

STATE OF VERMONT
RUTLAND COUNTY

DEC 28 2007

William Devendorf,
Plaintiff,

v.

State of Vermont,
Defendant.

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Rutland Superior Court
Docket No. 99-1-07 Rdev

DECISION

Plaintiff's Motion for Transcripts at State Expense, filed July 20, 2007

Petitioner William Devendorf is an inmate serving a sentence of 7 ½ to 20 years. His case is a petition for post-conviction relief under 13 V.S.A. § 7131. The present matter before the court is Petitioner's motion for transcripts at State expense. Petitioner is proceeding *pro se*. The State is represented by Rutland County State's Attorney James P. Mongeon.

Petitioner's claim for post-conviction relief is based on ineffective assistance of counsel, the admission of an erroneous presentence investigation report, and the failure of the court to determine whether Petitioner and counsel had an opportunity to review and discuss the PSI report as required by V.R.Cr.P. 32(a)(1)(A). In particular, Petitioner argues that his attorneys failed to present certain mitigating evidence at both sentencing hearings. Petitioner also argues that he was prejudiced by comments made by his attorneys at three different status conferences for which he was not present. Two of the status conferences involved either the appointment or withdrawal of counsel; the subject matter of the third status conference is not known. As Petitioner is proceeding *in forma pauperis*, he seeks to have transcripts of each of the five proceedings provided to him at State expense.

In post-conviction relief proceedings where the prisoner is financially unable to pay, the court "may order that all necessary costs and expenses incident to the matter, including but not limited to court costs, stenographic services, printing and reasonable compensation for legal services, be paid by the state from the appropriation to the court where the sentence was imposed." 13 V.S.A. § 7137. In exercising this discretion, the Court considers (1) the individual interest affected by the litigation, (2) the risk of erroneous deprivation, and (3) the value of providing the procedural safeguard versus the cost to the State of providing it. *In re L.G.*, 158 Vt. 639, 640 (1992) (mem.) (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). See also 28 U.S.C. § 753(f) (requiring transcripts at state expense in federal post-conviction relief proceedings if the court finds "that the suit or appeal is not frivolous and that the transcript is needed to decide the issue presented by the suit or appeal").

The records requested by Petitioner are necessary to permit effective review of the petition. Petitioner claims that his counsel failed in a variety of ways during the sentencing hearing and made prejudicial comments at the status conferences. The records will be necessary to determine whether (1) counsel's representation fell below prevailing professional norms and (2) there is a reasonable probability that the outcome would have been different had counsel not made these unprofessional errors. *In re Plante*, 171 Vt. 310, 313 (2000); *Strickland v. Washington*, 466 U.S. 668, 687-96 (1984). The record will also be necessary to review claims related to the court's failure to observe proper procedure and the handling of claimed inaccuracies in the PSI report.

Cost is a relevant determination. See *L.G.*, 158 Vt. at 640 (considering whether alternative records were available). On this basis, the State argues that Petitioner should be provided with audio recordings rather than written transcripts. The State represents that the cost for an audio duplicate is \$20 per 90-minute tape or CD, whereas the cost for a written transcript is \$2.65 per page of transcription.


The cost differential appears to be significant. Audio recordings should provide a "record of sufficient completeness to permit proper consideration of [Petitioner's] claims." *Id.* (quoting *Draper v. Washington*, 372 U.S. 487, 499 (1963)). Accordingly, Petitioner is entitled to audio recordings of the five requested hearings at state expense. The audio recordings will be in CD format unless Petitioner requests audio tape format instead. The expense will be "paid by the state from the appropriation to the court where the sentence was imposed." 13 V.S.A. § 7137.

ORDER

For the foregoing reasons, recordings of the following hearings will be provided to Petitioner by the Rutland District Court without expense in audio CD format unless an audio tape is requested within 15 days:

1. Status Conference, 2/14/05
2. Status Conference, 4/18/05
3. Sentencing Hearing, 12/1/05
4. Status Conference, 1/19/06
5. Sentencing Hearing, 8/24/06

Dated at Rutland, Vermont this 27th day of December, 2007.



Hon. May Miles Teachout
Presiding Judge