

11-1456

IN THE CIRCUIT COURT OF GILMER COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA,
ex. rel. STEVE LEE DILWORTH,

Petitioner,

v.

Case No.: 10-C-11
Honorable Judge Jack Alsop

THOMAS McBRIDE, Warden,
Mount Olive Correctional Facility,

Respondent.

ORDER GRANTING IN PART AND DENYING IN PART POST-CONVICTION
HABEAS CORPUS PETITION

This matter came before this Court on the Petition for post-conviction habeas corpus relief filed by Ray M. Shepard on April 4, 2010. On the 2nd day of July, 2010, Gerald B. Hough, the Prosecuting Attorney of Gilmer County, West Virginia, on behalf of the Respondent, filed "Respondent's Reply to Petitioner's Habeas Corpus Petition". Petitioner, by and through counsel, Mr. Ray M. Shepard, filed a "Memorandum of Law in Support of Petition for Writ of Habeas Corpus" on the 20th day of July, 2010.¹ Following the filing of these pleadings, the Court conducted a thorough review of the record and determined a hearing would be needed to fairly and fully adjudicate the Petitioner's claim.

An Omnibus Habeas Hearing was held before this Court on the 11th day of July 2011. The Petitioner appeared in person and with counsel, Ray M. Shepard, and the Respondent

¹ Petitioner, by and through counsel, Ray M. Shepard, filed a Petition for Writ of Habeas Corpus in Federal Court pursuant to 28 U.S.C. §2254. Petitioner alleged six grounds for relief in his Federal Writ for Habeas Corpus. Pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), Judge Keely, of the United States Fourth Circuit Court of Appeals, held Petitioner's §2254 Petition in abeyance and stay to allow Petitioner to fully exhaust all remedies available from the West Virginia state courts.

appeared by counsel, Gerald B. Hough, Prosecuting Attorney of Gilmer County, West Virginia. Following the hearing, the Court took the matter under advisement for further consideration. After carefully considering the evidence, the arguments presented by each party, the parties' briefs, the record of the Petitioner's trial, Petitioner's federal Habeas Petition, and pertinent legal authority, the Court has concluded the Petitioner has established a basis, in part, for the relief requested in his Petition for Writ of Habeas Corpus. The reasons for this decision are set forth below.

I. FINDINGS OF FACT

1. The Court takes judicial notice of all proceedings and the record in the underlying case, to wit: 06-F-6.

2. The Circuit Court of Gilmer County, West Virginia, has proper jurisdiction in this matter pursuant to W.Va. Code §53-4A-1 through 13, *et. seq.*

3. The Petitioner was charged in Case No. 06-F-6 with the felonious offenses of ten (10) counts of Sexual Abuse by a Parent or Guardian, in violation of W. Va. Code § 61-8D-5a, in a ten (10) count indictment returned by the Grand Jury of Gilmer County, West Virginia, on July 6, 2006.

4. The case was tried on January 30 and 31, 2007, in the Circuit Court of Gilmer County, West Virginia. On January 31, 2007, a petit jury returned a verdict finding the Petitioner guilty of ten (10) felony counts of Sexual Abuse by a Guardian.

5. This Court sentenced the Petitioner by Order entered on the 17th day of April, 2007.

6. The Petitioner was sentenced as to Counts One through Ten, Sexual Abuse by a Guardian, in violation of West Virginia Code §61-8D-5a, to not less than ten (10) years but not more than twenty (20) years in the penitentiary, per count.

7. This Court further adjudged and ordered the sentences for Counts One, Two, and Three of the indictment would run consecutively to each other; while Counts Three through Ten would be suspended and the Petitioner would be placed upon probation for a period of five years. In effect, the Court sentenced Petitioner to a term of not less than thirty (30) years but not more than sixty (60) years in the penitentiary.

8. On the 22nd day of August, 2007, Petitioner, through counsel, filed a Petition for Appeal to the West Virginia Supreme Court of Appeals, in an effort to appeal his conviction and sentence.

9. On the 10th day of January, 2008, the West Virginia Supreme Court of Appeals refused Petitioner's Appeal.

10. On November 12, 2008, Petitioner, by and through counsel, filed a Petition for Writ of Habeas Corpus in Federal Court pursuant to 28 U.S.C. §2254.

11. On the 2nd day of September, 2009, Magistrate Judge James E. Seibert of the United States District Court for the Northern District of West Virginia issued an order recommending Petitioner's Petition for Writ of Habeas Corpus be granted as to Ground Four, to wit: Mr. Dilworth was denied his right to a unanimous jury verdict. ²

12. Magistrate Judge Siebert agreed with Petitioner's argument as to Ground Four of Petitioner's Federal Habeas Corpus Petition, that the indictment in Petitioner's case was

² Petitioner alleges six grounds in which relief should be granted in his Federal Petition for Writ of Habeas Corpus. Petitioner also incorporated his Petition for Appeal that was filed with the West Virginia Supreme Court of Appeals into his Federal Writ. Magistrate Judge James E. Seibert further recommended that all claims, aside from Ground Four, set forth in Petitioner's Habeas Corpus Petition be denied.

insufficient under the United States Constitution to ensure his right to a unanimous jury verdict, and as such Petitioner was entitled to relief based on this assertion.

13. By Order issued on February 12, 2010, Judge Irene M. Keely of the United States District Court for the Northern District of West Virginia, adopted in part and rejected in part Magistrate Judge James E. Siebert's recommendations.

14. As to the issue currently before this Court, Judge Keely found that the Petitioner had failed to exhaust his claim in state courts as to his "Valentine" claim and stayed Petitioner's Writ for Habeas Corpus relief to allow Petitioner to present this unexhausted claim to the West Virginia state courts.

II. PRELIMINARY LEGAL AUTHORITY

In post-conviction habeas corpus claims, the Petitioner is required to meet three preliminary standards before their claim will be recognized. "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be reviewed." *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979). Therefore, the first requirement for post-conviction habeas corpus requires the Petitioner to allege that he or she has been denied a constitutional right. In this case, the Petitioner makes one allegation regarding the denial of his constitutional rights that this Court will recognize and address. Petitioner alleges he was denied his constitutional right to a unanimous jury verdict. This allegation along with the alleged constitutional violation will be discussed more thoroughly in this Court's *Petitioner's Grounds for Relief* section below. This Court recognizes that based on the allegations contained in the Petitioner's Omnibus Habeas Petition, the Petitioner has satisfied the first requirement by alleging a violation of his constitutional rights.

The Petitioner must next show the alleged constitutional violation has not been previously and finally adjudicated or waived, and thus barred by W.Va. Code §53-4A-1 (b)(c) [1967]. In this case Petitioner alleges one ground in which his constitutional rights were violated and such claim has not been previously adjudicated or waived.³ Trial counsel did not allege the constitutional violation raised in Petitioner's Omnibus Habeas Corpus Petition before in any other Habeas proceedings in the underlying case, to wit: 06-F-6. Thus Petitioner has satisfied the second preliminary requirement.

Finally, the Court must determine whether the Petitioner has previously waived his rights with regard to the grounds alleged in the Amended Omnibus Habeas Petition. The Petitioner in this case has not waived his constitutional rights as to Ground Four of the Amended Petition⁴; therefore, the third preliminary requirement has been met.

With these three preliminary standards satisfied, this Court proceeded to consider the merits of the claim alleged in Petitioner's Omnibus Habeas Petition.

III. DISCUSSION

A. PETITIONER'S GROUNDS FOR RELIEF

The Petitioner raises six grounds in which his constitutional rights were violated in his Petition for Habeas Corpus relief. However, this Court will only address Ground Four, which

³ This Court will note Petitioner is estopped from asserting claims in this Court that have previously been adjudicated and denied pursuant to his Federal Writ for Habeas Corpus. Accordingly, this Court will only be addressing the issue of denial of a unanimous jury verdict, set forth as Ground Four in Petitioner's Writ for Habeas Corpus and Subsection A in Petitioner's "Memorandum of Law in Support of Petition for Writ of Habeas Corpus".

⁴ Ground Four of Petitioner's Habeas Corpus Petition to this Court is the same as Ground Four alleged in Petitioner's Federal Writ for Habeas Corpus. As such, this Court finds Petitioner has not waived his rights as to Ground Four of his Habeas Corpus Petition in this Court.

alleges Petitioner was denied his right to a unanimous jury verdict.⁵ All other claims alleged in Petitioner's Habeas Petition to this Court were also set forth in Petitioner's Federal Writ for Habeas Corpus and have been denied by that Court and as such are barred by review in this Court.⁶ Petitioner advances his argument regarding the denial of his right to a unanimous jury verdict under both the United States Constitution and the West Virginia Constitution. To prevail in post-conviction habeas corpus proceedings, "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." *State ex rel. Scott v. Boles, Syllabus pt. 1*, 150 W.Va. 435, 147 S.E.2d 426 (1966). This Court has reviewed the recommendations of Magistrate Judge James E. Siebert and is in agreement with the finding that Counts Two through Ten of the Indictment are constitutionally defective under the United States Constitution. This Court is of the opinion, pursuant to the United States Constitution, Petitioner is entitled, in part, to the relief he has requested based on Ground Four of his Petition for Habeas Corpus relief. This Court will address this issue raised by Petitioner, and any sub-issues that may arise, in turn.

Ground Four: Due Process Violation

Petitioner alleges he was denied his constitutional right to due process as found in the 14th Amendment of the United States Constitution and Article 3 §10 of the West Virginia Constitution. Specifically, Petitioner contends he was denied his right to a unanimous jury verdict because Petitioner's indictment was faulty in that he was charged with, and convicted of,

⁵ Counsel for Petitioner refers to the constitutional violation in Ground Four of Petitioner's Writ for Habeas Corpus to this Court as a denial of a unanimous jury verdict, however, this Court is of the opinion this allegation is improperly labeled and would be more appropriately addressed as a violation of Petitioner's due process rights and a double jeopardy violation. Therefore, this Court will address the alleged violation as such.

⁶ Pursuant to West Virginia Code §53-4A-1 (b)(c), Petitioner is estopped from asserting claims previously adjudicated. The same six allegations were raised in Petitioner's Federal Writ for Habeas Corpus and all grounds but Ground Four were denied by that Court.

ten (10) identical, sexual abuse charges, and as such was not provided with sufficient information to prepare an adequate defense. Essentially, Petitioner is claiming the indictment, as worded, opens him up to double jeopardy issues and violated his “due process” rights. This issue, as to multiple counts of an indictment being identically worded, being constitutionally defective under the United States Constitution, has not previously been addressed in this jurisdiction, but has been raised in the United States Sixth Circuit Court of Appeals. After a thorough review of the Sixth Circuit’s decision in *Valentine v. Konteh*, 395 F.3d 626 (2005), this Court is of the opinion Petitioner is entitled, in part, to the relief requested in his Writ for Habeas Corpus and this Court so finds for the reasons set forth below.

The sufficiency of the indictment is a key issue in this case. In *Russell v. United States*, 369 U.S. 749 (1982), cited by Petitioner, the Supreme Court of the United States has set forth the criteria by which the sufficiency of all criminal indictments, both Federal and State, must be measured. Under *Russell*, a criminal indictment is sufficient only if it meets the following three standards: (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy. *Id.*; *Valentine v. Konteh*, 395 F.3d 626 at 631 (2005). “Generally, the sufficiency of an indictment is reviewed *de novo*. An indictment need only meet minimal constitutional standards, and the sufficiency of an indictment is determined by the practical rather than the technical considerations.” Syllabus Point 2, *State v. Miller*, 197 W.Va. 558, 476 S.E.2d 535 (1996); *State v. David D. W.*, 588 S.E.2d 156 at 161 (2003).

Petitioner cites *Valentine v. Konteh*, 395 F.3d 626 (2005), a case from the Sixth Circuit, United States Court of Appeals, as the main authority to support his argument that he was denied his constitutional right to due process. In *Valentine*, the defendant was convicted of sexually

abusing his eight year old stepdaughter. In the indictment in *Valentine*, the defendant was charged with twenty (20) identical counts of child rape and twenty (20) identical counts of felonious sexual penetration of a minor. The statutory language was present in each count, but *no further information was included to differentiate one count from another*, all counts were alleged to have occurred between March 1, 1995 and January 16, 1996. *Id. Emphasis added.* This case is very similar to *Valentine*, as Petitioner in this case was charged with ten (10) identical counts, occurring over a 12 month period, of sexual abuse by a parent or guardian in violation of West Virginia Code §61-8D-5(a). Further, no information was provided to differentiate one count from another.⁷

In *Valentine*, the United States Sixth Circuit Court of Appeals found defendant was “deprived of his constitutionally guaranteed due process rights as the multiple, identically worded counts of rape and felonious sexual penetration of a child over a 10-month period that were contained in the indictment deprived defendant of the due process right to protect against conviction of multiple counts for [the] same conduct in violation of double jeopardy.” *Valentine v. Konteh*, 395 F.3d 626 (2005). Although *Valentine* is not binding authority upon this Court, as the State of West Virginia is within the jurisdiction of the Fourth Circuit Court of Appeals of the United States, this Court finds *Valentine* to be very persuasive authority; therefore, this Court has

⁷ Each count, in the ten (10) count indictment returned against Petitioner on the 6th day of July, 2006, read as follows:

“ That on or about the ___ day of ___, 2001, in Gilmer County, West Virginia, **STEVE LEE DILWORTH** committed the felony offense of **SEXUAL ABUSE BY PARENT OR GUARDIAN** in that he, the said **STEVE LEE DILWORTH**, did then and there willfully, intentionally, unlawfully, knowingly, and feloniously engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with a child under his care, custody or control, and he was then the parent or guardian of the said child, to wit: **STEVE LEE DILWORTH** did, on or about the ___ day of _____, 2001, in Gilmer County, West Virginia, willfully, intentionally, unlawfully, knowingly, and feloniously, engage in or attempt to engage in sexual exploitation of, or in sexual intercourse, sexual intrusion or sexual contact with, **D.H.** a child under his care, custody or control, and he was then the guardian of the said **D. H.**, against the peace and dignity of the State of West Virginia in violation of West Virginia Code §61-8D-5(a).

chosen to accept the findings and conclusions of *Valentine*, with regard to the issue of double jeopardy, to this case. This Court would note that it has reviewed the West Virginia Supreme Court of Appeals decision with regard to the sufficiency of an indictment in *State v. David D. W.*, 214 W.Va. 167, 588 S.E.2d 156.⁸ Pursuant to the holding in that case, the indictment, upon its face, in the underlying matter would appear to be a sufficient indictment. However, a further review of *David D. W.* reveals that the West Virginia Supreme Court of Appeals did not address the issue of identical charging language in multiple counts of an indictment, and the effect that may have on an individual's constitutional due process rights; and as such, this issue was not raised for consideration by the West Virginia Supreme Court of Appeals.

It is a long recognized fact that fairly large time windows in the context of charges of child abuse prosecutions are not in conflict with constitutional notice requirements. *Valentine v. Konteh*, 395 F.3d 626; *State v. David D.W.*, 214 W.Va. 167, 588 S.E.2d 156. Although this Court agrees time is not the material issue in this case, this Court is of the opinion Petitioner had no way to identify what he was to defend against in the repetitive counts and no way to determine if the same evidence would be used to convict him on multiple counts, which does conflict with constitutional due process requirements and the double jeopardy provision. Further, a jury could have used a single act to convict the Petitioner for more than one count since all counts in the indictment were identical. The indictment returned against Petitioner on July 6, 2006, lacks any specific details as to the sexual abuse. In fact, each of the ten (10) counts are identical in nature. Accordingly, the issue of double jeopardy, which was the main issue in *Valentine*, is also an issue in this case as Petitioner was not adequately informed as to each of the charges against him. Each count was identically worded in the indictment, leaving Petitioner

⁸ *Valentine v. Konteh*, supra, was decided subsequent to *State v. David D. W.*, supra.

with no way of knowing what independent evidence was offered to prove each count of the indictment.

Although in this case Defendant Dilworth gave an incriminating statement to the State Police in which he admitted that he had sexually abused his step-daughter at least ten (10) times, which would factually distinguish this case from *Valentine*, this Court is of the opinion that this in itself does not correct the “due process” violation, and therefore does not protect Petitioner from double jeopardy. Due process requires that “criminal charges provide criminal defendants with the ability to protect themselves from double jeopardy.” *Valentine v. Konteh*, 395 F.3d 626 at 634. Further, a criminal indictment is sufficient only if it meets the following three standards: (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy. *Russell v. United States*, 369 U.S. 749 (1982); *Valentine v. Konteh*, 395 F.3d 626 at 631.

In this case, the indictment returned against Petitioner contained the statutory language, giving Petitioner adequate notice of the statute he violated. The indictment also contained the elements of the crime charged, meeting the second requirement for a sufficient indictment. However, the third requirement, protects the defendant against double jeopardy, is not met. Although, Petitioner admitted to sexually touching his step-daughter at least ten (10) times, his statement did not specify it was within the time period alleged in the indictment. Further, the State did not provide evidence at trial or during pre-trial proceedings that would affirm ten (10) separate counts of sexual abuse within the time period specified in the indictment.

Accordingly, this Court finds the indictment returned against Petitioner on the 6th day of July, 2006 is constitutionally deficient and cannot support the Petitioner’s guilt of ten (10) separate counts of Sexual Abuse by a Guardian, in violation of West Virginia Code §61-8D-5a,

as the indictment failed to provide Petitioner with adequate notice regarding each of the charges against him and subjected Petitioner to a potential double jeopardy conviction in this case. As such, the sentences imposed against Petitioner in the underlying case, to wit: 06-F-6 shall be set aside with the exception of Count One which will be affirmed as this Court finds the indictment provided Petitioner with adequate notice to defend on one count.

B. OTHER ISSUES

As previously stated Petitioner raised six (6) issues in his Petition for Habeas Corpus relief with this Court. However, Petitioner had previously filed, in the United States Fourth Circuit Court of Appeals a Federal Writ of Habeas Corpus, in which Judge Keeley denied the relief requested by Petitioner on all grounds except Ground Four, which Judge Keeley stayed pending a final ruling from the West Virginia state courts. This Court addressed the issue regarding Petitioner's denial of due process and double jeopardy violation above. Pursuant to West Virginia Code §53-4A-1 (b)(c), Petitioner is estopped from asserting claims previously adjudicated. As such the remaining claims in Petitioner's Petition for Habeas Corpus are hereby denied.

IV. CONCLUSION

It is therefore **ADJUDGED** and **ORDERED** that the guilty verdicts, as to Counts Two through Ten, against the Petitioner are invalid, and Petitioner is entitled to have the verdicts as to Counts Two through Ten **SET ASIDE**.

It is **ADJUDGED** and **ORDERED** that the following sentences imposed in 06-F-6, are **AFFIRMED**, to wit:

As to Count One, Sexual Abuse by a Guardian, in violation of West Virginia Code §61-8D-5a, the Petitioner is sentenced to the penitentiary for a term of not less than ten (10) years but not more than twenty (20) years.

It is further **ADJUDGED** and **ORDERED** that the sentences imposed in 06-F-6, as to Counts Two through Ten, Abuse by a Guardian, in violation of West Virginia Code §61-8D-5a, are **SET ASIDE**.

It is further **ADJUDGED** and **ORDERED** that the Petitioner must serve his sentence with regard to Count One, but the sentences imposed for the remaining nine (9) counts are to be **SET ASIDE**. In effect, the Petitioner is sentenced to a term of not less than ten (10) years but not more than twenty (20) years in the penitentiary. Petitioner shall receive credit for all time served, as set forth in the Sentencing Order in 06-F-6.

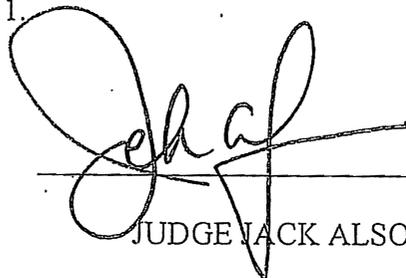
The Clerk of this Court is **ORDERED** to issue an amended Sentencing Order and an amended Commitment Order in 06-F-6 consistent herewith.

It is further **ADJUDGED** and **ORDERED** that this matter be dismissed and stricken from the active docket of this Court.

The Petitioner's objections and exceptions are noted.

The Clerk of this Court shall send certified copies of this Order to counsel of record.

Enter this 21 day of September, 2011.



JUDGE JACK ALSOP