

VERMONT SUPERIOR COURT
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CIVIL DIVISION
Case No. 305-4-20 Cncv

Bergquist vs. State of Vermont

ENTRY REGARDING MOTION

Title: Motion for Summary Judgment Partial (Motion: 13)
Filer: Andrew M. Gilbertson
Filed Date: November 13, 2023

This is a post-conviction relief case based upon claims of ineffective assistance of counsel. The State moves for partial summary judgment on one of the claims: that defense counsel failed to properly investigate whether a juror had sufficient English language comprehension skills.

The State argues that because Bergquist has no expert to support his claim regarding the juror, it cannot succeed. Bergquist responds with zero evidence. Instead, he merely argues that he will call the juror at trial in this case, and that the evidence will make clear that no expert is required. However, he proffers no affidavit from the juror or anyone else, and no other evidence to support the claim. It is not even clear how trial counsel should have known there was an issue as to the juror's language skills, or what the standard of practice is in the defense bar for investigating such issues.

A defendant may seek summary judgment on the basis that the plaintiff lacks facts to support a claim. "Where the moving party does not bear the burden of persuasion at trial, it may satisfy its burden of production by showing the court that there is an absence of evidence in the record to support the nonmoving party's case. The

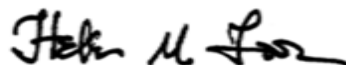
burden then shifts to the nonmoving party to persuade the court that there is a triable issue of fact.” Ross v. Times Mirror, Inc., 164 Vt. 13, 18 (1995)(citation omitted); *see also*, Wright & Miller, 10A Fed. Prac. & Proc. Civ. § 2727.1 (4th ed.) (“The movant can seek summary judgment by establishing that the opposing party has insufficient evidence to prevail as a matter of law, thereby forcing the opposing party to come forward with some evidence or risk having judgment entered against him.”).

Bergquist might theoretically be able to show that the juror’s possible flaws were so obvious that no expert is needed for the court to determine that trial counsel erred in not questioning or striking the juror. *See In re Burke*, 2019 VT 28, ¶ 19, 210 Vt. 157. However, the court has nothing before it to support that. Because Bergquist has the burden of proof, “it was sufficient for [the State] to assert that there was an absence of evidence in the record and it was up to [Bergquist] to demonstrate facts supporting their claim.” Moyers v. Poon, No. 2016-432, 2017 WL 2963438, at *4 (Vt. June 26, 2017) (unpub. mem.). Having not done so, his claim cannot stand.

Order

The State’s motion for partial summary judgment on the claim regarding a juror is granted. The case will be set for a one-day trial. If counsel agree that either more or less time is needed, they should advise the clerk as soon as possible.

Electronically signed on January 10, 2024 pursuant to V.R.E.F. 9(d).



Helen M. Toor
Superior Court Judge