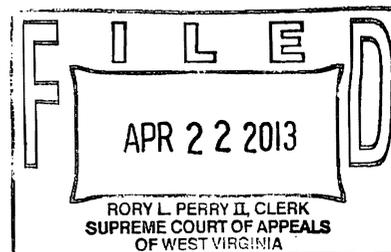


IN THE
SUPREME COURT OF APPEALS
OF
WEST VIRGINIA



CHARLESTON

ROBERT L. HOLCOMB,
Petitioner,

No. 12-0396
Underlying Proceeding
Criminal No. 06-F-4, Habeas case 09-C-44
Nicholas County Circuit Court

DAVID BALLARD, Warden
Mt. Olive Correctional Complex,
Respondent.

AMENDED BRIEF

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	A. Whether the Circuit Court of Nicholas County, West Virginia improperly sentenced the Petitioner to life in prison in violation of the West Virginia Recidivist Statute by failing to comply with the requirements contained therein which mandates a trial upon the same during the same term of Court for which the Petitioner is convicted of the underlying offense.	
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2. POINTS AND AUTHORITIES

1. It shall be the duty of the prosecuting attorney when he has knowledge of former sentences to the penitentiary of any person convicted of an offense punishable by confinement in the penitentiary to give information thereof to the court immediately upon conviction and before sentence. Said court shall, before expiration of the term at which such person was convicted causes such person or prisoner to be brought before it, and upon an information filed by the prosecuting attorney, setting forth the records of convictions and sentences and alleging the identity of the prisoner with the person named in each, shall require the prisoner to say whether he is the same person or not. W.Va. Code, §61-11-19;

2. While procedural steps relating to sentencing and other matters, including sentencing, may be done at a subsequent term, if the habitual criminal statute is sought to be enforced, the information must be given and the convicted person confronted with the charge of previous convictions before expiration of the term at which such person was convicted. *State ex rel Housden V. Adams*, 143 W.Va. 601, 103 S.E. 2d 873 (1958); *State v. Cavallaro*, 210 W.Va. 237, 557 S.E. 2d 291 (2001, *per curiam*):

3. The procedure, as set out in the habitual criminal statute, expressly requires that before a sentence of life imprisonment may be lawfully imposed....the prosecuting attorney might give information to the court of such sentences “immediately upon conviction and before sentence” and “said court shall, before expiration of the term at which such person was convicted” proceed to confront the convicted person with the charges for the purpose of identifying the convicted person with the person so previously convicted.

State ex rel Housden v. Adams, 143 W.Va. 601, 103 S.E. 2d 873 (1958) The provisions of this statute are mandatory. The statute must be complied with fully before an enhanced sentence for recidivism may be imposed. *State v. Cavallaro*, 210 W.Va. 237, 557 S.E. 2d 291 (2001, *per curiam*):

4. For a sentence to be constitutionally excessive, sentence must be so grossly disproportionate to the severity of the crime as to shock reviewing court's sense of justice or sentence must make no measurable contribution to penal goals [.] United States Constitution, Amendment VIII; *State v. Allien*, 814 So., 2d 743 (La Ct. App. 3d Cir. 2002); *State v. Vance*, 164 W.Va. 216, 262 S.E. 2d 423 (1980);

5. Although a sentence is within statutory limits, it may still violate defendant's constitutional right against excessive punishment. LSA-Const. Art. 1, §20; *State v. Keeley*, 814 So2d 664(La. Ct. App. 4th Cir., 2002), 33 A.L. R. 3d 335;

6. A sentence is constitutionally excessive, even if it is within the statutory limits, if it is grossly disproportionate to the severity of the offense or is nothing more than the needless and purposeless imposition of pain and suffering. United States Constitution, Amendment VIII; *State v. Hayes*, 845 So.2d542 (La. Ct. App. 1st Cir., 2003); LSA-Const. Art. 1, §20;

7. Excessive penalties, even if authorized by statute, cannot transgress the proportionality principle of *West Virginia Constitution, Article III, Section 5*; *State v. David D. W.*, 214 W.Va. 167, 588 S.E. 2d 156 (2003).

8. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d. 674 (1984).

3. ASSIGNMENTS OF ERROR AND THE MANNER IN WHICH THEY WERE DECIDED

A. Whether the circuit Court of Nicholas County, West Virginia improperly sentenced the Petitioner to life in prison in violation of the West Virginia Recidivist Statute by failing to comply with the requirements contained therein which mandates a trial upon the same during the same term of Court for which the Petitioner is convicted of the underlying offense.

The Circuit Court ruled that the recidivist hearing conducted four (4) months into the next term of Court was appropriate and sentenced the Petitioner to life in prison.

B. Whether the Circuit Court's imposition of the life recidivist in this matter is unconstitutionally disproportionate and excessive in this matter given the Petitioner's criminal history and the fact that the conviction which triggered the recidivist was not a violent offense.

The Circuit Court found that a life sentence was not disproportionate although the Court seriously questioned the same prior to sentencing the Petitioner to life in prison.

C. Whether trial counsel in this matter improperly advised the Petitioner to stipulate the underlying convictions during the Habeas Corpus proceeding.

The Circuit Court denied the Petitioner's grounds for ineffective assistance of counsel at the Omnibus hearing.

4. STATEMENT OF THE CASE

Petitioner was indicted by a Nicholas County grand jury of the felony offense of child

neglect creating a substantial risk of serious bodily injury or death, a violation of West Virginia Code, §61-8D-4(e). In a trial before the Honorable Gary Johnson, Petitioner was represented by Attorney Greg Hurley. On April 5, 2006, the jury returned a verdict of guilty.

Immediately following the jury verdict, the State filed an Information of Prior Convictions, seeking an enhanced sentence pursuant to West Virginia Code, §61-11-19 (commonly, the habitual criminal statute). Attorney Hurley was relieved of representing Mr. Holcomb and on May 8, 2006, “a licensed Attorney at Law, from the Public Defendant Services Appellate Division” was appointed to represent Petitioner in the recidivist proceedings. A new term of Court commenced on May 9, 2006, the second Tuesday in May. See Trial Court Rules 2.28.

Attorney Paul Williams filed a Notice of Intent to Appeal the underlying felony conviction on May 9. Judge Johnson advised the Chief Justice of this Court that he wished to voluntarily recuse himself from presiding over the recidivist proceedings. Upon a finding that the reasons were sufficient, the Hon. Jack Alsoy was temporarily assigned to the 28th Circuit to preside over this case by Administrative Order of June 2, 2006. On August 24, the State filed a Motion for imposition of Life Sentence, pursuant to the habitual criminal statute.

On August 1, 2006, a jury convened for the recidivist proceedings returned a verdict finding Petitioner to be the same person previously convicted of prior felonies. On August 25, Petitioner filed a Motion to Sentence the Defendant on Underlying Charge and Find that the imposition of a Life sentence would violate the Proportionality Principle of the West Virginia Constitution. On August 26, the Court held a hearing on sentencing and post trial motions.

On September 1, Petitioner filed a Motion to Vacate Judgment and Grant a New Trial in the original felony child neglect case. One of the grounds asserted was the failure of the Court, in its Charge to the jury, to instruct the jury on the element of gross neglect. The Charge presented to the Jury was as follows:

“To prove commission of child Neglect Creating Risk of Serious Bodily Injury or Death as contained in the indictment, the State must prove each of the following elements beyond a reasonable doubt:

1. The defendant, Robert Lee Holcomb,
2. In Nicholas County, West Virginia
3. On or about the 4th day of February, 2005
4. did neglect said child, ad
5. by such neglect to S. J. created the risk of serious bodily injury or death to S. J.”

At trial, there were no objections the charge.

Over the State’s objection, the Trial Court granted the defense motion and awarded Petitioner a new trial by an Order entered October 13, 2006. The new trial was held on January 4, 2007. The jury’s verdict was that Petitioner is guilty of the felony offense of gross child neglect creating a substantial risk of serious bodily injury or death. Once again, the prosecution announced to the Court that the State intended to file a recidivist information against Mr. Holcomb. The Court’s Trial Order on the conviction of gross child neglect was entered March 5, 2007.

Notice of the “Information of Prior Conviction” was filed in the Office of the Circuit Clerk on January 5, the same date that trial counsel was served (Appendix page 51). A copy of the Notice that shows Petitioner was personally served on January 8, the same day the September

2006 term of the Nicholas County Circuit Court adjourned (Appendix page 58). The January term commenced on January 9, 2007 (Appendix page 67). Nothing in the record suggests that Petitioner appeared to answer the Recidivist charges until a hearing/trial on April 30, (Appendix page 67). The parties appeared for trial, on the same but informed the Court that they had reached an agreement regarding the Information of Prior Convictions. The Agreement entered into by the parties whereas the Petitioner would admit the allegations of the prior offenses as set forth in the information of prior conviction and get no benefit therefrom by the State (Appendix pages 124, 125).

Following the agreed findings of fact, the Court adjudged that Petitioner is the same person convicted of the offense described in indictment 06-F-4, and furthermore, that he was the same person named in the five count recidivist information. Petitioner was sentenced to life in prison. Trial Counsel gave Notice of Intent to Appeal on May 9, 2007. The period for filing an appeal was subsequently extended until October 27. The undersigned Appellate Counsel moved to have Petitioner re-sentenced for purposes of appeal, and by its Order of December 19, the motion was granted. Counsel again gave Notice of Intent to Appeal, on January 8, 2008. An appeal is prosecuted from the Order of December 19, 2007.

On February 13, 2008 an Appeal was filed with the West Virginia Supreme Court as to the aforesaid conviction and habitual criminal life sentence. On September 4, 2008 the West Virginia Supreme Court of Appeals refused the Petitioner's Appeal. On April 22, 2011 the Petitioner filed a Habeas Corpus Petition in this matter and an Omnibus Habeas Corpus hearing was conducted by the Circuit Court on 26th day of August, 2011. That the Petitioner asserted various grounds in the

Habeas Corpus Petition (Appendix page 61) but for purposes of this appeal, Petitioner is specifically asserting that the Circuit Court did not conduct a recidivist proceeding within the term of Court for which the Petitioner was convicted and did not comply with W.Va. Code §61-11-19 and trial counsel was ineffective as to advise on admitting the recidivist allegations. Following the Omnibus hearing, the Circuit Court took the matter under advisement and issued a written Order entered on the 22nd day of November, 2011 which denied the relief requested in the Habeas Corpus Petition (Appendix page 20). On March 2, 2012 the Circuit Court entered an Order appointing subsequent counsel to file the appeal of the Habeas Corpus matter.

5. SUMMARY OF ARGUMENT

The Petitioner contends that the life sentence he received pursuant to West Virginia habitual criminal statute is illegal as the State of West Virginia failed to comply with the mandatory procedural requirements of said statute. This Court has held that there must be strict, compliant and statutory language with respect to criminal statute and requirements of law as set forth by our legislature and has further held in prior cases that the Court's must strictly comply with the terms contained in the recidivist act. **State v. Cavallaro**, 210 W.Va. 237, 557 S.E. 2d 291 (2001, *per curiam*): The West Virginia Habitual Criminal statute/ recidivist act requires that the prosecutions of persons for second or third offense must be conducted before the expiration of the term in which the person was convicted. In this case, the Prosecuting Attorney filed a recidivist petition on the last day of the term of Court following the Petitioner's conviction. The Petitioner was not confronted with the same and brought to trial until the following term of Court some four (4) months later. As such, the Petitioner contends that the State of West Virginia failed to

comply with the statutory requirements of the habitual criminal statute and accordingly the life sentence imposed by the Circuit Court is illegal and should be set aside.

The Petitioner further contends that the life sentence he received pursuant to the West Virginia Habitual Criminal statute is unconstitutional as the same is disproportionate as the offense for which he was convicted was not a violent offense as determined by this Court, and his prior offenses were stale and did not rise to the level to support a life sentence. Accordingly, the Petitioner contends under the proportionality principles or constitution the life sentence imposed upon the Petitioner was cruel and inhuman and therefore should be set aside.

The Petitioner contends that trial counsel, during his Habeas Corpus proceeding, advised him to enter a plea to admit the allegations contained in the Habeas Corpus Petition without realizing any benefit from the State of West Virginia with respect to the same. As such, the Petitioner was denied effective assistance of counsel during the Habeas Corpus proceedings and the ultimate sentence of life in prison would be unconstitutional due to the same and should be set aside.

6. STATEMENT REGARDING ORAL ARGUMENT

Counsel for the Petitioner asserts that oral argument in this case is requested pursuant to Rule 19 as Petitioner asserts that this matter has been clearly ruled on by the Court and further asserts that applying the procedural facts in this matter to the procedural requirements of the recidivist act and per case law would make this matter appropriate for either a memorandum decision or other opinion.

7. ARGUMENT

A. Whether the circuit Court of Nicholas County, West Virginia improperly sentenced the Petitioner to life in prison in violation of the West Virginia Recidivist Statute by failing to comply with the requirements contained therein which mandates a trial upon the same during the same term of Court for which the Petitioner is convicted of the underlying offense;

The procedure, as set out in the habitual criminal statute, expressly requires that before a sentence of life imprisonment may be lawfully imposed, the prosecuting attorney must file an information with the court of such sentences “immediately upon conviction and before sentence” and “said court shall, before expiration of the term at which such person was convicted” proceed to confront the convicted person with the charges for the purpose of identifying the convicted person with the person so previously convicted. *State ex rel Housden v. Adams*, 143 W.Va. 601, 103 S. E. 2d 873(1958) The provisions of this statute are mandatory. The statute must be complied with fully before an enhanced sentence for recidivism may be imposed. *State v. Cavallaro*, 210 W.Va. 237, 557 S.E.2d 291 (2001, per curiam).

In this case, the Notice of the “information of Prior Conviction” was filed in the Office of the Circuit Clerk on January 5, 2007 (Appendix page 67). A copy of the Notice show Petitioner was personally served on January 8, the same day the September 2006 term of the Nicholas County Circuit Court adjourned. The January term commenced on January 9, 2007, and the Petitioner was not brought before the Court to say whether he was the same person named in the prior convictions until April 30, 2007 (Appendix pages 104, 109).

Thus Court failed to comply with a mandatory procedure. As this Court said in *Cavallaro, supra*, “The provisions of this statute are mandatory. The statute must be complied with fully before an enhanced sentence for recidivism may be imposed.” See Syl. pt. 2, *Wanstreet v. Bordenkircher*, 166 W.Va. 623, 276 S.E, 2d 205 (1981). “Habitual criminal proceedings providing for enhanced or additional punishment on proof of one or more prior convictions are wholly statutory. In such proceedings, a court has no inherent or common law power or jurisdiction. Being in derogation of the common law, such statutes are generally held to require a strict construction in favor of the prisoner.”

Accordingly, the Prosecutor failed to comply with the mandatory requirements of the habitual criminal statute and the Court erred by imposing a life sentence, in the face of a failure to follow those requirements. As in *Cavallaro*, Petitioner prays that this Court reverse that part of the judgment imposing life imprisonment under the recidivist statute.

B. Whether the Circuit Court’s imposition of the life recidivist in this matter is unconstitutionally disproportionate and excessive in this matter given the Petitioner’s criminal history and the fact that the conviction which triggered the recidivist was not a violent offense.;

“Article III, Section 5 of the West Virginia Constitution, which contains the cruel and unusual punishment counterpart to the eighth Amendment of the United States Constitution, has an express statement of the proportionality principle: “Penalties shall be proportioned to the character and degree of the offence,” Syllabus Point 8, *State v. Vance*, 164 W.Va. 216, 262 S.E. 2d 423 (1980).

In determining whether a given sentence violates the proportionality principle found in the West Virginia Constitution, Article III, Section 5, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction. “ A sentence is constitutionally excessive if it makes no measurable contribution to acceptable goals of punishment, is nothing more than the purposeless imposition of pain and suffering, and is grossly out of proportion to the severity of the crime.” (citations omitted) *State v Keeley*, 814 So. 2d 664 at 668 (La Ct. App 4th Cir. 2002). Petitioner contends life imprisonment is grossly out of proportion for the act of driving recklessly and endangering a child.

The Petition admitted to four prior offenses, three of which had occurred more than twenty years before, and the fourth was eighteen years old. While none of the offenses, separately, are punishable by life imprisonment, all were fairly serious.

The Petitioner admitted to the following prior convictions:

3/31/1982 Grand Larceny

3/31/1982 Unlawful Wounding

8/13/1982 Receiving Stolen Goods

1/12/1989 Grand Larceny / Receiving Stolen Goods (Appendix pages 11 to 12)

The Circuit Court questioned the proportionality part of the case and said that “ the Court would note that despite the arguments of the State of West Virginia this is ----this is a close call on the proportionality issue” (Appendix page 138) However, the Court determined that the prior unlawful wounding conviction from 1982 justified the violence requirements of the

proportionality principle. Further, the Circuit Court made a determination that the offense of child neglect creating a risk of serious bodily injury is “a crime of violence which creates a threat of criminal violence, a significant risk of injury to the person and that being an infant child” (Appendix page 138). This Court has determined that Driving Under the Influence of Alcohol is a violent offense that would justify a life recidivist sentence under the proportionality principles set forth herein. However, this Court; has not gone so far as to say that the crime for which the Defendant was convicted rises to that level. In a DUI situation, the Court is concerned about the drivers ability to control one actions due to intoxication. In this case there is no allegation that the Petitioner was under the influence of alcohol or did anything that would be consistent with the dangers imposed by Driving Under the Influence of Alcohol line of reasoning. Thus, the Petitioner contends that the Circuit Court was over reaching in its determination that the Petitioner’s conviction for gross child neglect creating risk of serious bodily injury or death is a crime of violence to support a life recidivist conviction.

In State v. Hayes, 845 So. 2d 542 (2003) the Louisiana Court dealt with a similar case:

The sentencing range fo the underlying offense, theft when the misappropriation or taking amounts to a value of five hundred dollars or more, is imprisonment.. for more than ten years and/or a fine of not more than three thousand dollars. The underlying offense occurred between September 5, 1996, and September 13, 1996. The defendant’s two predicate offenses consist of simple robbery... and forgery [.] in accordance with the habitual offender statute in effect at the time of the adjudication as a multiple offender, the defendant was subject to a mandatory sentence of life imprisonment and received such mandated sentence. [internal citations omitted]

Upon appeal, the Court concluded, “that all of the defendant’s offenses combined cannot support a loss of liberty, at age 34, for the rest of his life.” Hayes, 845 So2d at 545. When

Hayes was re-sentenced, he was given a term of thirty years, a sentence permitted under Louisiana's recidivist statute, and the Court affirmed.

The Petitioner asserts that should this Court uphold the recidivist procedure in this case, that a life sentence is disproportionate to the nature of the underlying offense, and that this Court should strike down his sentence of life imprisonment.

C. Whether trial counsel in this matter improperly advised the Petitioner to stipulate the underlying convictions during the Habeas Corpus proceeding;

The Petitioner asserts that trial counsel in this matter was constitutionally ineffective during the recidivist proceedings in this matter.

The Petitioner contends his trial counsel was ineffective during the recidivist in this matter. At the start of the life recidivist trial, Petitioner's counsel advised Petitioner to admit the allegations contained therein without realizing any benefit or bargain from the State. The Petitioner's only issue that was tied to his admission was the ability to appeal the violation of the recidivist procedural issues and proportionality matters as set forth above. This would have been available to the Petitioner regardless of admitting the allegations contained in the recidivist petition. Thus, the Petitioner realized absolutely nothing in this matter from his admission and was ultimately sentenced to life in prison. Further, the Petitioner asserted during his Habeas proceeding (Appendix page 82) that he had a legal basis for challenging convictions contained in the recidivist Petition. Trial counsel testified at the Habeas evidentiary hearing that he believed there were no factual reasons to challenge the issues contained in the recidivist petition and further stated that he had legal arguments only with respect to the same. Thus, rather than hold

the State of West Virginia to its burden of proof, trial counsel chose the course of action to throw in the towel in this matter. (Appendix page 107)

The Petitioner asserts that trial counsel performance in this matter was in violation of his duty to provide effective assistance and accordingly the life recidivist petition should be set aside.

The law regarding effective assistance of counsel is as follows:

Where a counsel's performance, attacked as ineffective, arises from occurrences involving strategy, tactics, and arguable courses of action, his conduct will be deemed effectively assistive of his client's interests, unless no reasonably qualified defense attorney would have so acted in the defense of an accuse, State v. Thomas, 157 W.Va. 640, 203 S.E. 2d 445 (1974); State v. Wilson, 190 W.Va. 583, 439 S.E.2d 448 (1993). In the context of habeas corpus review of criminal proceedings, the Petitioner must prove that (1) counsel's performance was deficient under an objective standard of reasonableness; and (2) there is reasonable probability that, but for counsel's errors, the result of the proceedings would have different, State ex rel. Bess v. Legursky, 195 W.Va. 435, 465 S.E. 2d 892 (1995); Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d. 674 (1984); State v. Miller, 194 W.Va. 3, 459, S.E. 2d 114 (1995).

In reviewing counsel's performance, the courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstance, as defense counsel acted in the case at issue, State ex rel Bess v. Legursky, *supra*. Syllabus point 2; State v. Miller, *supra*. Syllabus point 6.

In addition, in the determination of a claim that an accused was prejudiced by ineffective assistance of counsel violative of Article III, Section 14 of the West Virginia Constitution and the Sixth Amendment to the United States Constitution, courts should measure and compare the questioned counsel's performance by whether he exhibited the normal and customary degree of skill possessed by attorneys who are reasonably knowledgeable of criminal law, except that proved counsel error which does not affect the outcome of the case will be regarded as harmless, State v. Thomas, supra; State v. Kilmer, 190 W.Va. 617, 439 S.E.2d 881 (1993).

Further, any charge of ineffectiveness of trial counsel must ultimately relate to a matter which would have affected the jury decision, Wickline v. House, 188 W.Va. 344, 424 S.E.2d 579, 583, (1992); State v. Watson, 164 W.Va. 642, 264 S.E.2d 628 (1980). A defendant who asserts a claim of ineffective assistance of counsel must prove (1) that his representation was inadequate, and (2) that such inadequacy prejudiced his case, House, supra, 424 S.E.2d at 583.

Petitioner contends that the errors made at his trial were not matters of strategy. In addition, he contends that none of these errors were harmless in the context of this particular case.

The Petitioner asserts that trial counsel advised him to admit the allegations contained in the recidivist petition without realizing any benefit from the same. Accordingly, the Petitioner was not adequately represented during the recidivist proceedings which ended up being the most significant part of the case. This prejudiced the Petitioner as he was incarcerated for life. As such, the Petitioner contends that he did not receive adequate representation by trial counsel and that pursuant to the Strickland standard the Petitioner's recidivist conviction would be unconstitutional and should be set aside.

8. CONCLUSION

The Petitioner prays that this Court grant his Appeal and rule that the life recidivist sentence imposed pursuant to the habitual criminal statute is illegal and unconstitutional and set the same aside. Further, that the Petitioner be granted such other relief as the Court deems appropriate and just.

Robert Holcomb, Petitioner
By Counsel

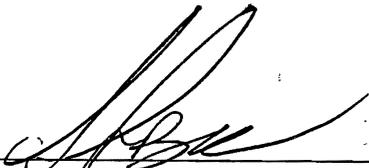


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CERTIFICATE OF SERVICE

I, Steven B. Nanners, do hereby certify that on this the 19th day of April 2013, the foregoing Petitioner's Amended Brief was duly served by depositing true copies thereof in an envelope, in the United States Mail, with sufficient postage attached thereto, addressed as follows:

Attorney General
Office of the Attorney General
State Capitol Complex
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