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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-477

JUNE TERM, 2005

In re James Pixley	}	APPEALED FROM:
	}	
	}	
	}	Washington Superior Court
	}	
	}	
	}	DOCKET NO. 394-6-02 Wncv
		Trial Judge: Matthew I. Katz

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

Petitioner appeals the superior court=s order granting summary judgment to the State and dismissing his petition for post-conviction relief (PCR). We affirm.

Petitioner was convicted of second-degree aggravated domestic assault after a trial by jury. A panel of this Court affirmed the conviction. See State v. Pixley, No. 2001-285 (Vt. March 26, 2002). In February 2003, petitioner=s assigned counsel filed an amended PCR petition alleging that petitioner=s trial counsel was so ineffective that the State=s case against him had not been subjected to meaningful adversarial testing. In the motion, petitioner listed eight deficiencies in trial counsel=s performance, alleging that he failed to: (1) conduct depositions of prosecution witnesses, (2) interview other witnesses; (3) investigate the case; (4) effectively communicate with his client; (5) subpoena witnesses to appear at trial, (6) effectively cross-examine witnesses; (7) effectively present a defense; and (8) remove a juror who was related to a state witness. The only allegation that included any specific details was the last one, in which he claimed he was denied due process because his attorney failed to seek the removal of a juror who indicated that a certain state=s witness might be his niece, in which case he might have difficulty being impartial. In August 2004, the State filed a motion for summary judgment containing a detailed statement of uncontested material facts. Without conceding that petitioner=s trial counsel was ineffective, the State contended that petitioner would not be able to demonstrate prejudice because of the overwhelming evidence of guilt presented at petitioner=s trial. Petitioner did not respond to the State=s motion.

In an October 2004 decision, the superior court dismissed the petition. The court ruled that petitioner waived his challenge to the juror by failing to object at trial, and that even assuming his trial counsel had provided ineffective assistance of counsel by failing to object, petitioner failed to meet his burden of demonstrating prejudice sufficient to undermine confidence in the outcome of the trial. Noting that Vermont does not have a rule automatically disqualifying jurors related to witnesses, the superior court reasoned that even if trial counsel had asked follow-up questions to confirm that the juror and witness were related, and then objected to the juror, there was no guarantee that the trial court would have disqualified the juror. The superior court also noted that the witness in question offered only corroborative evidence in a case in which there was extensive evidence of guilt. As for petitioner=s other claims of ineffective assistance of counsel, the court ruled that petitioner had failed to meet its burden of proof insofar as he did not respond to the State=s motion for summary judgment, which demonstrated a lack of support for petitioner=s claims.

On appeal, petitioner argues that: (1) service by a juror who is closely related to a prosecution witness constitutes

per se prejudice; and (2) in its motion for summary judgment, the State failed to demonstrate that it was entitled to judgment as a matter of law on petitioner=s seven other claims of ineffective assistance of counsel. In making the first argument, petitioner cites State v. Gesch, 482 N.W.2d 99, 104 (Wis. 1992), wherein the court held that prospective jurors who are closely related to a state witness Amust be struck from the jury panel on the basis of implied bias.@ The Wisconsin court reached its holding, however, in the context of a direct appeal in a criminal case in which the trial court denied the defense counsel=s motion to strike a juror who was the brother of the prosecution=s only police witness. Here, in contrast, defense counsel did not move to strike the witness, and petitioner=s appellate counsel did not raise the issue on direct appeal. We agree with the superior court that, under these circumstances, petitioner has waived the issue and cannot prevail absent a specific showing of prejudice, which he fails to make. Cf. State v. Koveos, 169 Vt. 62, 65-66 (1999) (seeing no reason to ignore general preservation requirement with respect to juror challenge, and holding that defendant waived challenge to juror by not raising issue prior to jury=s impanelment).

Assuming that defense counsel provided ineffective assistance of counsel by not moving to strike the juror, the question becomes whether petitioner has proved that counsel=s ineffectiveness prejudiced him to the extent that there is a reasonable probability that, but for counsel=s failure to challenge the juror, the outcome of his trial would have been different. In re Miller, 168 Vt. 583, 584 (1998) (mem.). Again, petitioner does not even attempt to make such a showing; rather, he relies exclusively on his argument that prejudice must be presumed. Accordingly, petitioner has failed to meet his burden of demonstrating prejudice.

Moreover, we reject petitioner=s argument that the superior court erred by ruling that petitioner cannot prevail on his other claims of ineffective assistance of counsel because of his failure to respond to the State=s motion for summary judgment. Apart from the juror disqualification issue, petitioner=s amended petition only generally alleged that defense counsel had failed to take certain steps to provide an adequate defense. Without conceding ineffective assistance of counsel, the State argued in its summary judgment motion that petitioner would be unable to demonstrate prejudice because of the overwhelming evidence of his guilt presented at trial. In its motion, the State set forth a detailed statement of the evidence presented against petitioner, including the statements of several witnesses who observed the victim=s bruises after the alleged attack. We conclude that the superior court was justified in dismissing petitioner=s claims, given his failure to respond to the State=s motion and to rely solely on a petition containing only generalized claims of ineffective representation. We recognize that failure to respond to a motion for summary judgment does not automatically warrant summary judgment, and that the moving party, even if no response is forthcoming, must demonstrate the absence of a genuine issue of material fact and entitlement to a judgment as a matter of law. Miller v. Merchants Bank, 138 Vt. 235, 237-38 (1980). Nevertheless, A[w]hen a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party=s pleading, but the adverse party=s response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.@ V.R.C.P. 56(e).

This sentence in Rule 56(e), which was added to the federal rule in 1963, was intended to overrule a doctrine holding that well-pleaded claims and defenses were invulnerable to attack from a motion for summary judgment. 10B C. Wright, A. Miller & M. Kane, Federal Practice and Procedure ' 2739, at 378 (1998) (quoting advisory committee note for proposition that A >[t]he very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine issue for trial.= @). The statement Amakes clear the substantial risk of an adverse judgment to a nonresponding opposing party.@ Id. ' 2739, at 386. A party opposing summary judgment does not have the right to withhold evidence until trial or to demand a trial based on the possibility that a material issue of fact may arise at that time. Id. ' 2739, at 388-89. Here, petitioner offered no response to the State=s motion detailing the overwhelming evidence of guilt and demonstrating the lack of prejudice. Under these circumstances, the court properly granted the State=s motion and dismissed petitioner=s remaining claims.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice