

STATE OF VERMONT
WINDSOR COUNTY, SS

In re Thomas Olsen

SUPERIOR COURT
Docket No. 602-12-05 Wrcv

ORDER

On October 7, 2008, this Court rejected a proposed settlement agreement for the reasons set forth therein. On November 17, 2008, the parties submitted a "Revised Agreement of Settlement." That agreement differs from those previously submitted in that it contains an agreement between the parties concerning certain facts pertaining to the sentencing of Mr. Olsen, along with their stipulation that the counsel Mr. Olsen received at sentencing was ineffective. The parties continue to dispute whether the counsel received by Mr. Olsen during trial was ineffective.

This Court has reviewed the agreed-upon facts and the stipulation as to ineffective assistance of counsel at the sentencing hearing. Specifically, the respondent does not contest that Mr. Olsen's counsel; failed to challenge an unsubstantiated allegation of physical and sexual abuse offered by a witness at the sentencing hearing (hearing transcript page 15); failure to challenge a witness regarding Mr. Olsen's decision not to testify at trial (hearing transcript page 14)(the Court, however, indicated it would not consider this (transcript page 44 and therefore this error is harmless); failure to adequately fashion an argument in support of mitigating factors at sentencing (transcript pages 47-52); failure to present a coherent sentencing argument consistent with the statutory framework (transcript pages 47-52 and throughout); and a failure to object to the exclusion of a person from the courtroom by the Court *sua sponte* during the sentencing hearing (transcript pages 16-17)(although this Court also believes this error to be harmless).

The parties have stipulated that based upon these errors, the Court may enter a finding that Petitioner received ineffective assistance of counsel at sentencing and that the matter should be returned to the District Court for resentencing as allowed by law.

In a post conviction relief proceeding, the burden rests with the party claiming the infirmity to establish the error and prejudice. *In re Kivela*, 145 Vt. 454 (1985). The burden of proof is by a preponderance of the evidence. *In re Stevens*, 146 Vt. 6 (1985). Here, the parties have stipulated, and the Court agrees that the claimed errors affect the fairness of the sentencing hearing. This is particularly true where, as here, the presumptive sentence was not imposed, but rather was increased by aggravating factors which the trial court found outweighed any mitigating factors. As the respondent does not contest that several of the claimed errors pertain to mitigation issues, the Petitioner has met his burden with respect to demonstrating by a preponderance of the evidence that

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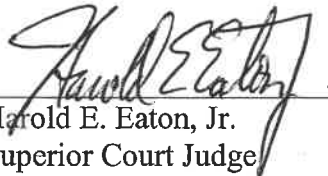
there were prejudicial errors in the sentencing hearing which were not effectively addressed by his counsel.

Accordingly, the sentence imposed by the District Court is hereby **VACATED** and the case **REMANDED to the Windsor District Court for re-sentencing**. Petitioner is to remain in custody pending further hearing before the Vermont District Court. Petitioner's conviction for murder in the second degree is not affected by this remand.

In remanding this case, this Court expresses no opinion as to any proposed settlement agreement between the parties. The acceptance or rejection of an agreement, if any, as to the sentence to be imposed is entirely within the province of the District Court and this remand is not conditioned upon the acceptance of any agreed-upon sentence.

Consistent with the terms of the parties' stipulation in this Court, all other claims of the Petitioner as to ineffective assistance of counsel and/or post-conviction relief are hereby **DISMISSED**, without prejudice, with leave to re-file only if the conditions set forth in paragraph 8 of the stipulation filed on November 17, 2008 are met.

Dated at Woodstock this 18th day of November, 2008.



Harold E. Eaton, Jr.
Superior Court Judge

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WINDSOR DISTRICT COURT