

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Petitioner,

v.

DAVIE LEE HURT,

Respondent.

Supreme Court No. 11-0816



RESPONDENT'S BRIEF

Robert C. Catlett
Deputy Public Defender
W.Va. Bar No. 8522
Office of the Public Defender
Kanawha County
Charleston, WV 25330
(304) 348-2323
rcatlett@wvdefender.com

Counsel for Respondent



TABLE OF CONTENTS

TABLE OF AUTHORITIESii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT.....2

STATEMENT REGARDING ORAL ARGUMENT AND DECISION3

ARGUMENT.....4

 A) Trial Counsel’s Ineffectiveness In Failing To Advise Hurt About His Right To
 Not Testify At Trial Was An Error Of Constitutional Dimension And The
 Trial Court Did Not Abuse Its Discretion In Finding Trial Counsel Ineffective.4

 B) The State’s Second Assignment of Error Does Not Address A Ground Upon
 Which Relief Was Granted As The Habeas Court Did Not Find That There
 Was A Credible Recantation; It Found Hopkins To Be Not Credible As A
 Witness.7

 C) The Final Order Fails To Set Forth Specific Findings of Fact And Conclusions
 Of Law As To Other Ineffective Assistance of Counsel Allegations.....8

CONCLUSION9

TABLE OF AUTHORITIES

In Re Investigation of the West Virginia State Police Crime Laboratory, Serology Division, 190 W.Va. 321, 326, 438 S.E.2d 501, 506 (1993)..... 6

Mathena v. Haines, 219 W.Va. 417, 633 S.E.2d 771 (2006). 4

State v. Miller, 194 W.Va. 3, 459 S.E.2d 114 (1995). 4

State v. Neuman, 179 W.Va. 580, 584, 371 S.E.2d 77, 81 (1988)..... 3

State ex rel. Watson v. Hill, 200 W.Va. 201, 203 488 S.E.2d 476, 479 (1997)..... 8

Strickland v. Washington, 466 U.S. 668 (1984)..... 5

OTHER AUTHORITIES

ABA Standards for Criminal Justice § 4-5.2(a) (2d ed. Supp. 1986)..... 6

STATEMENT OF THE CASE

The state's statement of the case is sufficiently accurate to avoid repetition except as to the sequence and nature of the hearings and rulings during the habeas corpus stage. There was an original habeas proceeding before Judge Rowe where Michael Hopkins recanted his testimony. (App. Vol. 2 at 117). Judge Rowe issued an order denying the petition. (App. Vol. 2 at 117-131). Later, a second habeas petition alleging ineffectiveness of habeas counsel was filed in front of Judge Pomponio, and he then ordered that a hearing should be had as to ineffectiveness of habeas counsel for not investigating additional alibi witnesses. (App. Vol. 2 at 133-142).

Original habeas counsel was found ineffective, and Judge Pomponio awarded Hurt a new omnibus habeas hearing. (App. Vol, 2 at 151-2.) Judge Pomponio specifically held that since Hurt had ineffective assistance at the original habeas proceeding, none of Judge Rowe's rulings were binding as to this new hearing; res judicata did not apply. *Id.* At this final hearing, Hurt testified that he was never advised of his right to not testify. (App. Vol. 2, April 15, 2011 hearing at 45) The habeas court also found that there was no record of the trial court instructing Hurt as to his right to not testify. (*Id.* at 666-7)

The habeas court ultimately found in favor of Hurt on all the ineffective assistance of counsel grounds in Hurt's final petition, giving specific attention to the ground that Hurt was not advised of his right to not testify. (App. Vol. 2 at 158-161.) This final order from the April 15, 2011 hearing vacating Hurt's conviction is the order at issue in this case.

SUMMARY OF ARGUMENT

Davie Hurt's conviction for first degree murder was rightly vacated by the habeas court based on ineffectiveness of trial counsel. The foremost ground of ineffective assistance of counsel is the failure of trial counsel to advise Hurt that Hurt had the right to decide not to testify. The record is barren of any such advice given Hurt, and Hurt's testimony that he was never so advised by counsel is uncontested in the record. The habeas court correctly found counsel's performance to be deficient under an objective standard of reasonableness. There is no question of trial strategy here as the decision to testify is left to the defendant to be made with the advice of counsel, and usurping the defendant's prerogative to decide is not a question of strategy.

The habeas court also rightly found that this error made it reasonably probable that the result would have been different. The habeas court noted several lines of cross-examination taken by the state and held that the evidence produced therewith was sufficiently prejudicial. Also, the habeas court found that since Michael Hopkins had changed his story several times, and had went so far to make absurd claims like denying not only the substance of his recantation, but that it happened at all, that Michael Hopkins was simply not credible as a witness. After removing the cross-examination, and the state's main witness in Michael Hopkins, it becomes obvious that the result could reasonably be different as no longer is a witness claiming direct knowledge that Hurt is guilty.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent believes oral argument is not necessary as the necessary facts supporting the appealed order are clearly stated in the record. Accordingly, Respondent believes this matter is appropriate for a memorandum decision.

ARGUMENT

The standard of review in reviewing the grant of a writ of habeas corpus is well settled: “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).

A) Trial Counsel’s Ineffectiveness In Failing To Advise Hurt About His Right To Not Testify At Trial Was An Error Of Constitutional Dimension And The Trial Court Did Not Abuse Its Discretion In Finding Trial Counsel Ineffective.

The habeas court found trial counsel ineffective for his failure to advise Hurt as to his right to not testify. (App. Vol. 2 at 160). Neither the trial court nor defense counsel advised Hurt as to his right to testify or not testify. Id.

The state claims the state erred both because the failure to advise is not an error of constitutional dimension, and because trial counsel was not ineffective in so failing to advise. The first contention can be discarded easily. Trial counsel’s failure to advise Hurt is raised as an ineffective assistance of counsel issue. Ineffective assistance of counsel is clearly constitutional error that can be raised via a petition for a writ of habeas corpus.

Trial counsel’s failure to advise Hurt as to his right to not testify was ineffective assistance of counsel. Ineffective assistance of counsel exists when “(1) counsel’s performance is 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." Id. at Syl. Pt. 6 (citing Strickland v. Washington, 466 U.S. 668 (1984)).

Hurt testified at the April 15, 2011 hearing that his counsel failed to advise him of his right to not testify. (App. Vol. 2, April 15, 2011 hearing at 45.) The habeas court determined that this was "deficient under an objective standard of reasonableness." (App. Vol. II at 160.) The decision to testify or not testify is the defendant's choice alone to be made with consultation of counsel. See State v. Neuman, 179 W.Va. 580, 584, 371 S.E.2d 77, 81 (1988) (citing ABA Standards for Criminal Justice § 4-5.2(a) (2d ed. Supp. 1986)⁽¹⁾). As such, the decision of counsel to simply instruct defendant to testify can not be considered a strategic decision made in good faith. See Neuman at Syl. Pt. 7 ("the defendant should also be advised that he has a right not to testify..."). This does not fulfill the above cited basic duty of defense counsel: the duty to inform a defendant of his right to decide to testify or not testify and to consult with the defendant to help him reach a decision. Because he was never advised by counsel that he did not have to testify, Hurt's right to decide for himself whether to testify was usurped by his trial counsel.

The habeas court also found "a reasonable probability but for Trial Counsel's error, the result of the proceedings would have been different." (App. Vol. 2 at 160). It found that by testifying Petitioner was prejudiced as a result of being cross-examined regarding three matters. Id. First,

⁽¹⁾ The text of Section 4-25.2(a):

(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are:

- (i) what plea to enter;
- (ii) whether to waive jury trial; and
- (iii) whether to testify in his or her own behalf.

“Past juvenile conduct involving a stolen van and stolen jeep.” Id. Second, “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. Id. Third, “the accusation of flight outside the state after the murder.” Id.

Furthermore, the habeas court made “a specific finding that Michael Hopkins, based on the entire record, is not a credible witness.” (App. Vol. 2 at 161.) Michael Hopkins committed the actual murder and throughout the case told multiple stories, some inculpatory to Hurt and some exculpatory. During his final testimony in front of Judge Pomponio, Hopkins made several fantastic claims, including denying his testimony at a previous hearing, testimony that is in the record of this case. (App. Vol. 2, April 15, 2011 hearing at 10-11). Because of Hopkins’ varying claims and his completely incredible statements made during his last appearance, the habeas court correctly found all his testimony unreliable. See generally In Re Investigation of the West Virginia State Police Crime Laboratory, Serology Division, 190 W.Va. 321, 326, 438 S.E.2d 501, 506 (1993) (holding due to later revelations of false testimony all testimony of certain serologist declared “invalid, unreliable, and inadmissible”). Given Hopkins’ varying stories, the habeas court’s finding was not clearly erroneous.

As Hopkins’ testimony was the centerpiece of, and absolutely critical to, the state’s case, the habeas court clearly did not abuse its discretion in finding that when eliminating this testimony along with the cross examination of Hurt, that there is a reasonable probability the result of the trial would have been different. As such, there is no basis for this Court to find the habeas court abused its discretion and reverse the habeas court’s decision.

B) The State's Second Assignment of Error Does Not Address A Ground Upon Which Relief Was Granted As The Habeas Court Did Not Find That There Was A Credible Recantation; It Found Hopkins To Be Not Credible As A Witness.

The state's second assignment of error alleges that "The habeas court erred in determining that there was an actual recantation and substantial corroborating evidence supported such recantation." (State's Brief at 24). This is somewhat confusing as the state does not deny that at the January 18, 2002, hearing Hopkins recanted his trial testimony by testifying that Hurt had nothing to do with the killing. (App. Vol. 2, January 18, 2002 hearing at 39-40, 48). This is a recantation. The state's claim seems to be contesting the finding that such a recantation was credible. The habeas court made no such finding. It found only that Hopkins was not credible as a witness. (App. Vol. 2 at 161).

The habeas court reversed Hurt's conviction based on several allegations of ineffective assistance of counsel. (App. Vol. 2 at 158-161). There was no finding that the newly discovered evidence (recantation) in and of itself was the basis for reversal. The habeas court did find, when discussing the prejudice prong, that "based on the entire record" Hopkins was "not a credible witness." *Id.* The state failed to address this specific finding of fact, instead focusing on the strawman argument against a finding the habeas court did not make.

C) The Final Order Fails To Set Forth Specific Findings of Fact And Conclusions Of Law As To Other Ineffective Assistance of Counsel Allegations.

Other than the right to not testify issue discussed above, petitioner concedes that the final order fails to set forth detailed findings of fact and conclusions of law as to other ineffective assistance of counsel allegations. If this Court does not affirm the habeas court ruling based on the right to not testify issue, petitioner respectfully requests that this case be remanded to the circuit court for a more developed order. See State ex rel. Watson v. Hill, 200 W.Va. 201, 203 488 S.E.2d 476, 479 (1997) (remanding case to circuit court to issue an order setting forth “specific findings of fact and conclusions of law relating to each contention advanced by petitioner, and to state the grounds upon which the matter was determined”).

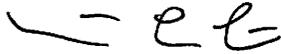
Also, the state’s continued references to Judge Rowe’s 2002 order as to these other ineffective assistance of counsel claims and the implication that petitioner had some sort of evidentiary burden to overcome is in error. Judge Pompinio found that Hurt received ineffective assistance of counsel during the proceedings leading to that order. (App. Vol, 2 at 151-2.) Accordingly, Judge Pomponio declared that at this new hearing “Petitioner should raise any and all possible grounds for relief; the grounds raised in his previous habeas corpus petition in Pocahontas County Civil Action No. 00-C-07, will be no bar to raising them in an omnibus habeas corpus hearing in Pocahontas County Civil Action 09-C-07.” (Id.) Also, “Petitioner’s previous habeas corpus petition adjudicated in Pocahontas County Civil Action 00-C-01 will not bar claims to be heard in 09-CV-07 based on res judicata.” (Id at 152.) What Judge Rowe decided in 2002 is totally irrelevant, and any order on remand would not have to specifically give reasons for making findings contrary to Judge Rowe’s 2002 order.

CONCLUSION

Respondent requests this Court affirm the order granting Davie Hurt's petition for a writ of habeas corpus and vacating his conviction and sentence for first degree murder.

Respectfully submitted,

Davie Lee Hurt
By Counsel



Robert C. Catlett
Deputy Public Defender
W.Va. Bar No. 8522
Kanawha County Public Defender Office
P.O. Box 2827
Charleston, WV 25330
(304) 348-2323
rcatlett@wvdefender.com

Counsel for Respondent

CERTIFICATE OF SERVICE

I, Robert C. Catlett, hereby certify that on this 1st day of February, 2012, a copy of the foregoing Response Brief on Behalf of the Respondent was sent via U.S. Mail to counsel for respondent, Laura Young , Assistant Attorney General, 812 Quarrier Street, 6th Floor Charleston, WV, 25301.



Robert C. Catlett
Counsel for Respondent