

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2004-120

NOVEMBER TERM, 2004

In re James Moreno

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APPEALED FROM:

Franklin Superior Court

DOCKET NO. S335-99 Fc

Trial Judge: Howard E. Van Benthuyesen

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

Petitioner appeals the superior court's order granting the State's motion for summary judgment in this post-conviction-relief (PCR) proceeding. We reinstate the PCR petition and remand the matter for further proceedings.

In August 1999, petitioner filed a letter in the superior court challenging his conviction on the basis of ineffective assistance of counsel. At a September 1999 status conference, the superior court allowed petitioner's assigned counsel to withdraw, and a new attorney was appointed the following month. For reasons that are unclear from the record, the second attorney was allowed to withdraw and a third counsel, Attorney Kenneth Geduldig, was appointed in September 2000. At an October 2000 status conference, the new attorney sought and received a continuance to review transcripts of the underlying criminal case. In November 2000, Attorney Geduldig informed the court that he had ordered but not yet received the transcripts and thus could not comment on the merits of the petition. The court dismissed the petition without prejudice, ruling that petitioner could renew it later if the transcripts showed a basis for it. In April 2001, petitioner requested that his PCR petition be reopened. Attorney Geduldig informed the court that he had spoken to petitioner and learned that petitioner's Vermont conviction may have affected the length of the federal sentence petitioner was serving. The court instructed petitioner's counsel to look into the matter further and submit a written statement regarding if or how the state conviction had affected petitioner's federal sentence.

At an October 2001 status conference, Attorney Geduldig informed the court that, based on his conversation with a federal parole officer, he believed that petitioner's Vermont conviction had had considerable impact on his federal sentence. The attorney requested that he be allowed to reorder the transcripts to determine whether petitioner's trial counsel had provided ineffective representation to petitioner in the underlying criminal case. The court approved the request. More

than one year later, in November 2002, Attorney Geduldig informed the court that he saw nothing in the transcripts leading him to believe that petitioner's trial counsel had provided ineffective representation. In response to the State's oral motion to dismiss, the court ordered the State to file a motion for summary judgment within thirty days. Seven months later, nearly four years after the original petition was filed, the State acknowledged that it had not filed a motion for summary judgment and requested an additional thirty days to do so. The court granted the motion and ordered petitioner's counsel either to oppose the motion or to advise the court that he could not present a viable response on the merits, in which case petitioner would be given the opportunity to file a pro se response.

On July 29, 2003, the State filed a motion for summary judgment, arguing that petitioner had failed to make a precise claim or provide a statement of facts indicating how he was entitled to relief. The State also noted that petitioner's counsel had stated at a status conference on the record that he had found nothing in the trial transcripts to support petitioner's claims. On September 11, 2003, the court granted the motion on a motion-reaction form, stating as follows:

Issues are moot in any event as the state sentence of which petitioner complains ended during the summer of 2003. He has not responded with any opposition to the State's 7/29/03 motion. As a result, it is granted.

On January 2, 2004, in response to a letter from petitioner that the court treated as a motion to reconsider, the court reiterated that neither petitioner nor his counsel had responded to the State's summary judgment motion. The court also appeared to rule on the merits of the petition, stating as follows: "The contention that trial counsel may have received treatment for a (mental) illness during his representation of Petitioner, standing alone, does not create a triable issue here. Dismissed." On appeal, petitioner argues that (1) the superior court erred by granting the State's motion for summary judgment on mootness grounds, given that petitioner had filed his petition while he was still in custody; (2) the superior court's order must be reversed because the first attorney assigned to represent petitioner later opposed the petition in his capacity as deputy state's attorney; and (3) the failure of petitioner's PCR counsel to comply with the court's order to either oppose the State's summary judgment motion or give petitioner an opportunity to do so denied petitioner due process. In response, the State contends that, even assuming the petition is not moot, the superior court's actual reason for granting the State's motion for summary judgment was that petitioner failed to state any claim upon which relief could be granted. Further, the State argues that, under the law, notice to petitioner's counsel was notice to petitioner himself, and thus even if petitioner's counsel never notified petitioner of the State's summary judgment motion, there was no due process violation.

We conclude that the superior court's order granting the State summary judgment must be reversed, and that the matter must be remanded for appointment of new counsel and the commencement of further proceedings to determine the merit of petitioner's claims. First, as the State virtually concedes, the record indicates that the petition is not moot because of the state sentence's effect on petitioner's federal sentence. Second, petitioner was effectively deprived of counsel in this PCR proceeding. At the time petitioner filed his petition, the Public Defender Act

guaranteed the right to counsel in PCR proceedings, even though such assistance is not constitutionally compelled. In re Gould, 2004 VT 46, ¶ 13, 15 Vt. L. Wk. 155 (construing 13 V.S.A. § 5233(a)(3) before it was amended in 2004). Since then, § 5233(a)(3) has been amended to entitle needy PCR petitioners to assigned counsel if “the attorney considers the claims, defenses, and other legal contentions to be warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.” 2003, No. 157 (Adj. Sess.), § 10 (effective June 8, 2004). In this case, Attorney Geduldig’s oral statement at a status conference that he could not find a basis for the petition was insufficient for the superior court to assume that the petition was frivolous. At a minimum, Attorney Geduldig should have submitted an affidavit (1) specifying petitioner’s claims; (2) setting forth any law or argument that could conceivably support those claims; and (3) stating that counsel did not consider the claims to be warranted by existing law or the establishment of new law. See Anders v. California, 386 U.S. 738, 744-45 (1967) (outlining procedure for withdrawal of counsel required to satisfy federal due process where there is constitutional right to counsel).

Third, the superior court ordered Attorney Geduldig either to oppose the State’s motion for summary judgment or to advise the court that he could not do so, in which case petitioner would be given an opportunity to file a pro se response. Attorney Geduldig did neither, and yet the court granted the State’s motion for summary judgment. The State does not challenge petitioner’s claim that Attorney Geduldig never notified petitioner of the State’s motion or of his failure to respond to it, rather the State contends that notice to a party’s attorney satisfies due process as to notice to the party. Under this reasoning, in this case petitioner could file yet another PCR petition, this time arguing that his PCR counsel was ineffective for failing to keep him apprised of what was happening in his case. We decline to add to the numerous procedural delays that petitioner has already been subjected to in the past five years. We remand the matter for appointment of counsel and the commencement of further proceedings as expeditiously as possible to review petitioner’s claims.

The superior court’s September 11, 2003 and January 2, 2004 orders are vacated, and the matter is remanded for appointment of counsel and for the commencement of further proceedings to address petitioner’s PCR claims.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.),

Specially Assigned