

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-095

AUGUST TERM, 2008

Edwin A. Towne, Jr.	}	APPEALED FROM:
	}	
	}	
v.	}	Windham Superior Court
	}	
	}	
Robert Hofmann, Commissioner of Department of Corrections	}	DOCKET NO. 211-4-07 Wmcv

Trial Judge: David A. Howard

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

Petitioner appeals pro se from the trial court’s dismissal of his complaint against the Commissioner of the Department of Corrections. We affirm.

Petitioner committed first-degree murder and he is incarcerated. State v. Towne, 158 Vt. 607 (1992) (affirming conviction). He has filed numerous petitions for post-conviction relief (PCR), all of which have been denied. Most recently, this Court upheld the dismissal of petitioner’s ninth PCR petition, holding that petitioner was barred from raising the same challenges to his murder conviction that had been raised and ruled upon in earlier PCR petitions. In re Towne, 2007 VT 80, ¶ 6, 938 A.2d 1205. In April 2007, petitioner filed a complaint pursuant to Vermont Rule of Civil Procedure 75, alleging that he was being denied meaningful access to the courts because the Department of Corrections failed to supply him with adequate access to Vermont legal materials. Petitioner maintained that, as a result of the Department’s actions, his legal filings were being denied, dismissed, or ignored by the court for failure to follow the rules. The State moved to dismiss the complaint on a variety of grounds, and the trial court granted its request.

The court first found that petitioner lacked standing. As it explained, while prisoners must be provided with assistance in preparing and filing legal papers, there is no “abstract, freestanding right to a law library or legal assistance, [and] an inmate cannot establish relevant actual injury simply by establishing that his prison’s law library or legal assistance program is subpar in some theoretical sense.” Lewis v. Casey, 518 U.S. 343, 351 (1996). Instead, inmates must show that a non-frivolous legal claim was frustrated or impeded by the failure of access. Id. at 352-53. The legal claim must be a direct or collateral attack on a prisoner’s sentence or a challenge to the conditions of confinement. Id.

In this case, petitioner alleged that his actual injury was established by the multiple instances in which his prior appeals were dismissed due to his failure to follow proper procedure. The court found this insufficient. As it explained, petitioner had filed more than eight PCR petitions, many of which raised the same arguments. In considering his ninth petition, this Court held that the petition did not present any new grounds and was in fact barred. Thus, in light of petitioner's long and fruitless history of appellate and post-conviction proceedings and given this Court's most recent conclusion that petitioner's ninth PCR constituted an abuse of the writ, the trial court concluded that petitioner's proposed petition would represent a frivolous if not abusive repetition of prior failed efforts. No matter how phrased, the court continued, petitioner essentially continued to raise the same arguments as to his guilt and the fairness of his trial, all of which had been repeatedly denied. Accordingly, the court found that petitioner could not establish the injury element of standing necessary to advance his claim.

The court also found that the action should be dismissed as untimely. As it explained Rule 75 required petitioner to file his complaint within thirty days from notice of the governmental action of which he was complaining. V.R.C.P. 75(c). The Commissioner had denied petitioner's grievance about access to legal materials on February 7, 2007.* Yet petitioner did not file a complaint until April 2007, more than thirty days later. The court thus concluded that his claim was not timely, and dismissal was appropriate. Given its conclusions, the court did not consider the Department's remaining arguments in support of dismissal. This appeal followed.

Petitioner does not directly address the court's conclusions above. Instead, he argues that the court should have ordered the Department to provide him with meaningful access to a Vermont State law library in some form. He maintains that had it done so, he would have discovered information relevant to his initial arrest, his ineffective assistance of counsel claim, and a variety of other claims related to his first degree murder conviction.

These arguments are unavailing. Petitioner's complaint was properly dismissed because his allegations of actual injury were insufficient. See Bock v. Gold, 2008 VT 81, ¶ 4 (Supreme Court reviews trial court's disposition of a motion to dismiss de novo, and may affirm on any appropriate ground). As the trial court explained, petitioner has litigated and re-litigated the same claims, and they have been repeatedly denied. In his Rule 75 complaint, he alleged that had he been provided meaningful access to the courts, he might have discovered a certain law apparently related to a felon's right to bear arms (which is apparently related to the validity of petitioner's arrest), he could have proved his actual innocence, and he could have demonstrated that he received ineffective assistance of counsel. These claims have already been raised and rejected, and petitioner is barred from raising them again. In re Towne, 2007 VT 80, ¶¶ 2-6. Thus, the legal claims which petitioner seeks to advance are frivolous, and the trial court properly found that he lacked standing to pursue his Rule 75 complaint. See Casey, 518 U.S. at 352-53 (to establish denial of meaningful access to courts, prisoner must show that a non-frivolous legal claim was frustrated or impeded by the failure of access). Given our conclusion,

* We note that in his letter denying petitioner's appeal, the Commissioner explained that Vermont was providing petitioner access to legal materials via the Department's Chief of Legal Education.

we need not address the timeliness of petitioner's complaint. Petitioner's complaint was properly dismissed.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice