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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-226

JANUARY TERM, 2002

In re Norman Powers	}	APPEALED FROM:
	}	Chittenden Superior Court
	}	DOCKET NO. S0909-95 Cnc
	}	Trial Judge: Matthew I. Katz

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

Petitioner Norman Powers appeals from an order on summary judgment in favor of the State on his request for post-conviction relief. He alleges his appellate counsel provided ineffective assistance by failing to raise in his direct appeal a claim that he was charged with multiple crimes when the facts support only one. We affirm.

In State v. Powers, 163 Vt. 98 (1994), we upheld petitioner's conviction for lewd and lascivious conduct with a child. The conviction was based on a series of fondling incidents in 1989. Petitioner, a Milton resident at the time, and his eleven-year old victim were neighbors in St. Albans where petitioner owned a camp. The victim would occasionally visit petitioner at the camp. Sometime in March 1998, the victim accompanied petitioner to his home in Milton prior to going to the YMCA in Burlington to swim. Before they left for the YMCA, petitioner asked the victim to try on some bathing suits. Petitioner rubbed the victim's penis as he tucked the first bathing suit's strings into the suit. Petitioner then had the victim try on two other suits, and each time the victim changed suits, petitioner fondled the victim again. Additional fondling occurred later in the day, but those incidents are not relevant to his appeal. Petitioner was eventually charged and convicted of lewd and lascivious conduct with a minor in violation of 13 V.S.A. 2602.

Petitioner commenced this action for post-conviction relief in July 1995. Petitioner based his claim for relief on his appellate counsel's failure to argue in his direct appeal that the three fondling incidents which occurred while the victim changed bathing suits were one act, and therefore they could not be charged as separate offenses. By order of April 13, 2001, the trial court dismissed the complaint on summary judgment. The court determined that each time petitioner fondled the victim's penis after the victim changed bathing suits, he committed a separate act prohibited by 13 V.S.A. 2602. To reach its conclusion, the court relied not only on the language of 2602, but also on the factors we set out in State v. Fuller, 168 Vt. 396 (1998) for determining whether an incident of sexual assault consists of one continuous assault or separate acts. See State v. Fuller, 168 Vt. at 400. Petitioner then took this appeal.

On appeal, we review summary judgment orders using the same standard as the trial court. Wentworth v. Fletcher Allen Health Care, 172 Vt. 614, 616 (2000). Summary judgment is appropriate if no genuine issue of material fact exists and any party is entitled to judgment as a matter of law. V.R.C.P. 56(C)(3). In this case, petitioner alleges that he received ineffective assistance of counsel during his direct appeal. Post-conviction relief on a claim for ineffective assistance of counsel is predicated upon a showing that the counsel's representation "fell below an objective standard of

reasonableness," and the petitioner suffered prejudice as a result. In re Cohen, 161 Vt. 432, 434 (1994). Prejudice exists where the petitioner demonstrates that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" Id. at 435 (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)). In this case, assuming it was error for appellate counsel not to raise the multiplicity issue on direct appeal, the error did not prejudice petitioner because the charges, and hence the convictions, were lawful under 2602.

How many counts are permitted under a criminal statute is determined according to legislative intent. State v. Perillo, 162 Vt. 566, 567 (1994). In State v. Perillo, we held that the Legislature did not intend 2602 to increase the penalty "depending on the number of touches involved in a single episode of sexual abuse." Id. at 568. We did not set forth a test to decide what constitutes a single episode of sexual abuse in that case, but our decision in State v. Fuller is instructive on this point. In that case, we explained the factors a court must examine when determining if multiple charges for sexual assault are justified. Fuller, 168 Vt. at 400. Those factors include the time between successive parts of the offender's conduct; whether the conduct occurred in more than one geographic location; whether any intervening event existed between successive parts of the offender's conduct; whether sufficient time for reflection between the prohibited acts existed for the offender to commit himself. Id.

Petitioner alleges it was error for the trial court to employ those factors in this case because the crime at issue in Fuller was aggravated sexual assault under 13 V.S.A. 3253(a)(9), not lewd and lascivious conduct with a child under 2602. We disagree. The acts prohibited by both 3253 and 2602 are sexual in nature. We did not intend Fuller to be so narrowly construed as to exclude other sexual crimes from the multiplicity analysis we discussed in that case. Indeed, the factors we set out in Fuller are helpful to determine whether multiple charges of lewd and lascivious conduct with a minor are justified in light of the Legislature's intent. Applying those factors to petitioner's conduct in this case shows that he was properly charged with three separate lewd acts upon his young victim.

Although all three incidents of fondling occurred in petitioner's Milton home, there was enough time between each touch for the victim to take off a bathing suit and put another one on. The time and intervening events (i.e., putting on and taking off each bathing suit) allowed petitioner an opportunity to reflect and to recommit himself to yet another act of fondling. Petitioner's actions are clearly distinguishable from the defendant's conduct in State v. Perillo, which petitioner believes is analogous to his case. In Perillo, the defendant picked the victim up, put her on a couch and began rubbing various parts of her body. Perillo, 162 Vt. at 567. There was no intervening event, like a change of clothes, to separate each touch of the Perillo victim's body. In addition, the facts in that case reveal no time for reflection between each touch as they do in this case. Because petitioner's three acts of fondling were properly charged as separate acts of lewd and lascivious conduct under 2602, he suffered no prejudice by his appellate counsel's decision not to raise the issue in petitioner's direct appeal. Consequently, the State was entitled to judgment as a matter of law on petitioner's complaint for post-conviction relief, and the trial court did not err by granting the State's motion for summary judgment.

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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James L. Morse, Associate Justice