



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CARLOS A. LEEPER-EL,
Petitioner below/Petitioner,

Vs.

No. 11-1352

ADRIAN HOKE, Warden, Huttonsville Correctional Center,
Respondent below/Respondent

**APPEAL FROM THE CIRCUIT COURT OF OHIO COUNTY
HONORABLE ARTHUR M. RECHT, JUDGE
CASE NO. 11-C-188**

SUPPLEMENTAL BRIEF OF PETITIONER

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ASSIGNMENTS OF ERROR

1. PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AS HE WAS COUNSELED TO ENTER INTO A PLEA AGREEMENT THE TERMS OF WHICH WOULD NOT BE FULFILLED OR WERE UNFULFILLABLE AS THE CIRCUIT COURT OF OHIO COUNTY WAS WITHOUT JURISDICTION FOR THE SAME
2. PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AS HIS COUNSEL DID NOT ADVISE HIM THAT HIS PLEA AGREEMENT CONTAINED TERMS THAT COULD NOT BE FULFILLED OR WERE UNFULFILLABLE

STATEMENT OF THE CASE

This is a Petition for Appeal from the September 8, 2011 Order Denying Petition for Writ of Habeas Corpus; said denial was summarily entered without an evidentiary hearing. (A.R. 17).

Petitioner Carlos A. Leeper-El was indicted by an Ohio County Grand Jury in the August, 2005 Term of Court in case number 05-F-98 on one (1) count of robbery in the first degree. (A.R. 1).

On November 16, 2005, Petitioner Carlos A. Leeper-El, pled guilty, pursuant to a written plea agreement and by *Alford* circumstances, to the lesser included offense of “Robbery in the Second Degree” in violation of West Virginia Code § 61-2-12. (A.R. 2).

Pursuant to the plea agreement, the State recommended that the Court sentence Petitioner to not less than five (5) nor more than eighteen (18) years in a state correctional facility for his conviction of “Robbery in the Second Degree” in violation of West Virginia Code § 61-2-12. (A.R. 3). Pursuant to the plea agreement, Petitioner was given leave to argue his respective position as to sentencing with discretion in sentencing left to the Court. (A.R. 3). Pursuant to the plea agreement, the “State and Defendant agree[d] to recommend to the Court that any sentence imposed by the Court run concurrent to any Federal sentence imposed by the United States District Court for violation for his supervised release.” (A.R. 3).

On November 16, 2005, the parties appeared before the Circuit Court of Ohio County, West Virginia and Petitioner did plead guilty to the lesser included offense in the indictment of “Robbery in 2nd Degree.” (A.R. 7). At said plea hearing, Petitioner waived

his right to a presentence-investigation report and sentencing was scheduled for December 7, 2005.

On January 6, 2006, a commitment order was entered sentencing Petitioner to the following sentence for his conviction by plea agreement of second degree robbery:

It is adjudged that the Defendant is hereby committed to the custody of the commissioner of the West Virginia Division of Corrections, or his authorized representative for imprisonment for a period of five (5) to eighteen (18) years WVDOC to run concurrent with federal sentence.

(A.R. 10)

Petitioner did not file a direct appeal of said sentence but sought to have the same set aside or considered discharged by filing a petition for writ of habeas corpus in case number 11-C-188. (A.R. 11). On September 8, 2011, the Circuit Court of Ohio County, West Virginia summarily entered an Order Denying Petitioner's Petition for Writ of Habeas Corpus. (A.R. 17). Said September 8, 2011 Order Denying Petitioner's Petition for Writ of Habeas Corpus was entered without requiring the State to respond and without an evidentiary hearing.

On September 22, 2011, Petitioner, *pro se*, did file a Petition for Appeal of the September 8, 2011 Order Denying Petitioner's Petition for Writ of Habeas Corpus. On October 3, 2011, The Supreme Court of Appeals of West Virginia did enter a scheduling order and denied Petitioner's requests to produce transcripts of the plea and sentencing hearings. (A.R. 20-22).

On November 22, 2011, Respondent did file a Motion to Proceed on Itemized Designated Record and requested that certain transcripts, pleadings, and orders from Criminal Case No. 05-F-98 and Civil Action No. 11-C-188 be designated as part of the record in this appeal. (A.R. 24). Included in said Motion to Proceed on Itemized

Designated Record was a request to designate as part of the record the Plea Hearing Transcript from the hearing held on November 16, 2005 and the Sentencing Hearing Transcript from the hearing held on December 7, 2005. (A.R. 25-26).

On December 23, 2011, Petitioner, *pro se*, did file his Petition for Appeal in this case. (A.R. 30).

On January 31, 2012, the Supreme Court of Appeals of West Virginia did refuse said motion for leave of Respondent to file a supplemental appendix. (A.R. 28).

On February 6, 2012, Respondent did concurrently file its Summary Response to Petition for Appeal and Motion for Leave to File Supplemental Appendix. (A.R. 40-50). In said Motion for Leave to File Supplemental Appendix, Respondent noted that Petitioner did not file an appendix in support of his claims and that the Court would be “aided in its determination by the inclusion in the record of the plea agreement that was executed by the parties.” (A.R. 48). Respondent’s appendix record did not contain the transcript from the plea and sentencing hearing as previously designated to be a necessary portion of the record.

On December 7, 2012, Counsel was appointed to represent Petitioner, Carlos Leeper-El by this Honorable Court to represent Petitioner in his appeal. (A.R. 52). After being appointed, counsel learned that transcripts that were previously designated as necessary parts of the record had not been requested by either party. On January 16, 2013, Counsel did receive confirmation from the Court Reporter that she had located the information necessary to make the transcript of the November 16, 2005 hearing and had conferred with the substitute reporter regarding transcription of the December 7, 2005 hearing. As of this date, leave has not been given to have said transcripts

transcribed but Petitioner brings this to this Honorable Court's attention as the same may be necessary prior to the final disposition of this proceeding.

STATEMENT OF FACTS

On March 8, 2005, Petitioner was released from serving a federal sentence and was placed on parole and federal supervised release. On November 16, 2005, Petitioner entered into a plea agreement wherein he would plead guilty to the felony offense of second degree robbery. As part of the plea agreement, the State and Defendant agreed to recommend to the Court that any sentence imposed by the Court run “concurrent to any Federal sentence imposed by the United States District Court for violation for his supervised release.” (A.R. 3). On January 6, 2006, a prison commitment order was entered and Petitioner was sentenced to five (5) to eighteen (18) years in the West Virginia Department of Corrections to be run concurrent with his federal sentence. (A.R. 10). At all times, Petitioner’s counsel advised him that his state sentence would be run concurrent with his federal sentence. At all times, as evidenced by the record before the Court, Petitioner thought the State and the Circuit Court of Ohio County, West Virginia were in agreement that the State and Federal sentences could, and would, be run concurrent.

In April, 2007, Petitioner was transferred to Hustonville Correctional Center to begin serving his State sentence and immediately began contacting federal authorities to be transferred to the Federal Bureau of Prisons to begin serving his federal sentence. In September 2010, Petitioner first saw the West Virginia Parole Board and was denied parole; Petitioner attributes this denial of parole to the fact the West Virginia Parole Board informed him that he had to have been specifically sentenced on the federal sentence to be paroled to said detainer. In September, 2010, that Petitioner first learned that his state sentence was not being served concurrently to his federal sentence and that

the federal authorities would not violate his terms of supervised release until his state sentence was complete.

On June 16, 2011, Petitioner filed a *pro se* Petition for Writ of Habeas Corpus. (A.R. 11). In said Petition for Writ of Habeas Corpus, Petitioner sought to have his plea overturned based on the ineffective assistance of his trial counsel who failed to advise Petitioner that the Circuit Court of Ohio County, West Virginia was without jurisdiction to bind the Federal Court to run his state sentence concurrent with his federal sentence. Further, Petitioner believes that he was misled by his attorney, the State, and the Circuit Court of Ohio County, West Virginia as they convinced him that his state sentence would run concurrent with his federal parole/supervised release violation.

As of this date, Petitioner has been paroled from the West Virginia Department of Corrections and is currently serving his federal criminal sentence in the Bureau of Prisons at the Philadelphia Detention Center. Counsel realizes that there may be implications regarding proceeding on an appeal of a habeas corpus proceeding of an individual no longer held in the custody of the West Virginia Department of Corrections; however, Counsel affirmatively states that the issues raised in the *pro se* Petition for Appeal may cause the appeal to survive despite the fact Petitioner is no longer in the custody of the State of West Virginia as it is an important legal issue to be addressed by the Court. Further, the case has previously been scheduled for oral argument pursuant to Rule 19 of the Supreme Court of Appeals of West Virginia Rules of Appellate Procedure.

SUMMARY OF THE ARGUMENT

Petitioner Carlos A. Leeper-El's Petition for Writ of Habeas Corpus should not have been summarily dismissed as Petitioner Carlos A. Leeper-El received ineffective assistance of counsel as he failed to advise Petitioner that he was entering into a plea that would not be fulfilled or was unfulfillable.

Second, Petitioner asserts that the plea entered into with the State and adopted by the Circuit Court of Ohio County, West Virginia should be set aside as the same was based on a plea bargain which was not fulfilled or unfulfillable.

STATEMENT REGARDING ORAL ARGUMENT

1. As set forth in the December 7, 2012 scheduling order, Petitioner affirmatively states that the issues raised in all of the assignments of error are issues that have already been schedule for oral argument pursuant to Rule 19 of the West Virginia Revised Rules of Appellate Procedure.

ARGUMENT

1. PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AS HIS COUNSEL DID NOT ADVISE HIM THAT HIS PLEA AGREEMENT CONTAINED TERMS THAT WOULD NOT BE FULFILLED OR WERE UNFULFILLABLE

The Circuit Court committed reversible error by not granting the relief requested in Petitioner's Petition for Writ of Habeas Corpus because Petitioner received ineffective assistance of counsel.

The Supreme court of Appeals has set forth a two-part standard for assessing claims of ineffective assistance of counsel:

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 L.Ed.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. 1. *State ex rel. Strogon v. Trent*, 196 W. Va. 148, 469 S.E.2d 7 (W. Va. 1996).

On November 16, 2005, Petitioner Carlos A. Leeper-El, pled guilty by *Alford* circumstances, pursuant to a written plea agreement, to the offense of "Robbery in the Second Degree" in violation of West Virginia Code § 61-2-12. (A.R. 2). Prior to accepting the plea and having the plea entered by the Court, Petitioner was promised by his counsel, the prosecution, and the Circuit Court of Ohio County, West Virginia that his sentence would be served concurrently to any federal sentence he received. Proof of the same is conclusively established from language set forth in the commitment order which sentences Petitioner; the same stating as follows:

It is adjudged that the Defendant is hereby committed to the custody of the commissioner of the West Virginia Division of Corrections, or his authorized

representative for imprisonment for a period of five (5) to eighteen (18) years WVDOC to run concurrent with federal sentence.

(A.R. 10)

In his *pro se* Petition for Writ of Habeas Corpus, Petitioner alleged that he received ineffective assistance of counsel as Petitioner was never informed by his attorney that the terms of the plea agreement could not be fulfilled or were unfulfillable. Despite this clear violation of Petitioner's due process rights, the Circuit Court of Ohio County did not appoint Petitioner an attorney or even require the State to respond to claims raised in Petitioner's *pro se* habeas corpus petition and the same was dismissed without a response or evidentiary hearing.

Pursuant to the plea agreement, the State agreed to recommend to the Court that any "sentence imposed by the Court run concurrent to any Federal sentence imposed by the United States District Court for violation of his supervised release." (A.R. 3). As evidenced by the Commitment Order, the Circuit Court adopted this recommendation as Petitioner's state sentence was Ordered to run concurrent to his federal sentence. (A.R. 10). As noted above, Petitioner is without the benefit of the transcript from the plea hearing or sentencing hearing, but the same can be obtained in a reasonable time if this Honorable Court grants Petitioner's motion for the same. As illustrated, a transcript of the same may benefit all parties as it is highly likely that the Circuit Court of Ohio County made specific findings at the sentencing hearing regarding the promise of concurrency.

By November, 2005, it was a well established legal theory that state courts could not bind federal courts to recognize or give inmates credit for state sentences ordered to be run concurrent to federal sentences. *See Generally State ex rel. Morris v. Mohn*, 165

W.Va. 145, 267 S.E.2d 443 (W. Va. 1980); *State ex rel. Massey v. Hun*, 197 W.Va. 729, 478 S.E.2d 579 (W. Va. 1996).

In *State ex rel. Massey v. Hun*, although not directly on point, the Supreme Court of Appeals of West Virginia clearly illustrates how West Virginia state courts cannot bind subsequent federal courts to recognize concurrency in sentencing. 197 W. Va. 729, 478 S.E.2d 579. The Petitioner in *State ex rel. Massey v. Hun* was released from federal custody and serving a term of three years of supervised release when he committed certain state offenses. 197 W.Va. 729, 478 W. Va. at 580. After being convicted of the state offenses, the Circuit Court of Boone County, West Virginia ordered that his state court sentences be served “concurrently, in federal custody, with any sentence to be imposed by the federal court for Mr. Massey’s violation of supervise release.” *Id.* The United States District Court for the Southern District of West Virginia revoked his supervised release and sentenced Mr. Massey to two years of imprisonment and remanded Mr. Massey back to State custody and declined to run said sentence concurrently to the state Court Sentence. 197 W.Va. 729, 478 W. Va. at 581. After being remanded, the Circuit Court of Boone County entered a “Supplemental Corrected Order of Sentence” and again ordered Mr. Massey’s state sentences to run concurrently with his federal sentence and ordered the state prison officials to “act immediately to effectuate the defendant’s transfer to federal custody.” *Id.*

After denial of the same, Mr. Massey filed a writ of mandamus seeking to compel Respondent to transfer him to federal custody and to have federal authorities credit him with time served on his alleged concurrent federal and state sentences. *Id.* However, this Honorable Court reasoned that mandamus does not lie where “performance of a the

thing sought to be compelled is an impossibility.” *Id.* In its reasoning, the Supreme Court of Appeals of West Virginia went to great lengths to explain that the conflict between “federal (consecutive) and state (concurrent) sentences” is not unique. In full, the sets forth the following on this issue:

We note that the conflict between the federal (consecutive) and state (concurrent) sentences that were imposed on Mr. Massey is not unique. In *Del Guzzi v. U.S.*, 980 F.2d 1269, 1271 (9th Cir.1992), the Court of Appeals for the Ninth Circuit found that under 18 U.S.C. § 3568, “federal authorities need only accept prisoners upon completion of their state sentence and need not credit prisoners with time spent in state custody. (Citations omitted.)” See *McIntosh v. Looney*, 249 F.2d 62, 64 (10th Cir.1957) (marshal has no duty to take petitioner into custody until released from second state sentence); *Lionel v. Day*, 430 F.Supp. 384, 386 (W.D.Okla.1976) (“Obviously no comment or order by a state judge can control the service of a federal sentence.”) In a concurring opinion in *Del Guzzi v. U.S.*, after outlining in detail the defendant's expectation of and state order for concurrent sentences, Judge Norris found no avenue to grant relief and hoped defendant's case would serve as a lesson. Judge Norris stated:

State sentencing judges and defense attorneys in state proceedings should be put on notice. Federal prison officials are under no obligation to, and may well refuse to, follow the recommendation of state sentencing judges that a prisoner be transported to a federal facility. Moreover, concurrent sentences imposed by state judges are nothing more than recommendations to federal officials. Those officials remain free to turn those concurrent sentences into consecutive sentences by refusing to accept the state prisoner until the completion of the state sentence and refusing to credit the time the prisoner spent in state custody.

Del Guzzi v. U.S., 980 F.2d at 1272-73 (Norris, J., concurring). See *Bloomgren v. Belaski*, 948 F.2d 688, 691 (10th Cir.1991) (the question of defendant's federal sentence running consecutively “to his state sentence is a federal matter which cannot be overridden by a state court provision for concurrent sentencing on a subsequently-obtained state conviction”).

As discussed below, the opinion of *State ex rel. Morris v. Mohn*, 165 W.Va. 145, 267 S.E.2d 443 (W. Va. 1980) is the opinion of the Court that is most on point and, although

predating *State ex rel. Massey v. Hun* 16 years, said opinion contains three (3) syllabus points which directly discuss the issue at hand; the third of which states as follows:

A guilty plea entered pursuant to a plea bargain which promises a concurrent sentence must be set aside where the promise of concurrency is not fulfilled.

Based on the published opinions of *State ex rel. Massey v. Hun*, 197 W. Va. 729, 478 S.E.2d 579 (W. Va. 1996) and of *State ex rel. Morris v. Mohn*, 165 W.Va. 145, 267 S.E.2d 443 (W. Va. 1980), Petitioner's trial counsel, the State, and the Circuit Court of Ohio County, West Virginia, should have been put on notice of the fact that Petitioner's plea contained an term that could not be fulfilled or was unfulfillable.

In his *pro se* petition, Petitioner clearly alleges, as his primary ground, that he received ineffective assistance of counsel as his counsel failed to advise him that he was entering into a plea agreement that contained an unfulfillable term; a term of which was adopted and ordered to be followed by the Circuit Court of Ohio County, West Virginia. (A.R. 13). However, the Circuit Court of Ohio County, in its Order Denying Petitioner's Petition for Writ of Habeas Corpus, never addresses any of Petitioner's claims of ineffective assistance of counsel in dismissing the petition. (A.R. 17-19). As noted above, the Order Denying Petitioner's Petition for Writ of Habeas Corpus was entered without requiring a response from the State or without evidentiary hearing. Petitioner respectfully asserts that, by failing to even reference the Petitioner's claim of ineffective assistance of counsel, said Order should be reversed.

From the above cited case law, Petitioner's counsel should have been put on notice that, if the Court adopted the State's recommendation regarding concurrency, that the Defendant's plea contained term that may not be fulfilled or is unfulfillable. But despite the fact that Petitioner could most likely establish that he received ineffective

assistance of counsel, the Circuit Court of Ohio County chose to not address this in its order of denial.

The actions of Petitioner's counsel amount to ineffective assistance as described in *Strickland* and *Strogen*. The Petitioner most likely would not have accepted the plea agreement if he had been properly advised regarding the same.

2. PETITIONER'S CONVICTION AND SENTENCE SHOULD BE SET ASIDE AS THE STATE OFFERED AND THE CIRCUIT COURT OF OHIO COUNTY ACCEPTED THE TERMS OF A PLEA AGREEMENT WHICH WAS NOT FULFILLED OR UNFULFILLABLE

Petitioner Carlos Leeper-El's conviction and sentence should be set aside as it was based on a guilty plea that could not be considered intelligently and voluntarily entered as said plea bargain was not fulfilled or is unfulfillable.

Syl. Pt. 1. A recognized corollary to the principle that a guilty plea must be shown to have been intelligently and voluntarily entered is the rule that if the plea is based on a plea bargain which is not fulfilled or is unfulfillable, then the guilty plea cannot stand.

Syl. Pt. 2. The federal parole revocation law militates against concurrency of sentence and ordinarily prevents the performance of a state commitment made in a plea bargain agreement which provides that the state sentence will run concurrently with the underlying federal sentence upon which the defendant was paroled.

Syl. Pt. 3. A guilty plea entered pursuant to a plea bargain which promises a concurrent sentence must be set aside where the promise of concurrency is not fulfilled.

State ex rel. Morris v. Mohn, 165 W.Va. 145, 267 S.E. 2d 443 (W.Va. 1980).

As clearly delineated in the above referenced syllabus points, it appears undisputed that the plea in this case must be set aside. In its Order Denying Petitioner's Petition for Writ of Habeas Corpus, the Circuit Court of Ohio County focuses on whether or not the Petitioner's plea agreement contained a "promise" regarding the "ultimate

determination of his sentence.” (A.R. 17). Further, the Circuit Court finds that even in the State’s recommendation were construed as a promise, “the substance of that recommendation, as evidenced by the plain language of the plea agreement, was that, in the event federal parole officials *were* to bring revocation proceedings against him that resulted in a sentence, he could continue to serve his state sentence while in federal custody.” (A.R. 18). In reaching its determination, the Circuit Court argues that despite the policies of the Parole Commission, the plea “purported only to *recommend* that he be permitted to continue serving his state sentence *in the event that* federal parole violation charges were brought and resulted in a sentence.” (A.R. 18).

In reference to these findings, Petitioner respectfully contends that the findings and reasoning of the Circuit Court of Ohio County are incorrect and against the great weight of the evidence. The plea agreement indicates that the “State and Defendant” agree to recommend to the Court that “any sentence imposed by the Court run concurrent to any Federal sentence imposed by the United States District for violation for his supervised release.” (A.R. 3). This is clearly a promise that the State and Defendant will *recommend* concurrency to the federal sentence. At the very least, the State is recommending something that may not be fulfilled or is unfulfillable. However, the Circuit Court’s reasoning is further incorrect as evidenced by the Commitment Order which clearly indicates that Petitioner’s “5-18 years WVDOC to run concurrent with federal sentence.” (A.R. 10). Pursuant to the reasoning of the Circuit Court of Ohio County, at what point does this recommendation become a promise? If the Circuit Court contends that the recommendation was never a promise, isn’t the mandate of the Commitment Order the legal instrument which causes the recommendation to become a

promise? Obviously, if the Circuit Court Orders the Petitioner's state sentence to run concurrently to the federal sentence, as it clearly did, then the agreement as memorialized through the commitment order contains an term that could not be fulfilled or is unfulfillable, as such, it must be set aside as it could not be considered a plea that was "intelligently and voluntarily" entered into by Petitioner. *State ex rel. Morris v. Mohn*, 165 W.Va. 145, 267 S.E.2d 443 (W. Va. 1980).

From all of the evidence, Petitioner has served a long sentence in the West Virginia Department of Corrections and has done so under the assumption that all of his time was being served concurrently with his federal sentence. As such, his relief must be granted as it was improper for the Circuit Court of Ohio County to summarily dismiss Petitioner's petition for writ of habeas corpus as his due process rights have been violated.

CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above, Petitioner respectfully requests that the relief requested in this Brief be granted; and that Petitioner's conviction and sentence be set aside or that the case be remanded for evidentiary hearing.



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Respectfully submitted,
Carlos A. Leeper-El,

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No. 11-1352

ADRIAN HOKE, Warden, Huttonsville Correctional Center,
Respondent below/Respondent

CERTIFICATE OF SERVICE

I, Christopher J. Prezioso, counsel for the Petitioner, do hereby certify that I have served a true and accurate copy of the foregoing Supplemental Brief of Petitioner upon the following persons, by U.S. Mail on this 21st day of January, 2013:

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