

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. 2020-233

JANUARY TERM, 2021

Frank Fellows* v. Attorney General & Department of Corrections	} } } } } }	APPEALED FROM: Superior Court, Orleans Unit, Civil Division DOCKET NO. 151-8-20 Oscv
		Trial Judge: Mary Miles Teachout

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

Petitioner appeals the Orleans Civil Division’s denial of his petition for a writ of habeas corpus. We affirm.

In 2010, petitioner was convicted of sexually assaulting and engaging in lewd and lascivious conduct with his then fourteen-year-old daughter. This Court affirmed the convictions. See State v. Fellows, 2013 VT 45, 194 Vt. 77. Petitioner then filed a petition for post-conviction relief (PCR), which the Essex Civil Division denied following a four-day evidentiary hearing. This Court affirmed the denial of that petition. See In re 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>]. Petitioner filed a second PCR petition, which the Essex Civil Division denied in January 2020 as an abuse of the writ. See In re Towne, 2018 VT 5, ¶ 25, 206 Vt. 615 (“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.”). We affirmed. See In re Fellows, No. 2020-051, 2020 WL 4038994 (Vt. July 14, 2020) (upub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo20-051.pdf> [<https://perma.cc/9YTD-PVCV>].

Meanwhile, in July 2019, while his second PCR petition was pending before the Essex Civil Division, petitioner filed a petition for a writ of habeas corpus in the Orleans Civil Division. The court dismissed the petition as premature, given petitioner’s pending PCR petition in the Essex Civil Division. The court also declined to grant the State’s request, as an alternative to dismissal, to transfer venue of the petition to the Essex Civil Division, in the county where petitioner’s sentence was imposed. The court concluded that doing so would be futile, given the pending PCR petition in Essex county. See 13 V.S.A. § 7131 (allowing “prisoner who is in custody under sentence” to file PCR petition in “the Superior Court of the county where the sentence was imposed”). We affirmed, agreeing that the petition had been prematurely filed because petitioner’s second PCR was still pending and thus “the court could not evaluate if the PCR remedy was ‘inadequate or ineffective to test the legality of his . . . detention,’ a threshold requirement under 13 V.S.A. § 7136.” In re Fellows, No. 2020-136, 2020 WL 4731929, *2 (Vt. Aug. 14, 2020)

(unpub. mem.), <https://www.vermontjudiciary.org/sites/default/files/documents/eo20-136.pdf> [<https://perma.cc/8VWB-WREM>] (quoting 13 V.S.A. § 7136, which provides that application for habeas petition will not be entertained if applicant has failed to apply for relief under PCR statute “unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his or her detention”).

Twelve days after our affirmance of the dismissal of his Orleans habeas petition, petitioner filed the instant habeas petition with the Orleans Civil Division, in which he cites six general grounds for relief containing dozens of claims of illegal conduct related to his conviction and sentencing. The Orleans Civil Division denied the petition, stating that: (1) because the petition itself indicated that petitioner was in custody under sentence, there is a lawful basis for his incarceration; and (2) because petitioner is incarcerated pursuant to a sentence imposed in Essex County, any further PCR petition must be filed with the Essex Civil Division.

On appeal, petitioner argues that filing another PCR petition with the Essex Civil Division would be inadequate or ineffective to test the legality of his detention because the Essex Civil Division would dismiss any further PCR petition as an abuse of the writ. We find this argument unavailing. “The language of § 7136 clearly shows that if [a] petitioner wants to collaterally attack the proceedings below he must first apply for postconviction relief under § 7131.” Shequin v. Smith, 129 Vt. 578, 581, 582 (1971) (holding that PCR statute is “the substantial equivalent of conventional habeas corpus” and that therefore “a postconviction remedy of a prisoner in custody under sentence of a court [is] not in derogation of the [habeas] rights of a convicted prisoner granted by the Vermont Constitution”); see also In re Stewart, 140 Vt. 351, 355 (1981) (stating that post-conviction relief “is a special statutory remedy in the nature of habeas corpus” limited to prisoners in custody under sentence (quotation omitted)). Petitioner cannot avoid his most recent petition being deemed successive by labeling it as a habeas corpus rather than a PCR. See Coyle v. Hoffman, 2009 VT 46, ¶ 5, 186 Vt. 525 (mem.) (“We treat petitions for habeas corpus challenging sentences as petitions for post-conviction relief (PCR) under 13 V.S.A. § 7136.”).*

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice

* Although the Orleans Civil Division was technically incorrect in stating that it lacked “jurisdiction” to consider petitioner’s habeas petition, see In re Laws, 2007 VT 54, ¶ 7, 182 Vt. 66 (stating that § 7131’s designation of county in which PCR petitions may be heard “goes to venue and not subject matter jurisdiction”), petitioner did not seek a transfer of his petition to the Essex Civil Division and he has not claimed any error in the trial court declining to do so.