

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-275

MARCH TERM, 2003

	}	APPEALED FROM:
	}	
Dale L. Conger	}	Lamoille Superior Court
	}	
v.	}	DOCKET NO. 15-1-02 Lecv
	}	
State of Vermont	}	Trial Judge: Howard E. VanBenthuyesen
	}	
	}	

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

Petitioner appeals the superior court' s order dismissing as successive his second post-conviction-relief (PCR) petition. We affirm.

In June 1997, following a jury trial, petitioner was acquitted of petit larceny but convicted of burglary and sentenced to ten-to-fifteen years in prison. He received assistance from two different attorneys before and during his trial and then obtained another attorney for his sentencing and appeal. A three-justice panel of this Court affirmed his conviction in April 1998. See State v. Conger, No. 97-157 (Apr. 10, 1998). Petitioner filed his first PCR petition in July 1998 and added an amended petition in October 1998. He claimed that both his trial counsel and appellate counsel had provided ineffective assistance. Among other things, he argued that his appellate counsel had provided ineffective representation by failing to address on direct appeal some of the deficiencies in his trial counsel' s representation. Although his petition was filed pro se, petitioner was represented by counsel at the PCR hearing. The superior court denied the petition, and a three-justice panel of this Court affirmed that decision in June 2001. See In re Conger, No. 00-266 (June 20, 2001).

Petitioner filed the present PCR petition in January 2002. Petitioner claimed that (1) both his appellate counsel on direct appeal and his first PCR counsel provided ineffective assistance by failing to challenge his conviction on the basis that the jury had acquitted him of petit larceny, which he contends is the fifth element of burglary; (2) the jury could not find him guilty of burglary after acquitting him of what he argued was a lesser included offense " petit larceny; (3) the trial court erred by failing to give the jury a lesser-included-offense instruction; and (4) the court' s instruction on the two charged offenses was so confusing that it violated his constitutional rights. The superior court granted the State' s motion for summary judgment, ruling that petitioner had waived the arguments by failing to raise them when he had an opportunity to do so in earlier proceedings, and that, in any event, none of the arguments had any substantive merit because petit larceny is not a lesser included offense of burglary.

We agree that petitioner waived the arguments raised in his second petition. The superior court " is not required to entertain a second or successive motion for similar relief on behalf of the same prisoner." 13 V.S.A. § 7134. Factual or legal contentions that a petitioner has failed to raise, without adequate excuse, either at trial or in prior PCR proceedings, are foreclosed. In re Mayer, 131 Vt. 248, 250-51 (1973); State v. Provencher, 128 Vt. 586, 591-92 (1970) (Holden, C.J., concurring). Here, petitioner has failed to show why the issues raised in the instant petition could not have been raised either at trial or in his first petition. Referencing several letters, he claims that he attempted to get prior counsel to raise these issues; however, his first pro se petition failed to address issues raised here, even though it claimed ineffective representation by appellate counsel. Nor did petitioner seek to file a supplemental brief on appeal from denial of his first petition to address issues not addressed by the superior court or raised by his counsel.

In any event, we agree with the superior court, for the reasons stated by the court, that none of the arguments raised by petitioner have any substantive merit. Petit larceny is not a lesser-included offense of burglary; the jury could have concluded that petitioner entered the building with the intent to commit larceny, but did not actually steal anything. Hence, even if his petition were not successive in nature, petitioner has failed to show that prior counsel was ineffective for not raising those arguments in prior proceedings.

Affirmed.

BY THE COURT:

Jeffrey L. Amestoy, Chief Justice

Denise R. Johnson, Associate Justice

Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned