

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 1st day of July, 2021.

Present: All the Justices

Steven Jerome Guarino,

Appellant,

Against Record No. 200192
 Circuit Court No. CL19HC-2410

Harold W. Clarke, Director,

Appellee.

Upon an appeal from a judgment rendered by the Circuit Court of Chesterfield County.

Steven Jerome Guarino appeals from a judgment of the Circuit Court of Chesterfield County (“circuit court”) denying his petition for a writ of habeas corpus without conducting an evidentiary hearing. Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is no reversible error in the judgment of the circuit court.

I.

Based on a home marijuana growing operation, Guarino was indicted for manufacturing with intent to distribute marijuana and possessing a firearm while simultaneously possessing with the intent to manufacture more than one pound of marijuana. At the beginning of his jury trial, Guarino assured the circuit court that he understood his charges and the possible penalties. Guarino affirmatively stated that he fully discussed his charges and possible defenses with his attorney, Keith Jones, and that he was entirely satisfied with Jones’ services. Guarino further assured the circuit court that he was entering his pleas of “not guilty” freely and voluntarily. The Commonwealth and Jones confirmed that an unspecified number of plea bargain offers had been communicated to Guarino.

On March 17, 2016, the jury found Guarino guilty of manufacturing with the intent to distribute marijuana pursuant to Code § 18.2-308.4(C) and possessing a firearm while simultaneously possessing more than one pound of marijuana with the intent to manufacture pursuant to Code § 18.2-248.1. The circuit court imposed the combined ten-year sentence set by the jury, consisting of the five-year mandatory minimum sentence under Code § 18.2-308.4(C) and the five-year minimum sentence under Code § 18.2-248.1. Guarino made a statement to the

circuit court during his sentencing hearing, but he failed to mention dissatisfaction with Jones' representation.

Between August 5 and 8, 2016, the circuit court received letters from Guarino in which he requested new counsel and complained that Jones failed to adequately explain the consequences of rejecting the offered plea agreement. Guarino specifically stated that when he inquired about his chances of prevailing in a jury trial, Jones replied, "That's what I do! Plus this prosecuting attorney is not the sharpest tool in the shed."

On December 1, 2016, Jones moved on Guarino's behalf for a delayed appeal to the Court of Appeals, stating that the missed deadline "was at no fault of [Guarino]." The Court of Appeals granted the motion for a delayed appeal; however, the Court of Appeals denied Guarino's appeal on the merits by one-judge review and again by three-judge review. On August 10, 2018, this Court refused Guarino's petition for appeal.

On July 11, 2019, Guarino filed a petition for a writ of habeas corpus in the Circuit Court of Chesterfield County. As relevant to this appeal, Guarino claimed he was denied the effective assistance of counsel because the Commonwealth offered Guarino a plea agreement pursuant to which he would serve a total of six months for all charges pending against him. Guarino alleged that he would have accepted the agreement but for Jones' advice to refuse the plea agreement because he "could beat the case against him."¹

Harold Clarke, the Director of the Virginia Department of Corrections (the "Director"), filed a motion to dismiss. Guarino replied and included an affidavit claiming the Commonwealth offered him the six-month plea agreement on three different occasions.

On December 6, 2019, the circuit court denied and dismissed Guarino's habeas petition without holding an evidentiary hearing. Specifically, the circuit court found that Guarino's claim that counsel was ineffective in his failure to advise him of the potential consequences of refusing the plea offer was without merit. The circuit court went on to explain that Guarino represented at trial that he (1) "understood the charges against him, that he had had sufficient time to discuss those charges with defense counsel," (2) "had discussed with counsel the elements of the

¹ In his habeas petition, Guarino raised three claims of ineffective assistance of counsel: (1) failure to call an expert witness on behalf of the defense; (2) failure to impeach the credibility of one of the Commonwealth's witnesses on cross-examination; and (3) failure to advise Guarino of the ramifications of refusing a plea offer for a six-month sentence. The Court only granted Guarino an appeal regarding his third claim.

offenses and what the Commonwealth had to prove, as well as any possible defenses,” (3) “had discussed with counsel his possible plea and had decided for himself to plead not guilty,” (4) “was entirely satisfied with his attorney’s representation,” and (5) “decided for himself to have a jury trial after discussing that decision with his attorney.” The circuit court found that Guarino “offered no justification for disregarding these repeated representations regarding the effectiveness of his attorney and his desire to be tried by a jury.” For these reasons, the circuit court found “that defense counsel rendered effective representation with respect to this matter.”

II.

On appeal, Guarino contends that Jones failed to impress upon him the maximum punishment for each offense and asks that this Court reverse the circuit court’s dismissal of his habeas petition and remand with instructions to conduct an evidentiary hearing on the alleged ineffective assistance of counsel. In reference to his ineffective assistance of counsel claim, Guarino states that it “was not until after [he] received a sentence of ten years that he understood how deeply his counsel had failed him by failing to explain the potential for incarceration twenty times the length of the plea bargain.” The Director argues that Guarino knew of this factual allegation when he filed his habeas petition in the Circuit Court of Chesterfield County in 2019, and thus, Guarino is barred from raising the issue for the first time on appeal. We agree.

Code § 8.01-654(B)(2) states that a “petition shall contain all allegations the facts of which are known to petitioner at the time of filing.” Here, Guarino’s claim that Jones never informed him of the maximum punishments he faced if convicted was a fact known to him when he filed his initial habeas petition; nevertheless, Guarino neglected to include that factual allegation in that pleading. Guarino’s initial pleading stated, “An attorney must correctly inform the defendant of the direct consequences of his plea,” failing to specify the consequences counsel failed to inform him of prior to his rejection of the plea deal.

Generally, a party may not “rise above” the allegations made in his pleading.² As this Court has often held, “[t]he issues in a case are made by the pleadings, and not by the testimony

² As we recently explained, this refers to the rule, originally set out in *Massie v. Firmstone*, 134 Va. 450 (1922), that “[n]o litigant can successfully ask a court or jury to believe that he [or she] has not told the truth” and that, as a result, “[his or her] statements of fact and the necessary inferences therefrom are binding upon him [or her].” *N. Va. Kitchen, Bath & Basement, Inc. v. Ellis*, ___ Va. ___, ___ n.3, 856 S.E.2d 593, 597, n.3 (Va. 2021) (citing *Patterson v. Patterson*, 257 Va. 558, 563 (1999) and *Courtney v. Commonwealth*, 281 Va. 363, 370 (2011)).

of witnesses or other evidence.” *Jenkins v. Bay House Assocs., L.P.*, 266 Va. 39, 44 (2003) (quoting *Ted Lansing Supply Co. v. Royal Aluminum & Constr. Corp.*, 221 Va. 1139, 1141 (1981)). “Thus, a court is not permitted to enter a decree or judgment order based on facts not alleged or on a right not pleaded and claimed.” *Id.* at 43. Because Guarino neglected to include in his initial petition the specific allegation that Jones did not inform him of the maximum punishment for the crimes for which he was indicted, it was not properly preserved for appellate review. *See* Rule 5:25. For these reasons, we hold that Guarino’s allegation of ineffective assistance of counsel is barred from consideration by this Court.³

III.

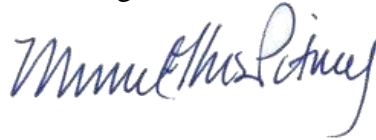
For the reasons stated, we find no error in the circuit court’s denial of Guarino’s habeas petition and affirm the judgment.

This order shall be certified to the Circuit Court of Chesterfield County.

A Copy,

Teste:

Douglas B. Robelen, Clerk



By:

Deputy Clerk

³ While it is not necessary for us to reach the question of whether the circuit court erred in not conducting an evidentiary hearing in this case, we note the circuit court conducted an extensive colloquy with Guarino, which is included in the record, ensuring that his plea of not guilty was made knowingly, intelligently, and voluntarily. At no time did Guarino claim that his attorney failed to advise him of the potential consequences of refusing the plea offer. To the contrary, Guarino assured the circuit court that he discussed with his attorney the charges against him, any possible defenses, and his possible plea. Guarino confirmed that his decision to plead not guilty was his own, and he was “entirely satisfied with his attorney’s representation.” “[A] convict may question by habeas corpus the adequacy of counsel and the voluntariness of a guilty plea *only* when he alleges and proves a valid reason why he should be permitted to disavow his prior, contrary declarations made at the trial.” *Smith v. Brown*, 291 Va. 260, 265 (2016) (quoting *Anderson v. Warden*, 222 Va. 511, 516 (1981)). In this case, Guarino failed to proffer in his habeas petition a specific and valid reason why he should be allowed to disavow the statements he made during his plea colloquy. Therefore, the circuit court was not required to receive additional evidence beyond that in the record.