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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-521

OCTOBER TERM, 2005

	}	APPEALED FROM:
	}	
In re Edwin A. Towne, Jr.	}	Windham Superior Court
	}	
	}	
	}	DOCKET NO. 462-10-3 Wmcv
		Trial Judge: Karen R. Carroll

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

Petitioner Edwin A. Towne, Jr. appeals from the trial court=s order granting summary judgment to the State on his petition for post-conviction relief. We affirm.

Petitioner is incarcerated based on a first-degree murder conviction. See State v. Towne, 158 Vt. 607 (1992) (affirming conviction). In October 2003, he filed a pro se petition for post-conviction relief (PCR), apparently his eighth such petition. Petitioner raised eight claims, all of which were predicated on the contention that the State breached a March 1983 plea agreement by failing to secure the dismissal of a New Hampshire felonious sexual assault charge and fugitive warrant.[*] The State moved for summary judgment, which the trial court granted in October 2004. The court found that, even assuming that the State had breached the plea agreement, petitioner could not show that he had been prejudiced by the breach. The court explained that the legality of petitioner=s subsequent arrest on the New Hampshire fugitive warrant had already been decided in the State=s favor. Thus, petitioner was precluded from arguing that he was prejudiced by his arrest on the warrant. The court found that petitioner had bargained for a particular sentence in the 1983 plea agreement, which he had received, and he could not show that he had been prejudiced by the somewhat untimely dismissal of the New Hampshire actions. Petitioner appealed.

Petitioner raises numerous other claims of error, all of which we find to be without merit. Summary judgment was appropriately granted in this case because the PCR was a successive petition. See Sorge v. State, 171 Vt. 171, 174 n.* (2000) (Supreme Court may affirm correct result in trial court for different reasons on appeal). The trial court Ais not required to entertain a second or successive motion for similar relief on behalf of the same prisoner.@ 13 V.S.A. ' 7134. A PCR petition is successive if Athe same ground was determined adversely to the petitioner in an earlier petition, the prior determination was on the merits, and the ends of justice would not be served by reaching the merits of the subsequent application.@ In re Currier, 147 Vt. 645, 645 (1986) (mem.) (citing Sanders v. United States, 373 U.S. 1, 15 (1963)). A petitioner is foreclosed from raising Athose factual or legal contentions actually adjudicated or questions which [he] knew of, but deliberately, or without adequate excuse, failed to raise either in the proceeding which led to his conviction or in prior post-conviction proceedings . . . .@ State v. Provencher, 128 Vt. 586, 591-92 (1970) (Holden, C.J., concurring). In this case, petitioner raised the same issues in his 2004 PCR petition that he raised, or could have raised, in a 1989 PCR petition.

In his 1989 PCR petition, petitioner sought to withdraw his plea under the March 1983 agreement and have the court vacate his sentence. Petitioner essentially claimed that the State had not honored its promise to ensure that New Hampshire dismissed its pending charges against him. Petitioner asserted that if New Hampshire had dismissed the charge according to the plea agreement, the police would not have arrested him in October 1986 as a fugitive from

justice. The trial court rejected this argument. It explained that the outstanding warrant was only one of two factors that led police to stop him in 1986---police had also received reliable information that petitioner was carrying a firearm in his vehicle, and this provided police with sufficient probable cause to stop his vehicle. The court found that petitioner=s ensuing arrest resulted as much from the discovery of the firearm as from the outstanding New Hampshire warrant. The court also found that petitioner had received the benefit of his 1983 bargain---in exchange for his guilty pleas, he received the reduced sentence to which he had agreed. The court thus concluded that petitioner had not suffered any prejudice to his liberty interest by New Hampshire=s failure to dismiss charges against him when he entered into a plea agreement in Vermont.

Petitioner raises essentially the same claims in his 2004 PCR petition, although some may be couched in slightly different terms. For example, neither petitioner=s allegation that the State engaged in prosecutorial misconduct by inducing his plea through an unkept promise, nor his assertion that his counsel was ineffective for failing to ensure that the terms of the plea agreement were met, undermines our conclusion that the PCR is successive. See Woodmansee v. Stoneman, 132 Vt. 107, 110 (1974) (affirming dismissal of PCR petition as successive where petitioner made same allegation in different language, with different legal theory to support it). All of petitioner=s claims for relief are predicated on the State=s alleged breach of the March 1983 plea agreement. Petitioner already raised this claim and it was decided against him. Any additional claims that petitioner attempted to raise in his 2004 PCR petition that were based on the State=s alleged breach of the plea agreement are foreclosed by his failure to raise them in his first PCR petition. Provencher, 128 Vt. at 591-92. As in Woodmansee, the grounds presented in petitioner=s 2004 petition do not Adiffer in any material way from those presented in the first petition. Nor can we conclude that the ends of justice would be served in reaching the merits of this second petition.@ 132 Vt. at 110. Summary judgment was appropriately granted to the State.

We are equally unpersuaded by petitioner=s assertion that the trial court erred by failing to assign him new counsel after allowing his previous PCR counsel to withdraw. Unlike the petitioner in In re Gould, 2004 VT 46, & 13, 177 Vt. 7, who requested that counsel be appointed to assist him in filing his first PCR petition, petitioner here has not demonstrated that he requested the appointment of new counsel below, nor has he shown that he objected to the court=s action below. We also note that this is petitioner=s eighth PCR petition. See id. & 24 (explaining that PCR statute, including its bar on successive PCR petitions, reflects Legislature=s attempt to strike a balance between giving prisoners all the tools they need to mount a final attack on their convictions, while keeping court and its officers free from absolutely groundless cases). Even if petitioner had preserved his claim of error, he has not demonstrated that reversal was required, as his PCR petition was plainly a successive petition barred by 13 V.S.A. ' 7134. We find no error.

Affirmed.

BY THE COURT:

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice

[*] The 1983 plea agreement involved kidnapping and sexual assault charges against petitioner. At the time of the

plea agreement, petitioner had also been indicted in New Hampshire on a felonious sexual assault charge for allegedly raping a nine-year-old girl. Petitioner failed to appear at his arraignment and New Hampshire had issued a warrant for his arrest. Although not part of his written plea agreement with the State of Vermont, petitioner=s attorney stated on the record that the plea agreement was contingent upon the dismissal of the New Hampshire charge and a withdrawal of the detainer on the pending New Hampshire charge. The New Hampshire warrant was not withdrawn, and in 1986, Vermont police, in possession of the New Hampshire fugitive warrant (as well as credible information that petitioner possessed a firearm), arrested petitioner and questioned him about the disappearance of a local teenager. Petitioner was later charged and convicted of the teenager=s murder (as well as six federal firearms violations); police found the murder weapon in the foundation of petitioner=s house. Petitioner=s murder conviction was affirmed by this Court.