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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-408

APRIL TERM, 2009

In re Roy Girouard	}	APPEALED FROM:
	}	
	}	
	}	Addison Superior Court
	}	
	}	
	}	DOCKET NO. 12-1-06Ancv
		Trial Judge: Helen M. Toor

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

Petitioner appeals the superior court's order granting the State summary judgment with respect to his petition for post-conviction relief (PCR). We affirm.

In December 1975, a jury convicted defendant of first-degree murder. The following month, the district court sentenced him to life imprisonment. This Court affirmed his conviction in March 1977. See State v. Girouard, 135 Vt. 123, 126 (1977). In January 2006, petitioner filed a PCR petition pro se, claiming that (1) his trial attorney rendered ineffective assistance of counsel by failing to argue on appeal that there was insufficient evidence to support a determination that the State met its burden of proving his sanity, by not advising him to accept an offer requiring him to plead guilty to second-degree murder, by failing to consult with him before raising an insanity defense, and by failing to participate in an interview in connection with the preparation of the presentence investigation (PSI) report; (2) the district court failed to give him an opportunity to speak at his sentencing hearing; and (3) he was denied parole for impermissible reasons.

In August 2008, following delays resulting from the assignment and withdrawal of counsel, the superior court issued a decision granting the State's motion for summary judgment and dismissing the petition. With respect to the claims of ineffective assistance of counsel, the court ruled that petitioner did not proffer expert testimony indicating that the alleged deficiencies in his counsel's performance fell below the range of competence demanded of attorneys in a criminal case at that time, and that such evidence was necessary because his claims of ineffective assistance of counsel did not demonstrate an apparent lack of care on his attorney's part. The court also ruled that petitioner failed to claim that he was affirmatively denied the opportunity to speak at his sentencing hearing or that he was prejudiced by any such lack of opportunity. Finally, the court ruled that petitioner's complaints about parole denial presented no challenge to

the legality of his underlying sentence, and so were not subject to any remedy available in a PCR proceeding.

On appeal, petitioner does not set forth any claims of error as to the district court's conclusions or decision, but rather reiterates some of the claims he raised in his petition. He argues that (1) he addressed and factually supported his claim that the State had failed to prove his sanity; (2) his trial counsel took advantage of his well-documented mental incapacities by persuading him to reject the State's offer that he plead guilty to second-degree murder and accept a sentence of thirty-five-to-forty years imprisonment; (3) his trial counsel failed to consult with him before deciding to raise an insanity defense; (4) his trial counsel failed to participate in an interview in connection with the PSI report; (5) the sentencing court erred by requiring him to address the court only through counsel; and (6) the district court sentenced him not to life imprisonment, but rather to a minimum sentence of zero years, thereby intending to make him eligible for release on parole.

All but the last two arguments claim ineffective assistance of counsel. To prevail on such a claim in a PCR petition, a petitioner has the burden of demonstrating "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.) (quotations omitted). As the superior court concluded in this case, petitioner failed to meet either criterion. With respect to petitioner's obligation to demonstrate that his trial attorney's performance fell below an objective standard of reasonableness, petitioner does not challenge the superior court's conclusion, which is supported by the record, that expert testimony was necessary to demonstrate the alleged ineffectiveness in this case because the deficiencies claimed do not demonstrate a lack of care per se. See In re Grega, 2003 VT 77, ¶ 16, 175 Vt. 631 (mem.) (noting that, without expert testimony, ineffectiveness of counsel will be presumed only in rare instances, namely, when counsel's "lack of care is so apparent that only common knowledge and experience are needed to comprehend it") (quotation omitted).

Petitioner first claims that his counsel was ineffective for failing to argue in his direct appeal that the testimony of two psychiatric experts was insufficient to support the trial court's determination that the State had met its burden of proving his sanity. In making this claim, petitioner relies upon the fact that this Court noted in his direct appeal of the criminal conviction that he asserted no such a claim. As the superior court concluded, this does not, by itself, raise a colorable claim of ineffective assistance of counsel.

Petitioner's second claim of ineffective assistance of counsel is that his trial counsel underestimated the strength of the State's case and thus failed to advise him of the desirability of accepting the State's offer that he plead guilty to second-degree murder and accept a recommended sentence of thirty-five-to-forty years imprisonment. We have held that although a defense counsel has a duty to inform a client of the terms and relative merits of a plea offer, there is not a duty to persuade a client to accept a plea offer, unless the offer is plainly favorable under the circumstances. See In re Plante, 171 Vt. 310, 313-14 (2000); State v. Bristol, 159 Vt. 334, 337-38 (1992). Here, absent expert opinion, petitioner cannot demonstrate that his attorney's advice against accepting a sentence of thirty-five-to-forty years, merely considered in hindsight,

was so inappropriate under all of the circumstances as to amount to ineffective assistance of counsel.

Petitioner's third claim of ineffective assistance of counsel is that his trial counsel failed to consult with him before raising an insanity defense. As the superior court pointed out, petitioner did not demonstrate that he objected to counsel's presentation of an insanity defense, and, in any event, at the time of petitioner's criminal trial, there was no Vermont precedent holding that the defendant, rather than trial counsel, controlled the decision to assert an insanity defense. See State v. Bean, 171 Vt. 290, 302 (2000) (joining courts holding that decision whether to assert insanity defense lies with defendant and not defense counsel). Even assuming that his trial counsel asserted the insanity defense without petitioner's informed consent, absent any clear legal standard to the contrary when the tactic was employed a quarter-century ago, summary judgment was appropriate.

Petitioner's last claim of ineffective assistance of counsel is that his attorney failed to participate in his interview for the PSI report. As the trial court pointed out, at the time of petitioner's sentencing, no Vermont precedent held that a defendant had a right to counsel at a PSI interview. See In re Carter, 2004 VT 21, ¶¶ 50, 60-61, 66, 176 Vt. 322 (noting that most courts have declined to find right to counsel at PSI interview, but adopting minority position requiring counsel where right to counsel is invoked). The superior court also concluded that petitioner could not show prejudice, even assuming error, because he had refused to participate in the interview for reasons unrelated to his lack of counsel. Again, summary judgment was appropriate under these circumstances. As the superior court stated, petitioner presented no affidavit, raised no fact issue, and made no allegation concerning how his trial counsel's representation fell below the prevailing standards for reasonable representation under the circumstances at the time of his trial and sentencing.

Petitioner next argues that he was denied his right to allocution during his sentencing hearing. He contends that the district court required him to speak through his attorney because of a previous incident resulting in a contempt order against him, and that his then-pending appeal "may have somewhat" restrained his later-realized desire to express regret for his actions. The superior court noted that, in the face of the State's motion for summary judgment, petitioner failed to provide any proof to support his claim of being denied effective allocution and that, indeed, petitioner stipulated to the truth of the State's statement of material facts, including the fact that the district court based its sentencing decision upon, among other things, the statement of defendant. The court concluded that petitioner was not entitled to relief in a collateral attack claiming lack of an opportunity for allocution when petitioner had appeared at the sentencing hearing with counsel, but failed to assert that the court was misinformed as to any relevant circumstances, that he would have offered specific mitigating factors, or that he was "affirmatively denied" an opportunity to speak. See Hill v. United States, 368 U.S. 424, 429 (1962). Petitioner fails to challenge any of these findings or conclusions, all of which support the superior court's order of dismissal.

Finally, petitioner argues that the mittimus indicates he received a minimum sentence of zero, thus demonstrating that the sentencing court intended to allow him to be released at some point between his zero minimum and maximum life sentence. This bare assertion appears to be a truncated version of his argument in his PCR petition challenging the parole board's most recent

decision to deny him parole. As the superior court determined, this is neither an attack on his sentence, nor a colorable claim for relief under our PCR statute. See 13 V.S.A. § 7131 (allowing PCR action based on claim that sentence was unconstitutional or unlawful, that court lacked jurisdiction to impose sentence, or that sentence was in excess of maximum authorized by law or otherwise subject to collateral attack).

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice