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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-559

NOVEMBER TERM, 2005

In re Darren Couture	}	APPEALED FROM:
	}	
	}	
	}	Chittenden Superior Court
	}	
	}	
	}	DOCKET NO. S0457-04 CnC
		Trial Judge: Richard W. Norton

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

Petitioner appeals from a superior court order granting the State=s motion to dismiss his petition for post-conviction relief. Petitioner contends the court erred in dismissing the petition as successive under 13 V.S.A. '7134 (AThe court is not required to entertain a second or successive motion for similar relief on behalf of the same prisoner.@). We affirm.

In 1991, pursuant to a plea agreement, petitioner pled nolo contendere to first-degree murder, and the State agreed to recommend a sentence of thirty years to life. The court accepted the plea and imposed the recommended sentence of thirty years to life. Petitioner filed his first PCR petition in 1991, asserting ineffective assistance of counsel based on counsel=s alleged failure to ensure that the court properly determined the degree of the crime, to properly evaluate the case, and to assert certain defenses. The trial court denied the petition, and this Court affirmed. In re Couture, No. 95-504 (Vt. June 28, 1996) (unreported mem.). Petitioner filed a second PCR petition in 1998, asserting that his PCR counsel had rendered ineffective assistance. The trial court dismissed the petition, and this Court again affirmed. In re Couture, No. 2000-403 (Vt. June 20, 2001) (unreported mem.).

Petitioner filed this third petition in April 2004, asserting that he had been denied several constitutional rights resulting from an error at sentencing that he had only recently discovered. As set forth in his accompanying affidavit, petitioner noted that the probation officer who prepared his PSI report had informed the court that the minimum release date for the recommended sentence of thirty years to life would be in seventeen years. The probation officer indicated that he considered this to be insufficient, and recommended a sentence of fifty years to life. The trial court noted that the statutory minimum was thirty-five years, but found sufficient mitigating evidence to impose the state-requested minimum of thirty years. Petitioner represented in his petition that, shortly after sentencing, in August 1991, the Department of Corrections determined that his actual minimum release date would be in twenty-two years. In his supporting affidavit, petitioner stated that he Adid not realize that there was a Post-conviction claim that I could raise regarding the length of my incarceration@ until another inmate, reviewing petitioner=s case in 2003, Apointed it out.@ Petitioner alleged that, had he been Aaware that the claim existed@ he would have raised it in an earlier petition.

The State moved to dismiss the petition as successive, arguing that the claim could have been raised in the earlier petitions, and that petitioner had failed to offer an adequate excuse for his failure to do so. The trial court granted the motion, finding that petitioner had failed to offer a valid excuse for his failure to raise the claim earlier, and had not shown how his claim prejudiced his sentencing. This appeal followed.

We have recognized that factual or legal contentions not raised on appeal or in a prior petition, either deliberately or without adequate excuse, may be foreclosed in subsequent petitions. In re Mayer, 131 Vt. 248, 250-51 (1973); State v. Provencher, 128 Vt. 586, 591-92 (1970) (Holden, C.J., concurring). This comports with the federal standard, as well. See McCleskey v. Zant, 499 U.S. 467, 488 (1991) (noting that under federal Aabuse of the writ@ standard, petitioner may be barred from raising claims that could have been raised or developed in earlier petition absent adequate excuse). Here, petitioner acknowledges that the Department calculated his correct minimum release date shortly after his sentencing in 1991. Moreover, petitioner did not allege in his affidavit that he was unaware that the minimum release date had been recalculated in 1991, or that he remained virtually ignorant of his actual minimum release date during the ensuing twelve years, during which time he filed two counsel-assisted state PCR petitions and one federal habeas petition. Petitioner=s alleged ignorance of the claim is insufficient to justify petitioner=s failure to raise it in his earlier counsel-assisted PCR petitions. See id. at 493-94 (excusable neglect requires showing that Asome objective factor external to the defense impeded@ efforts to raise the claim, or that basis of the claim was not reasonably available to petitioner or counsel) (citation omitted). Accordingly, we discern no basis to disturb the judgment.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice