

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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2007-081

AUGUST TERM, 2007

Nelson Barney, Jr.	}	APPEALED FROM:
	}	
	}	
v.	}	Rutland Superior Court
	}	
Robert Hofmann, Commissioner of Corrections	}	DOCKET NO. 216-4-06 Rdcv
	}	

Trial Judge: Stephen B. Martin

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

Petitioner appeals the superior court’s order dismissing as successive his second petition for a writ of habeas corpus, in which he challenged the revocation of his furlough status. We affirm.

Petitioner is currently serving a six-to-fifteen-year sentence after being convicted of aggravated domestic assault and other crimes. Based on allegations that he had contact with females without approval of the intensive domestic abuse program treatment team, his probation status was revoked following a July 2005 administrative hearing. Petitioner filed a pro se petition for a writ of habeas corpus, arguing that the revocation was improper because of various procedural errors made by the administrative hearing officer who had conducted the furlough-revocation hearing. After obtaining representation from the Prisoner’s Rights Office, petitioner amended the petition to add a claim that revocation was unlawful because it was based on a directive of the Department of Corrections that had not been promulgated in accordance with the Administrative Procedure Act. While the parties’ competing motions for summary judgment were pending, the Department sent petitioner a letter indicating that the decision had been made to release him back into the community, but explaining that some concerns had to be addressed first. One sentence stated that the “decision to release you back on furlough was made due to an administrative error in certifying the Hearing Officer (that has now been corrected),” but that the reasons for termination of furlough status, the conduct of the hearing, and the findings of fact were all found to be just. Three weeks later, on February 27, 2006, the superior court granted the Department’s motion for summary judgment, ruling that petitioner had no due process interest in the revocation of furlough.

In April 2006, petitioner filed a second petition for a writ of habeas corpus, this time arguing that the hearing officer who conducted the furlough-revocation hearing was not certified as required by Department regulations. The superior court dismissed the petition in a January 30, 2007 order, ruling that the petition was successive because petitioner was continuing to challenge the revocation of his furlough status based on claims that the Department had denied him due process by failing to

follow its own directives. On appeal, petitioner argues that his second petition was not successive because it was based on different grounds from the first petition. He also argues that the Department should be estopped from claiming that his awareness of the lack-of-certification issue during the pendency of his first petition made his second petition successive, given the Department's promise in the letter to reinstate his furlough status. The State responds that petitioner's second petition was successive because it raised the same general issue as the first petition and could have been raised in the first petition.

We have recently reviewed our law with respect to successive petitions in In re Laws, 2007 VT 54. By statute, the superior court "is not required to entertain a second or successive motion for similar relief on behalf of the same prisoner." 13 V.S.A. § 7134. This statutory section plainly "bars relitigation of claims actually raised and decided on the merits in an earlier" petition. Laws, 2007 VT 54, ¶ 11. As for successive petitions on different grounds, in Laws we adopted a test that requires the State to plead an abuse of the writ, and if it does so with the required level of specificity, shifts the burden to the petitioner to demonstrate cause and prejudice. Id. ¶ 22. Under this test, the State must claim an abuse of the writ, stating with clarity and particularity petitioner's prior and new claims. Id. ¶ 21. Once the State has established the petitioner's prior writ history, the burden shifts to the petitioner to show cause why the new claims were not raised in the earlier petition and further to demonstrate actual prejudice. Id. ¶ 20. The cause standard requires the petitioner to show that some objective factor external to the defense prevented the petitioner from raising the claim in an earlier proceeding. Id. The prejudice standard requires petitioner to show that errors raised by the new claims worked to his actual and substantial disadvantage, not merely that the errors created a possibility of prejudice. Id. Finally, the superior court must make findings on the issues of cause and actual prejudice. Id. ¶ 22.

Here, the superior court dismissed petitioner's second petition without the benefit of our decision in Laws. Nevertheless, we will examine the matter under the standard set forth therein. At the outset, we reject the State's argument that the issue raised in the second petition was the same as in the first petition. To arrive at its position, the State generalizes that, in both petitions, petitioner claims that his due process rights were violated in the probation-revocation proceeding because of the Department's failure to follow its own directives. While we recognize that the claims in the two petitions fall within the same general category, the fact remains that in the second petition petitioner is claiming different grounds for the alleged due-process violation.

Having determined that the grounds for relief were distinct in the two petitions, we consider the test adopted in Laws. Although the State may not have used the magic words "abuse of the writ," its response to petitioner's second petition demonstrates that it was in fact alleging an abuse of the writ. Further, in so responding, the State set forth with clarity and particularity petitioner's prior and new claims. The burden, then, shifted to petitioner to demonstrate cause and prejudice. Although petitioner addressed the prejudice prong in his response to the State, he did not explain his reason for failing to raise the lack-of-certification issue in the first petition. On appeal, however, he contends that he did not raise that issue when he learned about it while the first appeal was pending because the Department's letter mentioning the hearing officer's lack of certification promised him that he would be furloughed, thereby arguably reducing his incentive to challenge the revocation proceeding on that basis. We further note that petitioner was offered a new hearing before a certified

officer, a remedy he declined to avail himself of.

We find this argument unpersuasive. The Department's letter did not guarantee petitioner's return to furlough status; rather, it indicated that, assuming some concerns could be worked out, the Department anticipated petitioner's return to furlough status. After receiving the letter, petitioner did not seek to withdraw his pending first petition; to that extent, he obviously did not consider the letter a guarantee of return to furlough status. In short, the record demonstrates that, while his first petition was pending, petitioner knew of the claim that he later raised in his second petition, and yet, without good cause, he failed to bring that issue to the attention of the superior court during the pendency of the first petition. In dismissing the second petition, the superior court noted that the same reasons for denying the first petition applied to the claims in the second petition, and concluded, among other things, that the ends of justice would not be served by reviewing the second petition. Given the undisputed facts of this case, we see no reason to remand the matter for further consideration by the superior court, even though the court did not have the benefit of our decision in Laws.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

John A. Dooley, Associate Justice

Denise R. Johnson, Associate Justice