

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No.: 14-0780

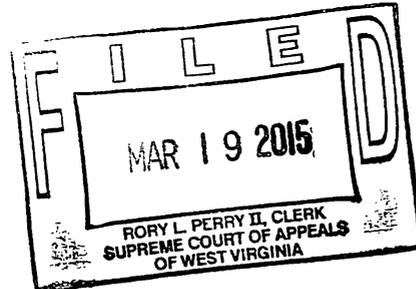
RICKY VON RAINES,

Appellant,

v.

DAVID BALLARD, Warden
Mount Olive Correctional Complex

Appellee.



APELLANT'S BRIEF

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TABLE OF CONTENTS

Assignments of Error 2

Statement of the Case..... 3

Procedural History..... 3

Statement of Facts 5

Summary of the Argument 8

Statement Regarding Oral Argument and Decision..... 9

Defendant’s Trial Counsel was Ineffective..... 10

Trial Counsel Failed to Prepare Mr. Raines for his Testimony 14

Conclusion..... 16

TABLE OF AUTHORITIES

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	10
<i>State v. Miller</i> , 194 W.Va. 3, 459 S.E.2d 114 (1995)	10
<i>Becton v. Hun</i> , 205 W. Va. 139, 516 S.E.2d 762 (1999)	11
<i>State v. Finney</i> , 174 W. Va. 595, 328 S.E.2d 203 (1985).....	11
<i>State ex rel. Burton v. Whyte</i> , 163 W.Va. 276, 256 S.E.2d 424 (1979).....	11

ASSIGNMENTS OF ERROR

1. Mr. Raines was provided incorrect and wrong legal advice when he was given the decision to accept or reject a plea agreement before proceeding to trial. His legal counsel in the underlying case did not correctly understand the law of recidivists in West Virginia and instructed Mr. Raines incorrectly that Mr. Raines could not be sentenced as a recidivist should he choose to go to trial. Mr. Raines was convicted at trial and sentenced as a recidivist. Therefore, Mr. Raines' attorney was ineffective as stated by the *Strickland v. Washington* standard.

2. Mr. Raines' attorney did not prepare Mr. Raines prior to Mr. Raines taking the stand in his own defense. Advice from counsel would have potentially prepared Mr. Raines for cross-examination and would have instructed Mr. Raines regarding the implications and ramifications of lying under oath. Mr. Raines took the stand in his own defense and was later convicted of perjury based upon this testimony. Therefore, Mr. Raines' attorney was ineffective as stated by the *Strickland v. Washington* standard.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

In January of 2009, Appellant 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. [JA 210] Attorney Mark Hobbs, who had previously represented Appellant in criminal matters, was appointed to represent Appellant on these charges. [JA 236]

After indictment, the case moved to trial. [JA 237] 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 Appellant on the day before the trial that he had conveyed it to his client and his client rejected it. [JA 237] The prosecuting attorney placed the offer on the record, which was an offer to plead guilty to the felony offenses of Breaking and Entering and Conspiracy, with a sentence to be determined by the Court, whether concurrent or consecutive. [JA 237] The most time in prison faced by Appellant on the offered plea was not less than two (2) nor more than fifteen (15) years. [JA 237]

Appellant reject the plea offer and the case proceeded to trial. [JA 237] Mr. Raines testified on his own behalf at the trial. [JA 239] Mr. Raines was convicted of Burglary, Robbery and Conspiracy. [JA 64] Mr. Raines was sentenced to 2 to 15 years for Burglary, 30 years for Robbery and 1 to 5 years for conspiracy, all to run consecutively with each other. [JA 64] Had Mr. Raines been provided the correct legal advice and accepted the plea agreement, he would have served 2 to 15 years in prison.

[JA 237] Following the trial, Mr. Raines admitted that he perjured himself during the trial, and he subsequently entered a plea of guilty to that charge. [JA 239-240]

Mr. Raines' trial counsel subsequently filed an appeal with this Court, which such appeal was denied by memorandum decision dated April 18, 2011. See Case Number 101296.

Mr. Raines filed his Petitioner for Writ of Habeas Corpus on or about March 3, 2012. [JA 65-73]. Undersigned counsel was subsequently appointed and filed an Amended Petition for Writ of Habeas Corpus upon which a Habeas Corpus hearing was conducted on October 23, 2013. [JA 73-178]. The issues were briefed by counsel for the respective sides and the Court issued an Order denying the relief sought by Mr. Raines. [JA 235-244]

STATEMENT OF FACTS

Ricky Von Raines was found guilty at trial of the following offenses: 1) Aggravated Robbery; 2) Nighttime Burglary; and 3) Conspiracy. Mr. Raines was found not guilty of Malicious Assault. The relevant facts to regarding this Petition are as follows:

At trial it was alleged that on or about August 6, 2008, Mr. Raines entered the home of Goble and Victoria McFarland for the purpose of stealing Mr. McFarland's medication and firearms. [JA 187] Prior to entering the home, Mr. Raines' sister, Jessica Raines, was to make sure that Mr. McFarland was not at home, with the plan being that no one would be home.

Mr. Raines is alleged to have entered the home of Goble and Victoria McFarland with his cousin, Timmy Lambert. [JA 188] Upon entering the residence, the two men began searching the home for the medication. [JA 188] During the search, the two men discovered Victoria McFarland in a back bedroom. [JA 188] They quickly tied Mrs. McFarland's hands with plastic zip-ties and demanded she tell them where Goble McFarland's medication was located. [JA 188] Because she and her husband slept in different bedrooms, Mrs. McFarland did not know where the drugs were located.

The two men continued to search the home while Mrs. McFarland remained tied up on her bed. [JA 188] The men found the medication and some firearms and then went back to where Mrs. McFarland was tied up. At that point, it is alleged the Mr. Raines hit Mrs. McFarland on the back of the head two (2) times in an attempt to disable

her, then the two men left the home. [JA 188] Mr. Raines was later arrested in an apartment located above the Mount Gay Lounge.

Mr. Raines was indicted, and charged with: 1) Aggravated Robbery; 2) Malicious Assault; 3) Nighttime Burglary; and 4) Conspiracy. Mr. Raines was convicted on all counts except Malicious Assault.

Prior to trial, Mr. Raines was offered a plea agreement, the anticipated result of which would have been a sentence of 2 to 15 years imprisonment. [JA 003] Trial counsel misinformed Mr. Raines as to the potential sentence he might face should he go to trial. [JA 51] This advice from trial counsel was also based upon a misunderstanding of the potential sentence Mr. Raines would face should he be convicted at trial, as is more fully set forth in the transcript of the Recidivist trial that occurred on June 23, 2009. [JA 51] During this hearing, when the matter of what possible sentence the lower court may impose was being discussed, trial counsel stated:

Judge, if that's correct law, I've told my client wrong and I want to be right up front, because I told him that the only sentence tomorrow would be if he's convicted, that he would be sentenced to life and be eligible after 15 years.

[JA 47]

Trial counsel later stated, during the same hearing:

I interrupted you. I need to make sure the Court is clear, if the Court is able, I did not take a position on this offer that was made this afternoon. I did not say yea or nay. If the Court is inclined to think that it can sentence to life and then also sentence on the underlying crimes, I do recommend this offer. Of course, I know George is withdrawing it, but I may

add it would be withdrawn only because of my mistake in the application of the law to the facts.

[JA 49]

It is clear from this exchange on the record that trial counsel incorrectly instructed Mr. Raines on the potential sentences he faced should he go to trial and be convicted. And it was based upon this incorrect knowledge of the recidivist laws that trial counsel instructed Mr. Raines to decline a pre-trial plea offer that would have imposed a sentence of 2 to 15 years. Had trial counsel had actual knowledge of the application of the recidivist laws to the facts of Mr. Raines' case and recommended the pre-trial plea offer to Mr. Raines, Mr. Raines could possibly be out of jail at this time.

Trial counsel also was ineffective during the trial of this matter with respect to Mr. Raines' decision to testify. Toward the close of the Defendant's case-in-chief and immediately prior to Mr. Raines testifying, trial counsel told Mr. Raines that the direct evidence was "putting the crime on [Mr. Raines]" and that Mr. Raines had to take the stand. [JA 134] Prior to this point in time, trial counsel had not discussed Mr. Raines' testimony with him and had not prepared Mr. Raines to testify. [JA 134-5] The result was Mr. Raines performing poorly on the stand, and incurring an additional charge for perjury. Mr. Raines would submit that trial counsel's failure to prepare him to testify is further evidence of trial counsel's ineffective assistance to Mr. Raines.

SUMMARY OF THE ARGUMENT

Mr. Raines' trial counsel was ineffective. Trial counsel admitted to providing the incorrect legal advice to Mr. Raines regarding the applicability of the recidivist statute to his case. Trial counsel told Mr. Raines that prior criminal convictions could not be used in application of the recidivist statute of this State. Based upon this advice, Mr. Raines refused to accept a plea agreement that would have carried a maximum sentence of 2 to 15 years. Instead, Mr. Raines went to trial and received a sentence of 33 to 50 years.

Mr. Raines was also not prepared to testify at trial. While Mr. Raines does not argue that he should have been told to tell the truth at trial, Mr. Raines does argue that a minimal amount of time preparing to testify in one's own defense should be a requirement by all trial counsel. This is especially true when one is testifying on one's own behalf at a criminal trial that could potentially result in a very lengthy sentence, as it did in this case.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is required under Rev. R.A.P. 19, because this case involves new issues regarding the applicability of habeas corpus law in the State of West Virginia. This case also involves assignments of error by the Circuit Court in the application of settled law. Furthermore, Appellant does not believe this case is appropriate for disposition by memorandum decision.

DEFENDANT'S TRIAL COUNSEL WAS INEFFECTIVE

The lower court erred in denying Mr. Raines' petition for habeas corpus relief. Mr. Raines' trial counsel was ineffective with respect to his knowledge of the recidivist sentencing options available to the trial Court and his advice to Mr. Raines based upon this incorrect knowledge of the law.

“In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.” Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

“In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted under the circumstances, as defense counsel acted in the case at issue.” Syl. Pt. 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Under the objectively reasonable standard, it was ineffective assistance to fail to understand the impact of the recidivist statutes on this case prior to the time of the Status Conference on Recidivist Trial, and only after the trial Court instructed defense counsel regarding the implications of the recidivist statutes. It is clear that this lack of knowledge

was not a strategic decision, but one of neglect and ineffectiveness. Further on trial counsel's ineffective assistance the West Virginia Supreme Court of Appeals has stated:

“Objective professional standards dictate that a criminal defense attorney, absent extenuating circumstances, must communicate to the defendant any and all plea bargain offers made by the prosecution. The failure of defense counsel to communicate any and all plea bargain proposals to the defendant constitutes ineffective assistance of counsel, absent extenuating circumstances.” Syl. Pt. 3, *Becton v. Hun*, 205 W. Va. 139, 516 S.E.2d 762 (1999). While Mr. Raines is not arguing that he was not communicated a plea made by the prosecution, there can be no question that Mr. Raines was not provided appropriate advice, and advice regarding the legal ramifications, regarding his decision to accept the proposed plea prior to trial, and the implications that decision would have on his potential sentence should he be convicted at trial.

Additionally, while the issue of a Defendant proceeding to trial based upon the erroneous advice of counsel does not seem to have been directly addressed by this Court, this Court has addressed the issue of a Defendant pleading guilty based upon the erroneous advice of counsel. “Before an initial finding will be made that counsel acted incompetently with respect to advising on legal issues in connection with a guilty plea, the advice must be manifestly erroneous.” Syl. Pt. *State v. Finney*, 174 W. Va. 595, 328 S.E.2d 203 (1985), citing Syl. Pt. 2, *State ex rel. Burton v. Whyte*, 163 W.Va. 276, 256 S.E.2d 424 (1979). In this case, as demonstrated by the admissions made by trial counsel on the record, the advice provided to Mr. Raines regarding the impact of the recidivist statutes on this case was manifestly erroneous. And analogously to this Court's holding

in Finney and Whyte, that manifestly erroneous advice lead to Mr. Raines refusing to accept a plea agreement that would have greatly benefitted him.

Mr. Raines was told that a) the evidence at trial could not support a finding of guilt; and b) even if he was found guilty, the longest sentence he could receive would be life. Without addressing the evidence adduced at trial, the second part of this advice is clearly wrong after a review of the recidivist statutes and the relevant case law. Therefore, there can be no question that the advice given Mr. Raines was manifestly erroneous, and Mr. Raines made a decision to go to trial based upon the manifestly erroneous advice.

In the current matter, trial counsel for the Defendant simply did not have an understanding of the law prior to trial at the time he advised Mr. Raines regarding a pre-trial plea, and at the time of the Status of Recidivist Trial. Therefore, the first prong of the *Miller* test, in that defense counsel's performance of deficient under an objective standard of reasonableness, is satisfied.

Moreover, had trial counsel had this knowledge, and recommended to Mr. Raines that he accept a pre-trial plea offer that would have carried a sentence of 2 to 15 years, there is a reasonable probability that Mr. Raines would have taken counsel's suggestion and accepted the proposed plea agreement. Thus the Second *Miller* prong is satisfied, demonstrating the Appellant's trial counsel's ineffectiveness.

Therefore, and based upon the above stated, this Court must find that Mr. Raines' trial counsel was ineffective for provided incorrect advice as to the application of this

State's recidivist law, overturn Mr. Raines' conviction, and remand this matter to the Circuit Court of Logan County for further proceedings.

TRIAL COUNSEL FAILED TO PREPARE MR. RAINES FOR HIS TESTIMONY

The undersigned admittedly has been unable to find relevant applicable law that clearly states trial counsel's failure to prepare a litigant for trial testimony is ineffective. Therefore, this is an issue of first impression for this Court.

On this issue, Mr. Raines is not arguing that trial counsel specifically review the ramifications of committing perjury while testifying in Court. However, to turn to a criminal defendant while a trial is ongoing and advise them that they must testify, without any preparation whatsoever rises to ineffective assistance of counsel.

There can be no question that Mr. Raines' testimony on the stand was objectively devastating to his case, and lead to an additional charge and conviction for perjury. As an objective matter, in trial advocacy all law school students are instructed that persons who are to testify at trial should be prepared to testify, including what questions are going to be asked on direct, what to expect on cross-examination, and how to comport oneself on the witness stand. Certain behaviors are to be avoided so as to appear to be honest and forthcoming. Eye contact with the jury is also very important to appear to be genuine.

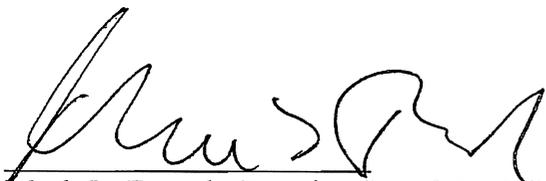
Additionally, while still not required by any current legal standard or holding, arguably the most important instruction to be given witnesses, especially criminal defendants testifying at their own trial, is do not commit perjury. While this may seem to be elementary to most people, Mr. Raines would argue that this is simple advice that he should have been given prior to testifying at his trial. Additionally, while not addressing Mr. Raines' ability to understand our legal system, many laypeople unfamiliar with our legal system could have a difficult time correlating the connection between lying on the

witness stand and severing jail time for doing so. That Mr. Raines was not instructed on all of these points demonstrates the ineffectiveness of his trial counsel.

CONCLUSION

Based upon the above stated, this Court must find that Mr. Raines' trial counsel was ineffective for providing incorrect advice as to the application of this State's recidivist law, overturn Mr. Raines' conviction and remand this matter to the Circuit Court of Logan County for further proceedings. Mr. Raines' trial counsel provided incorrect advice upon which Mr. Raines relied in refusing to accept a plea agreement that would have greatly inured to his benefit. Additionally, because Mr. Raines' trial attorney failed to prepare Mr. Raines for his trial testimony to any degree, Mr. Raines' conviction must be overturned and this matter remanded to the Circuit Court of Logan County for further proceedings

WHEREFORE, based upon trial counsel's lack of knowledge regarding the implications of the recidivist statute with respect to this case, and his failure to prepare Mr. Raines to testify at trial, this Court should find that Mr. Raines' trial counsel was ineffective and remand this matter to the Circuit Court of Logan County for further proceedings, along with all other and further relief this Honorable Court deems just and proper.



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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

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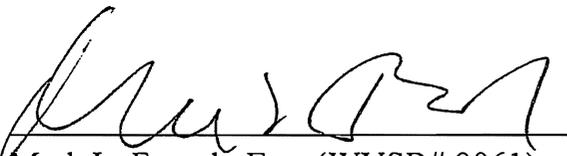
DAVID BALLARD, Warden
Mount Olive Correctional Complex

Respondent.

CERTIFICATE OF SERVICE

I, Mark L. French, counsel for Petitioner, Ricky Von Raines, do hereby certify that on this 19th day of March, 2015, I have served a true and exact copy of the foregoing “*Appellant’s Brief*” and “*Joint Appendix*” by way of United States Mail, postage properly paid upon the following:

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