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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-268

MAY TERM, 2008

In re Lee Tucker	}	APPEALED FROM:
	}	
	}	
	}	Chittenden Superior Court
	}	
	}	
	}	DOCKET NO. S1398-05 CnC
		Trial Judge: Matthew I. Katz

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

Petitioner appeals the superior court's order granting the State summary judgment on petitioner's request for post-conviction relief. On appeal, petitioner contends that his plea agreement, wherein he pled guilty to two counts of aggravated sexual assault against a minor, is invalid because he was coerced by his trial attorneys into signing the plea agreement and he did not understand the terms of the agreement. We affirm.

In January 2004, petitioner was charged with two counts of aggravated sexual assault on a minor. The charges were punishable by a maximum penalty of life imprisonment. In March 2005, petitioner signed a plea agreement with the State whereby he pled guilty to the two counts and the State agreed to be capped at arguing for a sentence of twelve to twenty-five years. Petitioner was free to argue for a split sentence of not less than six to twenty years. At the change-of-plea hearing, the court engaged petitioner in a colloquy and determined that petitioner entered the plea knowingly and voluntarily. Following a pre-sentence investigation (PSI), the court held a sentencing hearing in June 2005. The PSI recommended a sentence of fifteen to twenty-five years. In accordance with the terms of the plea, the court sentenced petitioner to concurrent terms of twelve to twenty-five years on each count.

In December 2005, petitioner filed a pro se motion for post-conviction relief. Petitioner alleged that he received ineffective assistance of counsel because, among other things, his attorney had failed to explain the terms of the plea agreement to him. He also claimed he was coerced into accepting the plea agreement. The State moved for summary judgment. The court granted the State's request, concluding that petitioner was unable to present facts to support his claims. Petitioner appeals.

In a post-conviction-relief proceeding, petitioner must demonstrate by a preponderance of the evidence that "fundamental errors rendered his conviction defective." In re Dunbar, 162 Vt. 209, 211-12 (1994) (quotation and citation omitted). Summary judgment is appropriate where there are no issues of material fact and the moving party is entitled to judgment as a matter of law. V.R.C.P. 56(c)(3). On appeal, we review the grant of summary judgment de novo and apply the same standard as the trial court. In re Barrows, 2007 VT 9, ¶ 5, 181 Vt. 283.

On appeal, petitioner first alleges that his attorneys coerced him into signing the plea agreement. We agree with the superior court that there is no evidence that petitioner's attorney impermissibly pressured him into pleading guilty. An attorney's advice regarding whether or not to enter a plea and pressure to elect one alternative over another is not coercion. In re Quinn, 174 Vt. 562, 564 (2002) (mem.). Petitioner's allegation that his attorneys told him that "he would not stand a chance at trial," and that it was "not a bad deal," does not amount to the type of impermissible pressure on a client to plead guilty that would render the deal involuntary. Cf. id. (holding that attorney impermissibly pressured client into pleading guilty where the attorney exerted undue influence on his client during the plea hearing).

Furthermore, evidence of "a petitioner's assertions in open court of voluntariness and lack of coercion, while not binding on a post-conviction proceeding, are cogent evidence against later claims to the contrary." Id. (quotation and citation omitted). In this case, the colloquy from petitioner's plea hearing demonstrates that petitioner understood the terms of the plea and entered it voluntarily. The court confirmed with petitioner that he was feeling well, not taking medication, and had not consumed any drugs within the previous forty-eight hours. The court explained the terms of the agreement to petitioner and reiterated that petitioner was entitled to continue his not-guilty pleas and proceed to trial. The court outlined the rights associated with going to trial that defendant was giving up, including confronting the State's witnesses, and defendant agreed that he understood. Defendant also agreed that he was satisfied with the legal advice he received. He acknowledged that his pleas were voluntary and not the result of threats or promises. Defendant presented no evidence to contradict his confirmation in the plea colloquy that he entered into the plea agreement voluntarily without any coercion. See In re Hall, 143 Vt. 590, 596 (1983) (concluding that defendant's assertion in his PCR proceeding that his plea was not knowing or voluntary was belied by the colloquy between defendant and the trial judge in which, among other things, the court "explained to the defendant that he did not have to so plead and that he could abandon his plea and proceed instead with a trial"). Thus, we conclude that defendant was not coerced.

Next, we address petitioner's claim that his plea should be withdrawn because his attorney failed to explain the terms of the plea agreement to him. Specifically, petitioner claims that he thought by signing the plea agreement he was to receive a sentence of six to twelve years. To prevail on his claim that a misunderstanding invalidated the plea agreement, petitioner must demonstrate "that he entered his plea reasonably relying on a material misunderstanding." In re Fisher, 156 Vt. 448, 458-59 (1991). As the superior court explained, petitioner cannot demonstrate that he reasonably relied on a material misunderstanding of the plea agreement because during the plea hearing, the court fully enumerated the terms of the deal to petitioner. At the beginning of the hearing, the court explained:

> The State agrees to be capped at arguing for a sentence of twelve to twenty-five years to serve. Now what that means is that the minimum would be no more than twelve, the maximum no more than twenty-five. Defendant agrees that he will argue for no less than six years to serve on the minimum, and no less than twenty years on the maximum term.

The court then asked petitioner if the agreement was "satisfactory," and petitioner replied, "Yes, Your Honor." Petitioner did not express concern regarding the sentence term at the plea hearing. See id. at 460 (concluding no error where petitioner did not express concern over parole eligibility during plea hearing). Given this uncontroverted evidence that the court explained the terms of the plea agreement to petitioner and petitioner acknowledged the terms, petitioner cannot demonstrate that he reasonably relied on a different understanding of the plea agreement.

We also reject petitioner's related claim that counsel's failure to explain the plea agreement to him constituted ineffective assistance. To prevail on an ineffective assistance claim, petitioner must show that "counsel's performance fell below an objective standard of reasonableness" and that the "deficient performance prejudiced the defense." See In re LaBounty, 2005 VT 6, ¶ 7, 177 Vt. 635 (mem.). Because the court fully explained the terms of the plea agreement to petitioner, as already described, petitioner cannot demonstrate that any error on his attorney's part prejudiced his defense. See id. (explaining that prejudice results when there is a reasonably probability that the outcome of the proceedings would have been different).

Petitioner presents additional arguments challenging the credibility of certain State witnesses and requesting an opportunity to confront all witnesses. Because petitioner did not raise these claims in the trial court, we do not address them on appeal. See In re Grega, 2003 VT 77, ¶ 17, 175 Vt. 631 (mem.) (declining to address arguments not raised in trial court).

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
John A. Dooley, Associate Justice

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Brian L. Burgess, Associate Justice