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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-390

OCTOBER TERM, 2005

Edwin A. Towne, Jr.	}	APPEALED FROM:
	}	
v.	}	Chittenden Superior Court
	}	
State of Vermont	}	
	}	DOCKET NO. S1222-01 CnC
		Trial Judge: Matthew I. Katz

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

Petitioner appeals the superior court=s denial of his motion seeking to reinstate a superior court judgment from which he filed an untimely notice of appeal. We affirm.

Petitioner is incarcerated after having been convicted of first-degree murder in 1989. See State v. Towne, 158 Vt. 607 (1992) (affirming conviction). In October 2001, he filed his seventh petition for post-conviction relief (PCR), claiming that the judge who denied his first PCR petition had been involved in his underlying criminal trial proceedings, in violation of 13 V.S.A. ' 7131 (A[T]he superior or district judge who presided when the original sentence was imposed shall not hear the application [for post-conviction relief].@). In April 2002, the State moved for summary judgment, arguing that (1) petitioner=s disqualification claim exceeded the scope of the PCR statute, (2) the claim was without merit, and (3) the claim was procedurally barred because petitioner had failed to raise it in previous petitions. On April 16, 2003, after petitioner filed a pro se response to the motion and his counsel was granted leave to withdraw, the superior court denied the petition. The court ruled that there did not appear to be any violation of ' 7131, and that, in any event, petitioner was precluded from raising the claim in his seventh petition because he failed to demonstrate that he had not deliberately bypassed the issue in prior petitions. On April 28, 2003, petitioner filed a motion for reconsideration, which was denied on June 11, 2003.

On August 4, 2003, petitioner filed a notice of appeal. This Court dismissed the appeal as untimely filed and later denied petitioner=s motion for reconsideration. In May 2004, approximately six months after his motion for reconsideration was denied, petitioner filed a V.R.C.P. 60(b) motion asking the superior court to vacate and re-enter its denial of his seventh PCR petition so that he could file a timely notice of appeal. Petitioner claimed that his notice of appeal had been not been mailed by prison officials through no fault of his own. The superior court denied the motion, ruling that (1) the relief petitioner sought was beyond the scope of Rule 60(b), and (2) petitioner had failed to demonstrate that relief was warranted under the rule. On appeal, petitioner argues that the superior court abused its discretion by denying his constitutional right to access the courts to challenge the dismissal of a non-frivolous PCR petition. Petitioner seeks relief under Rule 60(b)(6), the catch-all provision of the rule, which Ais intended to accomplish justice in extraordinary situations that warrant the reopening of final judgments after a substantial period of time.@ Riehle v. Tudhope, 171 Vt. 626, 627 (2000) (mem.).

We find no abuse of discretion and no basis for overturning the superior court=s denial of petitioner=s Rule 60(b) motion. As the superior court pointed out, petitioner does not appear to have a viable claim of a violation of ' 7131,

given that the judge who heard the first PCR petition was not the Ajudge who presided when the original sentence was imposed.@ Assuming, for argument=s sake, that ' 7131 can be extended to disqualify a judge who, as in this case, heard only pre-trial motions and was not the sentencing judge, petitioner=s disqualification claim exceeds the scope of the PCR statute, which (1) establishes a process for examining violations that result in a defective judgment or sentence, and (2) limits the remedy to vacating or otherwise correcting the defective judgment or sentence. See 13 V.S.A. " 7131, 7133; see also State v. Bristol, 159 Vt. 334, 337 (1992) (to obtain limited remedy provided by PCR statute, petitioner must show that fundamental errors rendered his *conviction* defective); In re Stewart, 140 Vt. 351, 355 (1981) (AThe [PCR] statute permits a collateral attack upon Vermont convictions or sentences which are defective under the Constitution, statutory law, or >otherwise subject to collateral attack.= @)(quoting 13 V.S.A. ' 7131). Petitioner=s disqualification claim, even if accepted, will not invalidate his conviction or sentence, or otherwise make his criminal judgment vulnerable to collateral attack.

Even assuming, further, that petitioner raised a viable disqualification claim cognizable under the PCR statute, it would be barred as successive. By no later than February 1993, petitioner was aware of a potential disqualification claim because of the first PCR judge=s pre-trial participation in his criminal case. Indeed, in a February 18, 1993 letter addressed to that judge, petitioner questioned the propriety of the judge considering his PCR petition after having been involved in pre-trial proceedings in the same case. Not only did petitioner fail to raise that claim in an appeal from the second PCR judgment entered in February 1993, but he also failed to raise it in his third, fourth, fifth, or sixth PCR petitions. See In re Mayer, 131 Vt. 248, 250-51 (1973) (upholding denial of second PCR petition because petitioner failed to raise his claims on direct appeal or in prior petition); State v. Provencher, 128 Vt. 586, 591-92 (1970) (Holden, C.J., concurring, with all members of the Court in accord) (13 V.S.A. ' 7134 forecloses factual or legal contentions that petitioner failed to raise, deliberately or without adequate excuse, on direct appeal or in prior PCR petitions).

Nor did petitioner raise the disqualification claim in a timely motion for relief from judgment under Rule 60(b). Petitioner knew of the potential claim well within one year of the dismissal of his first PCR petition in August 1992. His failure to raise the issue within that time prevented him from seeking relief based on excusable neglect or newly discovered evidence. V.R.C.P. 60(b)(1)-(3) (motions for relief from judgment based on excusable neglect, newly discovered evidence, or fraud must be brought within one year of judgment); see Perrott v. Johnston, 151 Vt. 464, 466 (1989) (Rule 60(b)(6), the catch-all provision, Ais available only when a ground justifying relief is not encompassed within any of the first five classes of rule@). Instead, petitioner raised the disqualification claim in his seventh PCR petition filed more than nine years after his first PCR petition was dismissed by the judge whom petitioner seeks to disqualify. Under these circumstances, we find unavailing his argument that his constitutional right to access the courts compelled the superior court to grant his Rule 60(b) motion. Petitioner was given access to the courts, but failed to raise his disqualification claim within a reasonable time.

In addition to the disqualification claim, petitioner notes that he stated in his docketing statement on appeal from denial of his seventh PCR petition that the superior court dismissed the petition after withdrawal of his counsel and before new counsel was appointed. Because of our disposition of the disqualification claim, this contention does not present any basis for granting petitioner=s Rule 60(b) motion and reinstating his appeal. Petitioner is not alleging that he had other viable claims (beyond his disqualification claim) that would render his underlying criminal conviction or sentence defective. In sum, the superior court acted well within its discretion in denying petitioner=s Rule 60(b) motion seeking reinstatement of his appeal from denial of another successive PCR petition.

Affirmed.

BY THE COURT:

_____

Denise R. Johnson, Associate Justice

_____

Marilyn S. Skoglund, Associate Justice

_____

Brian L. Burgess, Associate Justice