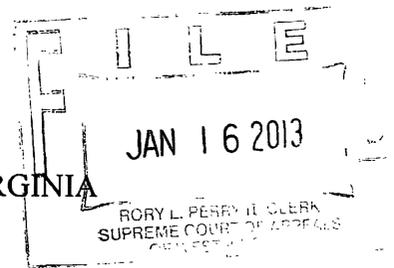


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Supreme Court No. 11-1271

v.

Circuit Court No. 99-F-137-O
(Logan County)

WILLIAM ADKINS,

Petitioner.

PETITIONER'S REPLY BRIEF

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REPLY ARGUMENT

I. The Habeas Court Correctly Found That Mr. Adkins' Trial Lawyer Pursued A Defense Of Habitation Strategy At Trial, But Erroneously Concluded That It Was Nonetheless Reasonable To Not Request Jury Instructions On This Or Any Other Defense.

The habeas court erred by ruling that a lawyer could reasonably fail to request defense of habitation instructions despite the factual finding that this was trial counsel's theory of defense. (*See* A.R. 1062). The State responds that a) Mr. Adkins did not actually argue he had a lower self-defense burden in his home and did not need to retreat, b) Mr. Adkins lawyer did, in fact, argue a habitation defense in closing, informing the jury of the law even if the court did not, and c) Mr. Adkins' evidence was "unbelievable," largely because it conflicted with the States' case. (State's Response, 7, 9, 10, 12). The State's response is not completely consistent and is unpersuasive in any event.

Defense of habitation was not one possible tactic that counsel considered and rejected – as the habeas court found below, it was counsel's strategy throughout the trial that Mr. Adkins was justified in using deadly force within his own home. (A.R. 592, 1062). However, counsel did not ask for *any* instructions in this first degree murder case, let alone on defense of habitation. (A.R. 678). By not providing a legal "hook" connected to the defense's factual theory, Mr. Adkins' trial lawyer essentially deprived him of a meaningful defense. *See State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114, Footnote 20 (1995) ("Without instructions as to the law, the jury becomes mired in a factual morass, unable to draw the appropriate legal conclusions based on the facts."). This falls below the threshold of objectively competent representation and the habeas court erred by denying Mr. Adkins a new trial.

a. The State Incorrectly Claims The Habeas Court Was Clearly Wrong That Trial Counsel's Actual Strategy Was Defense Of Habitation.

The habeas court made the explicit factual finding that “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.” (A.R. 1062). The State claims that this factual finding was “clearly wrong,” *See* Syllabus point 1, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975), and that instead of raising defense of habitation Mr. Adkins’ trial counsel raised a more onerous theory of self-defense, as though the homicide had taken place outside Mr. Adkins’ home. (*See* State’s Response, 7). However, the record clearly shows that the habeas court was correct in this factual finding. Its mistake was ruling that trial counsel nonetheless provided competent assistance.

Defense of habitation entails two points of law when the State accuses someone of murder within his or her dwelling: 1) “A man attacked in his own home by an intruder may invoke the law of self-defense without retreating,” and 2) “The occupant of a dwelling is not limited in using deadly force against an unlawful intruder to the situation where the occupant is threatened with serious bodily injury or death, but he may use deadly force if the unlawful intruder threatens imminent physical violence or the commission of a felony and the occupant reasonably believes deadly force is necessary.” Syllabus Points 1 and 2, *State v. W. J. B.*, 166 W. Va. 602, 276 S.E.2d 550 (1981).

Trial counsel’s theory of self-defense centered on the undisputed fact that the homicide occurred in Mr. Adkins’ house. (A.R. 288-91). Counsel sought to, and did produce, evidence that Mr. Dingess was an uninvited intruder in Mr. Adkins’ home. *Id.* Mr. Adkins testified that Mr. Dingess refused to leave unless he gave him money, and that Mr. Adkins could not force him to

leave otherwise. (A.R. 586-88, 592). Trial counsel argued in closing that this should be a sufficient basis to acquit, and that Mr. Adkins should not have to retreat or be fearful in his own home. (A.R. 722-23). The habeas court was correct, therefore, in finding that Mr. Adkins' trial counsel raised the defense of habitation. (*See* A.R. 1062).

In essence, the State is trying to show that trial counsel acted reasonably by arguing self-defense and *choosing* to place a more onerous burden on his client – that of meeting the more stringent self-defense standard that applies outside of one's home. (State's Response, 7). Mr. Adkins contends that such a trial "tactic" would also be ineffective. Regardless, the State has not pointed to anything in the record sufficient to overcome the deference due the habeas court's finding of fact that it was trial counsel's intent to offer a habitation defense to the jury.

b. That Trial Counsel Argued Defense Of Habitation To The Jury Does Not Cure The Lack Of Instruction. Instead, It Establishes Prejudice By Showing That Counsel's Trial Strategy Necessitated Habitation Instructions.

The State also argues that the jury actually was instructed concerning defense of habitation because trial counsel argued this theory in closing. (State's Response, 10-11). However, the argument of counsel cannot be construed as an instruction of law. The jury was instructed to only apply the law as given by the court, and not to consider any ideas about what the law is or ought to be other than that given in the jury instructions. (A.R. 685-86). Furthermore, the United States Supreme Court has explicitly stated that arguments of counsel are not, and cannot, be a substitute for jury instruction from the court. *Taylor v. Kentucky*, 436 U.S. 478, 488-89, 98 S. Ct. 1930, 1936 (1978). That trial counsel did, in fact, argue a habitation defense to the jury is no cure for the missing habitation instructions.

Indeed, counsel's closing argument actually shows the severe magnitude of the harm. Had

trial counsel not been relying on this defense, or had self-defense within Mr. Adkins' habitation only been one of several defenses raised, then his position on this issue would not be as strong. However, the only factual defense raised by Mr. Adkins' trial lawyer was that Mr. Adkins was justified in using deadly force because he was defending himself in his home. (A.R. 592, 1062). Without an instruction of law on this point, there essentially was no real defense. *See Miller*, 194 W. Va. 3, 459 S.E.2d 114, at Footnote 20.

This Court has expressed grave concern regarding the competency of lawyers who advance factual defense theories without requesting legal instruction that would enable the jurors to find in their clients' favor. *See Miller*, 194 W. Va. at 15, 459 S.E.2d at 126. In *Miller*, this Court stated that "it would be unusual" for counsel to proceed in this manner and that "[s]uch a maneuver is indicative of the lack of a trial strategy and 'no competent defense attorney would go to trial without first formulating an overall strategy.'" *Id.* at 15-16, 126-27. The facts of *Miller*, and particularly its procedural posture of raising ineffective assistance on direct appeal, prevented the Court from fully reaching the merits on this issue. However, this Court can reach the merits of Mr. Adkins' ineffective assistance claim. This is an appeal from a denied habeas, and by counsel's own admission at trial, his failure to request this or any other instruction was negligent, not strategic. (A.R. 678-79). Consistent with the dicta in *Miller*, this Court should reverse the habeas court's ruling that trial counsel was reasonably competent despite failing to request legal instructions necessary for the jury to acquit based on his trial strategy.

- c. **Mr. Adkins' Testimony Was Not Inherently Unbelievable, And Counsel's Conduct Prejudiced Him Because The Outcome Of His Trial Could Have Been Different Had The Jurors Been Properly Instructed.**

The State further argues that even if the habeas court was correct that trial counsel's

theory was defense of habitation, the outcome of Mr. Adkins' trial would have been the same because Mr. Adkins' testimony was "unbelievable." (State's Response, 12-13). It bases this argument on two points: 1) Mr. Adkins' testimony conflicted with the State's evidence and 2) at the habeas hearing Mr. Adkins' expert testified¹ that because trial counsel failed to prepare his client for trial, his testimony was not presented in a believable manner. (State's Response 9, 12-13). These arguments fail to show that Mr. Adkins' testimony was "so unbelievable on its face that it defies physical laws," and so his credibility can only be determined by a properly instructed jury, not by the State or court as a matter of law. *See* Syllabus Point 5, *Ballard v. Hurt*, 11-0816, 2012 WL 5478745 (W. Va. Nov. 9, 2012) (Not yet reported in West Virginia or South Eastern Reporter). That Mr. Adkins' evidence differed from the State's evidence is precisely why we have trials, and is not a basis to disregard his testimony as a matter of law. *See, id.* at 6. Nor can an expert opinion that lack of trial preparation rendered Mr. Adkins' delivery unbelievable dispense with the need for meaningful adversarial testing.

Further, it is clear that the result below could have been different, because based on Mr. Adkins' defense of habitation theory, the jury could have acquitted him had it been properly instructed. Contrary to the State's argument, this Court can not make assumptions about the jury's factual findings where the issue is whether counsel was ineffective for failing to request jury instructions. Logically, the guilty verdict is no guide to determining what factual theory the jurors believed where, without a proper instruction, an exculpatory factual theory would have still resulted in a guilty verdict. Other courts facing this issue have determined that prejudice is established by the degree to which the instruction impacts the defense case presented at trial. *See, e.g., Brunson v. State*, 477 S.E.2d 711, 713 (S.C. 1996). These courts conclude that the failure to

¹ The habeas hearing transcript has mysteriously vanished. It is presumed that the expert's live testimony was consistent with his report. (A.R. 883-86).

request an instruction is objectively unreasonable and prejudices the defendant because the jury could have given a different verdict had it been properly instructed. *Id.*; (*See also* Petitioner's Brief, 15-16). In light of the habeas court's factual finding that counsel's trial strategy was defense of habitation, the materiality and prejudice of not requesting a habitation instruction is unquestionable. The lower court's legal conclusion that counsel was nonetheless competent does not follow, and this Court should reverse the lower court's denial of habeas relief.

II. It Was Ineffective Assistance Of Appellate Counsel To Challenge The Trial Court's Suppression Ruling While Failing To Request A Transcript Of The Suppression Hearing.

“The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation ... counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption [of reasonable assistance] is simply inappropriate if counsel's strategic decisions are made after an inadequate investigation.”). Syllabus Point 3, *State ex. Rel. Daniel v. Legursky*, 195 W. Va. 314, 465 S.E.2d 416 (1995). In the context of appellate advocacy, that investigation centers on the transcripts – particularly here, where appellate counsel did not represent Mr. Adkins at the underlying trial. *Compare* (A.R. 220) *with* (A.R. 784). Mr. Adkins argues that it was ineffective assistance of appellate counsel to not request the suppression hearing transcript. As with the habitation defense at trial, this was not a marginal issue that appellate counsel considered and in his sound judgment rejected. (A.R. 806-08). Appellate counsel actually argued the suppression motion should have been granted, but failed to adequately investigate that claim or give this Court the factual information it needed to decide the issue on direct appeal. *See, id.*; *See also State ex rel. Johnson v. McKenzie*, 159 W. Va. 795, 799, 226 S.E.2d 721, 724 (1976).

The habeas court ignored the fact that appellate counsel actually did raise this issue, and ruled that it could not find counsel ineffective for “focusing on other issues for the appeal.” (A.R. 1076). In defense of the habeas court’s ruling, the State now argues that a) suppression hearings are entitled to great deference, b) Mr. Adkins was not prejudiced because the suppression hearing would have shown the officers found the evidence in plain sight while lawfully in Mr. Adkins’ home, and c) that the error was further harmless because if the police had asked Mr. Adkins’ permission, he likely would have consented to a search of his home. (State’s Response, 13-15). These arguments are unpersuasive. No trial court decision is afforded so much deference as to be completely immune from appellate review. *See McKenzie*, 159 W. Va. at 799-800, 226 S.E.2d at 724. Without a transcript there is no way to determine what happened at the suppression hearing, particularly where, as here, the police officer conducting the search appears to have materially changed his testimony between the grand jury and trial. *Compare* (A.R. 46-55) *with* (A.R. 426-28). Finally, Mr. Adkins’ right to be free from unreasonable searches and seizures does not turn on whether Mr. Adkins hypothetically could have consented, so long as he, in fact, did not. *See State v. Flippo*, 212 W. Va. 560, 568, 575 S.E.2d 170, 178 (2002).

Normally, a finding of ineffective assistance of appellate counsel would simply result in a person receiving a new appeal with competent representation. *See* Syllabus Point 4, *Rhodes v. Leverette*, 160 W. Va. 781, 239 S.E.2d 136 (1977). However, that is no remedy here because the transcript is mostly unavailable. (A.R. 888). Due to appellate counsel’s failure, only a small portion of the hearing, Mr. Adkins’ own testimony, is available. (A.R. 166-217). Testimony from the State’s witnesses, particularly the police officers who conducted the searches, as well the arguments of counsel are lost and cannot be produced. (A.R. 888). It is also highly unlikely that the entirety of the transcript can be reconstructed. The hearing happened nearly 13 years ago.

(A.R. 166). Mr. Adkins' trial counsel from that hearing is deceased, and the elected prosecutor from back then no longer serves in that capacity. (*Id.*; A.R. 1062). Under these circumstances, with the bulk of the transcript missing, Mr. Adkins is entitled to a new trial. *See* Syllabus Point 8, *State v. Graham*, 208 W. Va. 463, 541 S.E.2d 341 (2000); (*See also* Petitioner's Brief, 21-22). The habeas court below erred by ruling otherwise, and this Court should reverse.

a. Suppression Hearings Are Not Entitled To So Much Deference As To Be Beyond Appellate Review.

First, the State argues that Mr. Adkins' appellate counsel was not ineffective because suppression hearings are entitled to considerable deference. (A.R. 13). However, standards of review are meaningless without a record for an appellate court to review. Suppression hearings are not entitled to so much deference as to be completely insulated from appellate review, but that is precisely what happens when a transcript goes missing. *See McKenzie*, 159 W. Va. at 799, 226 S.E.2d at 724. For this reason, this Court has ruled that transcripts are so important to the appellate process that the State cannot deny them to indigent prisoners. *See Rhodes*, 160 W. Va. at 784, 239 S.E.2d at 139 (*citing Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585 (1956)). Where a prisoner has not filed an appeal in the allotted time due to missing transcripts, he or she is entitled to resentencing to restart the appellate process – sometimes even years later. *McKenzie*, 159 W. Va. at 804, 226 S.E.2d at 726. This Court has even ruled that where trial transcripts are unavailable and cannot be reproduced, a prisoner may even be entitled to a new trial on this ground alone. *Rhodes*, 160 W. Va. 781, 226 S.E.2d 136, at Syllabus Points 4 and 5. In light of this, it would be unconscionable to permit appellate counsel to irrevocably and permanently foreclose his client from meaningful appellate review by not requesting the transcripts of a trial

court ruling he himself is challenging. (*See* A.R. 806-08). Such conduct must be deemed ineffective assistance, and this Court should reverse the habeas court's denial of relief.

b. That The Transcript Is Unavailable And What Transpired Is Unknown Is The Prejudice Itself, Not A Basis For Denying Relief.

Second, the State contends Mr. Adkins was not prejudiced by his counsel's failure to request the transcript because it would have shown the police saw and seized evidence that was in plain sight. (State's Response, 14). However, this speculation concerning what the record could have been had it ever been provided is inappropriate, and in any event it is contradicted by the grand jury testimony.

At the grand jury, the police officer who conducted the search testified that when he arrived at Mr. Adkins' house he conducted a protective sweep to ensure Mr. Adkins was not present. (A.R. 47). He did not report seeing the evidence Mr. Adkins is challenging. (A.R. 47-48). The officer then left the building but remained outside. (A.R. 49). Presumably operating under the fallacious "crime scene" exception to the search warrant requirement, the testifying officer then re-entered the scene to begin collecting evidence, and then left the still-secured premises. (A.R. 50). Once again, the officer did not report seeing the evidence in question. *Id.* The officer then re-entered Mr. Adkins' home a third time, this time with the elected prosecutor² but still without a warrant, to conduct a more extensive search. (A.R. 50). Still, there is no mention of seeing the evidence in question, in plain sight or otherwise³. *Id.* The police officer again re-entered the house. (A.R. 52). Only at this point did the officer describe going into Mr.

² One month later, this Court had to remove this prosecutor from office due to "official misconduct, malfeasance in office, incompetence and neglect of duty." *In re Sims*, 206 W. Va. 213, 215, 523 S.E.2d 273, 275 (1999).

³ It is not entirely clear from the transcript whether the police officer exited and re-entered Mr. Adkins' home three or four times. What is clear, however, is that the police officer does not describe looking inside a drawer and finding the ammunition until the final search in the series. (A.R. 54-55).

Adkins' bedroom, seeing an end table whose drawer was ajar, looking inside, and finding a box of bullets, which contributed to the State's theory of premeditation and deliberation. (A.R. 54-55, 64-65).

This course of conduct would have been a clear violation of Mr. Adkins' Fourth Amendment right against unreasonable searches and seizures since there is no crime scene exception to the warrant requirement. *Flippo v. West Virginia*, 528 U.S. 11, 14, 120 S. Ct. 7, 8, (1999). Further, it appears that this grand jury testimony would have been consistent with the missing suppression hearing testimony. The trial court's order denying the motion to suppress makes no mention of the plain sight exception, simply stating in pertinent part that "the facts were such as to permit the officers to examine the scene of the crime without first obtaining a search warrant."

This original story changed drastically, or at least was considerably glossed over, by the time this same officer testified at trial. At trial, the officer testified that he conducted a protective sweep and saw a box of bullets on top of a nightstand. (A.R. 426-28). This is markedly different from his grand jury testimony, yet the State speculates that the officer's testimony at the suppression hearing would have matched what he said at the trial rather than at the grand jury hearing. (State's Response, 14). This speculation is unwarranted. It is possible the suppression hearing, which occurred between the grand jury and trial, would have somehow reconciled the inconsistent statements about when and where the police saw the evidence in question. It is also possible the suppression hearing would have shown the police reentered Mr. Adkins' home believing it to be a murder scene, and upon finding out this was not a warrant exception, altered their testimony to avoid the exclusion of evidence needed to show premeditated murder. In reality, this Court should not assume either speculative theory, or anything in between. As this

Court has previously ruled, without the transcript or the ability to reconstruct it, the hearing, and Mr. Adkins would argue the trial, was a nullity. *See State ex rel. Johnson v. McKenzie*, 159 W. Va. 795, 802, 226 S.E.2d 721, 725 (1976) (*holding* that proceedings revert back to the point of illegal State conduct). That we do not know what happened at the suppression hearing is precisely why Mr. Adkins is entitled to relief, not a reason for denying it, and so this Court should reverse the habeas court's ruling that appellate counsel provided effective assistance.

c. Finding That Mr. Adkins Might Have Hypothetically Given Consent To Search Had The Police Asked Him Does Not Exempt The Police From Securing A Search Warrant.

Finally, the State finds it significant that in the one excerpt from the suppression hearing that miraculously survived, Mr. Adkins states in hindsight that had the police asked him, he might have consented to a search of his home because he believed he had nothing to hide. (State's Response, 14-15). However, this is a rhetorical rather than a substantive point. A court cannot ignore Fourth Amendment protections simply by finding that the defendant might have consented to a search had he hypothetically been asked. The consent doctrine only extends to cases where the police actually receive consent, whether expressed or implied. *See State v. Flippo*, 212 W. Va. 560, 568, 575 S.E.2d 170, 178 (2002). That is not the case here, and it is no basis for excusing appellate counsel's failure to request a transcript necessary for the disposition of one of his assignments of error on direct appeal. (*See* A.R. 806-08). Worse still, appellate counsel's conduct has permanently ruined the record in such a way that cannot be remedied by simply ordering a new appeal. (A.R. 888). Mr. Adkins is therefore entitled to a new trial with a new suppression hearing.

CONCLUSION AND REQUEST FOR RELIEF

The court below erred by denying habeas relief. Both Mr. Adkins' trial and appellate lawyers were unprepared to fulfill their roles as counsel, and their conduct was objectively unreasonable and prejudicial. Accordingly, Mr. Adkins respectfully requests that this Court rule that his counsel below were ineffective and order a new trial.

Respectfully Submitted,

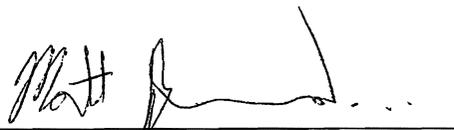
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CERTIFICATE OF SERVICE

I, Matthew D. Brummond, do hereby certify on the 16th day of January, 2013, I served by mail the attached *Petitioner's Reply Brief*, to Tom Rodd, Assistant Attorney General, 812 Quarrier Street, 6th Floor, Charleston, WV 25301.



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