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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-105

AUGUST TERM, 2008

In re Shawn Gibney	}	APPEALED FROM:
	}	
	}	Franklin Superior Court
	}	
	}	DOCKET NO. S459-05 Fc
		Trial Judge: Ben W. Joseph

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

Petitioner appeals from the trial court's order, granting summary judgment to the State on his petition for post-conviction relief. We affirm the trial court's decision.

Petitioner is incarcerated based on his conviction for first-degree murder. See State v. Gibney, 2003 VT 26, 175 Vt. 180 (affirming conviction). In October 2005, he filed a pro se PCR petition. He argued that his conviction and sentence should be vacated because: (1) he received ineffective assistance of counsel; (2) the prosecutor engaged in misconduct; (3) the trial court abused its discretion and failed to afford him due process of law; and (4) the Vermont Supreme Court applied incorrect standards in reviewing the issues raised in his direct appeal. In January 2008, the State filed a motion for summary judgment. Petitioner did not respond to the State's motion. In a February 2008 entry order, the court granted the State's motion without explanation. This appeal followed.

On appeal, petitioner essentially reiterates the arguments raised in his PCR. He argues that: (1) the evidence presented at his criminal trial was insufficient to support his guilt; (2) the trial court erred in preventing him from presenting evidence at trial that other people had motive and opportunity to kill the victim; (3) the court improperly allowed the systematic suppression of exculpatory evidence; (4) the prosecutor engaged in misconduct; (5) the trial court abused its discretion in certain rulings; (6) the Supreme Court applied incorrect standards in reviewing the issues raised in his direct appeal; and (7) his trial and appellate counsel were ineffective.

Petitioner does not argue that the trial court erred in granting summary judgment to the State. See In re S.B.L., 150 Vt. 294, 297 (1988) (appellant bears burden of demonstrating how the trial court erred warranting reversal, and Supreme Court will not comb the record searching for error); see also V.R.A.P. 28(a)(4) (appellant's brief should explain what the issues are, how they were preserved, and what appellant's contentions are on appeal, with citations to the authorities, statutes, and parts of the record relied on). Notwithstanding this shortcoming, we review the trial court's summary judgment decision, applying the same standard as the trial court. See In re Carter, 2004 VT 21, ¶ 6, 176 Vt. 322 (Supreme Court reviews summary judgment decision using same standard as trial court; summary judgment appropriate when there are no genuine issues of material fact and, when viewing the facts in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of

law). We conclude that with the exception of his ineffective-assistance-of-counsel claim, all of petitioner's claims are inappropriate for resolution in a PCR. His ineffective-assistance-of-counsel claim fails as a matter of law.

As we have explained,

> Post-conviction relief is not a vehicle for reexamining guilt or innocence, but is designed to correct fundamental errors. Post-conviction relief is not a substitute for appeal. Absent exigent circumstances, a matter adversely decided on direct appeal cannot be relitigated, and collateral attack is barred if the movant deliberately bypassed the issue on appeal.

In re Stewart, 140 Vt. 351, 361 (1981) (citations omitted). This Court has already considered and rejected petitioner's arguments concerning the sufficiency of the evidence and the trial court's evidentiary and other rulings. See Gibney, 2003 VT 26, ¶¶ 2, 17, 18, 29, 30, 49. Petitioner's claim regarding the standard of review employed by the Supreme Court should have been raised in a motion for reargument, not a PCR. Summary judgment was therefore appropriately granted to the State on petitioner's first six claims.

We thus turn to petitioner's ineffective-assistance-of-counsel claim. To succeed on his claim, petitioner "must demonstrate first that counsel's performance fell below an objective standard of reasonableness informed by prevailing professional norms and second, that counsel's deficient performance prejudiced the defense." In re LaBounty, 2005 VT 6, ¶ 7, 177 Vt. 635 (mem.) (citations omitted). Prejudice exists where "counsel's errors were so serious as to deprive the defendant of a fair trial . . . . In other words, the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (citations omitted). Petitioner failed to meet this standard. Indeed, he made no attempt to show how he suffered prejudice from the alleged errors made by counsel.

Petitioner first claimed that counsel was ineffective, because counsel failed properly to ensure that all police investigatory notes were preserved and disclosed to the defense. Defendant raises several additional claims related to these notes. The issue of the destruction of the police notes was raised by defense counsel at trial and in petitioner's direct appeal, and the argument was rejected by both the trial court and this Court. See Gibney, 2003 VT 26, ¶¶ 30-49. The trial court concluded that there was no reasonable possibility that the destroyed notes contained exculpatory material. This Court concluded that the investigatory notes were not important to petitioner's case and that their loss did not substantially prejudice petitioner. Id. ¶ 45. Petitioner does not explain how he was prejudiced by counsel's alleged errors, and we fail to see, in light of the findings above, how he could have been.

Petitioner's claim that counsel was ineffective for failing to investigate third party culpability fails for similar reasons. The issue of evidence related to third-party culpability was raised and rejected at trial and on appeal. See id. ¶¶ 18-29. We concluded that the evidence proffered by defense counsel had limited probative value, and it was outweighed by the prospect that it would confuse the issues and that it had no real connection to the offense being tried. Id. ¶ 29. Petitioner identified no specific prejudice from counsel's alleged errors, and we discern none.

As to counsel's alleged failure to depose a witness who would have testified that she did not see petitioner's car traveling near the crime scene, petitioner similarly fails to show how securing this

evidence would have changed the result of his trial. At trial, petitioner presented the testimony of two witnesses who stated that they did not see a car in the vicinity of the murder scene immediately after the shooting, and a third who testified that he observed defendant thirty minutes away within minutes of the shooting. Id. ¶ 12. We can discern no prejudice—and petitioner identifies none—from counsel's alleged failure to depose a witness who would have provided testimony cumulative to that presented by others. We note, moreover, that in his direct appeal, petitioner argued that the testimony of his witness, cited above, precluded any inference of guilt that could be drawn from the State's circumstantial evidence against him. We rejected this argument, noting that the State's evidence against defendant was very strong, and that numerous witnesses testified that they saw petitioner close to the murder scene near the time of the murder. Id. ¶¶ 6, 13.

We reach the same conclusion as to petitioner's allegations that: (1) trial counsel was incompetent for failing to seek a mistrial when it was discovered that the police had unauthorized contact and conversations with the jury during trial; and (2) appellate counsel was incompetent based on his performance during oral argument before this Court. Petitioner offers no argument as to how his defense was prejudiced as a result of these claimed errors. We agree with the trial court that the State was entitled to summary judgment in its favor.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice