

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-139

JANUARY TERM, 2005

In re Thomas Karov

}	APPEALED FROM:
}	
}	Addison Superior Court
}	
}	DOCKET NO. 143-7-01 Ancv
}	
}	Trial Judge: Helen M. Toor
}	
}	
}	

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

Petitioner Thomas Karov appeals from the trial court's order granting summary judgment for defendant State of Vermont on his petition for post-conviction relief. He argues that the trial court erred in granting summary judgment because, although he did not raise the issue of his competence on direct appeal, his complaint should have been considered pursuant to an exception to the deliberate bypass rule. We affirm.

In 1997, petitioner was charged with first-degree aggravated domestic assault, aggravated assault, two charges of kidnapping, and violation of an abuse prevention order. Based on an inpatient psychiatric evaluation and the stipulation of the parties, petitioner was found competent to stand trial. The court ordered a second competence hearing in early 1998, and petitioner was again ruled competent. In December 1998, another psychiatric evaluation was conducted, and the court held that petitioner was competent. In 1999, a jury found petitioner guilty of all of the charges against him. Trial counsel filed a motion for a new trial, asserting that petitioner had been incompetent during trial. The court denied the motion based on the psychiatric evaluations that had been conducted, and the court's own observations. Petitioner appealed to this Court, and although he indicated in his docketing statement that he would raise the issue of his competence on appeal, he did not brief this argument. This Court affirmed petitioner's convictions. State v. Karov, 170 Vt. 650 (2000) (mem.).

In July 2001, petitioner filed a post-conviction relief petition, asserting that his due process rights had been violated because he had not been competent to stand trial. He later added a claim that his appellate counsel had been ineffective. The State moved for summary judgment, asserting that petitioner had deliberately bypassed the competence issue on direct appeal, and he was therefore barred from raising it in a post-conviction proceeding.

In a February 2004 entry order, the court granted the State's motion for summary judgment, agreeing that petitioner's failure to raise the competence issue on direct appeal barred a collateral attack through post-conviction relief. The court recognized that there were exceptions to Vermont's deliberate bypass rule, but found that none applied. The court thus granted summary judgment for the State on petitioner's competence claim, as well as on his ineffective assistance of counsel claim. Petitioner appealed, challenging only the court's decision on the competence claim.

Petitioner maintains that his competency claim should have been considered because he demonstrated the existence of "extraordinary circumstances," and he presented evidence that could not have been made part of the record on direct appeal. He thus argues that the trial court erred in granting summary judgment.

In reviewing the trial court's order granting summary judgment, we use the same standard as the trial court. In re Carter, 2004 VT 21, ¶ 6, 848 A.2d 281. Summary judgment is appropriate when no genuine issues of material fact exist, and

viewing the evidence in the light most favorable to the moving party, the moving party is entitled to judgment as a matter of law. Id.; V.R.C.P. 56(c). Summary judgment was properly granted here.

Vermont's post-conviction relief statute allows a prisoner to challenge his confinement where the sentence is subject to collateral attack. In re Carter, 2004 VT 21, at ¶ 9. Post-conviction review is not a substitute for direct appeal. Id. "Where the issues raised in a petition for post-conviction relief were contested at trial and were not raised on direct appeal, they will not be addressed on post-conviction review unless it is demonstrated that the failure to raise them on direct appeal was inadvertent, that appellate counsel was ineffective, or that extraordinary circumstances excused the failure to raise the issues on appeal." Id. (block quote format, and citation omitted). The petitioner bears the burden of proving that he did not deliberately bypass issues that could have been raised on direct appeal. In re Hart, 167 Vt. 630, 631 (1998) (mem.).

Petitioner asserts that the "extraordinary circumstances" present in this case were the problems faced, and the difficulties created, in obtaining trial counsel's testimony regarding his competence during an ongoing trial. He maintains that such testimony must necessarily await a post-conviction relief proceeding to prevent a trial from descending into chaos. He also asserts that because he could not have presented evidence from his trial counsel on direct appeal, his claim must be considered on post-conviction review.

Petitioner fails to demonstrate the existence of extraordinary circumstances here. The issue of his competence was clearly contested at trial; the trial court made three separate findings on the issue. Additionally, trial counsel alleged in a post-judgment motion that, based on his interactions with petitioner at trial, petitioner had been incompetent during trial. The facts bearing on the issue of petitioner's competence were developed below, and petitioner had the opportunity to raise this issue on direct appeal. Indeed, it appears that at one time, he intended to do so. He ultimately failed to raise this argument, however, and he cannot do so now on post-conviction review. See Timberlake v. State, 753 N.E.2d 591, 598 (Ind. 2001) (where issue of petitioner's competency to stand trial was known and available on direct appeal, it was not available as a freestanding claim in post-conviction relief proceeding); see also Hill v. United States, 223 F.2d 699, 701 (6th Cir. 1955) (question of appellant's competence to stand trial was a factual one that was raised and adjudicated in trial court at time of trial; competence finding was subject to review on direct appeal, but it was not an appropriate subject for post-conviction review proceedings under 28 U.S.C. § 2255).

We reject petitioner's assertion that his claim must be considered because he presented an affidavit from his trial attorney concerning his competency, which could not have been considered as "evidence" by the trial court. The mere existence of evidence outside of the record on appeal does not constitute "extraordinary circumstances," nor does it fit within any other recognized exception to the deliberate bypass rule. This is particularly true here, where the substance of trial counsel's concerns were presented to, and rejected by, the trial court. Accepting petitioner's argument would create an exception that would swallow the deliberate bypass rule. As we have repeatedly stated, "[t]o allow an issue which had been deliberately waived on appeal to be asserted under post-conviction review would be to grant petitioner redress that he is entitled, at his own election, to have each claim of trial error the subject of separate appellate reviews." In re Hart, 167 Vt. at 631 (internal quotation marks, brackets, ellipses, and citation omitted). Because petitioner failed to raise his competence claim on direct appeal, he is barred from doing so on post-conviction review. Summary judgment was properly granted for the State.

BY THE COURT:

Paul L. Reiber, Chief Justice

Denise R. Johnson, Associate Justice

Frederic W. Allen, Chief Justice (Ret.),

Specially Assigned