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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-200

JANUARY TERM, 2005

Michael Connarn	}	APPEALED FROM:
v.	}	Washington Superior Court
State of Vermont	}	DOCKET NO. 396-7-03 Wncv
	}	Trial Judge: Geoffrey Crawford

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

Petitioner Michael Connarn appeals from a summary judgment dismissing his second petition for post-conviction relief. Petitioner premised his complaint on the belief that the prosecuting attorney and the investigating state police troopers conspired to prosecute petitioner for drug dealing. Petitioner claims that he was wrongly and unconstitutionally convicted. We affirm.

We review petitioner's appeal using the standard the trial court employed: if no genuine issue of material fact exists and any party is entitled to judgment as a matter of law, we will affirm the summary judgment. V.R.C.P. 56(c)(3); Wentworth v. Fletcher Allen Health Care, 171 Vt. 614, 616 (2000) (mem.). The facts are as follows.

In January 1977, during an undercover investigation of illegal drug activity in Rutland County, defendant was arrested for selling phencyclidine (PCP). On direct appeal from his conviction in 1978, petitioner claimed that he was denied a fair trial because the prosecution attempted to conceal the existence and identity of a police informant/witness from the defense and the jury. The attempted concealment ultimately failed when another prosecution witness inadvertently mentioned the existence of the undisclosed witness during her trial testimony. To ameliorate any potential prejudice to petitioner, the trial court ordered the State to produce the witness so that petitioner could depose him. The defense did so, and petitioner's counsel called the witness to testify at petitioner's trial. In its opinion on petitioner's appeal, this Court condemned the State for violating its discovery obligations. The Court affirmed the conviction, however, explaining that the informant's testimony was " largely cumulative," and the State had direct evidence of the drug sale from one of the troopers. State v. Connarn, 138 Vt. 270, 273 (1980).

In 1997, petitioner sought post-conviction relief in superior court. The court entered judgment for the State, and petitioner appealed to this Court. A three-member panel of the Court affirmed the superior court judgment in 1999. In re Connarn, No. 98-559 (Vt. 1999) (unpublished mem.). Meanwhile, federal authorities had charged petitioner with a federal drug offense for which he was eventually found guilty. Petitioner is currently serving time for that conviction under an enhanced sentence related to the 1978 state drug conviction at issue here.

In July 2003, seeking grounds for resentencing for the federal conviction, petitioner filed another post-conviction relief complaint in superior court. The State responded by moving to dismiss. Treating the State's motion as one for summary judgment, the court found no genuine issue of material fact and entered judgment for the State. The present appeal followed.

In this appeal, petitioner seeks a remand so he can pursue his theory that his conviction was the result of a conspiracy among law enforcement officials responsible for his arrest and prosecution. Petitioner characterizes the testimony of the

investigating officers as perjurious, and contends that the conspiracy against him was far more extensive than he previously understood.[1] In essence, petitioner argues that his trial was so rife with errors and perjury that it was patently unfair and did not pass constitutional muster.

Although petitioner peppers his contentions of unfairness with language from numerous United States Supreme Court opinions, his arguments amount to little more than a challenge to the jury's decision to convict him. Like his brief on appeal, petitioner's superior court complaint merely weaved his view of the conflicting trial evidence into a story that supports his belief of a prosecutorial conspiracy. Petitioner presented the trial court with no additional information or evidence to support his conspiracy theory, and all of petitioner's claims surrounding the discovery violation were dealt with on direct appeal. In its opinion in that appeal, the Court explained that it is the jury's responsibility to decide which evidence is credible. Connarn, 138 Vt. at 274. Those determinations are not reviewable. State v. Merchant, 173 Vt. 249, 257 (2001). Moreover, the Court found no prejudice resulting from the untimely witness disclosure, because the testimony was cumulative and tangential to petitioner's guilt. Connarn, 138 Vt. at 273. Thus, to the extent a conspiracy existed, it was misguided because the fact the prosecution attempted to conceal from petitioner and the jury was not material to petitioner's guilt. We find no error in dismissing petitioner's complaint.[2]

Petitioner raises numerous other claims of error in the trial court's decision, but fails to demonstrate that he preserved them by giving the trial court an opportunity to consider them. As such, they are waived for appeal. State v. Jones, 160 Vt. 440, 448 (1993); see also V.R.A.P. 28(a)(4) (appellant's brief must explain how issues were presented below and preserved for appellate review).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Denise R. Johnson, Associate Justice

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

Specially Assigned

Footnotes

1. Petitioner claims that even the court reporter who was responsible for transcribing his trial was part of the conspiracy against him, alleging that she omitted certain testimony damaging to the State and then later destroyed her trial notes to cover up her misdeed.

2. To the extent that petitioner argues the superior court erred by dismissing his claims impeaching the chain of custody of the PCP and whether petitioner received consideration for the drugs, we find no reason to revisit either issue. The Court addressed essentially the same challenges in the direct appeal. See State v. Connarn, 138 Vt. 270, 274

(1980).