

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-161

MARCH TERM, 2008

In re James R. Ingerson	}	APPEALED FROM:
	}	
	}	
	}	Windham Superior Court
	}	
	}	
	}	DOCKET NO. 512-12-04 Wmcv

Trial Judge: John P. Wesley

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

Petitioner appeals the superior court’s denial of his petition for post-conviction relief (PCR), claiming that his trial counsel’s failure to provide him with independent review of his presentence investigation report prejudiced him at his sentencing hearing. We affirm.

In 2002, petitioner was convicted of burglary and unlawful mischief, and sentenced as a habitual offender to a term of twenty-to-thirty years. This Court affirmed the convictions and sentence in State v. Ingerson, 2004 VT 36, 176 Vt. 428. Following that decision, petitioner filed his PCR petition, which eventually was narrowed to his claim that his trial attorney was ineffective for failing to provide him an opportunity to read his presentence report and seek a continuance to respond to the report. At the ensuing evidentiary hearing, petitioner, his former trial counsel, and expert witnesses for petitioner and the State testified. After the hearing, the superior court issued an order denying the petition, concluding that although petitioner’s trial counsel violated V.R.Cr.P. 32 and prevailing norms of professional conduct by discussing the report with petitioner over the telephone rather than giving him an opportunity to independently review the report, petitioner was not prejudiced by his counsel’s conduct. The court determined that the attorney’s error was of a technical nature, and that petitioner’s proffer as to what objections he would have raised had he had an opportunity to read the report failed to show by a preponderance of the evidence that his sentence would have been different. See In re LaBounty, 2005 VT 6, ¶ 7, 177 Vt. 635 (mem.) (holding that a petitioner seeking post-conviction relief based on ineffective assistance of counsel must demonstrate both that his counsel’s performance was below prevailing professional norms and that there is a reasonable probability that the outcome of the proceeding would have been different absent counsel’s sub-par performance).

On appeal, petitioner argues that the evidence he presented at the PCR hearing was sufficient to establish a reasonable probability that his sentence would have been different if he

had been allowed to read the report and file objections to its contents. In support of this argument, petitioner cites six statements in the report that he would have objected to as erroneous, as well as his grounds for objection: (1) regarding a statement that he had a substance-abuse problem and had failed to apply the tools he had learned in treatment, he would have noted a three-year period in which he had been drug-free and had not committed any crimes; (2) regarding a statement that he continued to commit crimes involving victims, he would have stated that his multiple DUI convictions had not involved accidents or injuries and that his burglary had not resulted in any physical injury to anyone; (3) regarding a statement that he had paid only fifteen dollars toward a restitution award of over \$700, he would have stated that he actually paid approximately half of an award of twice that amount; (4) regarding a statement that he had been returned to jail no less than seven times based on furlough and criminal infractions, he would have emphasized that he had not been charged with any new offenses; (5) regarding a statement that he had failed two of seventeen drug tests, he would have noted that one of the tests was administered before he had begun treatment; and (6) regarding a statement indicating that petitioner had told the author of the report that he did not think he should receive any jail time for the burglary, he would have contended that, to the contrary, he had acknowledged that some jail time would be appropriate but that the recommended sentence was excessive.

We do not agree that petitioner's proffer compelled the superior court to conclude that petitioner had demonstrated prejudice. As the superior court stated, most of the proffered objections, to the extent that they were accurate, amounted to characterizing or supplementing facts rather than identifying errors. Furthermore, as the superior court observed, if anything, arguing over the nuances of such facts might have presented petitioner as an offender in denial, thereby undercutting his principal plea at sentencing that he needed treatment rather than incarceration. See *id.* (trial court's findings in PCR proceedings will not be disturbed unless they involve clear error, and its conclusions will be upheld if supported by findings; where the evidence is conflicting, we defer to the court's judgment). In any event, the record reveals that petitioner raised each of the proffered points (1), (2), (3) and (5) at his sentencing hearing. The superior court did not err in concluding that petitioner failed to demonstrate prejudice by a preponderance of the evidence.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice