

11-1271

IN THE CIRCUIT COURT OF LOGAN COUNTY, WEST VIRGINIA

WILLIAM RAY ADKINS,

Petitioner,

v.

CIVIL ACTION NO. 01-C-323-O
Underlying Criminal Case: 99-F-137-O

MICHAEL COLEMAN, WARDEN,

Respondent.

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OPINION DENYING
REQUEST FOR HABEAS CORPUS RELIEF

This matter is before the Court on the Petition and Amendments thereto filed by William Ray Adkins (Defendant) pursuant to W.Va. Code §53-4a-1, seeking his release for a new trial. The Court has reviewed the Petition and its Amendments and has considered the record developed in this proceeding as well as the record in the underlying felony case from all of which the Court concludes that the Petitioner has failed to prove that he is entitled to relief and therefore the Petition and its Amendments are DENIED in its entirety.

Anthony Sean Dingess died on September 3, 1999, from multiple gunshot wounds. He was shot five (5) times including once in the leg and three (3) in the back. Two (2) of the back injuries were received at close range, with six (6) inches. He also had suffered pre-mortem injuries to his head including sixteen (16) abrasions and a fractured skull. His body was discovered at the home of the Defendant who was charged with his murder

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and convicted March 22, 1999, in a jury trial of First Degree Murder with a Recommendation of Mercy. His appeal was timely filed on November 1, 2000, and the Supreme Court refused review by Order dated January 24, 2001.

The Defendant, *pro se*, filed a Petition for a *Writ of Habeas Corpus* on October 23, 2001. As part of that Petition he asked that counsel be assigned to him to assist with the Petition. That request was granted and various Amendments to the Petition have been filed by counsel who also completed a Losh list with him. In an effort to provide, in this action, an *omnibus habeas corpus* proceeding in this Memorandum Opinion the Court intends to address those items not waived in the Defendant's check list of grounds for post-conviction *habeas corpus* relief filed September 21, 2005, as well as those raised in the Amended Petition and Supplements thereto.

In assessing the Petition the Court notes that the burden of proof is on the Petitioner to prove that he is entitled to relief and therefore without repeating that standard the Court has applied it to each of the grounds that will be addressed herein.

1. Prejudicial Pretrial Publicity

The Defendant presented insufficient evidence to show that he is entitled to relief and the Court FINDS that there was no prejudicial pretrial publicity. His claim for relief on this ground is DENIED.

2. Denial of Right to Speedy Trial

The offense in this case took place on September 3, 1999. The Defendant was charged in Magistrate Court and the matter was sent to the Grand Jury on or about September 30, 1999. The September 1999 Grand Jury was still in session and the Defendant's case was presented during that Term and an Indictment was returned. At the arraignment of the Defendant on October 21, 1999, his trial was set within the same Term of Court for January 4, 2000. At a pretrial hearing on December 16, 1999, the State moved and the Defendant did not object to a continuance to the next Term of Court. In that next Term of Court the trial was conducted on March 20th thru 22nd of 2000. The Defendant was not denied a right to a speedy trial. His claim for relief on this ground is DENIED.

3. Mental Competency at the Time of the Crime

The Defendant has not submitted any evidence to indicate that he was not competent at the time of the crime. Within an hour of the incident the Defendant's father characterized his behavior as normal. The Defendant's request for relief on this ground is DENIED.

4. Incapacity to Stand Trial Due to Drug Use

The Defendant was afforded Bond and placed on home confinement. During home confinement he was drug tested regularly. There is no indication and the Defendant has presented no evidence that he was impaired through

drug use or that he was not receiving medications which he should have been taking to insure that he was able to understand the proceedings against him and assist his attorney at trial. The Defendant has failed to meet his burden of proof on this issue and his request for relief on this ground is DENIED.

5. The State's Knowing Use of Perjured Testimony

The Defendant was of the opinion that witnesses Gary Price, Vicky Dingess, Violet Maynard, and Thomas Nord perjured themselves during their testimony at the trial. This ground stated that none of the witnesses were at the alleged crime scene when the alleged crime took place. The State never made any such contention and admitted that the only two (2) persons present physically at the Defendant's residence when the shooting took place were the Victim and the Defendant. The Defendant has presented no evidence that these people lied during testimony at his trial or that the prosecutor knowingly used perjured testimony. This ground is totally without merit and the Defendant's request for relief on this ground is DENIED.

6. Information and Presentence Report Erroneous

There was no presentence report prepared as the jury's finding left no discretion with the Court as to what the sentence would be, Life with Mercy. The Defendant's claim for relief on this ground is DENIED.

7. Ineffective Assistance of Counsel

The Defendant submitted the record in its entirety and as well as the

expert testimony from Attorney James Cagle and requested the Court to find that the Defendant's retained trial counsel was ineffective and that counsel's performance did not involve strategy or tactics that a reasonably qualified defense attorney would have employed and further that had counsel be effective and acted reasonably the reasonable probability that the result of the proceedings would have been different. The Defendant's witness opined that trial counsel did not reasonably pursue a motion to suppress evidence taken from the crime scene. When State Troopers Gunnoe and Johnson arrived in the scene, information was provided to them that an individual was inside the Defendant's house believed to be dead and that gunshots had been heard shortly before the discovery of the body. Witnesses further said that they did not believe that the Defendant was at home but that he had left the scene and gone to his father's house approximately three hundred (300) yards away. One (1) of the Troopers went into the house, one (1) of the Troopers went to look for the Defendant. After confirming that there was a body inside and even after believing that the victim was dead, the officer at the Defendant's residence conducted a protective sweep. During that protective sweep several items were in plain view and were confiscated including thirty eight (38) caliber shells, its .357 magnum shells in a box and on the nightstand in an upstairs bedroom. Other items were observed in plain view and photographs and measurements were taken later on in the investigation to document the

scene. During that documentation process the Prosecuting Attorney arrived at the scene and participated in processing the scene. The Court conducted a suppression hearing prior to the trial following the Motion to Suppress filed by Trial Counsel. The Court finds no constitutional error was committed in that the documentation of the items that were in plain view during the protective sweep where the discovery and seizure of the items in plain view was made during the protective sweep is an exception to the Fourth Amendment of the United States Constitutional requirements concerning unreasonable searches and seizures. The Court further finds no Constitutional error on the basis that having observed these items in plain view, even though it would have been possible to secure the scene and obtain a warrant, all of the evidence would have been inevitably discovered by the police.

Mr. Cagle further opines that trial counsel did not offer an instruction on the subject of defense of habitation consistent with the case of State v. W. J. B., 276 S.E. 2nd 550 (1981). Trial counsel did voice the argument in his closing statement to the jury therefore the Court cannot conclude that this was not the strategy of trial counsel. It should be noted that during the pendency of this Petition trial counsel died and his opportunities to comment on the expert analysis of his performance was never completed by either party to this action. This Court DOES NOT FIND that no reasonable attorney would have acted as trial counsel did. The Defendant's claim for relief on this ground is DENIED.

The expert witness also questions whether or not trial counsel should have developed a voluntary intoxication defense in an effort to reduce the degree of guilt from First Degree Murder to Second Degree. Although there was acknowledged evidence that the Defendant had been drinking prior to and during the time of his encounter with the Victim, the police officers who directly observed him and even his own father testified that there was no indication that he was under the influence. There was no evidence that he was not able to form the necessary intent or premeditation required for First Degree Murder. The Defendant's claim was self defense not that he was so intoxicated that he did not know what he was doing. The Defendant has failed to prove that trial counsel was ineffective in pursuing a voluntary intoxication defense. His claim for relief on this ground is DENIED.

The expert further concludes that the Defendant was not well prepared to testify. The Court finds otherwise noting that the Defendant had testified at a suppression hearing and that trial counsel had recognized that the Defendant in preparing for trial was ignoring the evidence that was indicated in the discovery and choosing to pursue what counsel believed to be an unreasonable course of action. Trial counsel had asked the Court to have the Defendant examined for competency, however the Court declined that request finding that defense counsel had made an insufficient showing for the Court to

question the Defendant's competency. Defense counsel was offered the opportunity for an independent evaluation but apparently declined to have the Defendant examined. His claim for relief on this ground is DENIED.

Trial counsel's strategy relied on self defense and the Defendant's fear of the Victim based upon past encounters. The State's evidence when viewed in the light most favorable to the State was contradictory of the Defendant's claims, particularly in light of the fact that the Victim was shot three (3) times in the back, twice at close range and had sixteen (16) facial abrasions and a fractured skull consistent with having been struck by the gun which the Defendant stated he used to shoot the Victim. None of the evidence concerning the injuries was unconstitutionally obtained.

The expert witness makes reference to trial counsel's affidavit concerning the trial preparation in the area of whether or not the Defendant was going to testify. That affidavit was never made available or used by the State before the jury and was filed by counsel in support of a pretrial motion. The record reflects that prior to testifying that the Defendant was advised by the Court of his right not to testify as well as his right to testify. The Court FINDS no ineffective assistance was committed by the trial counsel in filing that affidavit. His claim for relief on this ground is DENIED.

The expert witness also opined that the appeal was deficient having failed to address the crime scene evidence and the ineffective assistance of

counsel arguments. As noted above the Court finds no constitutional error on either claim and therefore further finds that the Defendant has failed to prove that trial counsel or appellant counsel acted ineffectively. His claim for relief on this ground is DENIED.

The claim for relief based upon ineffective assistance by trial counsel and appellant counsel each is DENIED in its entirety.

8. Irregularities in Arrest

The State Troopers were called to the scene of a suspected shooting. They were advised that the Victim was deceased and found inside the Defendant's residence, the victim of a shooting. The Defendant was found at his father's house approximately three hundred (300) yards away in possession of a weapon and was noticed to have a substance which appeared to be blood on his clothing and shoes. The police also were advised that when earlier inquiries had been made of the Defendant as to whether or not the Victim was at the Defendant's residence by some of the witnesses who discovered the body, the Defendant had denied that the victim was there. Probable cause existed for the officers to arrest the Defendant for the homicide of the Victim. No constitutional error occurred in his arrest. The Defendant's claim for relief on this ground is DENIED.

9. Excessiveness or Denial of Bail

Bail was originally denied for the Defendant who was charged with First

Degree Murder. Bail was discretionary; there was no abuse of discretion in denying bail. Bail was ultimately granted after the State moved to continue the original trial date and the Defendant was released on bail. He violated his bond by attempting to contact the Victim's family. The Defendant has failed to prove that he is entitled to relief on this ground and such claim is DENIED.

10. Challenges to the Composition of the Grand Jury or its Procedures

The Defendant has offered no evidence challenging the composition of the Grand Jury. His case was presented to the Grand Jury in the end October of 1999. Transcripts are available in the original record from which the Court concludes that the Defendant has failed to prove that the Grand Jury procedures were not followed in a constitutionally appropriate manner. His claim for relief in this regard is DENIED.

11. Improper Venue

The shooting occurred in Logan County and the trial occurred in Logan County. His claim for improper venue is without merit and is DENIED.

12. Pre-Indictment Delay

The death of the victim occurred on September 3, 1999, and an Indictment was returned in October of 1999. There is no basis to claim that there was pre-indictment delay in this case when he was indicted within forty

five (45) days of the occurrence of the crime. This claim is totally without merit and his request for relief on this ground is DENIED.

13. Refusal of Continuance

Trial counsel, from the Magistrate Court proceedings until the time shortly before the trial, vigorously pursued the Defendant's right to a speedy trial. Trial counsel made a motion for a continuance of the trial date and the Trial Court considered that motion finding insufficient grounds for the continuance. The Defendant has not produced any evidence as to how the denial of that motion inhibited his counsel from defending him and presenting his case. His request for relief on that ground is DENIED.

14. Refusal to Subpoena Witnesses

The Defendant has not identified any witness that defense counsel refused to subpoena nor has Defendant produced any evidence as to how any supposed witness's testimony would have changed the outcome of the trial. His request for relief on that ground is DENIED.

15. Claim of Incompetence at the Time of the Offense as Opposed to Trial

As previously noted the Defendant has presented no evidence to show that he was incompetent at the time of the offense as opposed to the time of trial. Therefore his claim of incompetence at the time of the offense is DENIED.

16. Constitutional and Errors in Evidentiary Rulings

Trial counsel for the Defendant filed motions to suppress statements of the Defendant as well as physical evidence seized from him, his residence, and his father's residence. The Court ruled that statements made by him during the time of his transport from the scene to the State Police Headquarters were not in response to any questioning by Trooper Wolfe and were therefore not illegally taken from him and were available for use in the State's case in chief. The Court further ruled that statements made by him at the State Police Headquarters in response to questioning by Trooper Wolfe were made after the Defendant was properly advised of his Miranda rights and after he had voluntarily agreed to speak with the officer. At the time that he requested an attorney, Trooper Wolfe ceased the interrogation and did not inquire further. Statements made by the Defendant to another Trooper were suppressed on the grounds that defense counsel had been assured by the Prosecuting Attorney that the Defendant would not be questioned any further without presence of counsel. Seizure of Defendant's clothing was not unreasonable based upon the observation of substances which appeared to be blood on the Defendant's clothing and shoes in plain view and therefore were not unconstitutionally seized. The Defendant's father provided the gun to the officers at his residence voluntarily and therefore no constitutional violation occurred in the seizure of the gun. Any crime scene evidence observed in

plain view was properly seizable and any other crime scene evidence would have been inevitably discovered. There was one (1) bullet that was retrieved from the front porch bannister which was observed in plain view on the outside of the residence and therefore no warrant was necessary to seize that evidence. There were no constitutional errors in the evidentiary rulings made by the Trial Court. The Defendant's claim for relief on this ground is DENIED.

17. The Claims of Prejudicial Statements by the Prosecutor

The Defendant submitted no evidence and makes no reference to any prejudicial statements made by the prosecutor which unconstitutionally denied him right to a fair trial or appeal. The Defendant's claims on this basis are without merit and are DENIED.

18. Sufficiency of the Evidence

As noted above and as covered by the Court at the close of the State's case, the Defendant's case, and post-trial motions there was evidence from which a reasonable jury could conclude that the Victim, an invited guest in the Defendant's home, was attempting to get away from the Defendant when he was shot in the back and after he was wounded, he was shot in the back twice more and his skull was fractured by the Defendant. There was sufficient evidence from which a reasonable jury could conclude that the Defendant deliberately, intentionally, and maliciously shot and killed the Victim and that such shooting was done with premeditation in a manner where the Defendant

did not act in self-defense and that such findings could be made beyond a reasonable doubt. The Defendant's claim that there was insufficient evidence upon which he was convicted is without merit and his claim for relief on that basis is DENIED.

19. Defendant's Absence from Part of the Proceedings

The Defendant failed to point to any part of the pretrial or trial stage where he was absent from the proceedings and that such absence prejudicially affected the outcome of his trial or appeal. His claim for relief in this regard is without merit and is hereby DENIED.

20. Improper Communications between Prosecutor or Witnesses and the Jury

There is no evidence presented on any improper communications between the prosecutor and any witness or any member of the jury. There was disclosure by one (1) of the jurors that during the trial a call was made to his home and before answering it he noted that the number and identifying information indicated that the call may have been coming from a number assigned to a witness who had appeared the day before in the trial. The juror said he did not answer the call, did not know the witness before he had testified, and had no idea who was calling or what the communication would have been. There is no constitutional impropriety on this ground and therefore Defendant's claim for relief on this issue is DENIED.

21. Excessive Sentence

The Defendant received the statutory sentence of Life with Mercy based upon the crime he was convicted of committing. There is no constitutional error in his sentence therefore his claim for relief on this ground is DENIED.

The previous rulings were based upon the items specifically mentioned in the Losh list. The Court will now address the other items mentioned in the Amended Petition some of which may duplicate or overlap with the rulings previously made herein.

22. Trial Counsel was Ineffective for Failing to Question Potential Defense Witnesses

The Defendant claims that trial counsel did not subpoena or call to testify certain defense witnesses as requested by the Defendant. The Defendant has failed to identify any such witness or what that witness's testimony would have been and how that would have established the Petitioner's state of mind to show that the Defendant was disoriented and therefore either incompetent at the time of the commission of the offense or suffering from some sort of diminished capacity especially considering the testimony of his father who saw him minutes after the shooting and characterized his behavior as "normal". The Defendant has failed to meet his burden of proof on this claim which is hereby DENIED.

23. Counsel Failed to Develop the Issue of Jury Tampering

A hearing was held during the trial on this issue and defense counsel was offered the opportunity to question the juror involved. A summary of the testimony would have been that someone called the juror's home from the number assigned to a witness but that no contact was made therefore the Court found then and reaffirms that no prejudicial contact occurred. The Defendant has produced no evidence that trial counsel did not otherwise investigate these allegations and found them to be consistent with the juror's testimony. His claim for relief on this issue is DENIED.

24. The Trial Court Erred When It Did Not Enter a Judgment of Acquittal Because the Defendant Was Not Given His Miranda Warnings or That The Police Did Not Have an Arrest Warrant

As noted above, before the State Police questioned the Defendant he was advised of his Miranda rights. Unless the police are going to question a suspect in custody there is no duty to advise him or her of his rights to remain silent and right to an attorney. Therefore when the Trooper took Mr. Adkins into custody and no questioning occurred, there was no constitutional violation for failure to give the Miranda warnings to the Defendant. The Defendant was taken into custody around 5:30 p.m. on September 3rd; however he was not questioned until after his Miranda warnings were given at 6:36 p.m. No constitutional violation occurred. His claim for relief on this ground is DENIED.

There was no constitutional error committed by the Trial Court in not

entering a judgment of acquittal because the police lacked an arrest warrant. Police may arrest an individual for a felony without a warrant even though the crime may have not been committed in the officer's presence. As noted previously, there is probable cause to believe the Petitioner had shot and killed the Victim, had covered it up, and had fled to his father's before before he was taken into custody. No constitutional violation occurred in his arrest and for his claim for relief on this ground is DENIED.

25. The Trial Court Committed Error When It Denied the Petitioner's Motion for Change of Venue

The Court finds no written motion for change of venue in the file and no evidence was ever submitted to the Court concerning prejudicial pre-trial publicity. The Petition makes reference to stories on local television stations, articles published in the local paper about the manner of death, court proceedings and other reports but no such evidence was ever made part of the record in the underlying proceeding or in pursuit of this Petition for *Habeas Corpus* and the Defendant has failed to substantiate his grounds of constitutional error for denying a motion for change of venue and therefore his claim for relief in this regard is DENIED.

26. The Defendant Claims that West Virginia's Appellate Laws Which Do Not Require Mandatory Appellate Review in Murder Cases are Unconstitutional as Violative of the Due Process and Equal Protection Clauses

The Defendant cites no Federal or West Virginia Authority in support of

this position and this Court does not believe and therefore finds that the non-mandatory appeal process used in West Virginia in Capital cases at the time of the Defendant's conviction was constitutional under both the Federal and State due process and equal protection clauses.

27. The State Failed to Provide the Petitioner with a Complete Copy of His Court Transcripts

The Defendant takes issue with a complete transcript from a suppression hearing held on February 23, 2010, and a transcript of a hearing supposedly held on March 7, 2010, not being available.

W.Va. Code §51-7-7, is cited as the authority for this claim. That section specifically refers to transcripts requested for the preparation of an appeal or a writ of error. Appellate counsel notified the Court Reporter on June 5, 2005, of the transcripts that he was requesting on the Defendant's behalf to pursue the Defendant's appeal. He did not mention either the hearing held on February 23, 2010, or the pre-trial hearing on March 7, 2010. The first request made for those transcripts was after the Defendant's appeal was denied. The request was made in this case on June 12, 2002. Despite a diligent search by the Court Reporter thereafter, the other parts of the recording from the suppression hearing in February, 2000, and the recording of the pre-trial hearing on March 7, 2000, were not available. With regard to the suppression hearing the trial court discussed the suppression hearings at the post-trial

motions for relief in asking that the verdict be set aside and a judgment of acquittal be entered. No constitutional error has been committed by the State or by the Court in failing to preserve the recordings after the Defendant's appeal had been denied. The Court further notes that trial counsel was retained and could have had those proceedings transcribed prior to trial or in preparation for post-trial motions but declined for reasons unknown to the Court. It is obvious there were recordings from the suppression hearing because the Defendant's testimony was transcribed and available to the State and defense counsel for use at trial. Appellate counsel did not request a transcript of those hearings. The constitution does not require preservation of tapes for a potential *habeas corpus* proceeding when transcription of those tapes was never requested for the trial or the appeal. No error has occurred entitling the Defendant to a *writ of habeas corpus*. His claim for relief on this ground is DENIED.

28. Ineffective Assistance of Counsel for Failure to Request Transcripts

It was not unreasonable for trial counsel not to have the suppression hearing or the pretrial conference hearing transcribed for the post-trial motions when the issues were fresh in everyone's mind. Trial counsel was advised on the record at the post-trial motion hearing by the Defendant that the Defendant intended to hire appellate counsel. Therefore, any reasonable

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counsel would not have incurred additional expenses on behalf of his client when that decision should have been left to appellate counsel. This Court cannot find that appellate counsel failed to act reasonably in focusing on other issues for the appeal rather than pursuing issues where there was no ground for appeal or the chances for success were minimal. The Defendant further has not shown how any information that would have been in either transcript would more than likely have changed the outcome of his trial or his appeal. Therefore his claim for relief on these grounds is DENIED.

The Defendant has failed to show that he is entitled to relief on any of the grounds cited and his Petition for *Writ of Habeas Corpus* is DENIED in its entirety.

Counsel for the State shall prepare the Order which shall strike this matter from the active docket of the Court.

Enter this 9th day of August, 2011.

Eric H. O'Briant

ERIC H. O'BRIANT, CIRCUIT JUDGE

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