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

ENTRY ORDER

SUPREME COURT DOCKET NOS. 2001-280 & 2001-386

APRIL TERM, 2002

Richard Gutzmann, Jr. v. John Gorczyk	}	APPEALED FROM: Caledonia Superior Court DOCKET NOS. 190-7-00 Cacv & 132-5-00 Cacv Trial Judge: Mark J. Keller

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

Petitioner appeals from the superior court's denial of his petitions for post-conviction relief (PCR), arguing that the court erred in failing to find that his guilty plea was not voluntarily and knowingly made. We affirm.

In June 1999, petitioner entered into a plea agreement under which he pled guilty to several offenses, including a charge of driving while intoxicated (DWI), third offense, fatality resulting. In return, the State agreed to dismiss other charges and recommend, in relevant part, a three-to-fifteen-year sentence to serve for the DWI offense. Under the agreement, defendant was free to argue for a lesser sentence. Before accepting petitioner's plea, the district court conducted a V.R.Cr.P. 11 colloquy with defendant. Following the colloquy, the district court imposed a sentence of two-to-fifteen years to serve on the DWI charge.

Shortly after defendant began serving his sentence, the Department of Corrections ordered petitioner to successfully complete a particular program, Pathways, before his release, even though an inmate normally had to have at least a three-year minimum sentence to be included in that particular program. In response to the Department's programming decisions, petitioner filed a motion for sentence reconsideration, which was denied by the district court. Petitioner then filed two separate PCR petitions, arguing in one that he had received ineffective assistance of counsel concerning the plea agreement, and in the other that the Department had abused its discretion concerning his programming. The superior court denied both petitions in two separate decisions. In the first decision, the court determined that petitioner's attorney provided thorough, competent, and successful representation, and that, even if she had not, petitioner failed to demonstrate that the outcome of his case would have been any different but for his attorney's actions. In the second decision, the court determined that the Department's actions did not violate petitioner's plea agreement, and that petitioner failed to show that the Department abused its discretion in requiring him to successfully complete the Pathways program.

On appeal, petitioner argues that the superior court erred in failing to find that his plea was involuntary and unknowing, given that he relied on incorrect assurances by his counsel concerning Department programming and the effect it would have on the actual time he would have to serve. Petitioner contends that he entered into the plea agreement believing, based on conversations with his counsel, that if he received a minimum three-year sentence, he would likely be released within eighteen months to two years, and that if he received a lesser minimum sentence, he would be ineligible for the Pathways program and would be released even earlier. According to petitioner, because he entered into the plea

agreement based on these good-faith, albeit erroneous, beliefs, his plea was involuntary and thus should be vacated. See In re Cronin, 133 Vt. 234, 237 (1975) ("If a defendant changes his plea in full reliance upon an understanding, entertained rightly or wrongly, but reasonably and in good faith, the change of plea is involuntary if the understanding proves to have been wrong.").

Petitioner's arguments are unavailing. As petitioner points out, we held in State v. Pilette, 160 Vt. 509, 511 (1993) that "[a] guilty plea is not voluntary unless the defendant knows and understands the consequences that attach to the plea." We also held, however, that a defendant needs to be informed only of those consequences of a conviction set forth in V.R.Cr.P. 11, which does not include information about parole eligibility. Id. at 511-12; see In re Moulton, 158 Vt. 580, 583-84 (1992). Here, defendant is complaining about collateral consequences of programming changes that did not violate the terms of the plea agreement and were not necessarily inconsistent with either the plea agreement or the sentence imposed.

Nevertheless, although neither the court nor defense counsel has an affirmative duty to provide information not contained in Rule 11, "misinformation regarding parole eligibility may provide a basis for a successful attack on the voluntariness of a plea." Moulton, 158 Vt. at 584. To succeed on such a claim, however, petitioner must demonstrate "that he entered his plea while reasonably relying on a material misunderstanding regarding his parole eligibility, and that such a misunderstanding worked to his prejudice." Id. (citing In re Fisher, 156 Vt. 448, 459 (1991)). We agree with the superior court that petitioner failed to make such a showing here. Petitioner entered his plea knowing that he could be sentenced to the three-year minimum sentence recommended by the State, and that he could be required to successfully complete the Pathways program. Nothing in the plea agreement mentioned any programming requirements or compelled defendant's release before expiration of the maximum sentence. Petitioner acknowledged at the plea hearing that he could be required to serve up to the maximum sentence imposed, and, as the superior court found, petitioner's counsel never assured petitioner that he would be released after a certain period of time, irrespective of the sentence imposed. Petitioner also knew that programming decisions would be subject to the discretion of the Department within the bounds of his sentence. We agree with the superior court that petitioner has failed to show any abuse of discretion on the part of the Department, or ineffective assistance of counsel on the part of his attorney.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

_____
James L. Morse, Associate Justice

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Denise R. Johnson, Associate Justice