

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2002-449

JUNE TERM, 2003

In re Patrick T. Lynch

}	APPEALED FROM:
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}	Lamoille Superior Court
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}	DOCKET NO. 211-10-01 Lecv
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}	Trial Judge: Howard E. VanBenthuyssen
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In the above-entitled cause, the Clerk will enter:

Patrick Lynch appeals from the Lamoille Superior Court's denial of his petition for post-conviction relief following a bench trial. We affirm.

Lynch is currently serving a three-to-seven year sentence after violating his probation for his seventh drunk driving conviction. Lynch's probation required that he successfully complete a one-year residential alcohol treatment program to his probation officer's satisfaction. Lynch entered the Phoenix House residential program in November 2000, but was discharged the following April for repeatedly violating program rules. His probation officer filed a notice of violation, a hearing was held, and the district court revoked his probation.

In October 2001, Lynch filed the present petition for post-conviction relief. On June 12, 2002, the court took evidence on Lynch's claims, including two of the claims he raises here: (1) that 13 V.S.A. § 7031(b) entitles him to credit on his sentence for time he spent at Phoenix house, and (2) he received ineffective assistance from his attorney on the violation of probation charge. The trial court denied both claims. This appeal followed.

On appeal, Lynch challenges both the superior court's decision on his petition for post-conviction relief and the district court's order revoking Lynch's probation. As to the district court proceeding, Lynch claims the record lacks evidence to find that he violated his probation, and he alleges that the court erred by admitting hearsay over his attorney's objection. We do not consider these claims because Lynch did not raise them by timely appeal from the district court, see V.R.A.P. 4 (appeal must be taken within thirty days of judgment), or bring them to the superior court's attention in the post-conviction relief proceeding. See Harrington v. Dep't of Employ. & Training, 152 Vt. 446, 448 (1989) (arguments not raised below may not be raised on appeal). Because Lynch raises these issues in this Court in the first instance, we limit our review to whether the superior court erred by denying his ineffective-assistance-of-counsel claim and his request for credit for time spent in the Phoenix House program.

The court denied Lynch's ineffective-assistance-of-counsel claim for lack of supporting evidence, including expert testimony, on his attorney's performance relative to objective professional standards. We find no error in the court's ruling. To succeed, Lynch had to convince the trial court by a preponderance of the evidence that (1) his counsel's performance "fell below the prevailing standard of competency," and (2) his defense suffered prejudice as a result. In re Miller, 168 Vt. 583, 584 (1998) (mem.). Because the court found that Lynch lacked evidence demonstrating that his lawyer's performance fell below prevailing standards, it did not address the question of prejudice. See id. (court need not address prejudice if it finds that counsel's performance conformed to prevailing standards). In this case, Lynch did

not present any testimony explaining the prevailing standard of competency or that his attorney's conduct fell below any such standard. Cf. In re Ringler, 158 Vt. 118, 119-20 (1992) (defendant's witnesses in support of his ineffective-assistance-of-counsel claim included his trial counsel and another attorney as an expert witness). The record supports the court's ruling; thus, we will not disturb it.

Lynch next claims that the court should have granted his request for credit for his stay at Phoenix House. The trial court held that 23 V.S.A. § 1210(c) precluded credit unless Lynch successfully completed the residential alcohol program, which he did not do. Although we agree with the trial court's interpretation of the relevant language in § 1210(c), the statute applicable to this case is § 1210(d). Subsection (d) of § 1210 applies to the third or subsequent offenses, while § 1210(c) applies to the second offense. Both provisions set forth the penalties for driving while intoxicated, and include the following identical language, excepting the number of required minimum hours\* :

At least 400 hours of community service shall be performed, or 100 consecutive hours of the sentence of imprisonment shall be served and may not be suspended or deferred or served as a supervised sentence, except that credit for a sentence of imprisonment may be received for time served in a residential alcohol facility pursuant to sentence if the program is successfully completed.

Id. § 1210(d). Lynch asserts that § 1210(d) does not apply to his circumstances because he committed his seventh drunk driving offense before the date the relevant language went into effect. Thus, Lynch asserts, 13 V.S.A. § 7031(b) requires that he receive credit for the time he spent in Phoenix House even though he did not successfully complete the program. Section 7031(b) requires the court to give an offender " credit toward service of his sentence for any days spent in custody in connection with the offense for which sentence was imposed." Id. Offenders on probation are not serving a sentence, however, State v. Bensch, 168 Vt. 607, 608 (1998) (mem.), and do not receive credit on their sentence for time spent on probation. In re Hall, 100 Vt. 197, 202-03 (1927).

Lynch argues that he was in custody during his time at Phoenix House and should receive credit toward his sentence under In re McPhee, 141 Vt. 4 (1982). In that case, the Court held that an individual residing at an alcohol treatment facility per pre-trial release conditions was in custody and entitled to credit on his sentence. 141 Vt. at 9. Lynch's circumstances are different from those in McPhee. Whereas the court in McPhee ordered the defendant to reside at the treatment facility as a condition of pre-trial release, id. at 6, Lynch agreed to enter the Phoenix House program as a condition of his plea agreement and suspended sentence. Because Lynch was not serving his sentence and was on probation while at Phoenix House, he is not entitled to credit on his sentence under § 7031(b).

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Marilyn S. Skoglund, Associate Justice

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Frederic W. Allen, Chief Justice (Ret.) Specially Assigned

### **Footnotes**

\* Section 1210(c) requires "[a]t least 200 hours of community service" or "60 consecutive hours of the sentence of imprisonment shall be served." 23 V.S.A. § 1210(c).