



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 Morris Nelson*

} APPEALED FROM:
} Superior Court, Bennington Unit,
} Civil Division
} CASE NO. 20-CV-00711
} Trial Judge: David A. Barra

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

Petitioner appeals a civil division order granting the State summary judgment in this post-conviction relief (PCR) proceeding. On appeal, petitioner argues that there were genuine issues of material fact that precluded summary judgment. We affirm.

Petitioner was convicted by a jury of aggravated sexual assault as part of a common scheme or plan, sexual assault of a minor entrusted to his care by authority of law, and sexual exploitation of a minor. He was sentenced to twelve years to life. Petitioner appealed to this Court, arguing, among other things, that his convictions violated the Double Jeopardy Clause and there was insufficient evidence to prove the by-authority-of-law element of entrustment. State v. Nelson, 2020 VT 94, ¶ 1, 213 Vt. 368. This Court vacated the exploitation charge on grounds of double jeopardy, id., ¶¶ 34, 41, but upheld the other two convictions, concluding that a reasonable jury could conclude that entrustment occurred based on the State's evidence. Id. ¶ 43.

The evidence at trial included the following. Petitioner was a teacher at a girls' school in southern Vermont and developed a close relationship with the victim, who was a student there. In October 2015, petitioner brought the victim to a concert, booked a hotel room, and provided the victim with alcohol. Victim became intoxicated to the point that she and petitioner were not allowed to enter the concert. Petitioner took the victim back to the hotel and engaged in nonconsensual vaginal sex. About a month later, petitioner's employment ended at the school. He and his wife then became permanent caring adults for the victim through the New Hampshire equivalent of the Department for Children and Families (DCF). Petitioner sexually assaulted the victim at his home while his wife was vacationing, and on other occasions, including at a hotel and in his vehicle.

The victim did not report the abuse, but did tell a classmate that petitioner had raped her. After the classmate disclosed this to a therapist at school, police became involved. As part of the

investigation, a detective interviewed the victim. During an initial interview, the victim denied any sexual relationship with petitioner. The detective testified that the victim was confused when first questioned, and later became a bit cut off, her bottom lip quivered, and she appeared nervous. The detective also interviewed petitioner, who did not deny the allegations.

The victim later went to the police department and reported petitioner's sexual assaults. She stated that petitioner had repeatedly sexually assaulted her in his home and at a hotel. At trial, defense counsel cross-examined the victim extensively regarding the differences between her first and second interviews, and she admitted that she had lied to the detective during the first interview. She explained that she lied because she had nowhere to go, and petitioner became increasingly aggressive between the two interviews.

Petitioner filed this PCR action alleging that his trial counsel was ineffective. As part of the PCR proceeding, petitioner disclosed an expert report from a retired criminal defense lawyer, which asserted that trial counsel was ineffective in failing to use the video to impeach the detective or the victim.¹ The expert stated that, in his opinion, the victim's demeanor changed dramatically between the first and second interviews and the circumstances of the first interview made the statements more reliable. The expert also indicated that the video did not support the detective's statement that during the first interview the victim's lip quivered when questioned about a sexual relationship with petitioner. Therefore, the expert opined that trial counsel should have sought to introduce the video at trial as a prior inconsistent statement.

Defense counsel provided a deposition in which he explained that he would have used the video to impeach the victim, but on cross-examination she agreed that she lied in her first interview.

The State moved for summary judgment and to exclude the report of petitioner's expert. The State argued that petitioner's expert report offered legal conclusions and a preferred litigation strategy rather than an admissible expert opinion. As to the merits, the State argued that the video of the first interview would not have been admissible to impeach either the detective or the victim because they both testified that she changed her story, and that defense counsel's decision not to seek admission of the video was a matter of trial strategy.

The PCR court granted the motion for summary judgment, concluding that even accepting the factual assertions in the expert report, petitioner failed to identify any actions that trial counsel took that fell below the acceptable standard of the profession. The PCR court explained that trial counsel pursued many of the strategies identified by petitioner's expert, including cross-examining the victim about her inconsistent statements. The court concluded that trial counsel's decision not to seek to admit the video was a matter of trial strategy. Moreover, the court concluded that even assuming trial counsel's actions fell below the professional standard, petitioner had not demonstrated that they reasonably affected the outcome of the case. The court noted that the jury heard from the two detectives who interviewed the victim and from the victim herself about her different reports of petitioner's actions. The jury

¹ Petitioner also argued that trial counsel was ineffective for failing to present evidence that the victim was not in petitioner's legal custody when the sexual assaults occurred. The PCR court concluded that there was no merit to this argument because this Court ruled on his direct appeal that the State presented sufficient evidence to prove entrustment and petitioner had not identified what proof trial counsel could have obtained to disprove this evidence. Petitioner does not raise any issue on appeal related to this argument.

also heard the victim’s explanation of why her statements denying sexual assault in the first interview were inconsistent with the second. Petitioner did not demonstrate how seeking to impeach one interviewing detective’s observation of the victim would have altered the jury’s view of the victim’s credibility.

“Post-conviction relief is a limited remedy, intended to correct fundamental errors in the judicial process.” In re FitzGerald, 2020 VT 14, ¶ 29, 212 Vt. 135 (quotation omitted). Petitioner had the burden of proving the merits of the petition by a preponderance of the evidence. Id. When a PCR is based on ineffective assistance of counsel, there is a two-part test for evaluating the claim. Id. ¶ 31. Petitioner must first show that “defense counsel’s performance fell below an objective standard of reasonableness informed by prevailing professional norms.” Id. (quotation omitted). Next, petitioner must demonstrate that the performance “prejudiced the defense by demonstrating a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. ¶ 32. Because the court’s decision was made at summary judgment, we use the same standard as the trial court and consider whether there were genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. In re Lowry, 2013 VT 85, ¶ 7, 195 Vt. 14; see V.R.C.P. 56(a) (providing summary-judgment standard). Therefore, the State is entitled to summary judgment if the undisputed facts, when viewed in the light most favorable to petitioner, indicate that trial counsel’s performance did not fall below prevailing professional norms and there is a reasonable probability that without the errors the result would not have been different. Lowry, 2013 VT 85, ¶ 8.

Petitioner argues that the PCR court failed to view the facts in the light most favorable to him as the nonmoving party because it did not view the video of the first interview before resolving his claims. There was no error. For purposes of resolving the summary-judgment motion, the PCR court accepted petitioner’s factual assertions regarding the video of the first interview—that it did not support the detective’s description that there was a change in the victim’s demeanor, that her lip quivered, and she was nervous. According to petitioner, the video does not support these claims and instead shows that the victim had a calm demeanor. The PCR court was not required to view the video to take petitioner’s facts regarding its contents as true for purposes of resolving summary judgment. In any event, this Court on appeal views the summary-judgment record without deference to the trial court’s decision and makes its legal conclusions taking petitioner’s factual assertions regarding the video as true.²

Petitioner next argues that this Court cannot conclude as a matter of law that trial counsel’s decision not to seek to introduce the video to impeach the detective fell within prevailing professional norms. There is a “heavy” burden to show that trial counsel’s performance fell below an objective standard of reasonableness and trial counsel is “permitted a great deal of discretion in decisions regarding trial strategy, and even the failure of that strategy is not the standard by which a reviewing court will measure trial counsel’s competence.” In re Dunbar, 162 Vt. 209, 212 (1994). The question is whether trial counsel’s decision was “within the range of competence demanded of attorneys in a criminal case at that time.” Id. (quotation omitted).

² Petitioner’s expert claimed that the video did not show that the victim’s lip quivered or her demeanor changed. Therefore, we assume this is true for purposes of resolving this motion for summary judgment.

Petitioner claims that his expert provided an un rebutted expert opinion that trial counsel was ineffective for failing to seek introduction of the video to impeach the detective. Petitioner relies on Lowry, where this Court reversed a summary-judgment decision because the PCR court relied on its own characterization of facts, instead of that presented by the petitioner. 2013 VT 85, ¶ 10. Here, petitioner has not shown that there were disputed facts that the PCR court failed to construe in his favor. The fact that petitioner’s expert made a legal conclusion that trial counsel’s performance fell below accepted norms did not require the PCR court or this Court to accept it for purposes of summary judgment. See Rodrigue v. Illuzzi, 2022 VT 9, ¶ 33, 216 Vt. 308 (explaining that at summary-judgment stage, “courts are not required to accept conclusory allegations or legal conclusions masquerading as factual conclusions” (quotation omitted)).

Taking all facts in the light most favorable to petitioner, the undisputed facts establish that trial counsel’s performance fell within an acceptable legal level of practice and the choices made by trial counsel amount to legal strategy rather than ineffective assistance. The thrust of petitioner’s expert’s report was that trial counsel should have used the videos to undermine the victim’s credibility and the detective’s description of her during the interview. The report then assumes that all parts of the video would have been admissible at trial, without explaining the basis for admissibility.

Trial counsel here pursued the exact strategy identified by petitioner’s expert—he sought to undermine the credibility of the victim through cross-examination and by highlighting the differences in her statements between her first and second interviews. The video of the interview was hearsay and could have been admitted only if an exception applied. See, e.g., V.R.E. 613 (providing requirements for admission of prior inconsistent statement of witness). Trial counsel explained that he did not seek to introduce the video to impeach the victim because he did not think it would be admissible, given that it lacked any impeachment value after the victim admitted that she had lied during the first interview. This is an entirely acceptable view of the law. See State v. Labrecque, 2024 VT 54, ¶ 12, 220 Vt. 27 (“While prior inconsistent statements can be used to impeach the credibility of a witness, the court must be persuaded that the statements are indeed inconsistent.” (quotation omitted)). As to seeking to admit the video to impeach the detective, petitioner does not provide a clear basis for admission. The detective testified as to his observations of the victim during the interview. Even if the video did not corroborate those observations, it is not readily apparent that the video could have been admitted to impeach the detective’s own observations. Therefore, even construing the facts in the light most favorable to petitioner, he has failed to show that portions, much less all, of the video would have been admissible to rebut the detective’s description of the victim during the first interview.

“Where the theory of law is untested or unsettled, counsel cannot be faulted for failing to raise every possible defense—this is both an unduly heavy and impractical burden.” In re Kirby, 2012 VT 72, ¶ 13, 192 Vt. 640 (mem.). The undisputed facts show that trial counsel pursued the strategy identified by petitioner’s expert, and the decision not to seek to admit the video to impeach the detective was a reasonable interpretation of the law rather than ineffective assistance. Because we conclude that petitioner has not met the first prong of an ineffective-assistance claim, we do not reach the question of whether any deficient performance reasonably affected the outcome of the trial.

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Nancy J. Waples, Associate Justice

Christina E. Nolan, Associate Justice