

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-174

MARCH TERM, 2002

In re Eugene Martel	}	APPEALED FROM:
	}	
	}	Caledonia Superior Court
	}	
	}	DOCKET NO. 74-4-99 Cacv
	}	
	}	Trial Judge: Alan W. Cheever
	}	
	}	

In the above-entitled cause, the Clerk will enter:

Defendant appeals from a judgment of the Caledonia Superior Court denying his petition for post-conviction relief. Defendant, through assigned appellate counsel, raises two contentions: (1) the trial court's finding that defendant was properly advised of, and knowingly waived, his right to testify was clearly erroneous; and (2) the trial court erred in rejecting defendant's claim of ineffective assistance of counsel resulting from a failure to object to certain statements in defendant's pre-sentence investigation report. In a supplemental pro se brief, defendant has raised several additional claims, including allegations of ineffective assistance of counsel, attorney conflict of interest, and judicial bias. We affirm.

Following a jury trial in September 1993, defendant was convicted of one count of sexual assault on his girlfriend. We affirmed the judgment on appeal. See State v. Martel, 164 Vt. 501 (1995). Defendant filed a petition for post-conviction relief in April 1999, and later filed several amended petitions. The matter proceeded to a hearing in March 2001, at which defendant and his trial counsel testified. At the conclusion of the hearing, the court entered findings and conclusions on the record, and subsequently issued an entry order denying the petition. This appeal followed.

Post-conviction relief will be granted when a petitioner establishes by a preponderance of the evidence that one or more fundamental errors rendered the conviction defective. See In re Hemingway, 168 Vt. 569, 570 (1998) (mem.). We will not disturb the superior court's findings on appeal unless they are clearly erroneous. Id.

Defendant (through assigned appellate counsel) first contends the court clearly erred in finding that he had knowingly waived his right to testify at trial. In so ruling, the court carefully reviewed the trial transcript, which showed that the prosecutor had specifically asked the presiding judge to inquire of defendant as to whether he had knowingly waived the right to testify. The transcript shows that the court thereupon elicited specific acknowledgments from defendant that he understood he had a right to testify, as well as an absolute right not to testify, that he had the opportunity to discuss the decision with counsel, and that he had reached his own decision not to testify. In light of this colloquy, defendant's contentions that he was not clearly apprised of the right to testify (as opposed to the right not to testify), and that he made the decision out of fear or surprise, are entirely unpersuasive. Equally unpersuasive is defendant's related contention that he was prejudiced by the non-admission of certain photographs that would have been introduced with his testimony. The court had ruled at trial that the photographs, depicting consensual sex between defendant and the complainant (his former girlfriend), were cumulative; the State had conceded that defendant and complainant repeatedly

engaged in consensual sexual intercourse prior to the assault, and the complainant had so testified. Accordingly, we find no error.

Defendant further contends the court erred in rejecting his claim of ineffective assistance, resulting from counsel's failure to correct an allegedly "incredible" statement in defendant's PSI report to the effect that he had threatened his attorney. Defendant testified at the hearing that an investigation into the incident found that he had not made such a threat. To demonstrate ineffective assistance of counsel warranting relief, a petitioner must first show that counsel's performance fell below an objective standard of reasonableness informed by prevailing professional norms, and second, that counsel's deficient performance prejudiced the defense. See *id.* at 571; Strickland v. Washington, 466 U.S. 668, 687-88 (1984). Here, even assuming that counsel was somehow deficient in failing to make a motion to strike the offending statement, nothing in the record suggests that the omission had any prejudicial impact at sentencing. On the contrary, the transcript of the sentencing hearing reveals that the trial court imposed a sentence of fifteen to twenty years based on the seriousness of the offense, defendant's numerous prior convictions, including several assaults, and his repeated violations of probation. We discern no basis to disturb the court's ruling.

In addition to the claims raised by appellate counsel, defendant has filed a pro se supplemental brief asserting a number of additional contentions. We address these in order. First, defendant contends the court erred in rejecting the claim that he was denied his Sixth Amendment right to counsel at the sentencing hearing based on counsel's alleged conflict of interest stemming from defendant's reported threat. The claim is unpersuasive. Defendant himself denies that the threat occurred. Moreover, the record is devoid of evidence that an actual conflict of interest adversely affected counsel's performance. See Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (to establish Sixth Amendment violation, defendant who raised no objection at trial must demonstrate that actual conflict of interest adversely affected attorney's performance); State v. Bacon, 163 Vt. 279, 302 (1995) (citing Cuyler). Indeed, the record shows that counsel called several witnesses to speak on behalf of defendant at the hearing, and argued vigorously for a favorable sentence. We thus discern no support in the record for defendant's claim that counsel rendered ineffective assistance at sentencing. Nor does the record suggest that the alleged conflict was so apparent that the court was required to inquire on its own motion. See United States v. Stantini, 85 F.3d 9, 13 (2d Cir. 1996) (inquiry required where court knew or should have known of potential conflict).

Defendant next contends that counsel rendered ineffective assistance at sentencing by failing to object to several statements in the PSI, including uncharged allegations of sexual assault by defendant against other women, and a statement by a friend of defendant that she feared defendant might kill the complainant. Defendant provides no persuasive argument that an objection to the statements would have been successful. Moreover, as noted, the court indicated that its sentence was based on the nature of the offense, defendant's prior convictions - several involving assaults - and his repeated violations of probation. Thus, we are not persuaded that counsel's failure to object to the statements was deficient or had any effect on the outcome.

Defendant additionally contends that counsel rendered ineffective assistance by failing to conduct a meaningful, independent pre-trial investigation; investigate the circumstances surrounding an extra-judicial admission by defendant; file a motion to suppress the admission in question; obtain the admission of photographs of consensual sexual intercourse between defendant and complainant; and inform defendant of any plea offer from the State. Apart from defendant's bare allegations, he offers no persuasive basis to substantiate the claim that counsel's pre-trial investigation was deficient, that the photographs were anything other than cumulative, as the trial court had ruled, or that counsel failed to communicate a favorable plea offer from the State. Defendant fails to identify the precise extra-judicial admission that he claims was obtained in violation of his constitutional rights, although the record citation in his brief suggests that it was a statement to a corrections officer admitting that he "had contact with [the complainant]." Even assuming that counsel was somehow deficient in failing to file a motion to suppress the statement, the record contains no persuasive evidence or argument showing that omission - in light of the abundant evidence of guilt - prejudiced the result. Accordingly, we discern no basis to disturb the judgment.

Defendant next contends the presiding judge at his trial was required to recuse himself because he had presided at the complainant's earlier relief from abuse proceeding. He further contends that counsel was deficient in failing to move for the judge's disqualification. The trial court properly rejected these claims, noting that the court's prior participation in the earlier proceeding did not require his recusal, see In re T.L.S., 144 Vt. 536, 542 (1984), that the record otherwise

revealed no bias on the part of the judge, and that counsel was not, therefore, deficient in failing to seek the court's disqualification.

Finally, defendant contends that he was denied due process by the superior court's failure to grant a continuance to present his pro se claims. In light of the record showing that the court carefully reviewed and considered each of defendant's claims, we fail to discern any prejudice from the court's ruling.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

James L. Morse, Associate Justice

Denise R. Johnson, Associate Justice