

VERMONT SUPREME COURT
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Case No. 26-AP-091

Note: In the case title, an asterisk () indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.*

ENTRY ORDER

OCTOBER TERM, 2026

In re James Burke*

} APPEALED FROM:
} Superior Court, Chittenden Unit,
} Civil Division
} CASE NO. 24-CV-05456
} Trial Judge: Megan J. Shafritz

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

Petitioner James Burke, self-represented, appeals from a civil division order concluding that his petition for a writ of habeas corpus was appropriately characterized as a successive post-conviction-relief (PCR) petition and granting summary judgment to the State on each of his claims. We affirm.

I. Background

As relevant here, the record reflects the following.¹ In July 2004, the State charged petitioner with one count of sexual assault; he was arrested and arraigned on the charge in October 2005. Petitioner was originally self-represented. Attorney Daniel Maguire was appointed as standby counsel in November 2007, and petitioner dismissed him in February 2008. Midway through depositions in 2009, petitioner requested representation by counsel and Attorney Maguire was again appointed.

Shortly before petitioner's jury trial in May 2010, Attorney Maguire sought leave to withdraw due to a conflict with petitioner. The court denied the motion and Attorney Maguire represented petitioner at trial. The jury convicted petitioner of sexual assault.

Attorney Maguire then renewed his motion for leave to withdraw. The criminal division granted the motion, and petitioner represented himself during his presentence investigation (PSI)

¹ The procedural background is set forth in greater detail in State v. Burke (Burke I), 2012 VT 50, ¶¶ 2-13, 192 Vt. 99, and In re Burke (Burke II), 2019 VT 28, ¶¶ 2-14, 210 Vt. 157.

interview and at his sentencing hearing. In October 2010, petitioner was sentenced to eighteen-to-twenty years to serve. Petitioner, self-represented, appealed to this Court. In June 2012, we affirmed. Burke I, 2012 VT 50.

In February 2013, petitioner filed his first PCR petition. He argued that Attorney Maguire provided ineffective assistance due to a conflict of interest. In March 2015, Attorney Paul Volk—an expert appointed by the court and compensated by the Office of the Defender General—submitted a report of his opinion as to whether petitioner received effective assistance of counsel from Attorney Maguire. The PCR court granted summary judgment for the State, petitioner appealed, and we affirmed. Burke II, 2019 VT 28.

In December 2024, petitioner filed the instant petition, which he styled as one for a writ of habeas corpus. He attached a copy of Attorney Volk’s 2015 report. Although the precise nature of his claims is at times difficult to discern, he generally alleged that—for various reasons—Attorney Maguire provided ineffective assistance of counsel at his 2010 trial. He also contended that newly discovered evidence demonstrated his actual innocence.

The State moved for summary judgment under Vermont Rule of Civil Procedure 56(a), arguing that petitioner’s ineffective-assistance claims were barred as successive or an abuse of the writ, and therefore failed to state a claim on which a PCR petition could be granted.² The State also moved for summary judgment with respect to petitioner’s claim of newly discovered evidence, contending that the proffered evidence was neither newly discovered nor admissible and that claim, too, failed as a matter of law.

In February 2026, the civil division issued a written order granting summary judgment to the State. The court noted that petitioner did not respond to the State’s statement of undisputed material facts in the manner required by Rule 56(c)(2) and, on this basis, deemed those facts undisputed for purposes of ruling on the motion. It then explained that, though labeled as a habeas corpus petition, petitioner’s filing was appropriately characterized as a successive PCR petition under this Court’s case law. It held that the majority of petitioner’s claims either were raised and adjudicated in his first PCR proceeding or could have been raised during that proceeding and were therefore barred by the doctrines of limitations on successive petitions or abuse of the writ.³ Lastly, it concluded that petitioner’s claim of newly discovered evidence of

² The State also argued that, to the extent petitioner sought to argue that Attorney Maguire rendered ineffective assistance by failing to raise theories of contributory negligence and assumption of risk with respect to the complaining witness, this argument failed as a matter of law because these were not legal theories that could have been raised in defense to a criminal charge. The civil division did not address this issue in its summary-judgment decision and petitioner did not raise it on appeal. As a result, we do not discuss it further.

³ As the trial court implicitly recognized, it was difficult to discern whether some of the claims petitioner advanced in his second PCR petition were materially different to those advanced in his first PCR petition. It thus effectively conducted its analysis of the claims under both the successive-petitions and abuse-of-the-writ doctrines and drew the same conclusion under each.

his actual innocence was without merit and therefore could not provide a basis to grant a new trial or support a PCR claim. This appeal followed.

II. Analysis

At the outset, we note that petitioner does not challenge the civil division's conclusion that his petition—while styled as one for habeas relief—was appropriately characterized as a PCR action under 13 V.S.A. § 7136. See, e.g., Coyle v. Hofmann, 2009 VT 46, ¶ 5, 186 Vt. 525 (mem.) (explaining that Vermont's PCR statute was enacted to afford same rights as writ of habeas corpus and noting that “[w]e treat petitions for habeas corpus challenging sentences as [PCR petitions] under 13 V.S.A. § 7136”); see also, e.g., Fellows v. Att’y Gen., No. 2020-233, 2021 WL 73946, at *2 (Vt. Jan. 8, 2021) (unpub. mem.), <https://www.vtcourts.gov/sites/default/files/documents/eo20-233.pdf> (“Petitioner cannot avoid his most recent petition being deemed successive by labeling it as a habeas corpus rather than a PCR.”). We therefore likewise view the petition through this lens.

“Post-conviction relief is a limited remedy, intended to correct fundamental errors in the judicial process.” In re Kirby, 2012 VT 72, ¶ 9, 176 Vt. 322. The petitioner has the burden of proving that “fundamental errors rendered his conviction defective.” In re Dunbar, 162 Vt. 209, 211-12 (1994) (quotation omitted). “When reviewing a grant of summary judgment in a PCR proceeding, this Court applies the same standard as the trial court, viewing the facts in the light most favorable to the nonmoving party.” Burke II, 2019 VT 28, ¶ 16. Summary judgment must be granted “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” V.R.C.P. 56(a).

We first address petitioner's argument that the civil division erred in granting summary judgment because there were genuine disputes of material fact. As we have explained, it is not enough for a party opposing a motion for summary judgment “to rest on allegations in the pleadings to rebut credible documentary evidence or affidavits.” Boulton v. CLD Consulting Eng'rs, Inc., 2003 VT 72, ¶ 5, 175 Vt. 413 (quotation omitted). Rather, Civil Rule 56(c)(2) provides that a nonmoving party asserting that facts are genuinely disputed “must file a paragraph-by-paragraph response, with specific citations to particular parts of materials in the record that the responding party asserts demonstrate a dispute.” Petitioner filed a document he titled as an “opposition affidavit” with supporting documents, but it did not include the requisite “paragraph-by-paragraph response” to the State's statement of undisputed material facts. V.R.C.P. 56(c)(2). Where, as here, a party “fails to properly address another party's assertion of fact as required by Rule 56(c), the court may . . . consider the fact undisputed for purposes of the motion” and “grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it.” V.R.C.P. 56(e)(2), (3). Because petitioner did not address the State's factual statement in the manner required by Rule 56, the court did not err in deeming the State's statement of facts undisputed for purposes of ruling on the summary-judgment motion.

Petitioner also has not shown that the civil division erred in concluding that his claims were barred under the “two related but distinct restrictions that limit a petitioner's ability to raise a claim in a second or subsequent PCR petition: limitations on successive petitions and abuse of

the writ.” In re Towne, 2018 VT 5, ¶ 21, 206 Vt. 615. We set forth the law as to each doctrine before discussing the civil division’s analysis.

The limitation on successive petitions “applies to relitigation of claims actually raised and decided on the merits in an earlier PCR.” In re Bruyette, 2026 VT 18, ¶ 39 (quotation omitted). While we have at times “suggested that if a claim has been addressed on the merits in a prior proceeding, a court is affirmatively precluded from entertaining it again,” we have not expressly overruled prior case law “that calls for consideration of the ‘ends of justice’ in determining whether to entertain a successive petition raising a claim previously addressed on the merits.” Towne, 2018 VT 5, ¶ 23; see Bruyette, 2026 VT 18, ¶ 39 n.6 (recognizing that whether doctrine of successive petitions constitutes absolute bar remains open question under Vermont law). We need not address this issue here because, as discussed below, the trial court expressly weighed the ends of justice in its analysis.

The prohibition of abuse of the writ, in contrast, “pertains to claims raised for the first time in a second or subsequent PCR petition.” Towne, 2018 VT 5, ¶ 25. The State “bears the burden of pleading abuse of the writ, setting forth a petitioner’s writ history, identifying the claims that appear for the first time, and alleging the petitioner has abused the writ.” Id. Where the State pleads abuse of the writ, “the burden shifts to the petitioner to show cause for failing to raise the claim previously and actual prejudice from the default.” Id. “Under the cause prong, the petitioner must show some objective factor external to the defense that impeded counsel’s efforts to raise the claim in an earlier proceeding.” Id. (quotations omitted). Actual prejudice, in turn, “requires more than merely showing that the alleged errors during the underlying trial created a possibility of prejudice, but rather that they worked to the petitioner’s actual and substantial disadvantage, poisoning the entire trial with errors of constitutional dimensions.” Id. (quotations omitted).

In this case, the trial court reasoned that petitioner’s claims regarding his relationship with defense counsel and alleged conflicts of interest were raised and addressed on the merits in his prior PCR petition. See Burke II, 2019 VT 28, ¶¶ 25-36 (concluding that “personal acrimony between petitioner and Attorney Maguire did not result in ineffective assistance of counsel” and affirming PCR court’s grant of summary judgment to State on this basis). As to those claims appropriately characterized as having been actually raised and decided on the merits in Burke II, the civil division concluded that the “ends of justice” would not be served by addressing them again. Petitioner has not demonstrated that the civil division abused its discretion in reaching this conclusion. See, e.g., Towne, 2018 VT 5, ¶ 24 (“[T]o the extent that the ‘ends of justice’ are a pertinent consideration in determining whether to entertain a successive petition regarding a matter previously resolved on the merits, we defer to the trial court’s reasonable exercise of discretion on that question.”).

With respect to petitioner’s claims regarding Attorney Maguire’s failure to present certain defenses, call certain witnesses, ask certain deposition and impeachment questions, and assist him with his PSI interview or at sentencing, the civil division reasoned that—to the extent petitioner had not raised these claims in his prior PCR proceeding—he could have raised them there and had not met his burden to show cause for his failure to do so or actual prejudice. Again, petitioner has not demonstrated that the civil division erred in this conclusion. The court appropriately concluded that the State met its burden to plead abuse of the writ. Id. ¶ 25.

Accordingly, it was petitioner's burden to show cause for failing to raise the claim previously and actual prejudice from the default. Id. Because petitioner failed to oppose the State's statement of undisputed material facts, or to file a separate statement showing that other facts were material and genuinely disputed, he could not do so. See V.R.C.P. 56(c)(2) ("To the extent that the responding party asserts that there are additional material facts that should be considered, the party may file a separate and concise statement of additional material facts in numbered paragraphs, with specific citations to particular parts of admissible materials in the record.").

For these reasons, petitioner has not demonstrated that the court erred in concluding that the claims detailed above were barred by either the limitation on successive petitions or the abuse-of-the-writ doctrine and therefore entering summary judgment for the State. See Nesti v. Vt. Agency of Transp., 2023 VT 1, ¶ 36, 217 Vt. 423 ("When a defendant moves for summary judgment, it satisfies its legal burden by presenting at least one legally sufficient defense that would bar the plaintiff's claim." (quotation and alterations omitted)).

Lastly, we review the PCR court's grant of summary judgment for the State on petitioner's claim that newly discovered evidence showed his actual innocence. In support of this claim, petitioner filed an affidavit in which he averred that the complaining witness in his criminal trial told her friend, who told petitioner's friend, who told petitioner, that she had actually consented to having sexual contact with petitioner on the date of the alleged offense. On this point, the trial court explained that a new trial on the basis of newly discovered evidence is warranted only where a petitioner establishes: "(1) the new evidence would probably change the result upon retrial; (2) the new evidence was discovered after trial; (3) the evidence could not have been discovered sooner through due diligence; (4) the evidence was material; and (5) the evidence was not merely cumulative or impeaching." Coyle, 2009 VT 46, ¶ 8 (quotation omitted). The civil division reasoned that petitioner's affidavit described only inadmissible double hearsay, and he made no effort to explain why the evidence could not have been discovered sooner or how—assuming it could be admitted in some way—it would change the result upon retrial. See V.R.E. 801(c) (defining "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"); V.R.E. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by statute.").

Although petitioner argues that the civil division should have held an evidentiary hearing on this question, he does not address his failure to file a statement of disputed or undisputed material facts under Civil Rule 56(c). In any event, the court considered his affidavit and concluded that the facts alleged therein would not be admissible—and that, as a result, the new evidence could not change the outcome upon retrial. See V.R.C.P. 56(c)(6) (providing that "[a]n affidavit or declaration used to support or oppose" summary-judgment motion must, among other things "set out facts that would be admissible in evidence"). Petitioner fails to explain why this was error.

To the extent petitioner seeks to raise additional arguments on appeal, they are inadequately briefed. Petitioner bears the burden "to demonstrate how the lower court erred warranting reversal" and this Court "will not comb the record searching for error." In re S.B.L., 150 Vt. 294, 297 (1988); see V.R.A.P. 28(a)(4) (requiring that argument section of appellant's brief contain "the issues presented, how they were preserved, and appellant's contentions and the

reasons for them—with citations to the authorities, statutes, and parts of the record on which the appellant relies”). Even considered with the “wider leeway” afforded to self-represented litigants, any other arguments petitioner may have intended to raise in his briefs do not satisfy “the minimum standards required by Vermont Rule of Appellate Procedure 28(a)(4),” and we therefore cannot consider them. Pcolar v. Casella Waste Sys., Inc., 2012 VT 58, ¶ 19, 192 Vt. 343 (quotation omitted).

We have addressed all arguments discernible in petitioner’s briefs and conclude that he has not identified any basis to disturb the civil division’s grant of summary judgment to the State.

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Nancy J. Waples, Associate Justice

Christina E. Nolan, Associate Justice