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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-414

MAY TERM, 2007

In re Jeffrey Whitcomb	}	APPEALED FROM:
	}	
	}	
	}	Orleans Superior Court
	}	
	}	
	}	DOCKET NO. 35-1-05 Oscv
		Trial Judge: Howard Van Benthuysen

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

Petitioner appeals the superior court's order denying his petition for post-conviction relief (PCR). We affirm.

In July 2004, petitioner pled guilty to, and was convicted of, two counts of petit larceny, several counts of violation of conditions of release, and one count each of unlawful mischief, DUI, unlawful trespass, and violation of an abuse-prevention order. Following his entering pleas on those counts, he was sentenced to two-to-eight years to be served in the Intensive Substance Abuse Program (ISAP), which does not compel residence in a correctional facility. Shortly thereafter, however, petitioner was charged with DUI, third offense. As a result, he was removed from the ISAP program and required to serve his sentence in jail.

In January 2005, petitioner filed his PCR petition, asserting that his trial counsel did not adequately investigate the charges against him and then coerced him into accepting a revised plea agreement. The Prisoner's Rights Office informed the court that they were referring the case to Attorney Mark Furlan due to "an ethical conflict." At a July 2005 status conference, Attorney Furlan informed the court that he had reviewed the transcripts from the underlying criminal proceeding but still had to examine voluminous files from petitioner's trial counsel. At a September 2005 status conference, Attorney Furlan stated that he had completed his review and determined that petitioner's claims were without merit, but that he was in the process of getting a second opinion from Attorney Charles Martin. In October 2005, the Defender General sent the court a letter stating that his office was declining assignment of the case pursuant to 13 V.S.A. § 5233(a)(3) (providing that a needy person is entitled to representation in a PCR proceeding "where the attorney considers the claims, defenses, and other legal contentions to be warranted by [] law"). On the same day, Attorney Furlan filed a motion to withdraw as counsel for petitioner. At a November 2005 status conference, in which petitioner participated by telephone, Attorney Furlan explained to the court that Attorney

Martin had sent a letter to the Defender General concurring with him as to the petition's lack of merit, but that petitioner wanted to proceed with the petition on his own. After discussing Attorney Furlan's motion with petitioner, the superior court granted it. Four days later, petitioner filed a pro se notice of appearance.

At a January 2006 status conference, petitioner asked the court to assign him an expert witness to assess the effectiveness of his trial counsel. The court informed petitioner that if he wanted the State to pay for an expert witness, he would have to file a motion explaining why an expert was necessary in the context of his claim. In an April 2006 letter, petitioner requested the court to appoint and pay for an expert, stating that his trial counsel had failed to produce eye witness evidence known to him through petitioner. In May 2006, the superior court denied the motion, noting that petitioner's case had already been investigated by the Prisoner's Rights Office and by the Defender General's Office and found to be lacking in merit. A hearing on the merits of the petition was held in July 2006. Following the hearing, in which petitioner testified and presented the testimony of his former girlfriend, the court denied the petition, stating that petitioner was unable to offer any credible support for his claim of ineffective assistance of counsel and had not met his burden of showing that fundamental errors had rendered his conviction defective.

On appeal, petitioner first argues that the superior court erred by granting Attorney Furlan's motion to withdraw and by failing to assign substitute counsel. According to petitioner, the court's decision to grant the motion to withdraw lacked a rational basis because it was solely dependent on the bare conclusions of Attorney Furlan, Attorney Martin, and the Defender General's Office, which was in no position to render an opinion given its ethical conflict. Petitioner further argues that the court compounded its error by failing to assign substitute counsel and by denying his motion for assignment of an expert witness at state expense. Upon review of the record, we find no error. The superior court granted Attorney Furlan's motion to withdraw based upon (1) Attorney's Furlan's determination, after reviewing the transcripts and trial counsel's files, that petitioner's claims were without merit; and (2) Attorney Martin's and the Defender General's concurrence with Attorney Furlan's determination. Further, petitioner accepted Attorney Furlan's withdrawal and apparently decided to proceed pro se because he did not move to have substitute counsel appointed. Under these circumstances, the court did not abuse its discretion in granting the motion to withdraw. See Cameron v. Burke, 153 Vt. 565, 573 (1990) (whether to grant an attorney's motion to withdraw is a matter committed to the discretion of the court). Nor did the court err by not appointing substitute counsel, given that petitioner filed his pro se appearance, and nothing in the record indicates that he ever moved for appointment of substitute counsel. Cf. In re Gould, 2004 VT 46, ¶ 13, 177 Vt. 7 ("Petitioner's statutory right to the assistance of counsel on his first PCR motion was improperly denied when the trial court refused his request to appoint new counsel after allowing his previous counsel to withdraw.").[*]

Petitioner also briefly asserts that the trial court compounded its error by denying his motion to provide him with an expert witness at state expense. We recognize that the superior court erred

[*] Our decision in Gould preceded the amendment to 13 V.S.A. § 5233(a)(3) granting assigned counsel in PCR proceedings "where the attorney considers the claims, defenses, and other legal contentions to be warranted by [] law").

by basing its denial of expert services on assigned counsel's oral assessment of the merits of the case. The Legislature has given the Defender General discretion to determine whether it will represent PCR petitioners, but the trial court cannot adopt that determination as the basis for denying expert services. Under the Public Defender's Act "the assignment of counsel and provision of other litigation support services are treated separately, so that waiver or denial of one does not preclude entitlement to the other." In re Barrows, 2007 VT 9, ¶ 7, 917 A.2d 490.

Nevertheless, petitioner cannot demonstrate reversible error with respect to the denial of his request for an expert witness unless he made an adequate showing below of a particularized need. State v. Wool, 162 Vt. 342, 349-50 (1994); see State v. Handson, 166 Vt. 85, 92 (1996) (trial court has latitude in determining if pro se defendant needs a requested service, and its decision will not be disturbed absent a showing of an abuse of discretion). A showing of necessity "requires more than a bare assertion of need; it requires that the specific purpose and nature of the expert assistance be demonstrated and a further showing that an adequate case cannot be made absent such assistance." Barrows, 2007 VT 9, ¶ 6. In the context of a petition for post-conviction relief, "this means showing how the assistance advances the argument that petitioner's trial was fundamentally flawed." Id. Thus, "petitioner needed to describe how a legal expert would assist petitioner to prove that specific shortcomings in his representation at trial fell below the level of competence for the particular task at issue." Id. ¶ 9.

Here, petitioner wrote two brief letters to the superior court requesting an expert at state expense. In the first one, he stated that there was evidence to prove his innocence concerning the charges of unlawful entry, petty larceny, and driving while intoxicated, but that his attorney did not investigate the evidence despite being aware of it. In the second letter, petitioner stated he had told his trial counsel about an eye witness who could help his defense, that the eyewitness also tried to contact his trial counsel to no avail, and that the trial counsel knowingly and deliberately withheld the evidence. Apparently, petitioner was referring to his former girlfriend, who allegedly would have testified that petitioner had been living with her at her home at the time he was charged with unlawful entry of her home. The implication is that petitioner could not have been convicted of unlawful entry for entering his own home.

We must keep in mind, however, that petitioner was seeking to withdraw his guilty plea, and that he knew before he entered the plea that he was being charged with unlawful entry of the house he claimed to have been living in at the time of the offense. Petitioner acknowledged in his petition that he asked his trial counsel why he should plead guilty to unlawful entry when he was being charged with entering his own home. Nevertheless, he elected to accept the plea bargain so that he could participate in a program in which he could avoid incarceration. A defendant is bound by his plea once it is determined that the plea was entered into voluntarily and with an understanding of its consequences, and "the burden of proving that a procedural shortcoming has hampered or frustrated the exercise of an accused's rights rests squarely on the petitioner in a post-conviction proceeding." In re Hall, 143 Vt. 590, 595 (1983) (citation omitted). Here, petitioner pointed to alleged shortcomings of his counsel that preceded his plea, but his own petition demonstrates that, despite being aware of these alleged shortcomings, he decided to go forward with the plea because of his desire to enter into a particular program. He now regrets this decision because his post-judgment conduct resulted in the loss of the benefit gained through the plea agreement. These facts, however,

do not render petitioner's plea involuntary or satisfy his burden to make a particularized showing with respect to his request for expert services. To the extent that petitioner argued he was coerced into accepting the agreement, he would be the principle witness. Absent a showing of how an expert could have aided him in showing coercion, petitioner is not entitled to expert services.

Petitioner also argues that the superior court's limited findings are not supported by the evidence. First, petitioner contends that the court erred in finding that his witness was unable to offer any credible evidence to support his claim of ineffective assistance of counsel. According to petitioner, the court interrupted the witness when she was about to provide relevant evidence as to whether his entry into her home was lawful, which would have been relevant to his claim that his trial counsel did not adequately investigate his case. We find this argument unavailing. Petitioner indicated to the court that he was satisfied with the evidence presented. More importantly, even if the girlfriend had supported petitioner's claim that he was living at her house, petitioner acknowledged being aware of this alleged fact at the time he accepted the plea bargain, and her testimony would not have been relevant as to whether petitioner entered his guilty plea voluntarily. Second, petitioner argues that the court erroneously found that his witness had undercut his central theory by acknowledging that she had "most likely" been interviewed by his trial counsel's investigator, **PC 3**, when in fact the witness testified that although it was possible, she doubted that the investigator had interviewed her. While it is true that the court misstated the testimony, we find the error harmless. The testimony of petitioner's witness may not have substantially undercut his central theory, but, as the court found, neither did it provide support for the claims raised in his petition. Lastly, petitioner states that the court noted his failure to call an expert witness, even though the court's own ruling prevented him from obtaining one. Again, the court's comment does not undercut its basic point that petitioner failed to submit sufficient evidence to support its petition, and he has not demonstrated error in the court's denial of his motion to provide an expert witness at state expense.

Affirmed.

BY THE COURT:

_____

Denise R. Johnson, Associate Justice

_____

Marilyn S. Skoglund, Associate Justice

_____

Brian L. Burgess, Associate Justice