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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-373

FEBRUARY TERM, 2008

In re Travis Lang	}	APPEALED FROM:
	}	
	}	
	}	Chittenden Superior Court
	}	
	}	
	}	DOCKET NO. S1029-04 CnC
		Trial Judge: Ben W. Joseph

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

Petitioner appeals the superior court's summary judgment ruling, dismissing his petition for post-conviction relief (PCR). We affirm.

Petitioner was convicted of murder in 1995, and this Court affirmed the conviction two years later. State v. Lang, 167 Vt. 572 (1997). In 2005, petitioner filed his PCR petition, alleging that his attorney provided ineffective assistance of counsel at his murder trial by not moving to suppress electronically monitored statements he had made to a wired informant. The superior court granted the State's motion for summary judgment based on its conclusions that (1) trial counsel was not ineffective for failing to seek suppression of the taped conversation, because police did not need a warrant to monitor the conversation where it took place, and, in any event, the warrant police obtained to monitor the conversation was supported by probable cause; and (2) even if trial counsel was ineffective in failing to seek suppression of the taped conversation, petitioner could not show prejudice, because the informant testified at trial as to petitioner's incriminating statements, and thus there was no reasonable possibility that the outcome of the trial would have been different had the audiotape been suppressed. On appeal, petitioner argues that (1) a warrant was required to monitor his conversation with the informant because it took place in part in his home; (2) the warrant obtained by police was not supported by probable cause; and (3) his attorney's failure to seek suppression of the electronically monitored conversation was prejudicial.

A petitioner seeking post-conviction relief based upon a claim of ineffective assistance of counsel must demonstrate both that trial counsel's performance fell below an objective standard of reasonableness based upon prevailing professional norms and that there is a reasonable probability that the deficient performance affected the outcome of his trial. In re LaBounty, 2005 VT 6, ¶ 7, 177 Vt. 5 (mem.). In this case, the superior court concluded that petitioner failed

to demonstrate either deficient performance or prejudice. We affirm the court's conclusion that petitioner failed to demonstrate that prevailing professional norms required his trial counsel to seek suppression of an electronically monitored conversation that took place in the informant's apartment and car.

The superior court concluded that no warrant was required, because petitioner had no privacy interest in the place where his incriminating statements were recorded. As the court noted, the wired informant testified at petitioner's trial that he knowingly recorded his conversation with petitioner in his (the informant's) apartment and car. Petitioner does not effectively challenge the court's legal conclusion that, under such circumstances, no privacy interest would be triggered and thus no warrant required. See State v. Geraw, 173 Vt. 350, 351, 358 (2002) (holding that Article 11 of the Vermont Constitution prohibits secret recording of persons in the privacy of their homes, but limiting the holding to police interviews in the privacy of the home); compare State v. Blow, 157 Vt. 513, 519 (1991) (holding that Article 11 prohibited police from monitoring and recording a conversation with a confidential informant in the defendant's home without first obtaining a warrant) with State v. Brooks, 157 Vt. 490, 493-94 (1991) (holding that the warrantless transmittal and recording of a conversation with a confidential police agent in a parking lot did not offend Article 11 because the defendant did not have the same expectation of privacy outside his home) and State v. Bruyette, 158 Vt. 21, 37 (1992) (Dooley, J., concurring) (suggesting that the secret monitoring of a conversation between the defendant and his girlfriend in a parked car was outside the protection of Article 11).

Rather, petitioner contends that he made the incriminating statements in his home, and that monitoring him violated his right to counsel because it occurred after he had been assigned counsel. We rejected the latter argument in our decision affirming his conviction. See Lang, 167 Vt. at 573 (noting that the sixth-amendment right to counsel applies only after the initiation of formal judicial proceedings). As for his contention that police monitored the incriminating conversation in his home, the superior court found that (1) the informant testified under oath at petitioner's trial that petitioner made the incriminating statements in his (the informant's) apartment and car; and (2) the transcript that petitioner submitted in support of his claim did not support even a credible inference that he made the incriminating statements in his home. On appeal, petitioner fails to demonstrate any error in this finding. See LaBounty, 2005 VT 6, ¶ 7 (noting that findings in PCR proceeding will not be disturbed unless they involve clear error). He cites a transcript excerpt that was not submitted to the trial court, see State v. Brown, 165 Vt. 79, 82 (1996) (noting that documents not submitted in the trial court are not part of the record on appeal), and that, in any case, does not indicate that any of the incriminating statements were made in his home. Accordingly, because neither petitioner's affidavit nor the transcript excerpts demonstrate the existence of any genuine issue of material fact as to where petitioner made the incriminating statements, the superior court did not err in granting summary judgment to the State based on petitioner's failure to counter the State's statement of uncontested material facts.

Given petitioner's failure to undermine the superior court's determination that a warrant was not required under the circumstances of this case, we need not consider whether the court erred in determining that probable cause supported the warrant. Nor need we address the issue of whether petitioner demonstrated prejudice, although we do note that petitioner has barely challenged the superior court's prejudice conclusion given the informant's testimony at trial. In

short, the superior court did not err in dismissing the instant petition for failure to demonstrate ineffective assistance of counsel.

Affirmed.

BY THE COURT:

_____
John A. Dooley, Associate Justice

_____
Denise R. Johnson, Associate Justice

_____
Marilyn S. Skoglund, Associate Justice