

IN THE CIRCUIT COURT OF MARION COUNTY, WEST VIRGINIA
DIVISION I

STATE OF WEST VIRGINIA, ex rel.
MICHAEL J. GLEASON,

Petitioner,

VS.

CASE NO. 10-C-60
JUDGE FRED L. FOX,
SENIOR STATUS JUDGE

GEORGE JANICE, WARDEN,
Stevens Correctional Center,

Respondent.

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OPINION/FINAL ORDER DENYING
"PETITION FOR WRIT OF HABEAS CORPUS"

This case came before the Court on 30 November 2010 for a final hearing on the "Petition for Writ of Habeas Corpus." The petitioner, Michael J. Gleason (hereinafter "petitioner"), was present and represented by Frances C. Whiteman, Esquire; Lea Anne Hawkins, Assistant Prosecuting Attorney, appeared on behalf of the respondent, George Janice, Warden, Stevens Correctional Center (hereinafter "respondent").

After due consideration of the evidence presented and the arguments of counsel, and fully researching the legal issues presented, the Court is of the opinion that the "Petition for Writ of Habeas Corpus" should be denied for the reasons set forth herein. In support of this ruling, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

1. In the June 2005 term of court, the Petitioner was indicted for the offenses of Abduction with the Intent to Defile, Burglary, Attempted Second Degree Sexual Assault, and Unlawful Wounding. The petitioner retained the legal representation of Jerald E. Jones, Esquire, an attorney from Clarksburg, West Virginia. On 12 July 2006 and 13 July 2006, the petitioner's case was tried, with the Honorable Fred L. Fox, II, presiding. There was evidence during the trial that the Petitioner followed the victim off of the interstate and to her residence, where he then forced his way inside and physically attacked her. After insisting on sex and attempting to force such an act, the Petitioner was struck by the victim and fled the scene. The petitioner was found guilty of all four counts of the indictment. After a hearing on post-trial motions, the Court reversed the conviction for Attempted Second Degree Sexual Assault while affirming the other three convictions. By Order entered 27 February 2007, the petitioner was sentenced as follows: for the offense of Abduction with the Intent to Defile, he was sentenced to not less than three (3) years and not more than ten (10) years; for the offense of

Burglary, he was sentenced to not less than one (1) year and not more than ten (10) years; and for the offense of Unlawful Wounding, he was sentenced to not less than one (1) year and not more than five (5) years. Each of the sentences in the Order are to run consecutively with each other. By Order entered 06 November 2007, a final Agreed Amended Sentencing Order was entered.

2. The petitioner then retained Jeffrey L. Freeman, Esquire, who filed a timely appeal, which was refused by the West Virginia Supreme Court of Appeals on 10 September 2008.

3. Petitioner filed, by newly retained counsel, Frances C. Whiteman, Esquire, a "Petition for Writ of Habeas Corpus" on or about 24 February 2010. The Court granted Petitioner's request in an "Opinion/Order," dated 06 April 2010. The Court therein directed the State to respond to the petition.

4. The petitioner raised the following grounds for habeas corpus relief: ineffective assistance of counsel; double jeopardy; instructions to jury; claims of prejudicial statements by trial judge; claims of prejudicial statements by prosecutor; sufficiency of evidence.

5. Pursuant to Rule 5 of the Rules Governing Post-Conviction Habeas Corpus Proceedings, Respondent filed its "State's Response to Petitioner's Petition for Habeas Corpus" on 03 May 2010, as directed in the "Opinion/Order." Respondent's Answer denied every ground within the petition. The evidentiary hearing, provided pursuant to Rule 9(b) of the Rules Governing Post-Conviction Habeas Corpus Proceedings, was held on 02 August 2010, and completed on 30 November 2010, in order to fully and fairly adjudicate Petitioner's claims.

6. The Petitioner's mother, Jeanie Gleason testified at the 02 August 2010 hearing. She testified that she called and met with Jerald E. Jones, Esquire, prior to the Petitioner's preliminary hearing and that she and her husband retained Mr. Jones to represent the Petitioner at that time. After the Petitioner posted bond and prior to trial, he moved to Riverview, Florida, to live with his parents. The witness further testified that the Petitioner and Mr. Jones met three times before the start of the trial, but that Mr. Jones had mailed the family essentially all the discovery materials provided by the State. She testified that the opening statement of Mr. Jones indicated that the

Petitioner got off the interstate to ask the victim for a date. She testified further that before the second day of trial, Mr. Jones informed the parents of the Petitioner that Mr. Jones and the Petitioner had agreed that the Petitioner should testify. Also on this day, the witness alleged that Mr. Jones wanted the petitioner to change his testimony as to why he got off the interstate. Ms. Gleason remembered believing at that time that such testimony would not be credible and would show the petitioner to be untruthful. Ms. Gleason further testified that during jury selection she witnessed potential jurors viewing pictures of the victim's battered face on a big screen projector in the courtroom during a break in the proceedings. Ms. Gleason testified that one of the potential jurors, who later was picked for the jury, stated, "oh my God" when the pictures were viewed. Ms. Gleason admitted that the family had not filed an ethics complaint against Mr. Jones.

7. The petitioner, Michael Gleason, also testified at the 02 August 2010 hearing. He testified that he met with Mr. Jones three times before trial. He testified that at a meeting just prior to the trial, Mr. Jones instructed the Petitioner to "brush off"

questions about why he exited the interstate. The Petitioner testified that he knew such a strategy would not work and pressed Mr. Jones on what he should say for why he got off the interstate. The Petitioner testified that Mr. Jones responded that the Petitioner should say he was "looking for a bathroom." The Petitioner stated that he thought he had to follow Mr. Jones' instructions because he was the Petitioner's attorney. The Petitioner admitted that his testimony at trial was perjured. He also stated under cross examination that he did not hear or know what Mr. Jones said in his opening statement to the jury.

8. At the 30 November 2010 hearing, the State called Jerald E. Jones, Esquire, as a witness. Mr. Jones testified that he did not instruct the Petitioner to lie. He testified that he spoke to the Petitioner over the telephone several times before trial. He stated that when the Petitioner testified at trial that he was getting off the interstate to search for a bathroom, he was concerned about the testimony but did not think it made a difference. Mr. Jones thought it was obvious that the Petitioner was following the victim off the interstate to her home. The victim's neighbor also testified at trial as to what he heard

during the incident. Mr. Jones testified at the evidentiary hearing that he did not want to extensively cross-examine this witness. He stated that he did not know how the neighbor would answer his questions and he could have just created more damaging testimony. In regards to the pictures accidentally shown to the potential jurors, Mr. Jones did not move for a mistrial because he did not think it would have been granted.

Conclusions of Law

1. The West Virginia Code provides that:

[a]ny person convicted of a crime and incarcerated under sentence of imprisonment therefor who contends that . . . the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under the common-law or any statutory provision of this State, may, without paying a filing fee, file a petition for a writ of habeas corpus ad subjiciendum, and prosecute the same, seeking release from such illegal imprisonment, correction of the sentence, the setting aside of the plea, conviction and sentence, or other relief, if and only if such contention or contentions and the grounds in fact or law relied upon in support thereof have not been previously and finally adjudicated or waived in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in

any other proceeding or proceedings which the petitioner has instituted to secure relief from such conviction or sentence. . . .

See W.Va. Code § 53-4A-1(a) (2000 Repl. Vol.).

2. "Habeas Corpus is a suit wherein probable cause therefor being shown, a writ is issued which challenges the right of one to hold another in custody or restraint." Syl. Pt. 1, State ex rel. Valentine v. Watkins, 208 W.Va. 26, 537 S.E.2d 647 (2000) (citation omitted). "Habeas corpus lies to test the legality of the restraint under which a person is detained." State ex rel. Anstey v. Davis, 203 W.Va. 538, 543-44, 509 S.E.2d 579, 584-85 (1998) (citation omitted). "A writ of habeas corpus ad subjiciendum will lie to effect the release of one imprisoned in the State Penitentiary without authority of law." Syl. Pt. 1, State ex rel. Vandal v. Adams, 145 W.Va. 566, 115 S.E.2d 489 (1960).

3. The West Virginia Code also provides that:

[f]or the purposes of this article, a contention or contentions and the grounds in fact or law relied upon in support thereof shall be deemed to have been previously and finally adjudicated only when at some point in the proceedings which resulted in the conviction and sentence, or in a proceeding or proceedings on a prior petition or petitions filed under the provisions of this article, or in any other proceeding or proceedings instituted by the

petitioner to secure relief from his conviction or sentence, there was a decision on the merits thereof after a full and fair hearing thereon and the time for the taking of an appeal with respect to such decision has not expired or has expired, as the case may be, or the right of appeal with respect to such decision has been exhausted, unless said decision upon the merits is clearly wrong.

W.Va. Code § 53-4A-1(b) (2000 Repl. Vol.); see also Losh v. McKenzie, 166 W.Va. 762, 764, 277 S.E.2d 606, 609 (1981) (Neely, J.) (holding that "every person convicted of a crime shall have . . . one omnibus post-conviction habeas corpus hearing at which he may raise any collateral issues which have not previously been fully and fairly litigated.").

4. An omnibus habeas corpus hearing as contemplated in W.Va. Code, 53-4A-1 et seq. [1967] occurs when: (1) an applicant for habeas corpus is represented by counsel or appears pro se having knowingly and intelligently waived his right to counsel; (2) the trial court inquires into all the standard grounds for habeas corpus relief; (3) a knowing and intelligent waiver of those grounds not asserted is made by the applicant upon advice of counsel unless he knowingly and intelligently waived his right to counsel; and, (4) the trial court drafts

a comprehensive order including the findings on the merits of the issues addressed and a notation that the defendant was advised concerning his obligation to raise all grounds for post-conviction relief in one proceeding.

Syllabus Point 1, Losh v. McKenzie, W.Va., 277 S.E.2d 606 (1981)

I. Ineffective Assistance of Counsel

5. 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: (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 results of the proceedings would have been different. Syl. Pt. 5, State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995).

6. To prevail in post-conviction habeas corpus proceedings, the "petitioner has the burden of proving by a preponderance of the evidence the allegations contained in his petition or affidavit which would warrant his release." Syl. Pt. 1, State ex rel. Scott v. Boles, 150 W.Va. 453, 147 S.E.2d 486 (1966).

7. First, the Petitioner asserts the theory that Mr. Jones instructed the Petitioner to testify that he exited the interstate in pursuit of a restroom and not the victim. The testimony of Mr. Jones was credible and was the most logical explanation of the Petitioner's embellishment. At no point during the evidentiary hearing were the explanations given by the Petitioner and his mother remotely believable. The Petitioner was not a good witness during his trial and Mr. Jones did his best to limit the damage. Next, the petitioner argues that Mr. Jones was not loud enough during the trial, thus irritating the jury. The Division I courtroom in the Marion County Courthouse is one of the most beautiful in the State of West Virginia, but can be cavernous to attorneys not used to its confines. While Mr. Jones was asked to speak louder at times throughout the trial, he conveyed his message well and it is very doubtful that the jury convicted the Petitioner out of spite, as opposed to the overwhelming evidence. Next, the Petitioner complains that Mr. Jones did not cross-examine Neale Patrick Minarik properly and failed to ask several critical questions. Mr. Minarik was the victim's upstairs neighbor and testified as to a couple of loud

bangs he heard downstairs during the assault, as well as seeing the Petitioner's car at the scene of the incident. Mr. Jones did not inquire further into the "loud bangs" because Mr. Minarik did not cooperate with the Petitioner's private investigator and Mr. Jones had no idea what the testimony would reveal. Considering the damage Mr. Minarik's testimony had already caused, it seems wise that Mr. Jones did not delve further into that witness. This, certainly, was a reasonable course of action by Mr. Jones. Further, the petitioner argues that Mr. Jones failed in his representation by not moving for a mistrial when a photograph of the victim's battered face was shown in the courtroom while the jury panel was assembling. This is immaterial because, as Mr. Jones correctly surmised to in his testimony, a mistrial would not have been granted for the very brief display of a picture in the courtroom. Mr. Jones' representation in regards to the pictures and projector in question was reasonable. The final theory by the petitioner is that Mr. Jones failed to attack the victim's credibility when Mr. Jones did not point out for the jury that the Petitioner's fingerprints were not on the deadbolt lock in the victim's apartment and when he did not question the victim as to why she

changed clothes between the time of the attack and when the police photographed her. These attacks on the victim's credibility are so minor that they would not have changed the outcome of the trial and Mr. Jones did not err in this regard.

II. The Charge of Abduction with Intent to Defile

8. The petitioner argues that the Court should reconsider its order entered 12 January 2007 and reverse the Petitioner's conviction for Abduction with Intent to Defile, Count I of the indictment. The Petitioner appeared at the victim's residence, forced himself into it, locked the door, told the victim to take off her pants, wrestled the victim to the ground and took out a roll of duct tape. Only through the victim's quick thinking and her proper use of an ashtray did she batter the petitioner and escape the apartment. This Court has, by prior order, ruled that the petitioner was properly convicted of Abduction with Intent to Defile. There has been no new argument presented that would alter the reasoning behind that prior order.

III. The Jury's "Rush to Judgment"

9. "A trial judge has an inherent need to

address both time constraints and the potential for scheduling issues, and the mere discussing of scheduling issues does not give rise to a presumption that the verdict was improperly coerced." State v. Waldron, 218 W.Va. 450, 459 (2005).

10. The Petitioner raises the issue that during deliberations the Court told the jury that if they failed to reach a verdict that day, they would have to come back three days later to continue deliberations. The jury indicated that they were divided at 4:23 p.m. and then they indicated they had reached a verdict at 5:31 p.m. The Petitioner argues that the Court's action influenced the jury and caused them to reach a verdict of convenience. The Petitioner therefore argues that the Court exerted improper influence on the jury to the verdict. This argument is without merit. It is common practice to inform jurors as to the Court's schedule. There was no prejudice done to the defendant by the Court's actions.

IV. Photograph Accidentally Shown Prior to Voir Dire

11. The Petitioner also raises the issue of the photograph of the victim's battered face accidentally projected in the courtroom prior to voir dire. The subject of the photograph was discussed with the

prospective jurors during voir dire and the prospective jurors indicated that the photograph would have no effect on them during the trial. To excuse the entire jury pool over an incident that did not affect their effectiveness at trial would have been wasteful. There was no prejudice to the Petitioner, and this argument is without merit.

V. The Charge of Unlawful Assault

12. The Petitioner argues that the charge of Unlawful Assault should be dismissed because that charge and the charge of Attempted Second Degree Sexual Assault were within one transaction and one continuing offense, and that the two charges share all the same elements, in violation of double jeopardy as held in Blockberger v. United States, 284 U.S. 299, 52 S. Ct. 180 (1932). However, the conviction for Attempted Second Degree Sexual Assault has already been set aside by this Court in a prior order dated 12 January 2007, making a double jeopardy argument rather difficult to conceive. Regardless, a reading of the two statutes reveals different elements, further dooming the Petitioner's argument.¹ The evidence against the

¹ Mr. Gleason could have just wounded the victim while intending to maim her, or he could have just attempted to

Petitioner was certainly sufficient and his conviction of Unlawful Assault was well deserved.

Accordingly, for the reasons set forth in the foregoing opinion, the Court is of the opinion to, and does, hereby **ORDER** that the relief sought in the "Petition for Writ of Habeas Corpus" filed by the petitioner, Michael J. Gleason, shall be, and the same is, hereby, **DENIED**.

The Court directs the Circuit Clerk of Marion County to provide certified copies of this "Opinion/Final Order Denying Petition for Writ of Habeas Corpus" to Lea Anne Hawkins, Assistant Prosecuting Attorney at 213 Jackson Street, Fairmont, West Virginia 26554; and to Frances C. Whiteman, Esquire at 229 Jefferson Street, Fairmont, West Virginia, 26554. The Circuit Clerk is further ordered to remove this case from the Court's docket.

ENTER: 01 MARCH 2011



JUDGE FRED L. FOX, II
SENIOR STATUS JUDGE

have sexual intercourse with the victim, by force. In choosing to do both, Mr. Gleason committed two separate felonies.

