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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-513

DECEMBER TERM, 2007

In re Donald Cleary	}	APPEALED FROM:
	}	
	}	
	}	Lamoille Superior Court
	}	
	}	
	}	DOCKET NO. 24-1-04 Lecv
		Trial Judge: Dennis R. Pearson

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

Petitioner appeals the superior court's order denying his petition for post-conviction relief (PCR), in which he claims ineffective assistance of counsel pertaining to his guilty plea to charges of attempted sexual assault and lewd and lascivious conduct. We affirm.

The lengthy history of petitioner's interaction with the judicial system is set forth in State v. Cleary, wherein we upheld his convictions based on our conclusions that the record supported the district court's competency finding and that any deficiencies in the colloquy required by V.R.Cr.P. 11 at the change-of-plea hearing did not amount to plain error. 2003 VT 9, ¶ 1, 175 Vt. 142. Following our decision, petitioner filed the instant petition, which he later amended, claiming ineffective assistance of counsel. After a two-day evidentiary hearing, the superior court concluded in a lengthy and well-reasoned decision that (1) petitioner's trial counsel did not commit any material performance errors in his representation of petitioner; and (2) to the extent that there were any deficiencies in the attorney's performance, they were either not actionable in light of the issues raised and rejected in the direct appeal or were not prejudicial in that they did not materially affect the outcome of the case. The court also confirmed that the State's case against petitioner had been subjected to the crucible of "meaningful adversarial testing" as required to vindicate his right to counsel under the Sixth Amendment. In re J.B., 159 Vt. 321, 325 (1992) (citing United States v. Cronic, 466 U.S. 648, 656 (1984)).

On appeal, petitioner argues that the superior court's findings and conclusions are not supported by credible evidence, which demonstrates that his trial counsel represented him ineffectively (1) by failing to file a motion to dismiss following the deposition of the complaining witness, and (2) by failing to continue to pursue the issue of petitioner's competency through the change-of-plea hearing. We disagree, and affirm the judgment of the superior court.

Post-conviction relief is a limited remedy where petitioners have substantial burdens to overcome and this Court's review is deferential. In re Grega, 2003 VT 77, ¶ 6, 175 Vt. 631 (mem.).

> To demonstrate ineffective assistance of counsel, a petitioner must 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 resulted in a different outcome.

Id. "In making this showing, petitioner cannot rely on the distorting effects of hindsight, and must surpass the strong presumption that counsel's performance fell within the wide range of reasonable professional assistance." Id. On appeal, we will not disturb the findings of the superior court "unless they involve clear error, and in the case of conflicting evidence, we will defer to the trial court's judgment." In re LaBounty, 2005 VT 6, ¶ 7, 177 Vt. 635 (mem.). Moreover, we will affirm a PCR court's conclusions as long as they are supported by the findings. Id.; see Grega, 2003 VT 77, ¶ 6 ("If the findings are supported by any credible evidence, and the conclusions reasonably follow therefrom, this Court will not disturb the trial court's judgment."). We review petitioner's arguments with these standards in mind.

Petitioner first contends that his trial counsel was ineffective for failing to file a motion to dismiss following the deposition of the complaining witness. In her original affidavit, complainant alleged actual intercourse, but later denied, in her deposition testimony, that intercourse had occurred. Following the deposition, the State amended its sexual assault charge to attempted sexual assault. Petitioner argued that his counsel should have sought dismissal of the amended charge based on the victim's deposition testimony that petitioner never made contact with her vulva. As petitioner points out, the superior court concluded that such a motion would not have succeeded and would not have given petitioner additional leverage in plea negotiations.

On appeal, petitioner contends that the court misapprehended the evidence in that his expert asserted substantial testimony and argument as to why a motion to dismiss would have been successful. According to petitioner, his expert opined that the complaining witness's acknowledgement during her deposition testimony that petitioner did not try to place his penis in her vagina would have fairly raised the issue of whether the State could have established that petitioner's actions went beyond mere intent to commencement of the consummation of the sexual assault. See State v. Goodue, 2003 VT 85, ¶ 5, 175 Vt. 457 (noting that an "attempt" requires the actor's conduct to advance beyond mere intent to commencement of consummation of the act). In making this argument, petitioner cites neither the record, nor the superior court's lengthy quotation of the complaining witness's testimony reflecting that it is petitioner, not the court, who misstates the substance of that testimony. Indeed, in her deposition testimony, complainant expressed her belief that petitioner thought his penis was at or in her vagina, but that his effort in this regard was ultimately frustrated by their mutual girth, or his excitement, or both. Nothing in her deposition testimony indicated that petitioner did not intend to sexually assault

the victim or did not commence consummation of the assault. To the contrary, as the superior court found, the record reveals substantial circumstantial evidence that petitioner had every intention of sexually assaulting the victim and in fact commenced that assault.

We also find unavailing petitioner's argument that, given the continuous nature of his conduct, the State's decision to charge him with both attempted sexual assault and lewd and lascivious conduct could have been challenged had defense counsel filed a motion to dismiss one of the counts as duplicative. See State v. Fuller, 168 Vt. 396, 400 (1998) (setting forth factors to determine when presumption of charging multiple sexual incidents as separate offenses rather than one continuous offense can be overcome). Petitioner fails, however, to undermine the superior court's conclusion that petitioner could not have sustained his theory that the two instances of misconduct were so interrelated that they had to be considered merged into one continuing offense. As the superior court stated, a substantial lapse of time and several material events intervened between the time petitioner initially fondled the victim's breasts, charged as lewd and lascivious conduct, and when he attempted sexual contact without her consent. Moreover, given the weakness of a potential motion to dismiss, and the relative apparent strength of the State's evidence, we agree with the superior court that such a motion would have provided defendant with little leverage in plea negotiations, particularly in light of the State's avowed intention to seek significant jail time to protect the public.

Next, petitioner argues that his counsel was ineffective for failing to continue to pursue the issue of his competency through the change-of-plea proceeding. Petitioner argues that his counsel should have raised anew petitioner's competency at that proceeding and should not have acquiesced to the court's request that counsel himself engage petitioner in the Rule 11 colloquy at the hearing. We find this argument unavailing. Petitioner submitted no evidence suggesting that his competency had diminished since the district court's competency decision filed the month before the change-of-plea hearing. As noted by the court, defense counsel engaged in frequent discussions with petitioner leading up to the change-of-plea and sentencing hearings, but had no substantial doubt about petitioner's competency during this time. We agree with the superior court that petitioner failed to meet his heavy burden of showing that (1) his counsel was ineffective for failing to renew the competency issue shortly after the district issued its lengthy decision finding petitioner competent, and (2) there was a reasonable probability that the outcome of the change-of-plea hearing would have been different had petitioner raised the competency issue again.

We also reject petitioner's argument that he is entitled to relief because his attorney agreed, at the district court's request, to engage petitioner in the Rule 11 change-of-plea colloquy, rather than insist that the court fulfill this procedural obligation. Petitioner failed to demonstrate that his attorney's acquiescence to the court's request prevented the court from making an informed decision on petitioner's competency to plead guilty to the charges. Nor has he shown a reasonable probability that the outcome of the proceeding would have been different had only the court conducted the colloquy.

Finally, we agree with superior court that petitioner has not shown that his attorney failed to test the state's case. Petitioner misplaces reliance on In re J.B., 159 Vt. at 325, for the proposition that a denial of right to counsel is presumed, without requiring actual prejudice,

where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing." Nothing approaching such failure occurred in petitioner's case. Defense counsel deposed complainant, causing the State to amend its charge to attempt, and put the State to its proof on petitioner's competency to stand trial. That there was no realistic basis upon which to mount further pre-trial attack on the State's case was not due to want of advocacy. The condemnation in In re J.B. is particularly inapposite to this case, where counsel's tactical shift from litigation to plea bargaining was driven by petitioner's express determination to avoid trial so as not to further embarrass himself and the victim.

Affirmed.

JOHNSON, J., concurring. I concur in the judgment because I cannot fault trial counsel for the substantial and prejudicial errors that occurred in the prosecution of this case. Those errors must be laid at the feet of the court presiding over petitioner's criminal proceeding, although no errors were recognized on appeal to this Court. See State v. Cleary, 175 Vt. 142 (2003). Consistent with my prior dissent, I still find particularly egregious the trial court's failure to personally conduct a Rule 11 colloquy with a defendant with mental retardation, a circumstance that demanded extraordinary vigilance at the entry of his plea. Id. at 166-73 (Johnson, J., dissenting). But, given this Court's inconsistent jurisprudence on Rule 11, noted by the PCR trial court, it is hard to fault trial counsel for acquiescing to the judge's request that counsel conduct the colloquy. Therefore, I concur in affirming the dismissal of the PCR petition only because petitioner cannot meet his burden of showing that trial counsel's performance fell below an objective standard of performance informed by prevailing professional norms, not because of some doubt as to whether an actual colloquy conducted by the judge would have revealed defendant's deficiencies in understanding and highlighted his lack of competence to enter a plea.

BY THE COURT:

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Denise R. Johnson, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice

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Brian L. Burgess, Associate Justice