

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-199

SEPTEMBER TERM, 2006

In re Pierre Capron

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APPEALED FROM:

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Orleans Superior Court

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DOCKET NO. 165-5-05 Oscv

Trial Judge: Howard E. Van Benthuisen

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

Petitioner Pierre Capron appeals pro se from the trial court=s dismissal of his complaint for post-conviction relief. He argues that the trial court erred by: (1) denying his requests to issue subpoenas and hire an expert witness on his behalf; and (2) rejecting his claim that his admission to violating probation was Avoid.@ We affirm.

The record indicates the following. Petitioner was placed on a suspended sentence for felony possession of marijuana in August 2004. He signed a detailed waiver of rights and a request to enter a plea form in the presence of his attorney. In November 2004, a violation of probation complaint was filed against petitioner. Based on the same facts that gave rise to the VOP charge, petitioner was also charged with burglary and

simple assault.

At the VOP hearing in May 2005, petitioner's attorney represented to the court that the parties had reached a plea agreement as to the VOP charge.* Pursuant to the agreement, petitioner would admit the VOP, his probation would be revoked, and the underlying sentence on the marijuana charge would be imposed. The State agreed not to bring any additional charges known to it at the time. Counsel for defendant also stated that the agreement was Acontingent upon the court accepting a plea to the burglary and assault charges,@ and defendant receiving a one to four year aggregate sentence on those charges, to be served consecutive to that imposed on the VOP charge. Petitioner was then advised of, and relinquished his rights with respect to the VOP proceeding, and he admitted violating probation by engaging in threatening and violent behavior.

The court scheduled a change of plea hearing on the burglary and simple assault charges but defendant decided not to admit his guilt to these charges and the case proceeded to trial. Before trial, the State amended the burglary charge to unlawful trespass but the simple assault charge remained unchanged. The parties then reached an agreement during trial pursuant to which petitioner pleaded guilty to simple assault and the State dismissed the unlawful trespass charge. The parties agreed that petitioner would receive a six to twelve month consecutive sentence, which was more favorable to petitioner than the terms of the previous agreement (one to four years consecutive). Petitioner accepted the agreement and the court imposed sentence.

In May 2005, petitioner filed a pro se petition for post-conviction relief, claiming ineffective assistance of counsel in the marijuana case and challenging the validity of a search warrant at issue in that case. Counsel was appointed, and through counsel petitioner filed an amended PCR petition in September 2005. In his amended petition, petitioner asked the court to vacate the May 2005 VOP admission, asserting that he admitted the VOP charge as part of a Apackage@ plea agreement, and the collapse of the latter part of the package rendered his probation violation admission null and void. Counsel withdrew in January 2006 because petitioner wanted to proceed with his original PCR petition and counsel did not believe that he could ethically advance petitioner's claims. Petitioner then entered a pro se notice of appearance.

Shortly before counsel withdrew, petitioner filed several pro se requests with the trial court asking the court to hire an expert witness on his behalf and to subpoena several witnesses. The court informed petitioner that his attorney needed to file such requests. In late January 2006, after counsel withdrew, petitioner renewed his requests. The court denied petitioner=s requests on several grounds. First, the court found that the witnesses that petitioner sought to have subpoenaed appeared to be the fact witnesses to the underlying marijuana case, and it explained that petitioner=s guilt or innocence was not at issue in his PCR proceeding. It therefore denied his requests for subpoenas. The court also denied petitioner=s Amotion for leave to conduct limited discovery,@ which appeared to include a request that the court hire an expert witness on petitioner=s behalf. The court explained that the PCR had been pending for nine months and a hearing date had been set for February 2006. Petitioner had been represented by counsel throughout almost this whole period and the parties had thus had nine months to identify, secure, and disclose an expert. The court noted that petitioner was free to secure an expert but it would not delay the trial.

Trial was held in February 2006, and the court thereafter issued a written order granting judgment to the State. The court rejected petitioner=s assertion that he had been coerced by his attorney into pleading to the marijuana charge, finding it unsubstantiated by the evidence. The court also rejected petitioner=s assertion, raised during the hearing, that his three trial attorneys had been ineffective because they had either failed to discover or ignored exculpatory evidence. The court noted that it was somewhat handicapped in addressing this issue because petitioner had not called either his trial attorneys or an expert who had reviewed the proceedings below. It found, however, that a review of the transcripts and the evidence in the underlying matters showed, prima facie, that trial counsel, collectively and individually, performed competently and effectively. Moreover, the court explained, petitioner failed to demonstrate that he had suffered any prejudice. He had obtained a much better outcome (two and one-half to five years) than that for which he originally bargained and agreed to (three to eight years). Because petitioner failed to show any error by counsel or any basis to conclude that his pleas were in any sense involuntary or in any way coerced, the court granted judgment for the State on the merits. This appeal followed.

Petitioner first asserts that the trial court erred in denying his requests to obtain and present the testimony

of material and expert witnesses. He maintains that he made an adequate showing of need for the requested expert services, and the court erred in holding him to a unreasonably high standard applicable to licensed attorneys. He asserts that his requests should not have been denied as untimely because he was proceeding pro se and he needed these witnesses to support the claims raised in his PCR petition.

First, assuming that petitioner was entitled to the services of an expert witness at state expense, the trial court did not err in denying his request that the trial be continued while an expert was secured. Cf. State v. Wool, 162 Vt. 342, 349 (1994) (a defendant who qualifies as a needy person under the Public Defender Act has a right to be provided with the necessary services and facilities of representation as authorized or later approved by the court) (citation omitted); State v. Handson, 166 Vt. 85, 92 (1996) (trial court has latitude in determining if pro se defendant needs a requested service and its decision will not be disturbed absent a showing of abuse of discretion). As the court explained, petitioner's PCR had been pending for nine months, and petitioner had been represented by counsel through most of this period. The court reasonably concluded that petitioner had already had ample time to identify and secure an expert witness.

To the extent that petitioner sought to have the court identify and hire an expert witness on his behalf in connection with the ineffective assistance of counsel claims raised in his first PCR, this request was also properly denied. All of petitioner's ineffective assistance of counsel claims related to his felony possession of marijuana conviction, which was based on petitioner's plea of nolo contendere. We have explained that a defendant is bound by his plea once it is determined that the plea was entered into voluntarily and with an understanding of its consequences, and the burden of proving that a procedural shortcoming has hampered or frustrated the exercise of an accused's rights rests squarely on the petitioner in a post-conviction proceeding. @ In re Hall, 143 Vt. 590, 595 (1983) (citation omitted). Petitioner's request for an expert in this case did not relate to the voluntariness of his plea. Instead, petitioner pointed to alleged shortcomings of counsel that preceded his plea. Petitioner was aware of these alleged shortcomings and nonetheless decided to go forward with his plea. The fact that petitioner may now regret his decision does not render his plea involuntary. Thus, while we recognize that expert testimony is generally necessary to support an ineffective assistance of counsel claim, the trial court did not err in denying petitioner's request based on the showing made by petitioner here.

As to the subpoenas, the trial court denied petitioner=s requests because the subpoenas reflected petitioner=s attempt to relitigate his guilt in the felony possession of marijuana case. This finding is supported by the requests themselves, which sought testimony relating to the legality of a search warrant. As the trial court recognized, guilt or innocence is not at issue in a PCR proceeding. In re Bentley, 144 Vt. 404, 409 (1984) (Apost-conviction relief proceedings do not address the guilt or innocence of the defendant, but the fairness of the proceedings leading to conviction and incarceration@). The trial court did not abuse its discretion in denying petitioner=s requests.

Finally, petitioner asserts that the court erred in rejecting his assertion that his admission to the VOP charge was Avoid.@ He maintains that the validity of the agreement reached at the VOP hearing was contingent upon the court=s acceptance of the second part of the plea agreement, namely his guilty pleas to the burglary and assault charges and the imposition of the agreed-upon sentence. According to petitioner, because he did not plead guilty to these charges and because the State later dropped the more serious charges, the plea agreement became unenforceable and therefore null and void. Petitioner asserts that the contingent language and nature of the plea made the agreement illegal and therefore involuntary because the second part of the plea agreement collapsed.

Our review of the trial court=s decision is limited. AWhen considering a PCR appeal, we review the superior court=s findings of fact under the clearly erroneous standard.@ In re Washington, 2003 VT 98, & 8, 176 Vt. 529 (2003) (mem.). If the court=s conclusions follow from its findings, they must be affirmed. Id.

The thrust of petitioner=s argument below was that he was coerced into admitting the VOP charge and that he received ineffective assistance of counsel in deciding to admit this charge. The court found no evidence to support either assertion, and its conclusion is supported by the record. The court also found that petitioner had suffered no prejudice as the result of his claimed error, but had in fact received a better sentence than that for which he bargained. We agree. As the State points out, it was petitioner who decided not to fulfill his end of the agreement. Despite changing his mind, petitioner never attempted to withdraw his admission to the VOP,

nor did he pursue a direct appeal of the court=s decision to revoke his probation and impose the underlying sentence. See 28 V.S.A. ' 302(b) (order revoking probation is appealable in same manner as would applicable to original conviction). As the trial court found, petitioner admitted the VOP charge voluntarily and with the assistance of competent counsel. He then voluntarily, and with the assistance of competent counsel, pleaded guilty to the simple assault charge and accepted the sentence imposed for that crime. In the end, as noted above, petitioner received a better bargain than that to which he had initially, and voluntarily, agreed. He has not suffered any harm. Petitioner failed to demonstrate that he was entitled to post-conviction relief, and we find no basis to disturb the trial court=s decision. See In re Hemingway, 168 Vt. 569, 570 (1998) (mem.) (to be granted post-conviction relief, a petitioner needs to show A by a preponderance of the evidence that one or more fundamental errors rendered his conviction defective@).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Brian L. Burgess, Associate Justice

* While the trial court referred to a signed plea agreement at the VOP hearing, no such agreement appears in the trial court file, nor has any party provided such agreement to the Court.