

11-0816

IN THE CIRCUIT COURT OF POCAHONTAS COUNTY, WEST VIRGINIA

State ex rel. DAVIS LEE HURT,
Petitioner,

Case No. 09-C-07(P)
Hon. Joseph Pomponio

v.

DAVID BALLARD, WARDEN
MOUNT OLIVE CORRECTIONAL CENTER
Respondent.

ORDER GRANTING WRIT OF HABEAS CORPUS AND SETTING BOND

On April 15, 2011, came the Petitioner, DAVIS LEE HURT, by Counsel, Richard B. Hollicker, and came the State of West Virginia by Mercer County Prosecuting Attorney Scott Ash, for a hearing on the Petitioner's Petition for a Writ of *Habeas Corpus*, pursuant to W.Va. Code §§ 53-4A-1, et seq.

Upon motion of the Petitioner, and without objection from the State, the Court took judicial notice of all prior proceedings in this case and in all related cases, all prior documents of record in this case and in all related cases, and all prior testimony in this case and in all related cases.

The Court took additional testimony from three witnesses and heard argument from Counsel.

FINDINGS OF FACT

1. The Petitioner was indicted for murder in Mercer County, WV, on December 11, 1996, in Case No. 97-F-10.
2. The initial trial against the Petitioner ended in a mistrial, with the jury hung 10-2 in favor of acquittal.

Apr. 18. 2011 4:42PM Pocahontas County Circuit Court, PONIO

No. 9383 P. 4 82/10
WVU2/10

04/18/2011 MON 15:00 FAX 304 348 2324 Kanawha Co. PD

3. After the mistrial, the Petitioner's Trial Counsel moved for a change of venue, which was granted by the Circuit Court of Mercer County.
4. The Petitioner was retried in Pocahontas County.
5. The Petitioner was found guilty on May 29, 1998.
6. On July 16, 1998, the Circuit Court of Pocahontas County sentenced the Petitioner to life in prison with mercy.
7. The Petitioner filed a *pro se Habeas Corpus* Petition on February 15, 2000, in the Circuit Court of Pocahontas County, starting Pocahontas County Civil Action No. 00-C-07.
8. On February 18, 2000, The Circuit Court of Pocahontas County appointed Counsel for the Petitioner and ordered said Counsel to file an amended *Habeas Corpus* Petition in Pocahontas Civil Action No. 00-C-07 based upon the grounds of newly discovered evidence.
9. After many extensions of time to file the amended *Habeas Corpus* Petition were granted, the attorney appointed was relieved and the Court appointed new Counsel for the Petitioner on February 20, 2001.
10. On December 20, 2001, Petitioner filed his amended *Habeas Corpus* Petition in Pocahontas County Civil Action No. 00-C-07.
11. The amended *Habeas Corpus* Petition was denied by the Circuit Court of Pocahontas County by Order dated April 9, 2002.
12. A federal *Habeas Corpus* Petition was denied on the basis that the Petitioner had not exhausted his available state remedies.

Apr. 18. 2011 4:42PM 13841 Pocahontas County Circuit Court MPOONIO

No. 9383 P. 5. 03/10
MJU03,010

04/18/2011 MON 15:00 FAX 304 348 2324 Renawha Co. PD

13. The Petitioner retained private Counsel and in January 2009 he filed another state Petition for Writ of *Habeas Corpus* (hereinafter, "Second State Petition") in the Circuit Court of Mercer County (9th Judicial Circuit).
14. Because of the 11th Judicial Circuit's greater familiarity with this case, the 9th Judicial Circuit transferred the Second State Petition to the 11th Judicial Circuit for adjudication.
15. In the Second State Petition, the Petitioner set forth two primary justifications for granting him a Writ of *Habeas Corpus*: newly discovered evidence that supported his claim of innocence and ineffective assistance of his previous *Habeas Corpus* Counsel.
16. By Order dated March 30, 2009, this Court granted the Petitioner an evidentiary hearing on a single issue: "whether Petitioner's previous *Habeas Corpus* Counsel committed reversible error by failing to obtain affidavits to corroborate the alleged recantation of Mr. Hopkins."
17. An evidentiary hearing on the matter was held before this Court on April 16, 2010.
18. Applying the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984), this Court found that the Petitioner's previous *Habeas Corpus* Counsel did commit reversible error.
19. This Court vacated the prior denial of *Habeas Corpus* relief and directed present *Habeas Corpus* Counsel to file another Petition for Writ of *Habeas*

Corpus (hereinafter "Third State Petition"), addressing any and all issues arising from the Petitioner's second trial.

20. The Third State Petition was filed. A hearing on that Petition was held on April 15, 2011.
21. The Court took judicial notice of the entire record in all prior related proceedings.
22. The Court heard testimony from three witnesses: Michael Hopkins, the self-admitted killer; Juanita Hurt, the Petitioner's mother; and the Petitioner himself.
23. The Court heard uncontroverted testimony, supported by the record in this case, that the Defendant was not advised of his *Neuman* rights prior to taking the stand at trial.
24. Also of note, two of the Petitioner's prior attorneys have had their law licenses annulled by the West Virginia Supreme Court of Appeals.

CONCLUSIONS OF LAW

1. "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to

eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 LEd.2d 674 (1984).

2. "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 LEd.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).
3. "A trial court exercising appropriate judicial concern for the constitutional right to testify should seek to assure that a defendant's waiver is voluntary, knowing, and intelligent by advising the defendant outside the presence of the jury that he has a right to testify, that if he wants to testify then no one can prevent him from doing so, that if he testifies the prosecution will be allowed to cross-examine him. In connection with the

privilege against self-incrimination, the defendant should also be advised that he has a right not to testify and that if he does not testify then the jury can be instructed about that right." Syl. pt. 7, *State v. Newman*, 179 W.Va. 550, 371 S.E.2d 77 (1988).

4. Absent a clear record indicating that the decision as to whether to testify is made voluntarily, knowingly, and intelligently, the presumption must be that a defendant does not waive his rights. "Courts indulge every reasonable presumption against waiver of a fundamental constitutional right and will not presume acquiescence in the loss of such fundamental right." Syl. pt. 6, *Newman*, citing syl. pt. 2, *State ex rel May v. Boles*, 149 W.Va. 155, 139 S.E.2d 177 (1964).
5. "Certain constitutional rights are so inherently personal and so tied to fundamental concepts of justice that their surrender by anyone other than the accused acting voluntarily, knowingly, and intelligently would call into question the fairness of a criminal trial." Syl. pt. 5, *Newman*.

DISCUSSION

The question this Court now answers is whether the Petitioner's previous Trial Counsel was ineffective in his representation of the Petitioner during the pendency of Pocahontas County Case No. 97-F-10.

Under *Strickland v. Washington* and *State v. Miller*, the test for ineffective assistance of counsel is the following: (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but

Apr. 18. 2011 4:42PM 1304 Pocahontas County Circuit Court, PONIO

No. 9383 P. 9 07/10
0007/010

04/18/2011 MON 15:01 FAX 304 348 2324 Kanawha Co. PD

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.E2d 114 (1995). This Court believes that the Petitioner's previous Trial Counsel was indeed ineffective.

The first prong of the *Strickland* test asks the court to examine whether the Petitioner's Trial Counsel was deficient under an objective standard of reasonableness. This Court believes that for all of the individual and cumulative reasons set forth in the Third State Petition, and incorporated herein by reference, the Petitioner's Trial Counsel was deficient under an objective standard of reasonableness. Thus, the Petitioner has met his burden under the first prong of the *Strickland* test.

Turning to the second prong of the *Strickland* test, there is a reasonable probability that, but for Trial Counsel's unprofessional errors, the result of the proceedings would have been different. For all of the individual and cumulative reasons set forth in the Third State Petition, and incorporated herein by reference, this Court believes that the Petitioner meets this criterion as well. Thus, the Petitioner has met his burden under the second prong of the *Strickland* test.

While the Court finds ineffective assistance of Counsel on all the basis of all of the individual and cumulative reasons set forth in the Third State Petition, the Court wishes to call special attention to the violation of the Petitioner's *Neuman* rights and his Trial Counsel's failure to enforce those rights.

The Petitioner took the stand at trial. Prior to doing so, the record reflects that he was not advised by the Court of his *Neuman* rights. The record does not reflect that he was advised of these rights by his Trial Counsel. In fact, at the Petitioner's sentencing

hearing, both the prosecutor and the Court acknowledged that the Court had failed to advise the Petitioner of his *Neuman* rights prior to the time he took the stand. On page 60 of the sentencing hearing transcript, the State noted that the Court *should* have advised Davis of his rights "because I think that's what *Neuman* says to do in every case" On page 73 of the sentencing hearing transcript, the Court states: "perhaps in my mind I didn't think it was necessary."

The Court clearly erred when it failed to advise the Petitioner of his *Neuman* rights. This error was compounded by Trial Counsel's failure to protect those rights and insist—or at least politely remind the Court—that it should engage in the standard *Neuman* instruction and colloquy. The Petitioner was prejudiced by this failing, specifically by being subjected to cross-examination in three regards: (1) past juvenile conduct involving a stolen van and a stolen jeep; (2) his appearance at Mr. Lester's home the morning following the murder and an accusation that he conveyed information to Mr. Lester's wife and others concerning the murder; and, (3) the accusation of flight outside the state after the murder.

Trial Counsel's failure to assure that the Petitioner was advised of his *Neuman* rights was deficient under an objective standard of reasonableness. Further, there is a reasonable probability that, but for Trial Counsel's error, the result of the proceedings would have been different.

Because the Petitioner has met his burden under both prongs of the *Strickland* test, this Court holds that Petitioner's Trial Counsel was ineffective.

Additionally, the Court makes a specific finding that Michael Hopkins, based on the entire record, is not a credible witness.

CONCLUSION

It is therefore, ORDERED that:

1. The Petitioner's conviction on one count of first degree murder in Pocahontas County Case No. 97-F-10 is vacated;
2. The Petitioner's sentence of life with mercy is void;
3. Bond is set in the amount of ten thousand dollars (\$10,000.00), which may be satisfied by the posting of real property;
4. The Division of Corrections shall immediately release Petitioner once bond has been posted;
5. The Petitioner shall have no contact, direct or indirect, with Michael Hopkins or his family;
6. The Petitioner shall have no contact, direct or indirect, with the family of Freddie Lester; and
7. This case is remanded to the Circuit Court of Mercer County for further proceedings consistent with this Order.

The State's objection to the Court's ruling is noted.

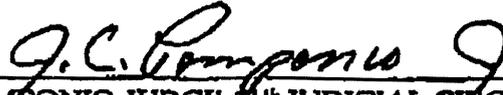
The Clerk of this Court shall forthwith forward a copy of this Order to each of the following: the Petitioner; the Prosecuting Attorney of Mercer County, West Virginia, in care of Scott Ash, Esq.; the Kanawha County Public Defender's Office in care of

Apr: 18. 2011 4:43PM 1384 Pocahontas County Circuit Court, POMONIO
04/18/2011 MON 13:01 FAX 304 348 2324 Kanawha Co. PD

No. 9383 P. 12 18/18
WVUAV/UV

Richard E. Hollicker, Esq.; the Mercer County Circuit Clerk; and the Huttonsville
Correctional Center in care of Adrian Hoke, Warden.

Entered this 18th day of April, 2011.



JOSEPH POMPONIO, JUDGE, 11th JUDICIAL CIRCUIT

Prepared by:



Richard E. Hollicker
Counsel for Petitioner
W.Va. Bar ID No. 7173
PO Box 2827
Charleston, West Virginia 25930
Telephone (304) 348-2323

CERTIFICATE OF SERVICE

I, Laura Young, Assistant Attorney General and counsel for the Respondent herein, do hereby certify that I have served a true copy of the "*Notice of Appeal*" upon counsel for the Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 18th day of May, 2011, addressed as follows:

To: Richard Holicker, Esquire
Kanawha County Public Defender's Office
P.O. Box 2827
Charleston, WV 25330



LAURA YOUNG