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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-232

MARCH TERM, 2006

In re Anthony Kinoian	}	APPEALED FROM:
	}	
	}	
	}	Chittenden Superior Court
	}	
	}	
	}	DOCKET NO. S0658-03 CnC

Trial Judge: Richard W. Norton

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

Petitioner appeals the superior court=s decision granting the State=s motion for summary judgment and denying post-conviction relief. We affirm.

The parties do not dispute the underlying facts. In May 2001, petitioner used stolen credit cards to purchase goods from Wal-Mart and Hannaford Brothers. The two incidents were prosecuted separately. In both instances, petitioner was charged with felony false pretense and misdemeanor credit card fraud. In the first

proceeding, petitioner=s attorney negotiated a guilty plea to the misdemeanor charge and the State dropped the felony charge. In the second proceeding, petitioner had a different attorney, who also negotiated a plea agreement, although the State refused to drop the felony charge this time.

In his PCR petition, petitioner argued that both attorneys provided ineffective assistance of counsel. Specifically, petitioner contended that his first attorney was ineffective in not seeking to have all the charges addressed in the same proceeding. Had she done so, according to petitioner, the State would have been forced to recognize that all of petitioner=s offensesCwhich were based on similar conductCshould properly have been categorized as misdemeanor rather than felony offenses. Petitioner further contended that his second attorney was ineffective in failing to argue that the statute establishing misdemeanor credit card fraud had effectively superseded the felony false pretenses statute. Had the second attorney made this argument, petitioner asserted, the State would have been forced to abandon the felony charges.

The superior court granted summary judgment to the State. With respect to the representation provided by petitioner=s first attorney, the court noted that, at the time of the first proceeding, the State had not charged petitioner with the other offenses, the petitioner had not told his attorney about the other offenses, and the police investigations into the other offenses had not been concluded or filed with the State. Accordingly, the court concluded that the possibility that further investigation by petitioner=s first attorney could have favorably altered the plea negotiations was Asimply too attenuated@ to support the conclusion that her representation fell below the standard of reasonable assistance. With respect to the representation provided by the second attorney, the trial court determined that, even assuming the statutory argument was a Astrong strategy,@ it was not established law and there was no guarantee that the State would have changed its negotiating position in the manner petitioner predicted. Thus, petitioner had not shown that prejudice resulted from his attorney=s failure to present that particular argument.

On appeal, petitioner reiterates the arguments set forth in his PCR petition. A[A] petitioner seeking post-conviction relief based on ineffective assistance of counsel must demonstrate first that counsel=s performance fell below an objective standard of reasonableness . . . and second, that counsel=s deficient performance

prejudiced the defense.@ In re LaBounty, 2005 VT 6, & 7, 177 Vt. 635 (mem.) (quotations omitted). In reviewing denial of a PCR, we will not disturb the superior court=s conclusions unless they are not supported by its findings. Id.

Upon review, we find the superior court=s conclusions are adequately supported. In both of the ineffective assistance scenarios put forward by petitioner, the State would have had to react in a particular manner to petitioner=s attorneys= efforts for petitioner=s prospects to improve. It requires unwarranted speculation to assume that petitioner could have realized better outcomes in his plea negotiations if (1) his first attorney had sought to bring all charges into the same proceeding or (2) his second attorney had advanced the statutory argument described above. See id. & 14 (concluding that petitioner had presented no evidence demonstrating that different tactic by defense counsel would have resulted in a different outcome, where hoped-for result of different tactic was speculative). The superior court was justified in refusing to engage in such speculation.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

_____

Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice