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. 2019-329

JUNE TERM, 2020

In re Darrell F. Day*	}	APPEALED FROM:
	}	
	}	Superior Court, Bennington Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 28-1-18 Bncv
		Trial Judge: David A. Barra

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

Petitioner appeals the dismissal of his second petition for post-conviction relief (PCR) as an abuse of the writ. We affirm.

In October 2010, petitioner was arrested after he drove while intoxicated, crashed into a minivan carrying an adult and three children, and attempted to flee from police. At the time, petitioner had forty-five prior convictions, fourteen of which were felonies and many of which involved assaultive behavior.

Petitioner pled guilty in June 2011 to five offenses, including one count of driving under the influence, third offense (DUI-3). The two predicate offenses for the DUI-3 conviction occurred in June 1986 and November 1991. Petitioner received a twenty-to-forty-year sentence for the DUI-3 conviction. The sentence was based on a habitual offender enhancement under 13 V.S.A. § 11.

Petitioner subsequently filed a motion for sentence reconsideration, which was denied by the trial court. We affirmed that decision on appeal, rejecting petitioner's arguments that his sentence violated the Ex Post Facto Clause of the United States Constitution and that it exceeded the sentence authorized by law. State v. Day, No. 2012-222, 2012 WL 6633576 (Vt. Dec. 13, 2012) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo12-222.pdf [https://perma.cc/L686-YRFB].

In July 2012, petitioner filed a pro se PCR petition claiming that his DUI-3 conviction violated the Ex Post Facto Clause and 1 V.S.A. § 214. Petitioner was subsequently assigned counsel. In April 2013, petitioner's counsel filed an amended PCR petition that reasserted his ex-post-facto claim and added a claim that he did not receive proper credit for the time he served prior to sentencing. The trial court granted partial summary judgment to the State on the ex-post-facto claim. In October 2013, petitioner's counsel filed a second amended petition claiming ineffective assistance of trial counsel and asserting that petitioner's guilty plea to the DUI-3 charge was involuntary due to his trial counsel's ineffective assistance. The trial court granted summary judgment to the State on all claims. We affirmed on appeal. State v. Day, No. 2014-134, 2015

WL 196312 (Vt. Jan. 9, 2015) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo14-134.pdf [https://perma.cc/GSD2-F8W8].

In November 2015, petitioner filed a pro se petition for habeas corpus in federal district court, claiming that his sentence for the DUI-3 conviction violated the Ex Post Facto Clause, that the superior court and this Court violated his right to due process, and that his trial attorney provided ineffective assistance. The district court granted summary judgment to the State. Day v. Menard, No. 2:15-CV-234-CR-JMC, 2017 WL 2623801, at *11 (D. Vt. Apr. 4, 2017), report and recommendation adopted, No. 2:15-CV-234, 2017 WL 2633505 (D. Vt. June 16, 2017).

In January 2018, petitioner filed the PCR petition that is the subject of this appeal. In this second proceeding, he alleged that his 2011 DUI-3 conviction should be vacated because the plea colloquy supporting the 1991 predicate conviction did not comply with Vermont Rule of Criminal Procedure 11(f) and a record of that colloquy was not preserved as required by Rule 11(g). Petitioner did not make these arguments in his original or amended petitions in the first PCR proceeding or in his federal habeas corpus petition. The State moved to dismiss for abuse of the writ, and defendant alleged in his response that both trial counsel and PCR counsel rendered ineffective assistance of counsel. The trial court granted the State's motion to dismiss the petition as an abuse of the writ, concluding that petitioner could have raised his Rule 11 claims in the earlier proceedings and did not show cause for failing to do so. This appeal followed.

Vermont's PCR statute provides that a prisoner who is in custody under sentence of a court and claims that his confinement is illegal "may at any time move the superior court of the county where the sentence was imposed to vacate, set aside, or correct the sentence." 13 V.S.A. § 7131. This Court has identified two limitations on a prisoner's right to raise a claim in a second or subsequent PCR petition: the restriction on successive petitions, which bars claims actually raised and litigated in an earlier petition, and—relevant here—the prohibition against abuse of the writ, which can prevent a prisoner from raising a claim in a second or subsequent petition that could have been raised in an earlier petition. In re Towne, 2018 VT 5, ¶ 21, 206 Vt. 615. The State has the burden of pleading abuse of the writ by "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. ¶ 25. The burden then shifts to the petitioner to show cause for not raising the claim in an earlier petition and actual prejudice resulting from the failure to do so. Id.

On appeal, petitioner argues that the trial court erred in dismissing his petition as an abuse of the writ because he did show sufficient cause for failing to raise his Rule 11 claims concerning the 1991 plea during the earlier proceeding: namely, that his trial and PCR counsel provided him with ineffective assistance. This Court has not yet determined the appropriate standard of review for a decision dismissing a petition as an abuse of the writ. Id. ¶ 31. However, as in Towne, we conclude that petitioner's claims in his second PCR petition are an abuse of the writ under any standard of review. Id.

The record shows that the State met its initial burden of pleading abuse of the writ by setting forth petitioner's writ history, identifying his new claims, and alleging petitioner abused the writ in its motion to dismiss. The burden accordingly shifted to petitioner to show cause for not raising his new claims in an earlier petition and actual prejudice resulting from the failure to do so.

We need not address petitioner's argument that he has shown cause for his failure to raise the Rule 11 challenge to the 1991 conviction in a prior PCR proceeding, because we conclude that

even if he made a showing of cause, he has failed to show prejudice. This is true regardless of whether we treat his claim as a challenge under Rule 11, as he claimed in his initial petition, see State v. Boskind, 174 Vt. 184, 192 (2002), or as a claim that his trial counsel was ineffective for failing to argue that his prior conviction was invalid, see In re Torres, 2004 VT 66, ¶ 15, 177 Vt. 507 (mem.).

To the extent that petitioner challenges his 2011 sentence on the ground that the plea colloquy in 1991 did not comply with Rule 11, he cannot show prejudice because he waived his claim by pleading guilty. Our analysis of this claim is driven by the law governing challenges to predicate offenses after a guilty plea. By pleading guilty in 2011, petitioner waived all challenges to the validity of the predicate offenses used to enhance his sentence, including the 1991 conviction. In re Gay, 2019 VT 67, ¶¶ 10-13. Accordingly, that challenge provides no basis for vacating petitioner's 2011 sentence—even assuming that petitioner could establish that his 1991 plea was ineffective.

Alternatively, notwithstanding his initial pleading in this case, petitioner may be making an ineffective assistance of counsel claim, arguing that if 2011 trial counsel had identified a potentially valid challenge to the 1991 conviction, he would not have entered into the plea deal despite the substantial exposure he faced on other felony counts. But petitioner has not averred that he would not have entered into the plea agreement. The 2011 sentence was imposed pursuant to a plea agreement under which petitioner pled guilty and the State dismissed two felony assault charges and amended another felony assault to a simple assault. If petitioner's counsel had identified a challenge to the 1991 DUI conviction underlying the 2011 DUI-3 conviction, petitioner may well have entered into this plea agreement anyway. Otherwise, the State could have maintained its original charges, using any of the other three felony charges to obtain the habitual-offender enhancement, and petitioner would still face a potential maximum sentence of life imprisonment. See 13 V.S.A. § 11 ("A person who, after having been three times convicted within this State of felonies . . . commits a felony other than murder within this State, may be sentenced upon conviction of such fourth or subsequent offense to imprisonment up to and including life."). Without any evidence that petitioner would not have entered into the plea bargain, petitioner has failed to show that, but for the alleged error by trial counsel, the result of the proceeding would have been different. See Stroup v. Hill, 103 P.3d 1157, 1161-62 (Or. App. 2004) (holding that in order to prevail in cases involving guilty pleas, petitioners must demonstrate that had they been properly informed they would not have pled, and concluding that petitioner in that case did not make necessary showing).

Petitioner argues that this Court should adopt the rule set forth in Martinez v. Ryan, 566 U.S. 1 (2012), as an exception to our state-law prohibition against abuse of the writ. In Martinez, the U.S. Supreme Court held that ineffective assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial. Id. at 14. Even if we were to adopt Martinez, which we need not decide here, it would not help petitioner because he has failed to adequately state a claim that PCR counsel provided him with ineffective assistance. See Towne, 2018 VT 5, ¶¶ 38-39 (noting that under Martinez, showing of prejudice is required both to overcome allegation of abuse of writ and to support ineffective-assistance claim). An ineffective-assistance claim requires proof, usually through expert testimony, "(1) that counsel's performance fell below an objective standard of reasonableness informed by prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. ¶ 38 (quotation omitted). Petitioner has not presented evidence that PCR

counsel's performance fell below an objective standard of reasonableness and that, but for counsel's errors, the result of the proceeding would have been different.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Harold E. Eaton, Jr., Associate Justice