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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2009-476

JULY TERM, 2010

In re Eejipp Ala	}	APPEALED FROM:
	}	
	}	
	}	Franklin Superior Court
	}	
	}	
	}	DOCKET NO. S340-08 Fc
		Trial Judge: Ben W. Joseph

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

Petitioner appeals the superior court's order dismissing his petition for postconviction relief (PCR). We affirm.

In March 2004, petitioner was charged with possession of marijuana, possession of cocaine, and attempted second-degree murder based on an incident in which he shot at a police officer who had entered his home pursuant to a search warrant. At a hearing on March 15, 2005, petitioner negotiated a plea agreement with the aid of his attorney, resulting in a sentence of ten-to-fifteen years to serve on a reduced charge of aggravated assault, and a concurrent five-to-ten-year sentence, suspended with conditions of probation, for possession of cocaine. Petitioner appealed the convictions, arguing that the trial court denied him his constitutional right to proceed pro se and failed to ensure that he had voluntarily entered into the plea agreement. This Court affirmed the convictions, concluding that petitioner entered into the plea agreement voluntarily with the aid of counsel. See State v. Ala, No. 2005-156, 2006 WL 5866275, at **2-3 (Vt. June Term 2006) (unrep. mem.).

In November 2006, petitioner filed an initial PCR petition that was ultimately dismissed. Petitioner filed a second PCR petition in July 2008. His counsel was granted permission to withdraw in March 2009. Petitioner filed an amended PCR petition in July 2009. On August 25, 2009, he filed a motion for summary judgment accompanied by a statement of undisputed facts. The State opposed the petition on October 23, 2009. Petitioner responded by moving to vacate his convictions, arguing in part that the State's response was untimely filed. On October 27, the superior court denied petitioner's motion for summary judgment, and on November 23, in response to petitioner's motion for an explanation of previous rulings, the court dismissed the PCR petition by motion-reaction form, stating that there was no basis in fact or law to set aside petitioner's convictions or grant petitioner a new trial.

On appeal, petitioner argues that the superior court's dismissal of his petition was premature and improvident, given that the State neither filed for summary judgment nor formally opposed summary judgment and that the court did not hold a hearing on his motion for summary judgment. We find no basis to overturn the superior court's dismissal of the petition. The petition alleged that petitioner entered into the plea agreement because of the trial court's threat

to impose the maximum sentence if he did not and his trial counsel's coercive actions. But the transcript of the March 15, 2005 hearing, which was part of the record reviewed by the superior court in the PCR proceeding, demonstrates that these allegations are false. Indeed, in this Court's decision affirming the convictions on direct appeal, we stated that the record unequivocally confirmed that defendant expressed his desire to negotiate the charges and then conferred with his attorney before voluntarily entering into the plea agreement. Id. As we stated, the district court's colloquy demonstrated that petitioner's pleas to the charges were entered voluntarily and with knowledge of the consequences.

Petitioner also alleged in his petition that his counsel did not adequately challenge the search warrant and did not interview a key witness. But these allegations cannot result in prejudice in light of petitioner's decision not to go to trial. At the March 15, 2005 hearing, a trial date was set after petitioner's trial counsel noted the additional time he needed to line up witnesses, including an expert witness to testify regarding petitioner's mental state. Petitioner expressly stated his desire to negotiate a plea agreement, however, and he did so with the aid of counsel. He eventually entered into a voluntary and knowing plea agreement, and, as the superior court concluded, has failed to state any viable basis for overturning his convictions.

The superior court was not required to hold a hearing or insist on any response from the State before dismissing the petition. See 13 V.S.A. § 7133 (recognizing that judgment may be based on record and without hearing if record conclusively shows that petitioner is not entitled to relief); In re Thompson, 166 Vt. 471, 478 (1997) (noting that Vermont Rule of Civil Procedure 56(c)(3) allows trial court to enter summary judgment against moving party "when appropriate," and thus rejecting petitioner's argument that trial court's grant of summary judgment in favor of State without State moving first for summary judgment prevented him from showing that there was genuine dispute over material facts); see also V.R.C.P. 78(b) (generally providing that, absent a particularized request for hearing and absent a timely memorandum in opposition, the court may dispose of motions without argument). Although we urge the superior court to state facts and conclusions in support of a summary judgment ruling, they are not necessarily required. See In re Barrows, 2007 VT 9, ¶ 17, 181 Vt. 283 ("When summary judgment disposes of the case, we urge, but do not require, that the trial court list the facts that it has determined to be undisputed."). Moreover, petitioner identifies no prejudice resulting from the procedure employed by the trial court. In this instance, the record fully supports the court's dismissal of the petition.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Brian L. Burgess, Associate Justice