

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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NO. 12-0108

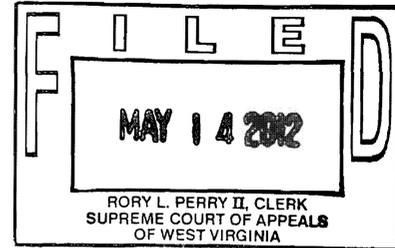
WILLIAM FOX, WARDEN, ST.
MARYS CORRECTIONAL CENTER,

*Plaintiff Below,
Respondent,*

v.

MYRON DANIELS,

*Defendant Below,
Petitioner.*



SUMMARY RESPONSE

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SUMMARY RESPONSE

I.

STATEMENT OF THE CASE

Underlying proceeding

On February 22, 1996, the Petitioner was indicted on seven felony counts contained in a single indictment: Count One- Aggravated Robbery of Wilma Collins; Count Two- Aggravated Robbery of Deborah Malech; Count Three - Aggravated Robbery of Clara Lill; Count Four - nighttime burglary; Count Five - entering without breaking in the nighttime; Count Six - Forgery, Count Seven - Uttering. (App. at 3-8.)

Petitioner's trial counsel moved the trial court to sever the counts of the indictment for trial based on the grounds that three different victims were involved and that "these offenses are not alleged to be of a single criminal transaction". (*Id.* at 117.) Furthermore, breaking down the dates of the offenses, Count One - 04-30-95, Count Two - 04-26-95, Count Three through Seven - 04-12-

95 demonstrated that they were separate offenses. (*Id.* at 117.) Said motion was granted and Petitioner went to trial only on Count One. A petit jury convicted him on October 9, 1996, of Count One - Aggravated Robbery. (*Id.* at 13.) The State filed a recidivist information against Petitioner that same day. (*Id.* at 113-15.) The information alleged Petitioner was the same Myron Daniels that was convicted by his plea of guilty to the felony offense of Rape on April 27, 1976 in the Court of Common Pleas of Franklin County, Ohio; and further that he was also convicted of the felony offense of Aggravated Robbery on September 25, 1990 in the Circuit Court of Kanawha County, West Virginia. In addition, it alleged Petitioner was the same person convicted of the felony offense of unaggravated robbery on February 20, 1991 in the Circuit Court of Kanawha County. (*Id.* at 114.)

After two and a half years of hearings, continuances, attempts to procure a competency evaluation, pro se motions and efforts to procure the attendance of an out of state witness, (*Id.* at 66), the Petitioner, finally, on June 14, 1999, entered into a non-binding plea agreement with the State. (*Id.* at 120-22.) In the plea agreement, Petitioner agreed to the following: plead guilty to the aggravated robbery contained in Count Three; admit to the recidivist information filed right after the jury verdict in Count One; admit to the recidivist information filed upon his guilty plea to the aggravated robbery contained in Count Three; and, in addition, the Petitioner would admit to violating his probation that he was given on his prior felonies. (*Id.* at 120.) The State agreed to recommend the following: that the recidivist life sentences to be imposed on Count One and Three be served concurrently with each other; and that the sentences to be imposed for his violation of probation on his prior felonies be served concurrently with his life recidivist sentences. The State also agreed to dismiss the remaining counts in the indictment. (*Id.* at 120-21.) Pursuant to an Order entered June 14, 1999, Petitioner was sentenced to two terms of life imprisonment as a habitual

offender, with said sentences to be served concurrently with each other. The remaining counts were dismissed. (*Id.* at 20.) Petitioner, in his waiver of rights, (*id.* at 14-16), specifically retained the right to appeal his jury trial conviction on Count One. This waiver of rights was filed on October 21, 1996. (*Id.*) This waiver expressly stated that Petitioner could file post trial motions regarding his conviction of the aggravated robbery of Wilma Collins as is reflected in Count One of the indictment. This waiver also expressly stated that Petitioner understands that the court was “inclined to approve my appointment of new counsel to represent me on any motions I wish to file for ineffective assistance of counsel”. (*Id.* at 15.) This waiver, signed by Petitioner, goes on to state:

But, I stand by my apology to the Court and counsel made in open court on Friday, October 18, 1996, and withdraw my motion for new counsel and specifically take back any assertions that Mr. Dues was not working on my behalf at any time he represented me in this matter or that he was ineffective in his representation of me. And, as indicated to the Court, I do not wish to have new counsel appointed.

(*Id.* at 16.) This is supported by the State referencing in its response:

Because the Petitioner claims that the fault in the late filing of the appeal lies with the petitioner’s former attorney, Mr. Dues, and because the petitioner has waived his right to raise a claim of ineffective assistance of counsel, as noted in an Order dated March 31, 1997, this claim cannot be used to support a petition for a writ of habeas corpus.

(App. at 82.)

Instant Habeas proceeding

Petitioner filed his original petition of Habeas Corpus ad Subjiciendum on June 7, 2005.

(*Id.* at 24.) The court appointed him counsel in an Order dated September 22, 2006. (*Id.* at 56.) An amended writ of habeas was filed September 25, 2006. (*Id.* at 57.) A second amended petition for a writ was filed April 30, 2009. (*Id.* at 65.) Petitioner’s right to appeal was noted in the response from the State, “ the right to petition for an appeal is a protected right under the Constitution of the

State of West Virginia. However, that right is predicated upon the timely filing of such an appeal.” (*Id.* at 82.) The habeas judge references this, “ So he sits in prison for six years and then files this motion.” (Supp. App. at 16.) Petitioner was clearly aware of his right to appeal as is evidenced in his waiver of rights previously mentioned and yet he chose not to pursue that right. Nothing prevented him from pursuing a direct appeal in a timely manner.

When petitioner entered his plea agreement in 1999 he had two attorneys. (*Id.* at 52.) Petitioner stated to the habeas court in a hearing on June 7, 2010, that:

The reason that the transcript was necessary for me was that the federal, in the federal law, the federal law says that if, you know, you file a habeas petition and no one answers within two years, that you can file your petition in federal court. So I am wanting a transcript to be able to file in federal court if the state didn't answer the habeas petition, you know.

(Supp. App. at 24.) Petitioner filed a federal writ of habeas corpus in 2009. (*Id.* at 72.)

The state habeas court found that the Petitioner wished to appeal his conviction as to Count One but his trial counsel failed to do so. (App. at 132.) The full transcript of petitioner's jury trial on Count One does not exist. (*Id.* at 108.)

II.

SUMMARY OF ARGUMENT

The habeas court properly ruled that two separate convictions from a multiple count indictment, separated pursuant to Petitioner's trial counsel severance motion, can each be enhanced under the habitual criminal statute, when Petitioner's record contains three prior qualifying felonies. Additionally, the habeas court properly upheld Petitioner's plea bargain finding that said plea agreement was fulfilled, as both parties performed their respective promises and both the State and Petitioner got the benefit of the plea agreement.

Petitioner argues that the habeas court should vacate the jury conviction on Count One of the indictment because of Petitioner's inability to appeal the jury verdict as the full transcripts do not exist. The State responds that petitioner knew he could appeal, he knew nothing was being appealed, and yet he sat for six years in the penitentiary until he finally filed this habeas. Through Petitioner's inaction the full trial transcripts do not exist. The State argues that Petitioner has waived his right to appeal his jury trial conviction for neither he nor his two counsel filed a timely Notice of Intent to Appeal.

However, if this Honorable Court disagrees and decides to grant petitioner's request to vacate his recidivist conviction on Count One and remand for a new trial because of the transcript issue, the conviction and recidivist sentence on Count Three of the felony indictment 96-F-34 is proper and should stand.

III.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Counsel for the Respondent states that oral argument is not necessary and believes a memorandum decision is appropriate. The State notes that dispositive issues have been authoritatively decided and the facts and legal arguments have been adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument.

IV.

ARGUMENT

- A. **The Petitioner's argument fails. The Petitioner's three prior felony convictions were properly the basis for the recidivist informations and the triggering offenses, Count One and Count Three were properly enhanced because of the severance.**

Petitioner's first assignment of error is a question of statutory interpretation and is therefore a question of law subject to a *de novo* standard of review. Syl. Pt. 3, *State v. Vance*, 207 W. Va. 640, 535 S.E.2d 484 (2000).

This Honorable Court stated:

We have also held that before any prior conviction can be used to enhance a present conviction, it must be shown that the prior felony was committed and a conviction obtained on it prior to the time of the present felony offense." *State v. McMannis*, 161 W. Va. 437, 242 S.E.2d 571 (1978); 4 *State ex rel. Yokum v. Adams*, 145 W. Va. 450, 114 S.E.2d 892 (1960); *State ex rel. Stover v. Riffe*, 128 W. Va. 70, 35 S.E.2d 689 (1945).

Turner v. Holland, 175 W. Va. 202, 203, 332 S.E.2d 164, 166 (1985)(footnotes omitted.)

A petit jury convicted Petitioner on October 9, 1996, of Count One - Aggravated Robbery. (App. at 13.) The State filed a recidivist information against Petitioner that same day. (*Id.*) The information alleged Petitioner was the same Myron Daniels that was convicted by his plea of guilty to the felony offense of Rape on April 27, 1976 in the Court of Common pleas of Franklin County, Ohio. The information alleged he was also convicted of the felony offense of aggravated robbery on September 25, 1990 in the Circuit Court of Kanawha County, West Virginia. In addition, the information also alleged Petitioner was the same person convicted of the felony offense of Unaggravated Robbery on February 20, 1991 in the Circuit Court of Kanawha County. (*Id.* at 114.) All the prior felonies were committed and the convictions obtained prior to Petitioner's conviction on October 9, 1996.

As this Court has said:

We have held that the purpose of our recidivist statute, W. Va. Code § 61-11-18, which authorizes a court to impose additional time to the sentences of repeat felony offenders, is to deter those who have been convicted of felonies from committing subsequent offenses. Since the statute is penal and in derogation of the common law, it should be strictly construed. *State ex rel. Ringer v. Boles*, 151 W. Va. 864, 157 S.E.2d 554 (1967).

Turner v. Holland, 175 W. Va. 202, 203, 332 S.E.2d 164, 165-66 (1985)(footnotes omitted.)

Petitioner's sentence reflects the purpose of West Virginia's recidivist statute with said purpose being explained artfully by the late Chief Judge Maxwell in a case before him:

It would seem that, notwithstanding the definitional confusion surrounding the use of the word 'conviction' in the West Virginia recidivist statute and in the case law, one is not judicially deterred from future offenses until he has felt the complete impact of his past offenses. One must perhaps not only witness the determination of his guilt through a guilty plea or jury verdict, but must also experience the punitive consequences of his offense. It is obviously the experience of the cold steel doors of the penitentiary slamming behind him or the inexorable conditions of probation, restricting his movements and actions, that effectively demonstrates the futility of crime. Apparently only when a man has faced the ultimate consequences of an offense should he be additionally penalized later on the basis of that offense. Apparently it is only when he has faced the total, stark consequences that he should have learned his lesson.

Moore v. Coiner, 303 F. Supp. 185, 191 (N.D. W. Va. 1969).

Petitioner obviously did not learn his lesson, as his first felony conviction occurred in Ohio all the way back in 1976. On that first conviction, Petitioner was sent to the penitentiary for six to twenty five years. (App. at 10.) Then, while on probation in Kanawha County for two more felonies, one aggravated robbery and one unaggravated robbery, Petitioner committed several more aggravated robberies. The State properly said "enough is enough" and utilized its discretion by properly filing the two recidivist informations. Petitioner, realizing the amount of serious time he was facing, wisely entered into a valid plea agreement. The plea agreement basically recommended concurrent sentencing, spelling out that the two recidivist life sentences to be imposed would run concurrent to each other. Nowhere on the four corners of the plea agreement does it spell out Petitioner's right to appeal his jury trial conviction on Count One. (*Id.* at 105.)

Petitioner's argument that the convictions were finalized on the same day and therefore cannot be enhanced is not supported by case law as this Honorable Court stated ,"

In applying these principles to the present case it becomes clear the judgment of sentence which must be finalized prior to the institution of the recidivist statute is the underlying or former convictions which in this case consisted of the 1968 conviction for breaking and entering and the 1982 conviction for grand larceny. The record reflects that both of these convictions had been finalized by the entry of a judgment of sentence and therefore were properly utilized in the recidivist proceeding. There is no requirement that the final offense, in this case the burglary, has to be finalized by the entry of a judgment order before the state can initiate action under the Habitual Criminal Statute.

State v. Housden, 184 W. Va. 171, 175-76, 399 S.E.2d 882, 886-87 (1990)(footnote omitted.)

Therefore, the trial court properly applied the recidivist statute and in full accord with Petitioner's plea agreement.

B. The habeas court did not vacate petitioner's plea agreement because it not only was legal and able to be fulfilled, it was actually fulfilled by both parties completing their promises.

Petitioner argues that the plea agreement resulted in an illegal sentence and therefore cannot be fulfilled as a matter of law and must be vacated. (Pet'r's Br. at 10.)

In Syl. Pt. 1. *State ex rel. Farmer v. Trent*, 209 W. Va. 789, 551 S.E.2d 711 (2001) this court stated:

A habeas petitioner may successfully challenge a guilty-plea conviction based upon an alleged violation of Rule 11 of the West Virginia Rules of Criminal Procedure only by establishing that the violation constituted a constitutional or jurisdictional error; or by showing that the error resulted in a complete miscarriage of justice, or in a proceeding inconsistent with the rudimentary demands of fair procedure. Moreover, the petitioner must also demonstrate that he was prejudiced in that he was unaware of the consequences of his plea, and, if properly advised, would not have pleaded guilty. Syl. Pt. 10, *State ex rel. Vernatter v. Warden*, 207 W. Va. 11, 528 S.E.2d 207 (1999).

In this case, there was no illegal sentence, but more importantly, Petitioner was completely informed of the consequences of his plea. (App. at 105.) In essence, Petitioner, got what he wanted and got what he bargained for in this plea agreement. Therefore, the habeas court was correct in not vacating the plea agreement and this decision should be affirmed by the Honorable Court.

C. Petitioner was aware of his right to appeal his Count One jury trial conviction. Yet petitioner did not pursue a direct appeal in a timely manner. Full transcripts of the Count One jury trial do not exist. If this Honorable Court grants petitioner's request for the habeas court to vacate the sentence as to Count One and remand for a new trial, that remedy will have no effect on Petitioner's life recidivist sentence on Count Three.

This Honorable Court should uphold the habeas court's denial of Petitioner's request to vacate his life recidivist sentence as to the Count One jury trial conviction and remand for a new trial as Petitioner sat on his right to appeal for six years with nothing preventing him from pursuing a direct appeal in a timely manner.

Pursuant to Syl. Pt. 1 *Rhodes v. Leverette*, 160 W. Va. 781, 239 S.E.2d 136 (1977), "An indigent criminal defendant has a right to appeal his conviction. He is also constitutionally entitled to a copy of the trial court record, including the transcript of the testimony, without cost to him. West Virginia Constitution, Article III, Sections 10 and 17." *Rhodes v. Leverette*, 160 W. Va. 781, 239 S.E.2d 136 (1977).

Additionally, this Court has held that:

The failure of the circuit court, in which an indigent person was convicted and sentenced to imprisonment for a criminal offense, acting by its clerk, to furnish a duly requested transcript in sufficient time to enable such indigent person to apply for an appeal, constitutes a denial of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and by Article III, Sections 10 and 17, of the Constitution of this State; the judgment imposing sentence is unenforceable; and such indigent person, in a habeas corpus proceeding, is entitled to be released forthwith from custody under such judgment.

Syl. Pt. 2 *State ex rel. Kennedy v. Boles*, 150 W. Va. 504, 147 S.E.2d 391 (1966).

The key language in the *Kennedy* case in reference to this case is, "a duly requested transcript" The record shows that the earliest such request for a transcript was in 2005.

Petitioner's argument if granted would support a course of action for all persons convicted of a crime in West Virginia to do nothing, wait six years and then get out of jail because the passage of time has introduced error into the proceedings.

However, even if Count One jury trial conviction is vacated and remanded for a new trial because of the failure to obtain a full transcript, controlling case law as the habeas court accurately cited Syl. Pt. 2. holds, "One who has been convicted of two crimes, one of which convictions has been declared void, will be relieved of punishment for such void conviction, but he must serve the term provided by statute for the valid conviction." *Syl. Pt. 2 Varney v. Superintendent, W. Virginia Penitentiary*, 164 W. Va. 420, 264 S.E.2d 472, (1980).

In *Varney*, unlike the facts in Petitioner's case, the trial judge repeatedly refused during the appeal period to furnish a transcript of the petitioner's trial and therefore the Petitioner was entitled to a discharge on that conviction. In this case, the trial judge did not repeatedly refuse during the appeal period to furnish a transcript of the jury trial. The judge was never even asked to order such transcript.

Moreover, the habeas court did not summarily dismiss this petition. The Court held a omnibus discovery hearing, reviewed numerous briefs and listened to arguments. In deciding to not vacate the Count One's sentence and remand for a new trial the court ruled that it was pointless.

However, this Honorable Court's has:

Although there may be occasions where the validity of one sentence has been upheld in review and the review of a separate conviction will not alter the circumstances of a defendant's confinement, a defendant is still entitled to a ruling on the merits when post-conviction habeas corpus relief is sought. A court cannot summarily dismiss a petition relying upon the concurrent sentence rule, since we refuse to adopt that rule.

Syl. Pt. 1 *State ex rel. Blake v. Chafin*, 183 W. Va. 269, 395 S.E.2d 513 (1990).

Petitioner's argument that the habeas court clearly adopted the logic behind the "concurrent sentence rule" is inapplicable to the instant case because the habeas court ruled on the merits and did not rely upon the concurrent sentence rule.

V.

CONCLUSION

For all the foregoing reasons, the State respectfully requests that this Honorable Court should affirm the Order of the habeas court. However, if this Honorable Court disagrees, then vacating the life recidivist on Count One for lack of a transcript and remanding for a new trial will have no affect on the life recidivist sentence Petitioner received on Count Three which should be affirmed.

Respectfully submitted,

STATE OF WEST VIRGINIA,
Respondent,

By Counsel,

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CERTIFICATE OF SERVICE

I, ANDREW MENDELSON, Assistant Attorney General, do hereby certify that I have served a true copy of the "SUMMARY RESPONSE" upon Petitioner's Counsel by depositing said copy in the United States mail, with first-class postage prepaid, on this 15th day of May, 2012, addressed as follows:

To: Robert C. Catlett, Esq.
Deputy Public Defender
Office of the Public Defender
Kanawha County
Charleston, WV 25330



ANDREW MENDELSON