

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

SUPREME COURT DOCKET NO. 2020-051

JULY TERM, 2020

In re Frank Fellows*

} APPEALED FROM:
}
} Superior Court, Essex Unit,
} Civil Division
}
} DOCKET NO. 23-6-18 Excv

Trial Judges: Robert R. Bent; Mary
Miles Teachout

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

Petitioner appeals pro se from the dismissal of his second petition for post-conviction relief (PCR). We affirm.

Petitioner was convicted of sexual assault and lewd and lascivious conduct with a child in 2010; the victim was his daughter. His direct appeal was unsuccessful. See State v. Fellows, 2013 VT 45, ¶ 1, 194 Vt. 77 (affirming convictions). Petitioner, with the assistance of counsel, filed a PCR, alleging that his trial counsel was ineffective in multiple ways. Following a four-day evidentiary hearing at which expert testimony was presented, the court denied the petition in a lengthy order, rejecting petitioner’s ten claims of ineffective assistance of trial counsel. We affirmed this decision on appeal. See In re Frank Fellows, No. 2018-130, 2018 WL 4835000 (Vt. Sept. 28, 2018) (unpub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo18-130.pdf> [<https://perma.cc/WH6P-JLGG>].

In June 2018, petitioner filed the pro se PCR at issue here. Because his complaint contained general and conclusory allegations, the court directed petitioner to file a more definite statement of his claims. Petitioner did so, filing a motion to amend and identifying ten claims against attorney Joshua O’Hara who represented petitioner in his direct appeal. Petitioner then filed a second motion to amend, seeking to add two additional claims against his trial counsel.

The court issued an entry order listing the twelve claims identified by petitioner, including as relevant here: counsel’s alleged failure to obtain necessary transcripts; failure to raise “illegal and mistrial actions” by the prosecutor; failure to argue that a witness’s testimony was unduly prejudicial; failure to raise issues concerning interrogation; failure to raise errors and conflict of interest by defense counsel; failure to raise lack of defense experts; failure to raise that court would not allow the jury to review certain evidence; failure of the system to provide a speedy trial without adequate explanation; unfair treatment for those without means; and, against trial counsel, a claim

that counsel felt threatened by petitioner. The court noted that petitioner had filed a substantial volume of argument and conclusory statements in response to various motions filed by the State and it advised petitioner that it would not sift through his documents to try to identify any further claims. It informed petitioner that, to the extent he had any additional claims, he must identify those claims to the court simply and concisely. The court also stayed discovery, noting that it might be appropriate if the case survived the State's motion to dismiss, and it denied petitioner's request to provide transcripts and assign an expert witness.

Petitioner filed a response with the court, agreeing that the court correctly identified the issues he raised with the exception of one claim against his trial counsel for which he could find no proof. The remaining claim against his trial counsel was his assertion that trial counsel felt threatened by him. The court granted petitioner's motion to amend his PCR consistent with its ruling. The State then filed a new motion to dismiss reflecting the amended claims, arguing abuse of the writ. See *In re Laws*, 2007 VT 54, ¶¶ 1, 21, 182 Vt. 66 (holding that petitioners are barred from raising claims in second PCR that could have been raised in first PCR unless they "demonstrate (1) cause for not raising the issues previously and (2) prejudice if the issues are not heard"; State has initial burden of pleading abuse of the writ with specificity and burden then shifts to petitioner to disprove abuse).

In a January 2020 decision, the court dismissed the PCR as an abuse of the writ and denied various motions filed by petitioner. It found that in its motion to dismiss, the State argued with specificity that all of petitioner's claims could have been raised in his first PCR. Petitioner responded by describing his allegations in very general terms. The court found that petitioner did not explain why he did not include claims against Attorney O'Hara in his first PCR. To the extent that petitioner referenced specific conduct, the incidents he described appeared to be claimed errors at trial. Petitioner did not identify the basis for a claim against appellate counsel as to such matters. The court found that petitioner could and should have raised his claims in his first PCR petition and the claims were now barred.

The court further noted that, with respect to some of his allegations, petitioner criticized his lawyer in the first PCR case. The court found such claims outside the previously defined scope of this case, which was entirely based on claims of Attorney O'Hara's conduct. With respect to the one issue that the trial court identified as potentially a PCR issue in this case—that trial counsel felt threatened by petitioner—the court found that the State met its burden of proving abuse of the writ, which petitioner failed to disprove. The court thus granted the State's motion to dismiss. This appeal followed.

Petitioner argues that the court erred in concluding that his PCR was limited to claims against Attorney O'Hara. He contends that he was also raising an ineffective-assistance claim against his first PCR attorney and he cites to various filings in support of this assertion. He also asserts that his PCR attorney was ineffective, which he argues constitutes cause for not raising his arguments in his initial PCR. Petitioner further challenges the court's denial of several of his motions. He questions if he was treated fairly as a pro se litigant.

We find no error. Pursuant to 13 V.S.A. § 7134, a court is "not required to entertain a second or successive motion for similar relief on behalf of the same prisoner." "When a petitioner files a second or subsequent petition, the government bears the burden of pleading abuse of the

writ, setting forth a petitioner’s writ history, identifying the claims that appear for the first time, and alleging the petitioner has abused the writ.” In re Towne, 2018 VT 5, ¶ 25, 206 Vt. 615. A petitioner must then “show cause for failing to raise the claim previously and actual prejudice from the default.” Id. “Under the cause prong, the petitioner must show some objective factor external to the defense that impeded counsel’s efforts to raise the claim in the earlier proceeding.” Id. (quotation omitted).

As an initial matter, the court did not err in limiting petitioner’s claims to his ten claims against Attorney O’Hara and his one claim against trial counsel. Petitioner stated to the court that these were the claims he sought to pursue. The court was mindful that petitioner had filed voluminous materials that appeared to reference other allegations. It explicitly informed petitioner that it would not comb through the filings to identify any additional claims and that the burden was on petitioner to identify any additional claims with specificity. Petitioner did not do so. His PCR was amended to reflect the issues identified by the court and petitioner is bound by this ruling. The State filed its motion to dismiss the PCR complaint as amended and the court appropriately limited its analysis to these claims.

With respect to his failure to include these claims in his first PCR, petitioner argued below in very general terms that his first PCR attorney was ineffective, which constituted cause. We considered a similar argument in In re Towne, 2018 VT 5. In that case, we discussed Martinez v. Ryan, 566 U.S. 1, 9 (2012), where the U.S. Supreme Court recognized “an exception to the general rule that negligence on the part of a prisoner’s post-conviction attorney does not qualify as ‘cause’ to excuse compliance with state procedural rules.” Towne, 2018 VT 5, ¶ 32. The Martinez Court held, for purposes of federal habeas corpus review, that the “ineffective assistance of PCR counsel in arguing ineffective assistance of trial counsel during [a] petitioner’s initial state PCR proceeding can constitute cause.” Towne, 2018 VT 5, ¶ 32 (emphasis added). To satisfy the burden of showing this type of cause, a prisoner must show that the first PCR counsel was ineffective under the standard set forth in Strickland v. Washington, 466 U.S. 668 (1984), and must also show that “the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit.” Martinez, 566 U.S. at 14 (emphasis added). The U.S. Supreme Court declined “to extend Martinez to allow a federal court to hear a substantial, but procedurally defaulted, claim of ineffective assistance of appellate counsel when a prisoner’s state postconviction counsel provides ineffective assistance by failing to raise that claim.” Davila v. Davis, 137 S. Ct. 2058, 2065-66 (2017) (explaining that “the Court in Martinez was principally concerned about trial errors—in particular, claims of ineffective assistance of trial counsel,” and emphasizing that a “criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not”).

We found it unnecessary in Towne to decide “whether to accept [the] petitioner’s invitation to import the reasoning of Martinez into our state law governing successive PCR petitions and abuse of the writ” because we concluded that the petitioner’s claims would fail even if we did so. In re Towne, 2018 VT 5, ¶ 35. We observed that the U.S. Supreme Court’s decision in Davila “would not constrain our ability to adopt or reject Martinez, or our ability to decide whether to extend Martinez to claims of ineffective assistance of appellate counsel.” Id. ¶ 41 n.13.

With this background in mind, we turn to the question of cause here. As reflected above, the trial court found that petitioner did not explain why his claims against Attorney O’Hara were

not included in his first PCR. Having reviewed petitioner's responsive filing, we agree. Petitioner's filing focused heavily on claims about his trial counsel; he also alleged generally that his first PCR counsel was ineffective for failing to investigate and file an amended PCR petition. He refers to pages in an unnamed document dated June 15, 2017, and again references alleged deficiencies by trial counsel. Petitioner appears to argue that if his first PCR counsel had obtained experts and witnesses, he would have prevailed in his first PCR. He made a general statement that his claims "should have been raised on direct appeal and/or PCR" and the fact that they were not demonstrated "cause." He appears to argue that an investigation would have revealed a conflict of interest arising from a friendship between the prosecutor and his trial counsel.

Even assuming *arguendo* we would incorporate the reasoning of Martinez into our law and extend it to claims based on the alleged ineffectiveness of PCR counsel, we agree with the trial court that petitioner failed to meet his burden to show cause. Petitioner raised very general allegations of ineffectiveness against PCR counsel that are refuted by the record. The record shows that PCR counsel did obtain and present expert testimony in support of petitioner's eight ineffective-assistance-of-trial-counsel claims. There is no evidence that PCR counsel's failure to file an amended PCR amounted to ineffective assistance under the Strickland standard, let alone evidence that his claims have merit. The record reflects that petitioner had a four-day trial on the initial PCR petition and the court considered the eight claims raised by PCR counsel and two additional claims raised by petitioner *pro se*.

We discern no persuasive argument to the contrary in petitioner's brief. Petitioner appears to focus on the merits of his ineffective-assistance claims. Because he failed to show cause to overcome the State's assertion that he has abused the writ, however, we do not examine the merits of his claims against appellate counsel. Finally, the record does not support petitioner's assertion that he was treated unfairly as a *pro se* litigant. To the contrary, the trial court provided him multiple opportunities to clearly state his claims.

We similarly find no error in the court's denial of various motions. Petitioner challenges the court's denial of his motion for mistrial in which petitioner referred to his trial attorney and circumstances concerning the trial. The court denied the motion in its January 2020 order; it also denied various motions associated with the motion for mistrial, such as petitioner's "motions to cure." The court found that these issues fell outside the scope of this case. It explained that the work of petitioner's trial attorney was the subject matter of the first PCR petition and there was no showing that the issues could not have been addressed then. It rejected petitioner's "motions to cure," filed in response to the State's response to his motion for mistrial, as procedurally inappropriate and moot. Petitioner argues on appeal that his mistrial motion concerned the conduct of his attorney in his first PCR. As indicated above, however, he agreed that his claims in this case were against Attorney O'Hara, with an exception not relevant here. He was not entitled to present evidence on this claim, as he appears to argue. The motions to cure were properly denied as moot.

The court similarly did not err in denying petitioner's request for experts and costs given the pending motion to dismiss and the absence of any authority that would require it to do so. See generally In re Barrows, 2007 VT 9, ¶ 9, 181 Vt. 283 (explaining that petitioner bears "burden to demonstrate necessity for expert services" and must "describe how a legal expert would assist petitioner to prove that specific shortcomings in his representation at trial fell below the level of competence for the particular task at issue"). It did not err in denying petitioner's request for

discovery. As it explained, discovery had been stayed pending resolution of the State's renewed motion to dismiss. That motion was granted and the request for discovery became moot.

We further find no error in the court's denial of petitioner's motion for a status conference in which he sought to present evidence. As the court explained, presentation of evidence was not the purpose of a status conference and the case was not yet ripe for an evidentiary hearing at the time the motion was filed. Given the court's ruling on the motion to dismiss, this motion too was moot. We have considered all of the arguments discernible in petitioner's brief and find them all without merit.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice