

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State ex rel. Kyle Longerbeam
Petitioner Below, Petitioner**

vs) **No. 11-0224** (Jefferson County 09-C-206)

**Adrian Hoke, Warden
Respondent Below, Respondent**

FILED

June 17, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Kyle Longerbeam appeals the circuit court's order granting the respondent's Motion for Summary Judgment and denying petitioner's amended petition for writ of habeas corpus. A copy of the entire record below accompanied the petition.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

Petitioner was indicted on charges of first degree sexual assault and second degree sexual assault of a sixty-nine year old bedridden woman, and daytime burglary for breaking into the woman's home. Petitioner then pled guilty to second degree sexual assault in return for the dismissal of the other two charges, and agreed to be sentenced to ten to twenty-five years for this crime. Approximately six months later, petitioner filed a habeas corpus petition, alleging that his plea was illegal, and requesting habeas counsel. Counsel then filed an amended habeas corpus petition, alleging ineffective assistance of counsel, involuntary guilty plea due to lack of understanding, excessive and harsh sentencing, failure to consider his mental state prior to the guilty plea, involuntary and illegally obtained statements, excessive bail, and unfair pretrial publicity. The respondent then filed a motion for summary judgment regarding the habeas petition.

The circuit court held a hearing regarding the petitioner's amended petition, as well as the respondent's motion for summary judgment. After the hearing, the circuit court entered an order granting the motion for summary judgment and denying the amended petition for writ of habeas corpus.

Petitioner now appeals from the grant of summary judgment and the denial of his habeas corpus petition below. “In reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to a *de novo* review.” Syl. Pt. 1, *Mathena v. Haines*, 219 W. Va. 417, 633 S.E.2d 771 (2006). Petitioner’s appeal cites the same assignments of error which he argued in the amended petition for writ of habeas corpus. Namely, he argues that the circuit court erred in the following ways: by failing to find that there was a genuine issue of material fact regarding the ineffective assistance of counsel; by failing to find that there was a genuine issue of material fact as to petitioner’s lack of a rational understanding of the law when he pled guilty; by failing to find that there was a genuine issue of material fact as to petitioner’s claim that his sentence violated the Eighth Amendment; by failing to find that there was a genuine issue of material fact regarding the failure to properly explore petitioner’s mental state prior to the entry of his guilty plea; and by failing to find a genuine issue of material fact regarding petitioner’s excessive bail.

In regards to the argument that petitioner’s sentence violated the Eighth Amendment of the United States Constitution and Article III of the West Virginia Constitution, this Court has held that “[s]entences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review.” Syl. Pt. 4, *State of West Virginia v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982). Petitioner admits that the sentence is within the statutory limit for his crime, and this Court finds that petitioner has failed to show that the sentence was based on some unpermissible factor.

In regards to petitioner’s claim that his bail was excessive, this Court has found that “[a] case by case determination of the right to and amount of bail in criminal proceedings is consistent with the Bill of Rights provision that excessive bail shall not be required and with the discretion vested in the courts under provisions of W.Va.Code, 62-1C-1.” Syl. Pt. 1, *State ex rel. Hutzler v. Dostert*, 160 W.Va. 412, 236 S.E.2d 336 (1977). In the present case, petitioner was charged with first degree sexual assault, second degree sexual assault and burglary involving a sixty nine year old bedridden woman. His bail was set at \$25,000, cash only. Under the facts of this case, this Court finds that petitioner’s bail was not excessive.

Regarding the other three assignments of error alleged by the petitioner, the Court has carefully considered the merits of these arguments as set forth in his petition for appeal, and has reviewed the appellate record. Finding no error in the grant of summary judgment in favor of the respondent, and in the denial of habeas corpus relief, the Court affirms the decision of the circuit court and fully incorporates and adopts, herein, the circuit court’s order dated July 20, 2010. The Clerk of Court is directed to attach a copy of the same hereto.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: June 17, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Menis E. Ketchum
Justice Thomas E. McHugh

**Appendix to Memorandum Decision
Supreme Court of Appeals Case No. 11-0224**

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, WESTVIRGINIA

STATE OF EX. REL. KYLE W. LONGERBEAM

VS.

Case No.: 09-C-206

LEWIS BARLOW, ADMIN, ERJ

Respondent

RECEIVED
JUL 20 2010
JEFFERSON COUNTY
CIRCUIT COURT
JC

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

On this the 28th day of June, 2010, came the Petitioner in person and by counsel, Christopher Prezioso, Esq., and the Respondent by Hassan S. Rasheed Assistant Prosecuting Attorney for Jefferson County for a hearing on the Petitioner's Amended Petition for Writ of Habeas Corpus, the Respondent's answer to said Petition and Respondent's "Motion for Summary Judgment" filed herein.

Whereupon, the Court heard the arguments of counsel as to the Respondent's "Motion for Summary Judgment". The Court initially took the Respondent's motion under advisement and allowed the Petitioner to present evidence in support of his petition. Petitioner then testified on his own behalf. No other witnesses were called by either party. The Court then heard arguments of counsel.

After considering the testimony of the Petitioner and reviewing the record and transcripts of hearings in the criminal matter, the Court makes the following FINDINGS OF FACT:

1. That the Defendant was arrested on July 2, 2007, and charged with the felony offense of Second Degree Sexual Assault. On July 5, 2007, he was arrested on the additional charge of Daytime Burglary. Both charges arose out of the same incident occurring on July 2, 2007 in

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which the Defendant sexually assaulted a 69 year old bedridden woman who was in her own home alone.

2. That the Defendant retained the services of Kevin D. Mills, Esq. who is a licensed attorney out of Martinsburg, West Virginia. Mr. Mills and his associate, Betsy Giggenbach, who also represented the Petitioner, are known to this Court to be well qualified criminal defense attorneys with many years of experience.

3. That Mr. Mills and Ms. Giggenbach filed numerous pleadings on behalf of the Petitioner including a "Petition to Reduce Bond" and "Petition for Reconsideration" of the denial of the original request to reduce bond. In support of these motions Mr. Mills attached numerous exhibits. Additionally, Mr. Mills retained the services of forensic psychologist Dr. Bernard Lewis who wrote a report in support of Petitioner's release on bond. Dr. Lewis also examined Petitioner's competency to stand trial and found that he was competent.

4. That Ms. Giggenbach zealously represented the Defendant during a contested preliminary hearing.

5. That Petitioner was indicted by the January 2008 term of the Jefferson County Grand Jury for one count of First Degree Sexual Assault, one count of Second Degree Sexual Assault and Burglary.

6. That Mr. Mills withdrew as counsel for Petitioner citing a breakdown in communication between him and the Petitioner. David Skillman, a duly licensed and competent attorney, was appointed to represent Petitioner.

7. That Mr. Skillman filed numerous pleadings on Petitioner's behalf, including a "Motion to Suppress Defendant's Statement" and accompanying memorandum of law.

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8. That Mr. Skillman also withdrew as Petitioner's counsel. He also cited a breakdown in communication with Petitioner. Robert Stone, Esq., an experienced criminal defense attorney and trial lawyer, was appointed to represent Petitioner.

9. That Mr. Stone filed a variety of pleadings on behalf of Petitioner. Including, "Supplemental Motion to Suppress Statement" with accompanying memorandum of law. Additionally, Mr. Stone retained the services of three experts to challenge the state's evidence: Walter Rowe, PhD, to review the DNA analysis of the West Virginia State Laboratory, Sue Brown, R.N., to challenge the testimony of the state's forensic nurse, and Dr. Lewis to testify as to Defendant's alleged intoxication.

10. That Mr. Stone challenged the introduction of the Defendant's statement at the pre-trial hearing held over two days, November 21, 2008, and November 25, 2008. During this hearing Mr. Stone vigorously cross-examined the investigating officer. Mr. Stone also called four witnesses on Defendant's behalf during this hearing.

11. That on December 8, 2010, one day before the scheduled trial date, the Petitioner and the State represented to the Court that they had reached a plea agreement. The terms of this agreement were that the Petitioner would plead guilty to Count 2 of the Indictment alleging Sexual Assault in the Second Degree. Counts 1 and 3, alleging First Degree Sexual Assault and Burglary, would be dismissed. Pursuant to the agreement the Petitioner would be sentenced to the statutory term of ten to twenty five years in the penitentiary.

12. That, pursuant to Rule 11 of the West Virginia Rules of Criminal Procedure, the Court then entered into a dialogue directly with the Petitioner. The Petitioner acknowledged the terms of the plea agreement and that he wished to proceed under those terms.

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13. That the Court informed the Petitioner of his constitutional right to a trial and all the rights associated with it. Additionally, the Court informed the Petitioner of the consequences of this plea.

14. That the Petitioner knowingly, intelligently, voluntarily, entered a plea of Guilty to the offense of Second Degree Sexual Assault.

15. That during the plea colloquy the Petitioner acknowledged that Mr. Stone had been a good lawyer for him and that he fully discussed the case and defenses that might be available.

16. That during the plea colloquy the Petitioner stated under oath that no person had used any force, pressure or intimidation to get him to plea guilty.

17. Pursuant to the request of the parties the Court moved directly to sentencing and the Petitioner was committed to the Department of Corrections for an indeterminate term of not less than ten nor more than twenty five years.

CONCLUSIONS OF LAW:

1. Where a guilty plea is sought to be withdrawn by the defendant after sentence is imposed the withdrawal should be granted only to avoid manifest injustice. *State v. Donald S.B.*, Syl. Pt. 2 184 W.Va. 187, 399 S.E.2d 898 (1990).

2. . A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law. Syl. Pt. 2, Kidd v. Mull, 215, W.Va. 151, 595 S.E.2d 308 *quoting* Syl. Pt. 3, Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963).

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CONCLUSION

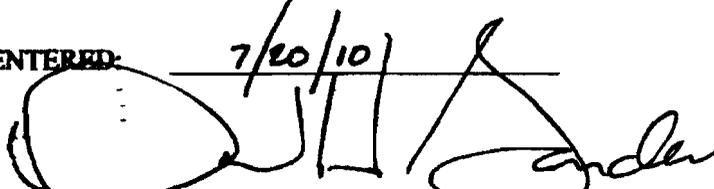
The Court concludes that the Petitioner has failed to demonstrate any “manifest injustice” which would result from the Court refusing his request to set aside his plea. The record clearly demonstrates that the Petitioner was represented by effective, experienced counsel throughout the proceedings in the criminal case. The record further reflects that Petitioner received a substantial benefit when he entered his plea. Specifically, the State dismissed two serious felony charges (First Degree Sexual Assault and Burglary).

ACCORDINGLY, the Respondent’s “Motion for Summary Judgment” is GRANTED and the Petitioner’s “Amended Petition for Writ of Habeas Corpus” is DISMISSED WITH PREJUDICE.

The Petitioner is remanded back into the custody of the Department of Corrections.

The objection of the Petitioner to any and all adverse rulings of the Court is noted.

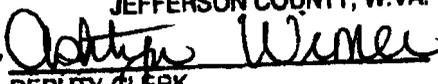
The Clerk shall enter the foregoing as for the date first above written and shall forward attested copies to all counsel of record, the Eastern Regional Jail and the Department of Corrections. The Clerk shall then retire this matter from the docket, placing it among causes ended and report the matter as disposed.

ENTERED: 7/20/10

HONORABLE DAVID H. SANDERS
JUDGE OF THE TWENTY-THIRD JUDICIAL CIRCUIT

4cc
← C. Prezioso
- H. Rasheed
- L. Barlow
- K. Langerbeam
7/20/10
AW

Prepared by:

HASSAN S. RASHEED
ASSISTANT PROSECUTING ATTORNEY
West Virginia State Bar Number 6655
Jefferson County Prosecutor’s Office

A TRUE COPY
ATTEST:
LAURA E. RATTENNI
CLERK, CIRCUIT COURT
JEFFERSON COUNTY, W.VA.
BY 
DEPUTY CLERK