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

SUPREME COURT DOCKET NO. 2018-124

SEPTEMBER TERM, 2018

In re Robert Boule*	}	APPEALED FROM:
	}	
	}	Superior Court, Orange Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 179-10-15 Oecv
		Trial Judge: Michael J. Harris

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

Petitioner appeals pro se from the trial court's denial of his petition for post-conviction relief (PCR). Petitioner was represented by counsel below. He challenges the court's findings both as unsupported and internally inconsistent. We affirm.

In March 2012, petitioner pled guilty to a single count of lewd and lascivious conduct with a minor. In his PCR petition, petitioner argued that his attorney coerced him into pleading guilty and thus, his plea was involuntary. See In re Quinn, 174 Vt. 562, 564 (2002) (mem.) ("Coercion by the defendant's attorney will render a plea involuntary."); see also Edwards v. Garrison, 529 F.2d 1374, 1380 (4th Cir. 1975) ("A guilty plea is not voluntary and must be stricken if [an accused's] free will is overborne by . . . the accused's lawyer."). Following an evidentiary hearing, the PCR court granted judgment to the State. It concluded, based on the totality of the circumstances, that petitioner failed to show that the plea was involuntary.

The court made the following findings. Petitioner was initially charged with two counts of aggravated sexual assault against his stepdaughters. The abuse allegedly began in 2000. The alleged victims provided similar descriptions of petitioner's conduct; they described multiple, sometimes daily, sexual assaults. Petitioner was charged with one count of sexual assault on T.G. and one count of sexual assault on P.G. The maximum sentence for each count was life imprisonment.

An experienced criminal defense lawyer was appointed to represent petitioner. The attorney served as petitioner's attorney for over a year. In that time, he hired an experienced licensed private investigator. Petitioner told his attorney that he was innocent. The complaining witnesses were deposed and petitioner and his attorney discussed the results of the deposition. Defense attorney found the women facially credible and assessed that at trial, their testimony could provide sufficient proof to convict petitioner on both counts. On the morning of the jury draw, the State offered a plea agreement to resolve both charges. Under the agreement, petitioner would plead guilty to one count of lewd and lascivious conduct with a child as to T.G. and the remaining

count involving P.G. would be dismissed. The plea agreement called for a maximum sentence of five to fifteen years, all to serve. The agreement called for an "open" but contested sentencing hearing.

There was conflicting testimony about the plea-agreement discussion that occurred between petitioner and assigned counsel. The investigator was present during these discussions, as well. Petitioner testified that his assigned counsel and the investigator coerced him into accepting the plea agreement. Counsel and the investigator could not recall the details of the plea agreement discussion. The investigator recalled that she did not feel that the plea decision was pressured. Counsel testified that he recalled no hesitancy on petitioner's part. Although petitioner claimed that he was taking certain medicine at the time of the plea, which impacted his decision-making ability, the court found no indication that petitioner told counsel of this. If he had, the court found that counsel would have investigated further and taken other steps to ensure a valid plea.

The PCR court accepted counsel's and the investigator's testimony that they did not pressure petitioner into accepting the plea agreement. It identified the following reasons for reaching this conclusion: petitioner's plea colloquy was inconsistent with his claim of a coerced plea; during the plea hearing, petitioner admitted to clear facts that constituted the crime of lewd and lascivious behavior as to T.G.; petitioner's statements during the presentence investigation (PSI) supported the conclusion that petitioner admitted (and committed) at least the lewd-and-lascivious-conduct charge to which he pled; the terms of the plea agreement wherein petitioner admitted to lewd and lascivious behavior with T.G., while denying the alleged repeated sexual assaults of both children, were consistent with petitioner's PSI statements and his continued protestations of innocence as to the charged aggravated sexual assault; petitioner never sought to withdraw his plea; assigned counsel had no reason to pressure petitioner to take a plea deal that the client did not want, particularly as he was prepared to go to trial on the day the plea agreement was offered; petitioner's version of events would require the court to find that both assigned counsel and the investigator engaged in inappropriate and/or unethical conduct, and the court did not find that the investigator would have given petitioner advice as to what was in his "best interests" as petitioner argued; and acceptance of the plea offer was entirely consistent with petitioner's goals at the time of the jury draw and when he accepted the plea offer. Based on its conclusion that petitioner's plea was not coerced, the court entered judgment for the State. This appeal followed.

Petitioner challenges various findings as unfounded. We do not address these arguments because petitioner failed to order a transcript of the proceedings below. He thereby waived his right to challenge the court's findings. See V.R.A.P. 10(b)(1) ("By failing to order a transcript, the appellant waives the right to raise any issue for which a transcript is necessary for informed appellate review."). "Without the transcript, this Court assumes that the trial court's findings are supported by the evidence." Evans v. Cote, 2014 VT 104, ¶ 7, 197 Vt. 523.[*]

Petitioner next argues that the court's decision contains inconsistent findings. Many of these arguments are simply challenges to the trial court's assessment of the credibility of witnesses

[*] The State moves to strike certain material in the printed case as it was not part of the record below. We have not relied upon this material, and we therefore deny the request as moot.

and the weight of the evidence. He contends, for example, that assigned counsel and the investigator could not have been "surprised" that he accepted the plea agreement given his testimony that they coerced him into accepting the agreement. As indicated above, the court did not credit petitioner's version of events, and there is no inconsistency as alleged by petitioner. We do not disturb the court's assessment of the weight of the evidence on appeal. See, e.g., Cabot v. Cabot, 166 Vt. 485, 497 (1997) ("As the trier of fact, it [is] the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence."). Petitioner raises other arguments in this vein, which we reject on similar grounds. This includes petitioner's assertions that: the PCR court should not have considered his failure to seek to withdraw his plea as inconsistent with his coercion claim; assigned counsel did have a reason to pressure petitioner to take a plea deal that petitioner did not want; and assigned counsel and the investigator did act inappropriately and/or unethically. The fact that petitioner disagrees with the court's findings and conclusions does not render them erroneous.

Petitioner next asserts that the court's finding that counsel and the investigator "could not recall the details of the plea agreement discussion from 2012" is inconsistent with the court's recitation of the testimony of what these parties did recall about the plea discussion, i.e., that petitioner was not pressured and that petitioner did not hesitate to accept the agreement. We find no inconsistency. One could reasonably forget the precise details of a conversation while remembering the gist of that conversation.

Petitioner next argues that the court erred in finding that petitioner's plea colloquy was inconsistent with his claim of a coerced plea. Petitioner contends that the record reflects "[s]cripted questions with rote answers" and that the colloquy is not inconsistent with a claim of a coerced plea. Again, this goes to the trial court's assessment of the weight of the evidence. The PCR court explained that during the plea colloquy, petitioner, among other things, acknowledged various rights that he was giving up; confirmed that he knew he could go to trial and stated that he "want[ed] to move on with [his] life and admit up to it"; and denied being under the influence of drugs or alcohol or suffering from any mental condition that made it hard to understand what was happening. The PCR court also found no hint of hesitancy or equivocation by petitioner in his exchanges with the trial judge. The court further found that, during the plea hearing, petitioner specifically admitted to clear facts that constituted the crime of lewd and lascivious behavior as to T.G. While petitioner contends that his recitation was "scripted," the court acted within its discretion in drawing a different conclusion from this evidence. It did not err in finding the plea colloquy inconsistent with petitioner's claim of a coerced plea. See In re Raymond, 137 Vt. 171, 181 (1979) ("Assertions in open court of voluntariness and lack of coercion, while not binding on a post-conviction proceeding, are cogent evidence against later claims to the contrary.").

Petitioner next challenges the court's finding that the evidence regarding his PSI statements supported the conclusion that petitioner admitted (and committed) at least the lewd-and-lascivious-conduct charge to which he pled. Petitioner argues that the PSI report was not in evidence and the court's finding is unfounded. We reject this argument. The PCR court acknowledged that the PSI report was not in evidence. It expressly based its finding on the plea hearing transcript, which was in evidence. There, the sentencing court stated that "in the presentence report, in a portion that is not objected to, [petitioner] admits to having contact inappropriately with T.G." This finding is

grounded in the evidence, and it supports the court's additional finding that petitioner's PSI statements were consistent with the terms of his plea agreement.

Finally, petitioner argues that his counsel in the PCR proceeding was ineffective. This claim is not properly before us as the trial court has never considered or ruled on such claim. See State v. Lund, 168 Vt. 102, 106 (1998) (holding that where there is "no record from which to judge defendant's claims of ineffective-assistance-of-counsel, we will not consider [such claims] on direct appeal from the proceeding in which the assistance was allegedly ineffective").

We have considered all of petitioner's arguments and find them all without merit. The court did not err in granting judgment to the State on petitioner's PCR.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Beth Robinson, Associate Justice