

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

**ENTRY ORDER**

SUPREME COURT DOCKET NO. 2006-386

APRIL TERM, 2008

In re Kenneth R. Bailey, Sr.

} APPEALED FROM:  
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}  
} Franklin Superior Court  
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}  
} DOCKET NO. S203-05 Fc

Trial Judge: Geoffrey Crawford

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

Petitioner filed for post-conviction relief, claiming that his convictions for sexual assault and domestic assault should be vacated because he was not present at the arraignment hearing for the charges. The trial court found, based on court documents, that petitioner was present at the arraignment and granted judgment in the State’s favor. We affirm.

On March 19, 2004, petitioner was arrested and held at the Northwest State Correctional Facility in St. Albans. The district court held an arraignment on March 22, 2004 on three counts of sexual assault and one count of domestic assault. The docket entries for March 22, 2004 do not specify whether or not petitioner was present on that date. According to the transcript, at the beginning of the hearing, the Court questioned, “Is this Mr. Bailey?” Petitioner’s attorney responded, “Yes, this is Mr. Bailey, Your Honor. Kenneth Bailey.” Petitioner was held without bail pending an evidentiary hearing, and the docket entries indicate that petitioner was in custody at Chittenden Regional Correctional Facility (CRCF) on that date. The mittimus to lockup is also dated March 22, 2004 and affirms that an officer committed petitioner to CRCF at “15:30 on 3/22/04.” The arraignment was not videotaped.

On May 27, 2004, petitioner entered into a plea agreement with the State whereby he pled guilty to one count of domestic assault and one count of sexual assault.

In March 2005, petitioner filed for post-conviction relief, claiming that he was not present at his arraignment on March 22, 2004. The court held an evidentiary hearing at which petitioner testified that he was not brought to court on March 22, 2004. Petitioner claimed that he remained at the Northwest State Correctional Facility until March 25, 2004 when he attended an evidentiary bail hearing. Petitioner also relied on the court docket entries and the transcript from the arraignment, claiming that neither indicated his presence at the hearing. On cross-

examination, the State admitted petitioner's public defender application dated March 22, 2004. At first, petitioner admitted that the signature on the application was his, but stated the handwriting was not. Later, petitioner denied that the signature was his and claimed that he did not complete the application. The State also introduced the mittimus to lock up that indicates defendant was transported to CRCF on March 22, 2004.

In a written decision, the trial court found that petitioner was present for his arraignment on March 22, 2004. The court explained that it did not find petitioner's testimony that he remained in lockup in St. Albans until March 25 credible because on the day of the arraignment "[petitioner], the judge, and court staff signed a public defender application and the mittimus shows that [petitioner] was taken from Franklin District Court by order of [the presiding judge] and transferred to the Chittenden facility in the middle of the afternoon." The court emphasized that although the docket entries do not indicate that petitioner was present at the arraignment, that "[i]t would be highly unusual to hold a felony arraignment without the defendant present." Thus, the court concluded that the lack of any notation as to petitioner's absence at the hearing was evidence that petitioner was indeed present. The court granted judgment in the State's favor.

On appeal, petitioner argues that the trial court's finding that he was present at the arraignment is erroneous. Petitioner claims that the mittimus, upon which the court's finding partially relies, is not reliable because the hand-written date on the officer's return of service is unclear. In addition, petitioner cites the lack of video evidence or of testimony establishing his presence at the arraignment as supporting his position that he was not present.

"For post-conviction relief to be granted, [a] petitioner must prove by a preponderance of the evidence that a fundamental error rendered his conviction defective." In re Quinn, 174 Vt. 562, 563 (2002) (mem.). On appeal, we will not disturb the findings of the trial court absent clear error, "and even when the evidence conflicts, we will defer to the superior court in this regard." Id. Because there is credible evidence to support the court's finding in this case, we affirm the court's order.

The court's finding that petitioner was present at the arraignment is supported by court records including petitioner's public defender application dated the same day as the arraignment and the mittimus to lock up that indicates petitioner was transported to CRCF that day. We are not persuaded by petitioner's argument that the mittimus is unreliable because the hand-written date is unclear. As an initial matter, petitioner did not challenge admission of the document on this basis in the trial court, and therefore his argument is not preserved on appeal. See Jordan v. Nissan N. Am., Inc., 2004 VT 27, ¶ 10, 176 Vt. 465. Furthermore, the date March 22, 2004 is typed in three other places on the document, giving credence to the hand-written date.

Petitioner's contention that he was present essentially rests on his own testimony and the lack of other evidence conclusively establishing his presence. We are not persuaded that either of these render the court's contrary finding clearly erroneous. The trial court determines the credibility of witnesses and did not find petitioner's testimony credible. See In re Calderon, 2003 VT 94, ¶ 13, 176 Vt. 532 (mem.) (explaining that it is "for the PCR court to determine the credibility of the witness"). In addition, the lack of conclusive direct evidence, such as video footage of petitioner at the hearing, was not necessary for the court to find that petitioner was

there. It was petitioner's burden to demonstrate that he was not present at the hearing, not the State's burden to prove that he was. See Quinn, 174 Vt. at 563 (petitioner had burden of proof in post-conviction relief hearing).

Because we conclude that the trial court's finding that petitioner was present at the arraignment is supported by the evidence, we do not reach petitioner's additional argument that his absence at the arraignment requires reversal of the underlying charges against him.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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Brian L. Burgess, Associate Justice