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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-298

FEBRUARY TERM, 2008

In re Anthony LaFlamme	}	APPEALED FROM:
	}	
	}	
	}	Bennington Superior Court
	}	
	}	
	}	DOCKET NO. 456-12-05 Bncv
		Trial Judge: John P. Wesley

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

Petitioner appeals from a superior court order dismissing his petition for post-conviction relief. He contends the court erred in denying his request for expert assistance on the grounds that petitioner: (1) was not entitled to such assistance as a pro se litigant and (2) failed to demonstrate that such services were necessary to support his claims. We affirm in part, reverse in part, and remand for further proceedings.

The charges against petitioner arose from an incident in September 2002, in which defendant struck his girlfriend. A jury convicted him of aggravated domestic assault, violation of an abuse prevention order, felony unlawful trespass, and disorderly conduct by telephone. Affirming the conviction, this Court rejected petitioner's claim that the trial court erred in denying a motion for mistrial based upon an alleged violation of petitioner's post-arrest right to remain silent. State v. LaFlamme, No. 2004-129 (Jan. 12, 2005) (unreported mem.). The motion relied on the arresting officer's testimony that, after petitioner was read his rights, he indicated that he did not want to give a statement. We held any error was harmless, noting that the above-mentioned reference was relatively brief and isolated and was not exploited by the prosecution, that other evidence showed petitioner did not, in fact, remain silent, and that the record contained overwhelming evidence of petitioner's guilt, including his own admission at trial that he struck his girlfriend twice. Id. at 2. A subsequent motion for reconsideration of sentence was denied, and we again affirmed. State v. LaFlamme, No. 2005-207 (Dec. 1, 2005) (unreported mem.).

In December 2005, petitioner filed a petition for post-conviction relief, indicating that he wished to proceed pro se. He subsequently filed several motions to amend the petition and a motion to compel the defender general to provide a list of potential expert witnesses and funding for an expert witness to support his ineffective-assistance claims. In September 2006, the court issued an entry order denying the motion, ruling in part that the law did not authorize the

payment of experts "to review the viability of a claim of ineffective assistance of counsel brought on the part of a petitioner who elected to proceed pro se."

The State thereafter moved to dismiss the petition. In May 2007, the superior court issued a nine-page written decision granting the motion. The court noted that the several petitions raised essentially four claims relating to alleged trial errors and six separate claims of ineffective assistance of counsel. The court considered and rejected all of the alleged trial errors, and petitioner has not challenged any of its findings and conclusions in this regard on appeal. As to the allegations of ineffective assistance, the court corrected its earlier ruling that a pro se litigant was not entitled to funding for an expert witness. Citing our intervening decision in In re Barrows, 2007 VT 9, the court observed that "[w]hile a pro se petitioner has a statutory right under 13 V.S.A. § 5231(2) to the services of an expert witness, he must show that such services are 'necessary to his defense.' " Assessing petitioner's claims in this regard, the court found that the "bulk" of his contentions fell within "the category of tactical decisions" by counsel to which broad discretion is afforded, that petitioner had "offered no specific explanation of how such [expert] assistance would" support the claims, and that any omission on counsel's part would "fall short of proving the necessary prejudice to warrant post-conviction" relief in light of the overwhelming evidence of guilt, much of it attributable to petitioner's own admissions. Accordingly, the court granted the motion to dismiss and entered judgment in favor of the State. This appeal followed.

As noted, petitioner does not challenge the superior court's dismissal of his claims based on alleged defects in the trial process—apart from his allegations of ineffective assistance of counsel—and we find no basis to disturb the court's dismissal of those claims. With respect to petitioner's claim of ineffective assistance of counsel, however, we conclude that petitioner alleged sufficient facts to overcome the State's motion to dismiss, which stated only that petitioner would be unable to prove prejudice. As the superior court noted, neither party attached a statement of undisputed facts or otherwise observed the requirements of V.R.C.P. 56. The court recognized that petitioner's pleadings were supported by attached documents, which were the only basis for assessing the sufficiency of his claims. Indeed, the State failed to make any attempt to challenge petitioner's factual allegations regarding his claim of ineffective assistance of counsel. For his part, petitioner attached documents indicating that (1) the testimony of key prosecution witnesses changed from the time they were interviewed by defense counsel's investigator and the time they gave deposition and trial testimony; and (2) defense counsel was aware of those discrepancies and pointed them out to the trial court, but then ultimately did not take advantage of an opportunity to present the testimony of the investigator to the jury. We conclude that petitioner's allegations and supporting documents were sufficient to require the State to respond effectively to the alleged facts rather than rely on a bare assertion of a lack of prejudice in its motion to dismiss. For example, in the context of a summary judgment motion meeting the requirements of Rule 56, the State did not submit an affidavit of petitioner's trial counsel, providing an explanation for why he did not present the testimony of his investigator. The State's motion to dismiss made a mere summary claim of a lack of prejudice. This was not sufficient to undermine petitioner's supported allegations.

Petitioner also argues that expert legal assistance was necessary to support his claims that trial counsel was deficient in: (1) failing to advise him that he had a right to counsel during the pre-sentence investigation; (2) not presenting any evidence at sentencing, particularly a letter

from a correctional officer that allegedly contradicted information in the PSI that petitioner had received a disciplinary report for assault with a weapon; and (3) in advising petitioner not to testify at sentencing. It may be that the court included these allegations among the other "tactical" decisions which it found to be immune from second guessing, but this is not clear from the court's decision. There are no findings addressing the necessity of expert assistance with regard to these particular claims, and the court's ultimate conclusion that any error was harmless in light of the overwhelming evidence of guilt at trial plainly does not apply to claims of ineffective assistance at sentencing. Accordingly, we conclude that the judgment of dismissal must also be reversed with respect to these particular claims, and the matter remanded to the trial court for additional findings and conclusions.

We emphasize that although petitioner is not entitled to obtain the services of an expert witness merely by alleging ineffective assistance of counsel, he is entitled to such services if his petition draws a connection between the request for an expert and the specific allegations contained in the petition. Barrows, 2007 VT 9, ¶¶ 8-9. In this case, after the State is given an opportunity to file a motion for summary judgment, the court must reevaluate petitioner's request for expert services.

The judgment is affirmed in part, reversed in part, and remanded for further proceedings consistent with the views expressed herein.

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