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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2002-409

JUNE TERM, 2003

Mark Jankowski v. State of Vermont	}	APPEALED FROM: Rutland Superior Court DOCKET NO. 347-6-99 Rdcv Richard W. Norton

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

Petitioner appeals the superior court' s denial of his second petition for post-conviction relief (PCR), arguing that the court erred by refusing to allow his proffered expert testimony. We affirm.

In 1996, petitioner was charged with domestic assault, aggravated domestic assault, aggravated assault, and attempted false pretenses. Under a June 1996 plea agreement, he pled no contest to aggravated assault, two counts of domestic assault, and attempted false pretenses. The agreement called for an aggregate sentence of four to twenty years, including zero to five years for the attempted false pretenses charge. In November 1996, petitioner filed his first PCR petition, seeking, among other things, to withdraw his plea based on his claim that his trial counsel had failed to adequately investigate the false pretenses charge, which should have been only a misdemeanor charge of unauthorized use of a credit card. The attorney assigned to represent petitioner eventually negotiated a settlement that did not vacate the entire plea agreement, but rather vacated only the plea and conviction for the attempted false pretenses charge " in exchange for petitioner agreeing to plead no contest to an amended charge of fraudulent use of a credit card. In October 1998, pursuant to the parties' stipulation, the superior court vacated the attempted false pretenses charge and denied petitioner' s PCR petition in all other respects. As it turned out, the State did not file the amended misdemeanor charge because the three-year statute of limitations had already expired. Petitioner received a new sentence of four to fifteen years " the original sentence, reduced by dismissal of the zero-to-five-year sentence for the attempted false pretenses charge.

In June 1999, petitioner filed his second PCR petition, arguing, in relevant part, that because all of the 1996 charges against him had been grouped together in the plea bargain, the entire plea agreement should have been voided. At the August 15, 2002 hearing on the petition, petitioner testified himself and called three witnesses, including his trial counsel. Eventually, the superior court excluded trial counsel' s proffered expert testimony, ruling that petitioner had failed to disclose to the State before the hearing that it intended to call trial counsel as an expert witness. At the conclusion of the hearing, the court made findings on the record and denied the petition, concluding that petitioner (1) failed to establish through expert opinion that the first PCR counsel' s representation had been ineffective, and (2) failed to show a reasonable probability that, but for his counsel' s ineffectiveness, the result of the proceeding would have been different. See State v. Bristol, 159 Vt. 334, 337 (1992) (stating two-prong burden established in Strickland v. Washington, 466 U.S. 668 (1984) for petitioners claiming ineffective assistance of counsel).

On appeal, petitioner argues that the superior court erred first by precluding his proffered expert testimony, and then by concluding that he had failed to present expert testimony to support his ineffective-assistance-of-counsel claim. We conclude that any error on the part of the court in excluding trial counsel' s expert testimony was harmless. The gist of petitioner' s second PCR petition, as explained by his attorney at the PCR hearing, is that his plea was involuntary because he was never told that he could attack the attempted false pretenses charge, and that an involuntary or

unknowing plea must be vacated in its entirety. Petitioner' s counsel argued that the first PCR counsel should have insisted that the entire plea agreement be vacated, not just the attempted false pretenses charge. He explained that he needed trial counsel' s testimony to provide a factual basis for what occurred in the case and to state " what the proper remedy is when a plea is allegedly the basis of a knowing, voluntary, or intelligent plea bargain." Upon further questioning from the court, petitioner' s counsel reiterated that he was not going to ask trial counsel about the Strickland standard of care, but rather was simply going to ask " what the proper remedy is when a plea is allegedly the basis of a knowing, voluntary, [and] intelligent plea bargain." In short, petitioner' s proffer was that trial counsel would testify, as an expert, on the appropriate legal remedy when a plea is found to be involuntary. The source of petitioner' s legal position is In re Kasper, 145 Vt. 117, 121 (1984), where we found the petitioner' s pleas to be involuntary and then declined to consider the State' s other claims of error because " [a] conviction on a plea found to be involuntary for any reason must be vacated."

Petitioner did not need the testimony of trial counsel to establish the state of the law. Indeed, petitioner' s attorney argued at the PCR hearing that Kasper requires vacation of a plea deemed involuntary for any reason. Petitioner' s attorney also stated that although the court had not allowed trial counsel to testify regarding Kasper, the direct examination of petitioner' s first PCR counsel revealed that the gravaman of petitioner' s claim was that his plea had been involuntary and thus had to be vacated. Given this record, we fail to see how the exclusion of trial counsel' s expert testimony prejudiced petitioner. The proffer for that testimony demonstrated that trial counsel was not going to testify specifically on whether petitioner' s first PCR counsel provided ineffective assistance of counsel, but rather simply on what the legal remedy is once a plea is determined to be involuntary. Petitioner' s counsel advised the superior court of the Kasper holding, and thus trial counsel' s expert testimony would not have added anything to what was presented to the court.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.)

Specially Assigned