

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2005-206

NOVEMBER TERM, 2005

Byron Martin	}	APPEALED FROM:
	}	
	}	Orleans Superior Court
v.	}	
	}	
Steven Gold, Commissioner of the Department of Corrections, et al.	}	DOCKET NOS. 66-4-03 Oscv & 310-12-03 Oscv

Trial Judge: Dennis R. Pearson

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

Petitioner Byron Martin appeals pro se from the trial court=s order granting summary judgment to the State on his consolidated petition for post-conviction relief and writ of habeas corpus. Petitioner raises numerous claims of error. We affirm.

Petitioner is incarcerated based on his conviction of felony possession of stolen property. He appealed from his conviction, asserting that the trial court erred in denying his motion to suppress an incriminating statement. We rejected petitioner=s argument and affirmed his conviction. State v. Martin, No. 2003-174 (Vt. Dec. 4, 2003) (unreported mem.). In April 2003, petitioner filed a request for post-conviction relief raising numerous claims of error. In December 2003, he filed a petition for writ of habeas corpus. The actions were consolidated for review.\*

In May 2005, the court issued a detailed order granting summary judgment to the State. It first summarized the underlying facts. The court explained that in 2002, police obtained a warrant to search a residence occupied by petitioner and his girlfriend. During the search, petitioner stated to the officers that everything in the house was Ahis responsibility.@ Police recovered over \$500 worth of stolen property at the home. Petitioner later moved to suppress his incriminating statement, asserting that he was Ain custody@ at the time the statement was made and he was not provided with a Miranda warning. As noted above, the trial court denied the motion, and this Court affirmed its decision. See id. We explained that while the parties had agreed that petitioner was Ain custody@ at the time the statement was made, the trial court=s finding that petitioner=s statement was voluntary and not the product of police interrogation was supported by the record.

With this factual and procedural history in mind, the trial court turned to the numerous claims of error raised in petitioner=s PCR, which it grouped thematically. Petitioner asserted, among other things, that: his incriminating statement had been improperly obtained and admitted at trial; the State had engaged in trial misconduct; his attorney was ineffective; and his sentence was unfair. The court found all of petitioner=s claims without merit. It explained that petitioner had deliberately bypassed several issues that he raised in his PCR, including the voluntary nature of his incriminating statement to police. Other issues, such as the admissibility of his incriminating statement, had been finally decided against him. The court found that other allegations, such as any dispute over whether petitioner had been Ain custody@ at the time the incriminating statements were made, were immaterial. The court also rejected petitioner=s ineffective assistance of counsel claims, finding that petitioner had failed to show how any alleged negligence on the part of counsel would have probably affected the outcome of the proceedings in his favor. Finally, the court rejected petitioner=s claims that his sentence of five to ten years to serve was unfair. The court explained that petitioner had failed to provide any independent record evidence to show that the trial judge was biased against him or

that the sentence had been imposed as a punishment because petitioner had rejected a plea agreement. The court thus granted summary judgment in the State's favor on the PCR petition. As to the habeas corpus petition, the court found, among other things, that based on its rejection of the substantive claims raised by petitioner in his PCR, it was clear that petitioner could not demonstrate that he was being unlawfully detained. This appeal followed.

On appeal, petitioner essentially reiterates the claims that he made to the trial court. He argues that: (1) the police engaged in misconduct in searching his residence, obtaining his incriminating statement, and arresting him; (2) he received ineffective assistance of counsel; (3) he received an excessive sentence; (4) the State engaged in prosecutorial misconduct at trial; (5) his conviction was based on insufficient evidence; (6) the trial court erred in denying his motion to suppress; and (7) he possessed newly discovered evidence to show that he was innocent and that his incriminating statement was obtained through coercion.

Vermont's post-conviction relief statute allows a prisoner to challenge his confinement where the sentence is subject to collateral attack. In re Carter, 2004 VT 21, & 9, 176 Vt. 322. A post-conviction relief is not a substitute for direct appeal. Id. Instead, it is a limited remedy requiring petitioner to demonstrate by a preponderance of the evidence that fundamental errors rendered his conviction defective. In re Koveos, 2005 VT 28, & 6 (mem.). We review the trial court's findings for clear error, and we must uphold its conclusions if they are supported by its findings. In re Grega, 2003 VT 77, & 6, 175 Vt. 631 (mem.). In this case, the trial court thoroughly addressed the issues raised by petitioner, and we find no error in its resolution of his claims. We need not repeat all of the court's findings here. The findings are supported by the record, and they support the court's conclusions as to petitioner's claims.

As the trial court found, the admissibility of petitioner's incriminating statement was raised at trial and on appeal, and it has been decided adversely to petitioner. In denying petitioner's motion to suppress, the trial court found that the statement was voluntary. Petitioner cannot now relitigate these issues in his PCR petition. See State v. Provencher, 128 Vt. 586, 591-92 (1970) (a petitioner is foreclosed from raising those 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) (Holden, C.J., concurring); but see In re Carter, 2004 VT 21, & 9-10 (discussing application of deliberate bypass rule and distinguishing between issues that were preserved for appeal but not raised on appeal and those that were neither raised nor adjudicated at trial). Finally, as the trial court found, petitioner's arguments and the new evidence that he offered to show that he was in custody at the time of the statement were irrelevant to the trial court's rationale for deciding the motion to suppress.

We similarly find no error in the trial court's rejection of petitioner's ineffective assistance of counsel claims. To sustain this claim, petitioner needed to show by a preponderance of the evidence that: (1) his counsel's performance fell below an objective standard of performance informed by prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the proceedings would have had a different outcome. In re Koveos, 2005 VT 28, & 6 (quotation omitted). While the trial court stated that expert evidence would have bolstered petitioner's claim, its decision did not rest solely on this basis. The court discussed in detail the absence of evidence presented by petitioner to support his claims. As the trial court found, even assuming that trial counsel's performance was inadequate, petitioner made no showing as to how these alleged deficiencies would have resulted in a different outcome. Similarly, petitioner failed to present admissible evidence to establish, or even create, a genuine dispute that any alleged failures to raise issues on appeal were in fact negligent or that any such negligence made any material difference in the ultimate outcome. We find no error in the trial court's findings or its conclusions.

Finally, the court did not err in rejecting petitioner's claim that he received an unfair sentence. As the trial court explained, petitioner presented no independent record evidence to show that the court acted improperly. This finding is supported by the record, and it supports the court's conclusion. We have considered all of the claims raised in petitioner's brief and find them without merit. The trial court did not err in granting summary judgment for the State.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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\* Petitioner also filed a civil suit for damages against the State under 42 U.S.C. ' 1983, which was consolidated with his PCR petition and his petition for habeas corpus. In its order, the court dismissed petitioner=s ' 1983 complaint without prejudice. Petitioner filed an untimely notice of appeal with this Court, and the appeal was dismissed on this basis in November 2005.