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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-187

SEPTEMBER TERM, 2006

In re Kenneth Harbec	}	APPEALED FROM:
	}	
	}	
	}	Caledonia Superior Court
	}	
	}	
	}	DOCKET NO. 141-6-03 Cacv

Trial Judge: William D. Cohen

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

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

In August 2002, pursuant to a plea agreement that dealt with a number of charges against him, petitioner pled no contest to driving while intoxicated (DWI), third offense. Among other things, the agreement called for a one-to-three-year sentence to be served within the intensive substance abuse program (ISAP). It was

anticipated that the program would be done on a furlough basis, and thus petitioner could avoid jail time for the DWI charge, as long as he successfully participated in and completed the program. Following an August 6, 2002 change-of-plea hearing in which the judge engaged defendant in a colloquy concerning his decision to enter into the plea agreement, the district court accepted petitioner=s plea of no contest to the DWI charge. The matter was continued for sentencing pending a required report from the Department of Corrections. Between the change-of-plea hearing and the September 11, 2002 sentencing hearing, petitioner incurred two additional violations of the conditions of release set at arraignment.

At the sentencing hearing, the district court advised petitioner that (1) the Department of Corrections had recommended a sentence of two-to-five years (instead of one-to-three years) because of his prior criminal record and history of supervision; (2) the court intended to reject the agreed one-to-three-year sentence in favor of the Department=s recommended sentence; and (3) defendant was free to withdraw his no-contest plea and reinstate his not-guilty plea. After consulting with his counsel, petitioner decided to go forward with sentencing under the recommended sentence. Accordingly, the district court sentenced petitioner to two-to-five years to be served on pre-approved furlough in the ISAP program. Later, petitioner was removed from the program and required to serve the balance of his sentence in jail. In June 2003, petitioner filed his PCR petition, claiming that his no-contest plea had not been taken in conformance with V.R.Cr.P. 11, and that he had been denied effective assistance of counsel. Following delays concerning whether petitioner was entitled to representation in the PCR proceeding, the parties filed cross- motions for summary judgment. In April 2006, the superior court issued a decision granting the State=s motion and dismissing the petition.

On appeal, petitioner argues that the superior court erred in determining that (1) his no-contest plea was made knowingly, intelligently, and voluntarily, and (2) his claims did not support a finding of ineffective assistance of counsel. Regarding the first issue, petitioner asserts that his free will was overborne by trial counsel, and that he Amindlessly@ followed his counsel=s instructions. He also argues that once the district court rejected the parties= initial agreement, his plea became involuntary. We find no merit to these arguments. The petitioner in a PCR proceeding has the burden of demonstrating that a procedural shortcoming violated his rights. In re Hall, 143 Vt. 590, 595 (1983). Particularly in the context of a PCR proceeding, we

have emphasized that a petitioner must show more than a formal or technical violation of Rule 11. Id. at 596. Thus, a petitioner claiming Rule 11 violations cannot prevail if the district court was in substantial compliance with the rule and engaged the petitioner in an open dialogue regarding the rule=s elements so that the petitioner understood the full array of legal consequences attached to a guilty plea. Id. at 595.

Here, as the superior court stated, the transcript of the change-of-plea hearing demonstrated that petitioner entered his no-contest plea knowingly and voluntarily. The transcript shows that the district court addressed petitioner personally in open court, and that petitioner assured the court that (1) he had reviewed and understood the five-page document he signed concerning his petition to enter a plea; (2) he had had sufficient time to consult with his attorney concerning the document; (3) he understood that he would be able to complete the sentence on a furlough basis unless he did not satisfactorily follow through on the programming, in which case he would serve his sentence in jail; (4) he was entering into the agreement voluntarily; (5) he was Avery satisfied@ with his attorney=s representation and the opportunity he had been given to ask questions regarding the agreement; (6) he understood that he was giving up his right to a jury trial, and that a conviction of DWI, third offense, implicated other potential penalties; and (7) he agreed that the State had sufficient evidence to prove beyond a reasonable doubt that he committed the charged offense. Moreover, at the sentencing hearing, the district court personally informed petitioner that it was accepting the Department=s recommendation of a higher two-to-five-year sentence, but that petitioner could withdraw his no-contest plea and reinstate his not-guilty plea. This is precisely what Rule 11(e)(4) requires of the court. See State v. Currier, 171 Vt. 181, 186 (2000) (before rejecting plea agreement, court must inform parties of its rejection, personally advise defendant that it may not be bound by agreement, afford defendant an opportunity to withdraw agreement, and advise defendant of consequences of persisting in agreement). After consulting with his attorney, petitioner chose to continue with sentencing, notwithstanding the higher recommended sentence. Following sentencing, petitioner exercised his right of allocution to thank the prosecutor and his lawyer for giving him an opportunity to stay out of jail. In short, the record unequivocally demonstrates that petitioner entered his no-contest plea knowingly and voluntarily.

Petitioner also argues that the superior court erred by failing to find that his trial attorney provided him

ineffective assistance of counsel. On the one hand, petitioner contends that the court erred by denying his claim without the benefit of expert testimony or an evidentiary hearing. On the other hand, he contends that he was not required to produce expert testimony in support of his claims that his trial counsel failed to inform him of the Rule 11 requirements or the elements of the charged offense and further failed to conduct a proper investigation or depose witnesses concerning his defense. Again, we find no merit to these arguments. ATo demonstrate ineffective assistance of counsel, a petitioner must show by a preponderance of evidence that: (1) his counsel=s performance fell below an objective standard of performance informed by prevailing professional norms; and (2) there is a reasonable probability that, but for counsel=s unprofessional errors, the proceedings would have resulted in a different outcome.@ In re Grega, 2003 VT 77, & 7, 175 Vt. 631 (2003) (mem.). AIn making this showing, petitioner cannot rely on the distorting effects of hindsight, and must surpass the strong presumption that counsel=s performance fell within the wide range of reasonable professional assistance.@ Id. Moreover, ineffective assistance of counsel will be presumed only in rare situations when the attorney=s lack of care is so apparent that only common knowledge and experience, not expert testimony, are needed to comprehend it. Id. & 16.

Here, petitioner=s claims that his trial counsel failed to inform him of the requirements of Rule 11and the elements of the charged offense are belied by the record. The district court has the responsibility of determining that petitioner understood his rights as required by Rule 11, and, as stated above, the record in this case demonstrates that the court fulfilled its duties and apprised petitioner of his rights under the rule. Further, petitioner signed an agreement that detailed his rights, and he told the court that he discussed those rights with his attorney, who gave him a full opportunity to consider and ask questions about the agreement. The record also demonstrates that petitioner was well aware of the elements of the DWI charge, which is not surprising, given that he had been convicted of the offense twice before. Finally, regarding petitioner=s claims that his trial counsel did not adequately investigate his defense to the DWI charge, the record reveals that (1) petitioner and his trial counsel were well aware of the defense that petitioner did not operate the vehicle on the night in question; and (2) the reason that this defense was not pursued beyond the denial of petitioner=s motion to dismiss was that petitioner made the knowing and voluntary decision to plead no-contest to the charge.

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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Brian L. Burgess, Associate Justice