrina N. Chester, Esquire VSB# 86576
LAW OFFICE OF SABRINA CHESTER
20 Bobby's Way, Ste. 105
Staunton, VA 24401
(540) 280-2791 - Telephone
(540) 904-4723 - Facsimile
lawofficeofsabrinachester@yahoo.com

Counsel for Appellees
Francis Chester and Chester-Cestari Law, P.C.

CERTIFICATE OF FILING AND SERVICE

1. I hereby certify, pursuant to Rule 5:26, that on this 23rd day of February, 2015, I electronically filed the foregoing Brief of Appellees with the Clerk of the Court via e-mail (scvbriefs@courts.state.va.us) and sent fifteen (15) copies of the foregoing to the Office of the Clerk via hand delivery.

2. I further certify that three (3) copies of the foregoing Brief of Appellees were sent via e-mail and first-class mail to the following:

   W. Michael Lewis, Esquire
   Dean E. Lhospital, Esquire
   Lewis & Lhospital, PLLC
   100 Court Square, Third Floor
   Charlottesville, VA 22902
   Michael@cvillelawyers.com
   dean@cvillelawyers.com

3. This Brief of Appellees contains 3,020 words.

/s/Sabrina N. Chester

Sabrina N. Chester, Esquire VSB# 86576
LAW OFFICE OF SABRINA CHESTER
20 Bobby's Way, Ste. 105
Staunton, VA 24401
(540) 280-2791 - Telephone
(540) 904-4723 - Facsimile
lawofficeofsabrinachester@yahoo.com

Counsel for Appellees
Francis Chester and Chester-Cestari Law, P.C.