Ingerson v. State, No. 512-12-04 Wmcv (Wesley, J., Mar. 29, 2007)



**STATE OF VERMONT**
**WINDHAM COUNTY, SS.**

**JAMES INGERSON,**
**Petitioner,**

**v.** **WINDHAM SUPERIOR COURT**
**DOCKET NO. NO. 512-12-04 Wmcv**

**STATE OF VERMONT,**
**Respondent.**

**OPINION AND ORDER ON PETITION FOR POST-CONVICTION RELIEF**

On March 10, 2002, James Ingerson was convicted of a felony violation of 13 V.S.A. § 1201 for burglary and a misdemeanor violation of 13 V.S.A. § 3701(c) for unlawful mischief. The State sought habitual offender enhancement and the District Court imposed a sentence of twenty to thirty years to serve for the burglary and a concurrent sentence of five to six months to serve for the unlawful mischief. The conviction was affirmed in *State v. Ingerson*, 2004 VT 36, 176 Vt. 428. On December 6, 2004, Mr. Ingerson filed the instant petition alleging various grounds, of which, after the reframing of his petition per the Court's scheduling order, only one remained for the trial held in this matter on February 27, 2007. Mr. Ingerson contends that he was denied effective assistance of trial counsel with regard to the presentation of his presentence investigation report. Based on the evidence and argument presented at the hearing, as well as the record in this case including transcripts from the district court proceedings, the Court concludes that Mr. Ingerson failed to show by a preponderance of the evidence that counsel's errors

prejudiced his sentence, and therefore **DENIES** the petition.

Mr. Ingerson was present and represented by Eric S. Louttit, Esq. at the post-conviction trial on February 27th.[1] The State was represented by Windham County State's Attorney, Dan M. Davis. Mr. Ingerson's former trial counsel, Joanne Baltz, testified, as did two attorneys whom the Court recognized for their criminal defense expertise, Matt Harnett, Esq. and Stephen Fine, Esq.

**Findings of Fact**

Mr. Ingerson's sentence was considered and imposed on February 7, 2003. The presentence investigation report, which consists of twenty six pages, including attachments and cover, recommended a sentence of 20-25 years to serve. The report was distributed and Attorney Baltz received a copy about ten days before the scheduled hearing.[2] Rather than visit with Mr. Ingerson at the Newport Correctional Center where he was incarcerated prior to sentencing, Ms. Baltz phoned Mr. Ingerson to discuss the document. Although she did not read him the preliminary matters at the beginning of the report and it is unlikely she read every word that followed, Ms. Baltz's testimony and her pencil marks throughout the report establish the comprehensive breadth of her conversation with Mr. Ingerson and the likelihood that she reviewed with him virtually all of the salient aspects of the report and its recommendations. Telephone records indicate that the call lasted 55 minutes. Nonetheless, it is undisputed that Ms. Baltz did not offer Mr. Ingerson the opportunity to read the report himself, nor did she consult him about the extension of time that he might have requested given the late delivery of the

[1] In these post-conviction proceedings, Mr. Ingerson was represented by no less than four attorneys. For reasons unrelated to their client, Attorneys Mark Furlan, Robert Manley and Adele Pastor each represented him for a period of time before being granted leave to withdraw.

[2] V.R.Cr.P. 32(c)(3) provides: "[t]he presentence investigation report shall be available for inspection by the defendant, his attorney, and the prosecution at least fourteen (14) days prior to sentencing."

presentence investigation. She felt no need for additional time herself. Instead, she timely prepared and filed a list of seven objections to the presentence investigation based on her conversation with Mr. Ingerson, and made arrangements for various witnesses to attend the sentence hearing. Ms. Baltz testified that she does not always file all the objections that defendants raise, depending on strategic considerations. Based on her assessment as revealed by her testimony, it is unlikely Attorney Baltz would have done anything differently in Mr. Ingerson's case even if the presentence investigation had been timely produced.

Most of the objections which Ms. Baltz listed for the court were efforts to recharacterize factual statements in the report, rather than claims that facts had been inaccurately reported. With the exception of two factual errors, the objections were denied on this basis. In his petition, and by his testimony, Mr. Ingerson specified other matters about which he claims he would have wanted to object, had he been given the opportunity to read his presentence investigation report himself before the sentencing took place. As with most of the objections raised by Ms. Baltz, these consist mostly of re-characterizations rather than corrections of fact. They include his perception that the burglary and unlawful mischief convictions had not involved any victims and were not violent, that the statement of debt outstanding to the Department of Corrections did not reflect that he had already paid some of the money owed, that the seven times for which he had been returned to jail were for sanctions rather than new criminal charges, that only two of many urinalysis tests were positive, and that while he believed the presentence recommendation was excessive, he was willing to acknowledge that some term of imprisonment was appropriate.

On the day of sentencing, Mr. Ingerson exercised his right of allocution. He offered his own explanation of his actions and asked the district court to take his substance abuse problem into consideration as well as his desire to work his problems out. Evidently, the District Court was unswayed by Mr. Ingerson's reasoning or expressions of remorse. Noting that she had made

a careful accounting of his prior record, the sentencing judge concluded that Mr. Ingerson had already had his opportunities to succeed on probation and with treatment, and that it was now time for a sentence focused on incapacitation and deterrence.

Attorneys Harnett and Fine each gave an opinion as to the professional standards for defense counsel with regard to the duty to insure that defendants are given the opportunity to personally review a presentence investigation report. Attorney Harnett opined that Ms. Baltz did not meet prevailing practice norms as embodied by Rule 32 of the Vermont Rules of Criminal Procedure when she failed to provide Mr. Ingerson with an opportunity to read his own report and by failing to advise him of his right to request a continuance because the report was late. Attorney Fine, on the other hand, stated his opinion that it is an acceptable alternative to read a presentence investigation report to a defendant by telephone even if the reading does not include the entire document. For his part, Mr. Harnett declined to venture any opinion as to whether or not a different outcome might have resulted at sentencing if Mr. Ingerson had been able to read his report and raise the objections he later identified. On the other hand, Mr. Fine testified that it was his opinion that none of the additional objections identified by Mr. Ingerson would have resulted in a different outcome. He acknowledged that the sentence could fairly be characterized as harsh, in light of all the circumstances described in the presentence investigation report. Nevertheless, in Mr. Fine's opinion, most of the objections raised by Mr. Ingerson were "minutaie" that would have detracted from the major thrust of his plea for leniency which was based on his capacity for rehabilitation. Indeed, Attorney Fine would have strongly discouraged resort to such "nit-picking" as likely to be seen by the court as evading responsibility, and he believed Attorney Baltz made the tactically sound election to forego such a strategy. Moreover, as Mr. Fine observed, most of the issues about which Mr. Ingerson would have taken issue were not matters to which the sentencing judge gave any particular attention in stating her sentencing

rationale.

**Analysis**

To demonstrate ineffective assistance of trial counsel in a petition for post-conviction relief, the proponent must show (1) that trial counsel's performance fell below a standard of reasonableness based on prevailing professional norms, and (2) that this sub-standard performance prejudiced the defense, in the sense that there is a reasonable probability that the result would have been different had counsel's performance not been sub-standard. See, e.g., *In re LaBounty*, 2005 VT 6, ¶ 7, 177 Vt. 635, 636; *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984).

The only issue of ineffective representation raised in this case concerns the application of V.R.Cr.P. 32, which governs sentencing and the disclosure and use of presentence investigation reports. Clearly, Rule 32 anticipates that a defendant will have the opportunity to review his or her own presentence investigation report prior to sentencing. The rule mandates disclosure of the report "to the defendant, his attorney, and the prosecution" and further specifies that it shall be made available for inspection "by the defendant, his attorney, and the prosecution at least fourteen(14) days prior to sentencing." V.R.Cr.P. 32(c)((3). In addition, pursuant to Rule 32(a)(1)(A), before imposing sentence a judge is obligated to determine "that the defendant and his counsel have had the opportunity to read and discuss" the report.[3] The rule employs an atypical identification of the defendant's independent (though concurrent) right to inspect the PSI report, together with his defense counsel, representing the specific recognition of a defendant's

[3] It is undisputed that the sentencing judge did not make this inquiry in Mr. Ingerson's case. However, Mr. Ingerson does not invoke this omission as a separate ground for relief. In any event, viewing the underlying issue through the lens of his claim for ineffective assistance results in the same analysis.

personal need to have such direct access.

The amendments to Rule 32 promulgated in 1985 introduced the current language to V.R.Cr.P. 32(a)(1)(A), a "form of judicial prodding" to insure full disclosure. Reporter's Notes-1985 Amendment. The notes explain further that the new text was intended to insure that "the defendant and defendant's counsel have read" the report. *Id*. As originally amended in 1985, and to effect this goal, the rule required the court to send a copy of the report directly to the defendant. This requirement was deleted shortly thereafter on account of concerns that defendants did not always understand that the factual allegations and sentencing recommendation in the reports were not binding, and because the reports might be highly upsetting to some defendants. History, Purpose of 1985 emergency amendment. However, the amendment which removed that requirement was meant "to insure that defendants review the report for the first time in the presence of counsel," without otherwise "limit[ing] the defendant's right of access to the report." Reporter's Notes-1985 Emergency Amendment. The importance of these goals was confirmed in *State v. Ramsey*, 146 Vt. 70(1985), a decision issued between the original and emergency amendments of 1985. By that ruling, the Vermont Supreme Court reviewed "the goals of sentencing, and defendant's constitutional rights in the sentencing process, in order to identify the sentencing procedures that basic concerns of criminal justice compel." *Id*. at 77-78(internal quotation and citation omitted). Holding that defendants have the constitutional right to be sentenced only on the basis of reliable factual information, the court mandated full disclosure of presentence investigation reports sufficiently in advance of sentencing to allow an adequate opportunity for rebuttal. *Id.* at 81.

Notwithstanding Attorney Fine's opinion to the contrary, the Court is convinced that the prevailing norms of professional conduct require defense attorneys to comply with the full mandate of Rule 32 by insuring that their clients are offered meaningful opportunities to make an

independent review of their own presentence investigation reports.[4] Attorney Baltz did not meet this standard in Mr. Ingerson's case by reviewing the document with him on the telephone.

Having reached this conclusion, the Court must determine if trial counsel's error prejudiced Mr. Ingerson's case at sentencing; in other words, whether there is a reasonable probability that he would have received a lower sentence if Ms. Baltz had fully complied with Rule 32 and Mr. Ingerson had had a timely opportunity to read his presentence report. In this regard, the Court observes that Mr. Ingerson's expert, Attorney Harnett, specifically declined to offer an opinion on this question, while the State's expert strongly resisted the notion that Mr. Ingerson's unexpressed objections would have made any difference at all. For its part, the Court is convinced that Attorney Baltz's error was of a technical nature that did not affect the final result. As Attorney Fine suggested, it is often true that raising a proliferation of marginal issues and arguments dilutes the impact of the better ones, and it is part of counsel's responsibility to decide which issues and arguments to emphasize. It is not likely that Attorney Baltz would have chosen to present the additional objections later identified by Mr. Ingerson, but even if she had, the Court agrees that there is no reasonable probability that either any one or all of them together would have persuaded the sentencing judge to reach a different result.

Although the petition focuses on a specific error that counsel made, it occurs against the background of the proceedings as a whole, and the quality of counsel's performance throughout.

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[4] The Court recognizes that this can be a difficult burden for those with busy practices and clients incarcerated at the other end of the state, even with the full fourteen day advance period. While the Court acknowledges the concerns which lead to the 1985 emergency amendment and relieved the courts of the duty to send a copy of the report directly to defendants, the fact that a copy is not routinely generated expressly for the defendant seems problematic. Since defense counsel is precluded from making further copies, see V.R.Cr.P. 32(c)(5), the daunting logistics driving the approach elected by Attorneys Baltz and Fine (and doubtless many others) are easily understood.

See *In re Hatten*, 156 Vt. 374, 378 (1991) (court evaluates counsel's competency by reviewing record as a whole); *In re King*, 133 Vt. 245, 248 (1975) (a defendant has a constitutional right to a fair trial, but not an errorless one). Taking the whole of Ms. Baltz's preparation for and conduct of Mr. Ingerson's sentencing, the Court concludes that there was no fundamental breakdown of the adversary process nor any errors which undermine confidence in the result.

Based on the conclusion that Mr. Ingerson was not prejudiced by counsel's failure to comply with Rule 32, the petition for post-conviction relief is **DENIED**.

Dated at Newfane, Vermont, this ____ day of March, 2007.

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John P. Wesley
Superior Court Judge