

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 15th day of February, 2019.

Kyle A. Burks, No. 1024584,

Petitioner,

against Record No. 180648

Harold Clarke, Director of the Department of Corrections,

Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon consideration of the petition for a writ of habeas corpus filed May 14, 2018, the rule to show cause, the respondent's motion to dismiss, and petitioner's reply, the Court is of the opinion that the motion should be granted and the writ should not issue.

Pursuant to a written plea agreement, petitioner pled guilty in the Circuit Court of the City of Winchester to burglary and two counts of misdemeanor sexual battery, and was sentenced, in accordance with his plea agreement, to twenty years and twenty-four months' imprisonment with sixteen years and twenty-four months suspended.* Petitioner did not appeal. He now challenges the legality of his confinement pursuant to these convictions.

In claim (1), petitioner contends he was denied the effective assistance of counsel because trial counsel informed him he was "out of continuances." Because of counsel's misadvice and because the trial court had twice denied petitioner's motions for new counsel, petitioner believed any additional motion for new counsel would be denied and that he had no choice but to plead guilty.

The Court rejects claim (1). The record, including the trial transcript, demonstrates the trial court engaged in a thorough plea colloquy with petitioner prior to accepting his guilty pleas. During that colloquy, petitioner affirmed he fully understood the charges against him, he had discussed with his attorney what the Commonwealth was required to prove and how petitioner might be able to defend himself, and he was pleading guilty voluntarily. In addition, petitioner told the trial court he understood the maximum sentences he could receive for each crime. Petitioner affirmed no one had made him any promises different from those contained in the plea

*The circuit court also revoked two previously suspended sentences of six years each and ordered that one of the sentences run concurrently with the sentences for petitioner's new convictions. Although petitioner lists these revocations in his petition, he does not raise any claims related to them.

agreement, he fully understood the plea agreement, and he was thoroughly satisfied with the services of counsel. Petitioner failed to offer a valid reason why he should not be bound by his representation at trial that his counsel's performance was adequate and that his guilty pleas were voluntary and there is no evidence identified by petitioner that would support the contrary conclusion that the pleas were involuntary. *Anderson v. Warden*, 222 Va. 511, 516 (1981).

In claim (2), petitioner contends he was denied the effective assistance of counsel because trial counsel failed to file a motion with the trial court seeking a recording of a 911 call after trial counsel had requested the recording by letter to the Commonwealth's Attorney. Petitioner attached to his petition a letter from the Commonwealth's Attorney informing trial counsel that the recording of the 911 call no longer existed. Petitioner alleges the 911 call contained a witness description of the perpetrator and this evidence would have been exculpatory.

The Court rejects claim (2) because petitioner failed to offer a valid reason why he should not be bound by his representation at trial that his counsel's performance was adequate. *Id.*

In a portion of claim (3), petitioner contends he was denied the effective assistance of counsel because trial counsel did not object to any "exculpatory" evidence. Petitioner states that because of counsel's ineffectiveness, he was coerced into pleading guilty.

The Court rejects this portion of claim (3) because petitioner failed to offer a valid reason why he should not be bound by his representation at trial that his counsel's performance was adequate and that his guilty pleas were voluntary and there is no evidence identified by petitioner that would support the contrary conclusion that the pleas were involuntary. *Id.*

In another portion of claim (3), petitioner contends he was denied the effective assistance of counsel because trial counsel did not file unspecified motions on petitioner's behalf. Petitioner states that because of counsel's ineffectiveness, he was coerced into pleading guilty.

The Court rejects this portion of claim (3) because petitioner failed to offer a valid reason why he should not be bound by his representation at trial that his counsel's performance was adequate and that his guilty pleas were voluntary and there is no evidence identified by petitioner that would support the contrary conclusion that the pleas were involuntary. *Id.*

In another portion of claim (3), petitioner contends he was denied the effective assistance of counsel because trial counsel did not investigate unspecified witnesses or petitioner's alibi.

Petitioner states that because of counsel's ineffectiveness, he was coerced into pleading guilty.

The Court rejects this portion of claim (3) because petitioner failed to offer a valid reason why he should not be bound by his representation at trial that his counsel's performance was adequate and that his guilty pleas were voluntary and there is no evidence identified by petitioner that would support the contrary conclusion that the pleas were involuntary. *Id.*

In another portion of claim (3), petitioner contends he was denied the effective assistance of counsel because trial counsel failed to appear for unspecified scheduled court dates. Petitioner states that because of counsel's ineffectiveness, he was coerced into pleading guilty.

The Court rejects this portion of claim (3) because petitioner failed to offer a valid reason why he should not be bound by his representation at trial that his counsel's performance was adequate and that his guilty pleas were voluntary and there is no evidence identified by petitioner that would support the contrary conclusion that the pleas were involuntary. *Id.*

In another portion of claim (3), petitioner contends he was denied the effective assistance of counsel because trial counsel did not "disclose the exculpatory medical records" until after petitioner had entered his guilty pleas.

The Court holds this portion of claim (3) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In support of his claim, petitioner attached medical records from Winchester Medical Center memorializing the physical examination of the victim and the collection of a physical evidence recovery kit. However, petitioner does not allege how the medical records are exculpatory, or how counsel's alleged failure to provide the attached medical records to the petitioner caused him to plead guilty. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, he would have pleaded not guilty, would have proceeded to trial, and the outcome of the proceedings would have been different. *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

In claim (4), petitioner contends he was denied the effective assistance of counsel because trial counsel failed to inform him the Commonwealth would have been required to prove at trial that petitioner had broken into the victim's home.

The Court rejects claim (4) because petitioner failed to offer a valid reason why he should not be bound by his representation at trial that he understood what the Commonwealth was

required to prove in order to find him guilty of each offense and that his counsel's performance was adequate. *Anderson*, 222 Va. at 516.

In claim (5), petitioner contends he was denied the effective assistance of counsel because trial counsel failed to investigate and subpoena John Defalco, who petitioner alleges was a "key witness."

The Court rejects claim (5) because petitioner failed to offer a valid reason why he should not be bound by his representation at trial that his counsel's performance was adequate. *Id.*

In claims (6) and (7), petitioner contends he was denied the effective assistance of counsel because trial counsel moved the court to submit evidence to the Department of Forensic Science for DNA testing instead of viewing the evidence himself and hiring a private forensic expert. Petitioner further contends he never consented to allowing the Department of Forensic Science to test the evidence.

The Court rejects claims (6) and (7) because petitioner failed to offer a valid reason why he should not be bound by his representation at trial that his counsel's performance was adequate. *Id.*

In a portion of claim (8), petitioner contends the court did not give a reason for sentencing him above the recommended sentencing guidelines.

The Court holds this portion of claim (8) is not cognizable in a petition for a writ of habeas corpus. Although the trial judge must provide a written explanation for departure from the guidelines, *see* Code § 19.2-298.01(B), failure to comply with that requirement is not cognizable in habeas corpus. Code § 19.2-298.01(F).

In another portion of claim (8), petitioner contends he was denied the effective assistance of counsel because trial counsel failed to object to the sentence he received and withheld the sentencing guidelines until after petitioner was sentenced.

The Court holds this portion of claim (8) satisfies neither the "performance" nor the "prejudice" prong of the two-part test enunciated in *Strickland*. The record, including the plea agreement and the trial transcript, demonstrates the Commonwealth and petitioner agreed to the sentence for each offense to which petitioner pled guilty. Although petitioner contends trial counsel did not share the guidelines with him before sentencing, the petitioner affirmed during the plea colloquy that he read the plea agreement and discussed the terms with counsel before

signing the agreement. Furthermore, before the trial court accepted petitioner's guilty pleas, it noted on the record that petitioner agreed to a sentence that was an upward departure from the guidelines, and petitioner affirmed he was aware of that fact, but wished to proceed with his guilty pleas. Thus, petitioner has failed to demonstrate that counsel's performance was deficient or that there is a reasonable probability that, but for counsel's alleged errors, he would have pleaded not guilty, would have proceeded to trial, and the outcome of the proceedings would have been different. *Hill*, 474 U.S. at 59.

In his reply to the motion to dismiss, petitioner contends for the first time that he was denied the effective assistance of counsel because trial counsel did not review exculpatory evidence that petitioner alleges fraudulently linked him to the crime scene. In support of this claim, petitioner alleges the victim's medical records demonstrate that he did not ejaculate at the crime scene and, therefore, the certificate of analysis showing he could not be eliminated as a contributor to a spermatozoa sample found at the crime scene was fraudulent. Petitioner contends trial counsel was ineffective for failing to review the police report and the certificate of analysis and to inform him that the documents were inconsistent.

The Court holds this claim is not properly before the Court. Petitioner has neither requested nor been granted leave to amend his petition to include this claim. *See Rule 5:7(e)* (a petitioner may not raise new claims unless, prior to the expiration of the statute of limitations and the entry of a ruling on the petition, he obtains permission from the Court to do so); *see also* Code § 8.01-654(B)(2) (a petition for a writ of habeas corpus "shall contain all allegations the facts of which are known to petitioner at the time of filing").

Accordingly, the petition is dismissed and the rule is discharged.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:



Deputy Clerk