

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

**Ian Smith,
Petitioner Below, Petitioner**

vs) **No. 11-1429** (Cabell County 06-C-144)

**West Virginia Regional Jail
And Correctional Facility Authority,
Respondent Below, Respondent**

FILED

January 14, 2013
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Ian Smith, by counsel Glen Conway, appeals the September 16, 2011 order of the Circuit Court of Cabell County denying his petition for a writ of habeas corpus. Respondent West Virginia Regional Jail and Correctional Facility Authority, by counsel Jake Morgenstern, has filed a summary response.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, 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 of Appellate Procedure.

On June 3, 2003, petitioner entered a guilty plea to one count of attempted robbery and one count of malicious wounding. He was thereafter sentenced to a determinative sentence of forty years in prison for attempted robbery and an indeterminate sentence of two to ten years in prison for malicious wounding, said sentences to run consecutively. Petitioner sought a direct appeal of that criminal matter, which this Court refused by order entered on September 9, 2010. On August 25, 2008, petitioner, by counsel, filed an amended petition for a writ of habeas corpus in the circuit court. An omnibus evidentiary hearing was held on September 23, 2008. The circuit court thereafter denied the petition for habeas relief.

On appeal, petitioner alleges that his plea was involuntary because he incorrectly believed that he was entering into an agreed sentence pursuant to Rule 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure and because his trial attorney was ineffective because he incorrectly advised petitioner that the circuit court had agreed to a binding plea agreement. Respondent argues in support of the circuit court's denial of habeas relief, and notes that the record clearly shows that petitioner was told that this was a non-binding plea agreement. Further, respondent argues that petitioner did not receive ineffective assistance of counsel because his attorney never promised petitioner a specific sentence.

This Court has previously held that

[i]n 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). After careful consideration of the parties' arguments, this Court concludes that the circuit court did not abuse its discretion in denying the petition for a writ of habeas corpus. Having reviewed the circuit court's "Amended Order For Purposes Of Appeal" entered on September 16, 2011, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we find no error in the decision of the circuit court and its September 16, 2011 order denying the petition for writ of habeas corpus is affirmed.

Affirmed.

ISSUED: January 14, 2013

CONCURRED IN BY:

Chief Justice Brent D. Benjamin

Justice Robin Jean Davis

Justice Margaret L. Workman

Justice Menis E. Ketchum

Justice Allen H. Loughry II

11-1429

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

FILED

STATE OF WEST VIRGINIA

2011 SEP 16 P 12:32

VS.

CASE NO. 06-C-144

IAN SMITH

ADELL CHANDLER
CIRCUIT CLERK

ALFRED E. FERGUSON, JUDGE

AMMENDED ORDER FOR PURPOSES OF APPEAL

On a prior date, came the Defendant by counsel, Glen Conway, and also came the State of West Virginia by Christopher D. Chiles, Prosecuting Attorney, pursuant to this matter having been set down for hearing on a Petition for Writ of Habeas Corpus.

Whereupon, the Court did make the following findings:

- 1. That this plea was not a Rule 11(e) plea, which is clear from the record in this case;
- 2. That the Petitioner had numerous chances to state what sentence he believed he was to receive or that he did not want to plea guilty without knowing his sentence; and
- 3. That there was no agreement as to sentence in this case.

Therefore, based upon the above-stated findings, the Court did hereby ORDER that there was no basis for relief and did DENY the Petition for Writ of Habeas Corpus.

It is further ORDERED that Glen Conway is hereby appointed to represent the Petitioner in the Appeal of this matter.

Trial copies sent to:
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 parties
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 or objectives accomplished:
 by Circuit Clerk

APPROVED FOR ENTRY:


 CHRISTOPHER D. CHILES, (#717)

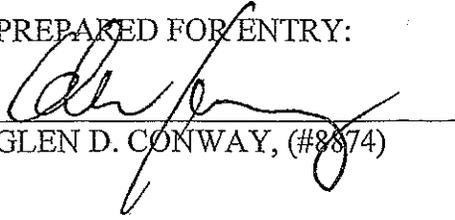
ORDER:
ENTER:


 ALFRED E. FERGUSON, JUDGE
 STATE OF WEST VIRGINIA
 COUNTY OF CABELL

ADELL CHANDLER, CLERK OF THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA
 DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
 ENTERED ON: SEP 16 2011
 GIVEN UNDER MY HAND AND SEAL OF SAID COURT
 THIS
 CLERK
 CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

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PREPARED FOR ENTRY:


GLEN D. CONWAY, (#8874)

86-C-144

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