

STATE OF MAINE
PENOBSCOT, ss.

SUPERIOR COURT
Docket No.: 08-CR-957
JC N - PEN - 12/22/2009

Terry Chesnel,

FILED

Petitioner

DEC 22 2009

DECISION AND ORDER

v.

PENOBSCOT JUDICIAL CENTER
PENOBSCOT COUNTY SUPERIOR COURT
BANGOR DISTRICT COURT

State of Maine,

Respondent

This matter was heard on December 22, 2009, on Petitioner Terry Chesnel's Petition for Post Conviction Review. Attorney Jeff Toothaker represented Petitioner. Assistant District Attorney Susan Pope represented the Respondent.

Through his petition, Mr. Chesnel seeks relief from his July 8, 2008, conviction for Aggravated Operating After Habitual Offender Revocation, for which conviction he received five-year sentence to the Department of Corrections. At the hearing, Petitioner argued that he was denied effective assistance of counsel because his attorney failed to negotiate a lesser sentence.

At the hearing, the parties agreed that the indictment, which alleged that Petitioner had been convicted of Operating After Habitual Offender Revocation on three occasions within a 10-year period, accurately reflected Petitioner's prior record. In addition, the evidence revealed that at the time of his arrest on the charge of Aggravated Operating After Habitual Offender Revocation on February 29, 2008, Petitioner's blood alcohol level was .23. Finally, at the hearing, the parties stipulated that at all pertinent times, the mandatory minimum sentence for the offense as charged included a period of incarceration of 5 years.

Discussion¹

Whether Petitioner received ineffective assistance of counsel requires a two-part inquiry by the Court. First, the Court must assess “whether there has been serious incompetency, inefficiency, or inattention of counsel amounting to performance ... below what might be expected from an ordinary fallible attorney ...” *Francis v. State*, 2007 ME 148, ¶ 4 (quoting, *McGowan v. State*, 2006 ME 16, ¶ 11, 894 A.2d 493, 496-97). The Court then is required to determine “whether the attorney’s performance ‘likely deprived the defendant of an otherwise available substantial ground or defense’ or ‘likely affected the outcome of the [proceeding].’” *Id.*

In this case, the offense with which Petitioner was charged required the imposition of a five-year period of incarceration in the event of a conviction. At the time he entered the plea, Petitioner was aware of the mandatory minimum sentence. In fact, Petitioner does not contend that he received a sentence other than the sentence that he understood would be imposed upon entry of his plea. Instead, Petitioner maintains that his counsel should have been able to negotiate with the State for a lesser sentence.

Simply stated, the record contains no evidence from which the Court could conclude that “an ordinary fallible attorney” could have persuaded the State to amend the indictment, and agree to a plea to a charge that did not require a sentence of five years. Indeed, the only evidence of record confirms the State had a factual basis for the charge, and was unwilling to negotiate a plea to a charge other than Aggravated Operating After Habitual Offender Revocation. In short, Petitioner has not demonstrated a “serious incompetency, inefficiency, or inattention of counsel amounting to performance ... below

¹ At the conclusion of the hearing, the Court made findings of fact and conclusions of law on the record. The Court incorporates herein the findings made on the record.

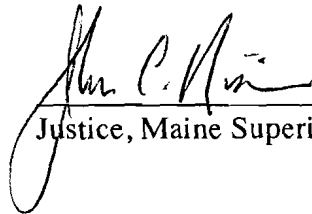
what might be expected from an ordinary fallible attorney ...” *Francis v. State*, 2007 ME 148, ¶ 4 (quoting, *McGowan v. State*, 2006 ME 16, ¶ 11, 894 A.2d 493, 496-97). Accordingly, Petitioner is not entitled to post-conviction relief.

Conclusion

Based on the foregoing analysis, the Court denies Petitioner’s Petition for Post-conviction Review.

The Clerk shall incorporate this Decision and Order into the docket by reference.

Dated: 12/22/09



Justice, Maine Superior Court

CR-08-957

Jeff Toothaker Esq.

PO Box 1084

Ellsworth ME 04605

State

Susan Pope Asst- DA

Office of District Attorney

97 Hammond St

Bangor ME 04401