

**IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA**

**Rickey Von Raines,  
Petitioner**

vs.

**CASE NO. 12-C-102  
Underlying Case No. 09-F-46**

**David Ballard,  
Warden Mount Olive Correctional Center,  
Respondent**

**ORDER DENYING PETITION FOR HABEAS CORPUS**

The Court has considered the petition, responses filed thereto, the amended petition, and evidence submitted at the October 23, 2013 hearing, which Petitioner attended in person and by counsel, Mark French, and which the Respondent appeared by Keith Randolph, Special Prosecuting Attorney for this County. The Court DENIES his request for a Writ of *Habeas Corpus* in 12-C-102. This Court has considered the Amended Petition; the response thereto; the evidence and testimony of Petitioner and his former counsel produced at the October 24, 2013, hearing attended by Petitioner, in person, and with current counsel; the parties' briefs in support of each party's position on the claims raised; and the Petitioner's response to the Respondent's brief. This Court rules as follows:

**STANDARD OF REVIEW**

This Court, in reviewing the question of whether a trial counsel was ineffective in representing the petitioner, has applied the two part analysis of Strickland v. Washington, 466 U.S. 668 (1984), recognized by our State Supreme Court in State v. Miller, 149 W.Va. 3, 459 S.E.2d 114, syl. pt. 5 (W.Va. 1995):

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Furthermore, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Defendants are entitled to the effective assistance of counsel during plea negotiations and the two-part Strickland test applies to guilty pleas based on ineffective assistance of counsel. See Lafler v. Cooper, 132 S. Ct. 1376 (2012). This Court finds that rejection of a plea offer is also subject to the Strickland standard of review.

The Petitioner has the burden of proving by a preponderance of the evidence the allegations in his petition warrant the relief requested.

#### PROCEDURAL HISTORY

In January of 2009, Petitioner was indicted, along with co-defendants Timothy Lambert and Jessica Raines, for the crimes of Robbery in the First Degree, Malicious Assault, Nighttime Burglary, and Conspiracy to Commit Robbery in the First Degree. Attorney Mark Hobbs, who had previously represented Petitioner in criminal matters, was appointed to represent Petitioner on these charges.

After indictment, the case moved to trial. On the first day of trial, before jury selection, defense counsel (referred to herein as trial counsel) informed the Court that the State had made a plea offer to Petitioner on the day before the trial, that he had conveyed it to his client and his client rejected it. (Trial transcript, Day 1, p. 29). The prosecuting attorney placed the offer on the record, which was an offer to plea guilty to the felony offenses of Breaking and Entering and Conspiracy, with a sentence to be determined by the Court, whether concurrent or consecutive. (Id., at pp. 29 and 30). The most time in prison faced by Petitioner on the offered plea was not less than two (2) nor more than fifteen (15) years.

The Court then addressed defense counsel and the Petitioner, who confirmed that the offer was conveyed, recommended by trial counsel and declined by Petitioner. (Id. at p. 30). At this time, the prosecutor made it clear that, if Petitioner were convicted, he reserved the State's right to file a habitual offender petition, seeking a sentence based on prior felony convictions, stating his belief that Petitioner could be subject to a sentence of "up to life in the penitentiary." (Id. at pp. 30-31).

Trial counsel then informed the Court that he had discussed the possibility of a recidivist action with the Petitioner. (Id. at 30). Trial counsel further explained that a "second violent crime conviction, that would present a possible factual basis for the recidivist to the life sentence rather than doubling the minimum." (Id. at 33-34). The Court then asked trial counsel and Petitioner if they both understood that accepting the State's offer would eliminate the filing of a recidivist action, to which both answered in the affirmative. (Id. at 34).

Petitioner testified at the evidentiary hearing on this *habeas corpus* matter that his attorney had advised him that his prior convictions could not form the basis for a recidivist action, as they were not violent crimes, and that specifically he could not be subject to consecutive sentences. Trial counsel says he told him after trial that the sentences for multiple convictions would subject him to one life sentence. This Court concludes that no such pre-trial advice was given other than to tell Petitioner that he could possibly face a life sentence. The Court rejects the Petitioner's testimony that this advice came at the pre-trial assessment of the plea agreement offer. There was a question about a conviction in Boone County for Attempted Burglary as to whether such was a violent crime, but it is undisputed that Petitioner had a separate prior Burglary conviction from Logan County. Trial counsel specifically told Petitioner that a conviction of a second violent crime could serve as the basis for a life sentence as a recidivist offender. There was no discussion between trial counsel and Petitioner prior to trial as to how he might be sentenced if there were multiple convictions in the jury trial. Trial counsel acknowledged that his advice, if the issue had been raised, would have been that only one sentence could be imposed. This was the issue that he unsuccessfully argued in Petitioner's Appeal (Case No. 101296) to the West Virginia Supreme Court. Trial counsel testified that he specifically could not recall what he had told Petitioner regarding the prior convictions, however he did testify that he advised his client that if he were convicted of a violent crime, the State could proceed with a recidivist action. (Id. at p. 60).

Petitioner contends that he believed that the worst sentence he could receive at trial would be life imprisonment, with the eligibility for parole after fifteen (15)

years. During the evidentiary hearing in this matter, he testified that had he received correct advice as to what his sentence could be for multiple convictions, he would have accepted the plea offer made prior to trial. (Id. at 44). This testimony is incongruous with Petitioner's own testimony that he was innocent of the crimes charged, stating "[t]he reason why I refused to accept it is because the State was trying to say that I had involvement, that Vickie McFarland had gotten hurt in the process of the robbery. They was trying to pin it all basically on me to say that I broke into that residence and I never entered the McFarland residence." (Id. at 22-23).

Trial counsel confirmed that the Petitioner rejected the offer because of his claimed level of involvement at the time. (Id. at 64). Trial Counsel further testified that, prior to trial, Petitioner never expressed concern as to whether he could get additional time in addition to the life sentence. (Id. at 65.) This Court finds that trial counsel is the more credible witness on the issue.

The case proceeded to trial, and Petitioner took the stand in his own defense. Prior to doing so, the Court addressed Petitioner in open court, outside the presence of the jury. In response to the Court, Petitioner acknowledged that he discussed his right to testify with his attorney, as evidenced by a form titled "Advice of Petitioner's Right to Testify." (Trial transcript, Day 1, p. 81) Thereafter, Petitioner was called to testify and given the standard oath provided to all witnesses. (Id. at 82). After affirming to tell the truth, Petitioner denied any role in the offenses charged and denied being present, claiming that he was at home with his girlfriend at the time of the crimes. She testified on his behalf to partially corroborate his presence at the residence, although she admitted she was asleep during the time of the crimes. Later

he admitted that he perjured himself when he claimed to have an alibi. (Transcript of Habeas Corpus Hearing, p. 43)

The jury convicted Petitioner of Robbery in the First Degree, Nighttime Burglary, and Conspiracy, while acquitting him of Malicious Assault. Petitioner later pled guilty to the offense of Perjury for his conduct on the stand in the underlying matter.

#### ANALYSIS

Petitioner claims that he was given erroneous advice on his potential habitual offender status, which led him to decline the State's pre-trial plea offer. When responding to a question from his own counsel at the evidentiary hearing in this matter, he first claims that trial counsel did not recommend the plea offer, then stated that trial counsel recommended the plea to him, but that recommendation was not followed. (See Evidentiary Hearing Transcript, p. 43)

It is clear from Petitioner's own testimony, and that of trial counsel, that Petitioner, contrary to advice of counsel, proceeded to trial because he believed that the State could not meet its burden of proof that he was guilty of the crimes charged, rather than any threat of punishment. Knowing that one of the co-defendants was prepared to testify that Petitioner was present and was the person who inflicted the injuries to the victim; and further having reason to believe that his sister was prepared to testify that he had confessed to her, Petitioner chose to rely on his alibi, which was obviously rejected by the jury and which we now know was fraudulently put forth to mislead the jury.

It is clear from the record, and uncontested, that trial counsel had a mistaken belief that the Trial Court could not sentence Petitioner for multiple convictions to any additional time in addition to a life sentence if he was found guilty of being a habitual criminal with at least two prior qualifying felony convictions. However, that did not become an issue until the day of the scheduled trial in the habitual offender proceeding. That misunderstanding by Trial counsel was corrected by the Trial Court. Thereafter, Petitioner and trial counsel had the opportunity to thoroughly discuss the matter, and the Petitioner ultimately received the benefit of his plea bargain with the State at the habitual offender proceeding, a sentence with a parole eligibility date in less time (ten and one half years) than life in prison (minimum fifteen years).

Although trial counsel was mistaken as to whether Petitioner's sentence could be enhanced as a result of the habitual criminal proceeding and include consecutive sentences on the other crimes, it is clear from the record that Petitioner's motivation to go to trial was not based on any possible sentence, but rather on his belief that he would not be found guilty, therefore this Court finds by a preponderance of the evidence that any error on trial counsel's part regarding the potential sentence was not so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment of the United States Constitution or Article Three Section Fourteen of the West Virginia Constitution. Any mistaken interpretation of the law or omission by trial counsel in discussion of sentences that could be imposed on the multiple convictions did not prejudice the Petitioner and was not so serious as to deprive Petitioner of his right to fairly consider the plea offer, nor did such serve as motivation for Petitioner to reject the plea deal and therefore did

not meet the Strickland standard that the but for the trial counsel's advice or omission the result of the proceeding would have been different. Petitioner's claim for relief on the ground that trial counsel failed to accurately advise him regarding possible sentences is DENIED.

Petitioner next contends that his counsel failed to properly advise him regarding the consequences of taking the stand in his own defense. Although trial counsel had no specific recollection at time of the evidentiary hearing regarding his discussions with Petitioner regarding testifying, he stated that it was his practice to discuss a client's testimony in a criminal trial at some point in the proceedings, and that it was his practice to discuss the matter in a "point/counterpoint about what is good and bad that can happen if a [criminal defendant] testif[ies]." (Habeas Corpus Evidentiary Hearing, Tr. P. 80). He further stated that he probably told him, as it is his practice with all his clients, that he did not, in recent memory, remember "a client who was acquitted that testified." (Id.) Petitioner had given a statement to police which denied any involvement in the crime and claimed to establish an alibi which he officially noticed as his defense pursuant to Rule 12.1 of the West Virginia Rules of Criminal Procedure. Had he testified at trial contrary to his claimed alibi, his testimony would be subject to impeachment with the prior inconsistent statement. This Court concludes that trial counsel covered this in his "point/counterpoint" discussion in deciding whether the Petitioner would testify and, if so, what he claimed to be the truth. Petitioner cites no legal authority supporting his contention that such an omission, if it did occur, rises to the level of ineffective assistance of counsel. This Court finds that trial counsel is the more credible witness. Based upon trial counsel's

testimony that it is his general practice to go over the issue of whether his clients will testify at trial, this Court finds that trial counsel did tell the Petitioner to tell the truth. Petitioner's claim that he is entitled to relief because trial counsel failed to advise him not to lie on the stand is DENIED.

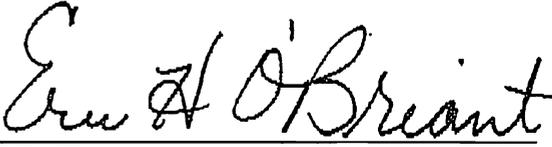
Although Petitioner raised a claim in the Losh List included in his *Habeas Corpus* Notification Form that he is entitled to relief on the ground that there were "[i]nconsistent elements of conviction/acquittal regarding conviction for aggravated robbery and acquittal of malicious assault," he has not addressed this claim in his Memorandum of Law in Support of Amended Petition for Writ of *Habeas Corpus Ad Subjucendum*, nor has he offered any evidence or law regarding this issue during the evidentiary hearing in this matter. Petitioner's contention is deemed to be that since he was not convicted of the charge of Malicious Assault, he could not be guilty of Robbery in the First Degree. The Crime of Robbery in the First Degree can be proven based not only on a robbery which included an actual physical assault of the victim, but also if the defendant "uses the threat of deadly force by the presenting of a firearm or other deadly weapon" therefore, it is possible to be guilty of Robbery in the First Degree where there was no physical assault of the victim even though he was found not guilty of Malicious Assault, which is not a lesser included offense of Robbery. The jury could find, based on the trial evidence that Petitioner was present and participated in the robbery, but did not attack or participate in the attack of the victim. Petitioner's claim for relief on this basis is DENIED.

On April 13, 2012, Petitioner filed his original Post-Conviction Habeas Corpus Form Application to Proceed *In Forma Pauperis* and Affidavit, along with his

pro se Petition for a Writ of *Habeas Corpus*. That original pleading raised thirty five (35) grounds for Habeas Corpus relief. Subsequently, through counsel, Petitioner filed a Habeas Corpus Notification Form, which included a Losh List, in which he raised only the grounds of ineffective assistance of counsel and inconsistent elements of conviction and acquittal regarding the conviction for Aggravated robbery and his acquittal for Malicious Assault, and expressly waived all other grounds for relief not initialed on that pleading. The Losh List was signed and initialed by the Petitioner, and filed by counsel on October 26, 2012. Petitioner has expressly waived and not offered evidence or legal argument on any other claims for relief other than ineffective assistance of counsel and the inconsistent jury verdicts in his subsequent pleadings or at hearing, therefore all other grounds for relief raised in the April 13, 2012 pleading are DENIED.

This is intended to be a FINAL ORDER, subject to the Petitioner's right to appeal. The Clerk is hereby ORDERED to send a copy of this Order to all parties, through counsel, and strike this case from the docket.

Enter this 14<sup>th</sup> day of July, 2014

  
ERIC H. O'BRIANT  
CIRCUIT JUDGE