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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-079

DECEMBER TERM, 2003

	}	APPEALED FROM:
	}	
	}	
Willard Buell	}	
	}	Bennington Superior Court
v.	}	
	}	
State of Vermont	}	DOCKET NO 255-7-01 Bncv
	}	
	}	Trial Judge: Richard W. Norton
	}	
	}	

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

Petitioner appeals the superior court's summary judgment ruling in favor of the State with respect to his petition for post-conviction relief (PCR). We affirm.

In March 1993, petitioner pled guilty to a felony solid waste violation. He appeared pro se at an en masse arraignment, where the presiding judge apparently addressed the defendants together before conducting individual colloquies with each defendant. After speaking to defendant, the district court accepted his plea and imposed a sentence of three-to-five years, all suspended, except for four months to be served on house arrest. Later, petitioner pled guilty to having violated his probation and was sentenced to two-to-five years, with credit for time served.

In July 2001, petitioner filed a pro se PCR petition, asking the superior court to allow him to withdraw his 1993 guilty plea on the ground that he was not fully informed of his rights, as required by V.R.Cr.P. 11. An evidentiary hearing was held after petitioner' s counsel entered an appearance and filed an amended petition. During the hearing, the State argued that the transcript of the March 1993 hearing submitted by petitioner was incomplete insofar as it did not include the court' s en masse reading of rights to all of the defendants at the arraignment. At the conclusion of the PCR hearing, the superior court gave petitioner sixty days to produce the complete transcript. When petitioner had difficulty producing the additional portion of the transcript, the superior court gave him a limited period of time in which to depose the judge who had presided over the arraignment. Petitioner took the judge' s deposition in October 2002. The State filed a motion for summary judgment on December 6, 2002. Two months later, without having received a response from petitioner, the superior court granted the State' s motion.

On appeal, petitioner first argues that the superior court erred in granting the State' s motion for summary judgment because the motion was not accompanied by a separate statement of undisputed material facts. According to petitioner, by not including the statement, the State failed to meet its initial burden of showing the absence of controverted material facts. We find no reversible error. Under V.R.C.P. 56(c)(2), the party moving for summary judgment is required to annex to the motion " a separate, short, and concise statement of material facts as to which the moving party contends that there is no genuine issue to be tried." The purpose of this provision " is to focus more directly the arguments on motions for summary judgment by requiring specifications by the parties as to the facts that they contend either are or are not in dispute." Reporter' s Notes, V.R.C.P. 56, 1995 Amendment. Normally, however, summary judgment motions precede any evidentiary hearing. Here, in contrast, the facts of the case were initially presented at an evidentiary hearing, in which petitioner testified. The deposition of the presiding judge taken by petitioner' s attorney supplemented those facts. The State recited the facts in detail in its motion for summary judgment. Not only was petitioner aware of the facts relied upon by the State in moving for summary judgment, but he never disputed them. Hence, the State met its initial burden of demonstrating the absence of disputed material facts. The only real issue with respect to the State' s motion was whether the undisputed facts demonstrated that petitioner had failed to prove a Rule 11 violation, and thus whether the State was entitled to judgment as a matter of law. See White v. Quechee Lakes Landowners' Ass' n, Inc., 170 Vt. 25, 28 (1999) (moving party must show that there is no genuine issue of material fact and that it is entitled to judgment as matter of law). We agree with the State that, given the procedural history of this case, we would be exalting form over substance if we were to reverse the superior court' s summary judgment ruling on the ground that the State failed to annex a separate statement of disputed facts to its motion for summary judgment.

Next, petitioner argues that the superior court committed reversible error by permitting the judge to testify as to the validity of petitioner' s waiver of his Rule 11 rights. We find no merit to this argument. Petitioner bore the burden of producing a record that supported the claims he alleged in his petition. See In re Mossey, 129 Vt. 133, 138 (1971) (as advancing party, PCR petitioner " has the burden of establishing the facts alleged in his petition"). Here, petitioner failed to produce a transcript of the entire proceeding and then, without objection, subpoenaed the judge to fill in the gaps left by the missing transcript. Having done so, he has waived any claim that the superior court erred in permitting him to subpoena the judge. See State v. Massey, 169 Vt. 180, 185 (1999) (aggrieved party must assume responsibility for any prejudice resulting from evidence introduced by party; otherwise, " party who allowed inadmissible evidence to come in without objection could gain an unconscionable advantage"); State v. Johnson, 143 Vt. 355, 360 (1983) (" Errors not raised below may not be heard for the first time on appeal, and are deemed waived.").

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice