

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

**ENTRY ORDER**

VERMONT SUPREME COURT  
FILED IN CLERK'S OFFICE

SUPREME COURT DOCKET NO. 2008-246

FEB 4 2009

FEBRUARY TERM, 2009

In re Richard Gero

} APPEALED FROM:  
}  
} Windham Superior Court  
}  
} DOCKET NO. 196-5-05 Wmcv

Trial Judge: David A. Howard

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

Petitioner appeals from a superior court order granting summary judgment in favor of the State on his petition for post-conviction relief. He contends that the court erred in basing its decision in part on petitioner's failure to adduce expert evidence where it had previously denied his request for such services. We affirm.

The lengthy procedural history underlying this appeal may be summarized as follows. In November 2002, petitioner was charged with six offenses, including burglary and assault, in connection with an incident in which he broke into a residence and threatened the occupants. Prior to trial, the court granted the public defender's motion to withdraw and appointed substitute counsel Altieri. The court subsequently denied petitioner's motion to discharge his new attorney and, following discovery and a number of pre-trial motions, the case proceeded to trial. The State presented a number of witnesses, including eyewitnesses at the scene. On the third day of trial, just before closing arguments, petitioner entered into a plea agreement in which he agreed to plead guilty to four of the six charges and the State agreed to dismiss an assault charge and an habitual-offender-enhancement allegation and to cap its sentencing recommendation to ten-to-twenty years to serve. Following a hearing, the court accepted the plea.

Before sentencing, however, petitioner filed a series of motions to dismiss his court-appointed attorney, disqualify the presiding judge, and withdraw the plea on the ground that he had been suffering from a cold and lack of sleep and was pressured by his fiancée to accept the plea. The court issued a lengthy written decision in February 2004 denying the motion. The court found that there was no evidence of involuntariness or undue pressure and that granting the motion would substantially prejudice the State, observing that the State had prepared for trial and marshaled and presented its witnesses and that in these "straightened circumstances [petitioner's] options [had] bec[o]me both narrower and clearer" and "he took the plea deal." The court thus concluded that petitioner's tactic could "only be described as a stall" and accordingly denied the motion. Petitioner subsequently received a sentence of ten-to-twenty years to serve.

In May 2005 and February 2006, petitioner filed pro se petitions for post-conviction relief raising numerous claims, including allegations that his trial counsel had rendered ineffective assistance

during pre-trial proceedings and at trial by failing request disqualification of the trial judge, failing to call and question witnesses, and allowing a co-defendant to appear before the jury in leg-irons, as well as in allowing petitioner to enter an involuntary plea, all allegedly resulting from the fact that his lawyer was then suffering from cancer and on heavy medication. Several motions followed in which petitioner expressed a wish to dismiss his court-appointed attorney, then changed his mind, then renewed his request to represent himself which the court ultimately granted.

In October 2006, the State moved for summary judgment, arguing that petitioner had failed to adduce expert evidence to support his claim that counsel's representation fell below the standard of care. In response, petitioner filed a cross-motion for summary judgment and a request for a court-appointed expert. In January 2007, the court issued a written order observing that petitioner, who was then pro se, could not realistically be expected to locate and retain an appropriate expert unless represented. Accordingly, the court ruled that, unless petitioner objected, it would assign counsel, who would then have forty-five days to locate an expert. The court thereafter appointed attorney Furlan to represent petitioner. The following June, attorney Furlan notified the defender general that he had reviewed petitioner's claims on the merits and concurred in the conclusion previously reached by counsel for the Prisoner Rights Office that none of the claims had merit. As to the claims of ineffective assistance based on an alleged failure to call witnesses and effectively cross-examine, Furlan noted that the State had presented a series of eyewitnesses at trial whose testimony was consistent, that trial counsel had done his best to cross-examine and impeach them, and that there was no basis to find that counsel's performance fell below the standard of care. He also opined that given the overwhelming evidence of guilt there was nothing counsel could have done to alter the outcome, and that the plea agreement was favorable to petitioner. Furlan subsequently moved to withdraw as counsel based on his conclusion that petitioner had no meritorious claims, which the court granted in September 2007.

In February 2008, the court issued a written order denying petitioner's motion for appointment of an expert. The court noted that petitioner had essentially already had the benefit of two experts (attorney Furlan and counsel for the Prisoner Rights Office) to review petitioner's claims of ineffective assistance and that "neither [attorney] supported them." "The petitioner essentially asks for a third lawyer," the court observed, "to do an analysis that has occurred twice already." The court also found that petitioner's claims of ineffective assistance at trial were too general to support the appointment of an expert, and that his claims concerning certain pre-trial proceedings failed to show how any of the alleged deficiencies had affected the ultimate outcome of the case. On the same date in February, the court also issued separate orders denying petitioner's motion for summary judgment and denying the State's motion "without prejudice to re-file" accompanied by a more complete statement of undisputed facts.

In March 2008, the State filed a renewed motion for summary judgment, again noting that petitioner's claims of ineffective assistance were unsupported by any expert evidence that trial counsel's performance was below the standard of care, and that the only evidence on this point from attorney Furlan supported the opposite conclusion. The court granted the State's motion, ruling that petitioner had not shown that any of counsel's alleged pre-trial deficiencies (at petitioner's bail hearing, for example) had any effect on the outcome of the case; that his performance at trial was affected by his illness or below the standard of competent representation; or that the plea was coerced or rendered involuntary in any way because of counsel's performance, but rather was driven by the overwhelming evidence of guilt and the relatively favorable plea agreement. The court noted, in this regard, that petitioner had offered no "medical or other expert opinion on this or the nature of any medications taken, or even if such were involved, nor any expert legal opinion evidence concerning such."

On appeal, petitioner contends that the court erred in denying his request for expert services and in relying on the lack of expert evidence in granting the motion for summary judgment. Even if we agreed—solely for the sake of argument—with petitioner’s claims, it would not alter the judgment, for the trial court also expressly found that petitioner had not shown that a more favorable outcome was reasonably likely absent counsel’s alleged deficiencies. To be entitled to post-conviction relief, a petitioner must demonstrate “that fundamental errors rendered his conviction defective.” In re Grega, 2003 VT 77, ¶ 6, 175 Vt. 631 (mem.) (quotation omitted). A petitioner claiming ineffective assistance of counsel has the burden of showing, by a preponderance of the evidence, that: (1) his counsel’s performance fell below the 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. In re Koveos, 2005 VT 28, ¶ 6, 178 Vt. 485 (mem.). A “reasonable probability” is a probability “sufficient to undermine confidence in the outcome.” In re LaBounty, 2005 VT 6, ¶ 7, 177 Vt. 635 (mem.) (quotation omitted). The trial court’s findings in a post-conviction relief proceeding will not be disturbed if supported by credible evidence, nor its conclusions if reasonably supported by the findings. Id.

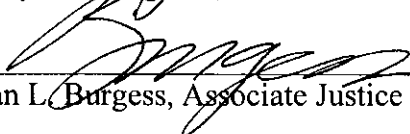
As noted, even assuming that the court here somehow erred in denying petitioner expert advice, or in noting the lack of expert evidence to support the claim of ineffective assistance, petitioner here has not demonstrated how any of counsel’s alleged deficiencies had any effect on the outcome of his case. As the trial court noted, petitioner made virtually no showing as to how counsel’s conduct at petitioner’s bail hearing might have had any impact on the trial or guilty plea, nor any showing that the trial judge harbored the slightest bias or that counsel’s allegedly negligent failure to request the judge’s disqualification would have altered the outcome. As for counsel’s representation at trial, the court found that, in light of the powerful evidence of petitioner’s guilt, “even if [counsel] could have done some trial work differently or more effectively, the court cannot find disputed facts that would show a different outcome was likely.” As to petitioner’s allegation that his plea was somehow rendered involuntary because of ineffective assistance, the court found that even if it “gave the petitioner the benefit of such conclusory claims, he does not demonstrate how a different result would have reasonably or likely have been obtained with a different performance.” Eyewitnesses testified consistently to petitioner’s guilt, and petitioner himself admitted the elements of the offense in entering his guilty plea. Accordingly, we find no basis to disturb the court’s conclusion that petitioner failed to establish the elements of a prejudice essential to a viable ineffective-assistance claim, and therefore no basis to disturb the judgment.

Affirmed.

BY THE COURT:

  
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Denise R. Johnson, Associate Justice

  
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Marilyn S. Skoglund, Associate Justice

  
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Brian L. Burgess, Associate Justice