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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT
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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, Ex rel.
MYRON DEWAYNE DANIELS
Petitioner,

v.

Case No. 05-MISC-265
(Judge Jennifer F. Bailey)

WILLIAM FOX, WARDEN
St. Mary's Correctional Center
Respondent.

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

On a former day came the Petitioner, Myron Dewayne Daniels, and presented his Petition for Writ of Habeas Corpus and brief in support thereof. Subsequently, came the Respondent William Fox by counsel, K. Michele Drummond, Assistant Prosecuting Attorneys in and for Kanawha County and timely presented a Reply to the Petition for Writ of Habeas Corpus. After a thorough review of the petition, the Respondent's reply, exhibits, underlying records including but not limited to the trial transcript, other documentary evidence, and applicable case law, the Court **FINDS** the matter ripe for a decision and makes the following Findings of Fact and Conclusions of Law:

On February 22, 1996, the Petitioner was indicted for the felony offenses of Aggravated Robbery as contained within Counts One and Three of Felony Indictment Number 96-F-34. Counts One and Three were severed pursuant to Petitioner's Motion to Sever. The Petitioner was convicted by a jury of the Aggravated Robbery as contained within Count One. The State of West Virginia filed an information alleging that the Petitioner had been twice convicted of a felony.

On June 14, 1999, the Petitioner entered a plea of guilty to Aggravated Robbery as contained within Count Three. Additionally, the Petitioner entered a plea of guilty to the information alleging that the Petitioner had been twice convicted of a felony pursuant to W.Va. Code 61-11-11 as to both Count One and Count Three. The Court sentenced the defendant to life in a state correctional facility with regard to each count and ordered that said sentences run concurrently.

The Petitioner wished to appeal his conviction as to Count One but trial counsel failed to do so. The Office of the Clerk of the West Virginia Supreme Court of Appeals has stated that full transcripts of the trial as to Count One do not exist.

Petitioner argues the plea was illegal on its face noting that for an offense to be considered a distinct offense for the purposes of the recidivist statute, that offense must be committed after conviction and sentence for any prior offense being used for enhancement purposes. The recidivist informations filed cites a prior conviction for Rape for which the Petitioner was committed to the Ohio Department of Corrections on November 10, 1976; a conviction for Aggravated Robbery for which the Petitioner was sentenced to a determinate term of thirty years in the West Virginia Penitentiary on October 25, 1990, which sentence was suspended in favor of five years probation on the same date; and a conviction for Unaggravated Robbery for which the Petitioner was sentenced to an indeterminate term of five to eighteen years in the West Virginia Penitentiary, which sentence was declared to be consecutive to the sentence imposed in the case of Aggravated Robbery, on February 20, 1991, which sentence was suspended in favor of five years probation. The verdict of the petit jury as to Count One of Felony Indictment 96-F-34 occurred on October 9, 1996. The plea entered as to Count Three of Felony Indictment 96-F-34 occurred on June 14, 1999. Clearly, the offenses alleged in Counts

One and Three were committed after conviction and sentence for any prior offense alleged in the recidivist informations.

Petitioner argues that only one felony can be enhanced out of a set of felonies. Although Counts One and Three of Felony Indictment Number 96-F-34 were brought under the same indictment, the two counts of Aggravated Robbery occurred on two separate and distinct dates. Count One occurred on April 30, 1995, and Count Three occurred on April 12, 1995. The Petitioner filed a Motion to Sever the Counts of said indictment on August 14, 1996, alleging that the charges in the indictment were of a diverse nature which would necessitate varying elements of proof for each offense which may tend to confuse the jury; especially as the same applies to different alleged victims at different points in time. Counts One and Three of Felony Indictment Number 96-F-34 were severed and accordingly the Respondent was able to properly file a recidivist information with regard to both counts of the indictment.

Petitioner argues that because the two separate recidivist sentences were plainly illegal that the terms of the plea bargain could not be fulfilled. Again, the Petitioner chose to request a severance of the counts which permitted the Respondent to legally pursue a recidivist action with regard to both. Petitioner accepted the extended plea agreement which provided that the two recidivist life sentences to be imposed as a result of the plea would be served concurrently. Not only was the plea bargain fulfiliable, the plea bargain was fulfilled when the Court ordered that Petitioner's sentences run concurrently.

Petitioner argues that he has a constitutional right to petition for appeal and that since full transcripts do not exist that Petitioner has the option of appealing on the basis of a reconstructed record or of receiving a new trial. The West Virginia Supreme Court of Appeals in Varney v Superintendent, West Virginia Penitentiary, 164 W.Va. 420, 264 S.E.2d 472 (1980), held that

where the trial court repeatedly refused during the appeal period to furnish a transcript of petitioner's trial and subsequently the reporter's notes from which a trial transcript could be made were lost, the petitioner was entitled to discharge on that conviction. However, where petitioner had been convicted on two crimes, only one of which convictions had been declared void, he was required to serve the term provided by statute for the valid conviction. Even if the Court were to grant Petitioner's demand for a new trial as to Count One of Felony Indictment 96-F-34, the sentence for Count Three of the same indictment should stand.

Based upon the foregoing, the Court **DENIES** the instant Habeas Petition and **ORDERS** the matter stricken from the docket. The Court also notes the Petitioner's objection and exception to its ruling. Lastly, the Court **ORDERS** certified copies of this Order and Opinion to be provided to all counsel of record and Petitioner.

ENTERED THIS 23rd **day of** January, **2012**

Jennifer F. Bailey

JENNIFER F. BAILEY, JUDGE
Thirteenth Judicial Circuit

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 25th DAY OF January, 2012
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA KH

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FILED

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CATHY S. GATSON, CLERK
KANAWHA CO. CIRCUIT COURT

MYRON DEWAYNE DANIELS,

Petitioner,

v.

Civil Action Number: 05-MISC-265
Judge Jennifer Bailey Walker

WILLIAM HAINES, Warden,
Huttonsville Correctional Center,

Respondent.

ORDER

The Court has considered the Petition for Writ of Habeas Corpus, filed by the Petitioner Myron Daniels, *pro se*, and other pertinent legal authorities. As a result of these deliberations, the Court concludes the petitioner may have grounds for relief.

Accordingly, this Court finds that the petitioner qualifies for the appointment of counsel under Rule 3(a) of the *Rules Governing Post-Conviction Habeas Corpus Proceedings in West Virginia*, and the Court finds that the appointment of counsel is warranted. Therefore, pursuant to Rule 4(b), this Court hereby **ORDERS** that the Kanawha County Public Defender is appointed to represent the Petitioner in this matter.

It is further **ORDERED** that the Clerk of this Court send a certified copy of this Order to all *pro se* parties, counsel of record, the Prosecuting Attorney of Kanawha County, and the Kanawha County Public Defender's Office.

ENTERED this the 22nd day September, 2006.

Jennifer Bailey Walker
JENNIFER BAILEY WALKER, Judge
Thirteenth Judicial Circuit

Date: 9-22-06
Certified copies sent to:
✓ counsel of record
✓ parties
✓ other SCA
(please indicate)
By: ✓ certified/1st class mail
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Other directives accomplished:
Deputy Circuit Clerk

RECORDED

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF THE CIRCUIT COURT OF SAID COUNTY AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 10
DAY OF February, 2012
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA