

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-029

SEPTEMBER TERM, 2002

In re Jason Mode

}	APPEALED FROM:
}	
}	Franklin Superior Court
}	
}	DOCKET NO. S 147-01 Fc
}	
}	Trial Judge: David A. Jenkins
}	
}	
}	

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

Defendant in this post-conviction relief proceeding appeals from a summary judgment of the Franklin Superior Court in favor of the State of Vermont. Defendant contends the court erred in granting the State's motion for summary judgment in the absence of a separate statement of undisputed material facts supported by affidavits or other evidentiary material. We agree, and therefore reverse.

In December 2000, defendant pled no contest to charges of negligent operation of a vehicle with serious bodily injury resulting and operation of a vehicle without the owner's consent. He was seventeen years old at the time. The court imposed a sentence of two to eight years to serve on the negligent operation charge and a concurrent four to five year sentence on the operation without consent charge. In March 2001, defendant filed a PCR petition, and in May he filed an amended petition, alleging that he had received ineffective assistance of counsel. Petitioner claimed that trial counsel negligently failed to investigate the circumstances surrounding a police interrogation of defendant in his home, where he made a number of incriminating statements allegedly without Miranda warnings and outside the presence of a disinterested adult or guardian. Defendant claimed that counsel negligently failed to file a motion to suppress, and argued that if the statements had been properly excluded there would not have been sufficient evidence of guilt and he would not have entered a no-contest plea. Defendant also asserted that counsel was negligent in failing to inform the court of certain inaccuracies in the pre-sentence investigation report, and that the omission resulted in a more severe sentence that he would otherwise have received.

The State filed a combined motion to dismiss for lack of jurisdiction and motion for summary judgment. The summary judgment motion argued that defendant was not in custody at the time of the police interview, and that his mother had left the room at defendant's request. Therefore, it argued that defendant could not satisfy his burden of showing that counsel rendered inadequate assistance in failing to file a suppression motion. The State did not specifically address defendant's claim relating to alleged inaccuracies in the pre-sentence investigation report. The State filed no separate statement of undisputed material facts, as required by V.R.C.P. 56(c)(2), nor any affidavits or other evidentiary material to support the facts alleged in the motion, other than an attached copy of a docket sheet from the district court. Defendant filed an opposition to the motion, arguing that the State's allegation that he was not in custody during the police questioning was a factual dispute and therefore not susceptible to summary judgment. The State subsequently filed a transcript from the change of plea hearing, requesting that it be considered in support of the motion.

Shortly thereafter, the trial court issued a brief entry order, granting the State's motion for summary judgment without a hearing. The order stated: " Petitioner has the burden of proof. He must come forth with evidence, not merely stand on pleadings, to survive summary judgment. This, he has not done. A judgment order shall be submitted by the State." The court thereafter signed a judgment order, stating that it had granted summary judgment because defendant had " failed to come forward with evidence in response to the State' s Motion," and therefore dismissed the petition. This appeal followed.

Summary judgment is appropriate only where the moving party establishes that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Samplid Enters., Inc. v. First Vt. Bank, 165 Vt. 22, 25 (1996). Once the moving party has met its burden, the party opposing the motion may not rest on mere allegations in the pleadings, but must come forward with an affidavit or other evidence that raises a dispute as to the facts in issue. Pierce v. Riggs, 149 Vt. 136, 137 (1987). The moving party, however, must meet its burden of showing an absence of material facts before the opposing party is required to come forward with suitable opposing affidavits or other evidence. Id. at 138. " Analytically, the burden does not shift to the nonmoving party until the court determines that the moving party has met its burden that there are no material facts which are in dispute between the parties." Id.

The court here explained that it had granted summary judgment based on defendant' s failure " to come forward with evidence in response to the State' s motion." The record reveals, however, that the State filed no affidavits or other evidentiary material to support the bare factual allegations in its pleading. This was insufficient to establish the facts alleged. See Alpstetten Ass' n, Inc. v. Kelly, 137 Vt. 508, 514 (1979) (burden shifts to nonmoving party only when summary judgment motion is " accompanied by an affidavit or affidavits or other documentary evidence sufficient to call into question the existence of the factual basis for the claim"). Accordingly, the State did not meet its burden of demonstrating an absence of genuine issues of material fact, and the burden did not, therefore, properly shift to defendant to adduce opposing evidence. Pierce, 149 Vt. at 138. Although the State argues that any deficiency in its motion was waived, defendant was not obligated to plead the absence of evidentiary support for the State' s motion to avoid having the burden of proof shift. We conclude, therefore, that the judgment must be reversed, and the matter remanded for further proceedings.

Reversed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice