

IN THE SUPREME COURT OF APPEALS OF THE
STATE OF WEST VIRGINIA

DAVID BALLARD, WARDEN, ex rel.,
MOUNT OLIVE CORRECTIONAL CENTER,

Petitioner/Respondent Below

vs.

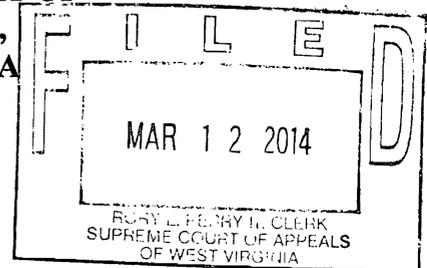
PATRICK J. MECKLING,

Respondent/Petitioner Below

APPEAL NO.: _____

CASE NO.: 09-C-163

CIRCUIT COURT OF
OHIO COUNTY,
WEST VIRGINIA



PETITION FOR APPEAL

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**TO: THE HONORABLES, THE JUSTICES OF THE SUPREME COURT OF
APPEALS OF THE STATE OF WEST VIRGINIA**

**HON. ROBIN JEAN DAVIS, CHIEF JUSTICE
HON. BRENT D. BENJAMIN, JUSTICE
HON. MARGARET L. WORKMAN, JUSTICE
HON. MENIS E. KETCHUM, II, JUSTICE
HON. ALLEN H. LOUGHRY, II, JUSTICE**

HON. RORY L. PERRY, II CLERK

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FACTS AND PROCEDURAL HISTORY

The case below began in September of 2007 with a criminal indictment charging the Respondent with one count of “Kidnapping”, one count of “Abduction With Intent to Defile”, one count of “Malicious Assault” and one count of “Driving While Revoked for Driving Under the Influence of Alcohol, Second Offense”. On October 25, 2007, the State filed a motion to revoke Respondent’s bond. The State’s motion was granted, the Respondent’s bond was revoked and a warrant was issued for his arrest. The Respondent was not apprehended prior to the trial commencing in this matter.

On October 29, 2007, the Respondent’s trial commenced and Respondent appeared for said trial. A jury was seated, opening statements were made and the State called the victim to testify in its case-in-chief. Approaching the noon hour, the Court broke for lunch. As the jury was being excused and began to leave the jury box to go back into the jury room, the Court ordered the Defendant be taken into custody pursuant to the State’s previously filed bond revocation and the Court’s order revoking the Respondent’s bond. It is not clear from the record whether the jury saw what was taking place or comprehended what was taking place. During the lunch recess, Respondent’s trial counsel moved for a mistrial, based upon, among other things, jurors seeing the Respondent handcuffed. Said motion was denied by the Circuit Court. Subsequently the trial reconvened after the lunch recess and the State proceeded to call its remaining witnesses. The trial concluded and the jury returned verdicts of guilty as to “Abduction with Intent to Defile”, and “Battery” a lesser included offense of “Malicious Assault”. The State subsequently filed a Recidivist Information charging the Respondent with being the same person twice previously convicted of felony offenses punishable by confinement in a penitentiary. On December 3, 2007,

Respondent admitted to being the same person twice previously convicted of a felony offense punishable by confinement in a penitentiary and on December 10, 2007 was sentenced to the West Virginia Penitentiary for life. The sentence for the misdemeanor battery conviction was ordered to run concurrently with said life sentence.

On or about April 7, 2008, Respondent's appellate counsel filed a Petition for Appeal. On May 22, 2008, the Supreme Court of Appeals of West Virginia refused Respondent's Petition for Appeal. The Respondent subsequently filed a pro se Petition for Writ of Habeas Corpus in the Circuit Court of Marshall County, which was transferred to the Circuit Court of Ohio County. On December 9, 2008, the Circuit Court of Ohio County, Judge Arthur M. Recht, entered a Memorandum of Opinion and Order dismissing Respondent's Petition and striking the same from the active docket of the Court. In said Order, the Court noted the grounds for relief asserted by the Respondent had been previously and finally adjudicated or waived. The Respondent renewed his Petition for Writ of Habeas Corpus again seeking relief from the Circuit Court. On January 28, 2009, the Circuit Court issued a Supplemental Memorandum of Opinion and Order again dismissing Respondent's renewed Petition for Writ of Habeas Corpus. In that Order, the Court again noted that specific findings of fact and conclusions of law were made in that order insofar as the grounds for relief the respondent had asserted had been previously and finally adjudicated or waived. Subsequent to that Order, Respondent again sought relief from the Supreme Court of Appeals of West Virginia by filing a Writ of Habeas Corpus on March 15, 2009. On May 13, 2009, the Supreme Court of Appeals of West Virginia ordered the matter remanded to the Ohio County Circuit Court directing the Court to appoint an attorney to aid the Petitioner in the filing of an amended petition for writ of habeas corpus and to conduct an omnibus habeas corpus hearing. On May 21,

2009, the Circuit Court appointed counsel to assist Respondent in his Amended Writ of Habeas Corpus which is the subject of this appeal.

ASSIGNMENTS OF ERROR

1. Trial Court erred in granting Respondent's Amended Petition for Writ of Habeas Corpus as was the same as barred by the doctrines of *res judicata* and/or collateral estoppel. *State v. Miller*, 194, W.Va. 3, 459 S.E.2d 114 (1995) at Syl. Pt. 1.
2. The Trial Court erred in its application of *State v. Brewster*, 164 W.Va. 173, 261 S.E.2d 77 (1979) and *State v. Linkous*, 177 W.Va. 621, 355 S.E.2d 410 (1987).
3. The Trial Court's findings of fact were clearly erroneous and the Trial Court abused its discretion in its rulings. See Syl. Pt. 3, *State v. Vance*, 207 W.Va. 640, 535 S.E.2d 484 (2000).

LAW AND ARGUMENT

I. Res Judicata/Collateral Estoppel

The issue of any prejudice to the Respondent as a result of any jury members seeing him handcuffed during the course of his trial have been previously addressed and adjudicated multiple times.

Initially, at a lunch recess during the course of the trial, trial court conducted a hearing on Respondent's request for a mistrial based upon the belief that jurors may have seen him placed in handcuffs. Trial court presumably determined at that time that it was not prejudicial for any of the jury members to have seen the Respondent in handcuffs at that time and denied Respondent's motion for a mistrial at that time.

On April 7, 2008, the Respondent filed a Petition for Appeal in the Supreme Court of Appeals of West Virginia. The first assignment of error in said Petition for Appeal was that the Trial Court erred when it had Respondent placed in handcuffs in front of the jury. On May 22, 2008, the Supreme Court of Appeals of West Virginia refused Respondent's Petition for Appeal. The Respondent then filed a pro se Petition for Writ of Habeas Corpus in the Circuit Court of Marshall County, which was then transferred to the Circuit Court of Ohio County. On December 9, 2008, the Ohio County Circuit Court dismissed the Respondent's Writ of Habeas Corpus, concluding the grounds for relief the Respondent asserted had been previously and finally adjudicated or waived. *See attached Memorandum of Opinion and Order which is attached hereto and incorporated herein as Exhibit A.* Subsequently, the Respondent filed a renewed Petition for Writ of Habeas Corpus asserting the Court's December 9, 2008 Memorandum of Opinion and Order did not contain specific Findings of Fact and Conclusions of Law. The Ohio County Circuit Court entered a Supplemental

Memorandum of Opinion and Order on January 28, 2009 noting the Court had previously made a specific Finding of Fact and Conclusion of Law that the grounds for relief that the Petitioner had asserted had been previously and finally adjudicated or waived and again dismissed Respondent's Petition for Writ of Habeas Corpus. *See attached Supplemental Memorandum of Opinion and Order which is attached hereto and incorporated herein as Exhibit B.* This was the third consecutive time Respondent's attempt to obtain relief from, among other things, the issue of Respondent being handcuffed immediately prior to the lunch recess and finally adjudicated.

Subsequent to the Ohio County Circuit Court's January 28, 2009 Order, the Petitioner again sought relief, through counsel, by filing yet another Writ of Habeas Corpus. On July 25, 2013, the Ohio County Circuit Court issued a Memorandum of Opinion and Order denying Respondent's Petition for Writ of Habeas Corpus and dismissing the matter from the Court's active docket. *See attached Memorandum of Opinion and Order which is attached hereto and incorporated herein as Exhibit C.* On or about August 8, 2013, Respondent yet again attempted to obtain Habeas Corpus relief by filing a Motion to Reconsider, which gives rise to the instant appeal.

The Doctrine of *Res Judicata* and/or Collateral Estoppel bar the Respondent from, for a fifth time, attempting to obtain Habeas Corpus relief.

"Collateral estoppel will bar a claim if four elements are met: (1) the issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with the party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action." *State of West Virginia vs. Susan Miller*, 194 WV a 3, 459 SE2d 114 at Syl. Pt. 1. (Cleckley, J.)

Clearly all four of the elements pursuant to Syl. Pt. 1 *id.*, have been met in this instance. The issue in this matter is identical to the issue previously adjudicated, there has been final adjudication

on the merits of the prior action, the Petitioner is the same individual seeking the same relief and he has had a full and fair opportunity to litigate the issue in the prior action.

II. Application of *State v. Brewster* and *State v. Linkous*

The Circuit Court, in granting Petitioner's Petition for Writ of Habeas Corpus and in its Findings of Fact and Conclusions of Law erred in its application of *State v. Brewster* and *State v. Linkous* in the case at bar. The Circuit Court relied upon multiple cases relative to a criminal Defendant having the right to be tried free of physical constraints. While that is clearly the law in West Virginia, the cases relied upon by the Circuit Court in granting Respondent's Writ of Habeas Corpus dealt with the Defendant being *tried* in shackles. See *Order granting Petitioner's Petition for Writ of Habeas Corpus, dated February 3, 2014, which is attached hereto and incorporated herein as Exhibit D*. The Trial Court's Order discusses various cases dealing with the Defendant being tried in shackles in the presence of a jury. It is clear in West Virginia that a defendant may be tried in physical restraints when sufficient reasons, such as safety, necessitates the need for shackling the defendant. In the instant case, the Respondent's bond was revoked and a warrant issued for his arrest as a result of Respondent making contact with the victim multiple times prior to the trial and threatening her in an apparent attempt to intimidate her from testifying truthfully at the trial of this matter. Prior to the lunch recess, the Court addressed an issue of the victim being asked if she wanted the Respondent charged with the crimes for which he was being tried and if she wanted to see him go to jail. The jury was excused and the Court addressed the issue of the victim being asked those questions and shaking her head to the jury. During this recess, the Court noted "as I understand this gentlemen's bond was revoked because he did make contact?" See *Trial Transcript which is attached hereto and incorporated herein as Exhibit E at page 119*. The jury was brought

back out and the victim completed her testimony. The Court then dismissed the jury and said “We’ll see you back here at 1:00 o’clock. The Defendant may be taken into custody.” *See Trial Transcript at page 125.* It is not clear from the Trial Transcript whether the Defendant was handcuffed in the presence of the jury. According to Respondent’s Affidavit of a petit juror, it appears that at least one petit juror witnessed Respondent being placed in *handcuffs only*. *See affidavit of Nathan Alan Young which is attached hereto and incorporated herein as Exhibit F.* As evidenced by this affidavit, petit juror Young indicated that he recalled observing, *during a break in trial proceedings*, Respondent being shackled and taken into custody. There is nothing in the affidavit to indicate petit juror Young or any other juror was improperly influenced or prejudiced by seeing the Respondent placed in handcuffs during the recess. In granting Petitioner’s Writ, the Circuit Court incorrectly assumed that the jury was improperly influenced or prejudiced by the Respondent being placed in handcuffs during the lunch recess. Additionally, it appears only one, possibly two jurors witnessed this act and there is no evidence to support that this juror or any other juror was improperly influenced or prejudiced by this occurrence. Furthermore, Respondent was seen only for a brief period of time, if at all, by other jurors as he was placed in handcuffs while the jury was excused and apparently exiting the jury box. As appellate counsel for Respondent noted in his original Petition for Appeal, the Respondent was returned to the courtroom after the lunch recess free of restraints. The Respondent remained free of restraints for the duration of the trial.

The law in West Virginia regarding a defendant being shackled during the course of a trial is clear. A leading case in this regard is *State v. Brewster*, 164 W.Va. 173, 261 S.E.2d 77 (1979). The *Brewster* court noted “a criminal defendant has the right, absent some necessity relating to courtroom security or order to be tried free of physical restraints.” *Brewster at Syl. Pt. 3.* The

Brewster case was relied upon by Respondent's counsel in the instant *Writ* as well as the current trial court. What sets the *Brewster* case apart from the case at bar is that the *Brewster* case dealt with the defendant who was shackled during the entire course of the trial. That is clearly not the case here as the Respondent was only in handcuffs for a very brief period of time, presumably less than a minute in front of the jury, and there is no evidence that any more than one juror witnessed the Respondent in handcuffs or was prejudiced by what they may have seen. The case more closely on point to this issue is *State v. Linkous*, 177 W.Va. 621 (1987). The *Linkous* court dealt with a defendant who had been in handcuffs for only a brief period of time prior to the trial commencing. In fact, the *Linkous* court drew a major distinction between the facts in the *Brewster* case compared to those in the *Linkous* case as to the extent of time the defendant was in restraints before the jury, noting the defendant in the *Brewster* case was required to remain in physical restraints throughout the entire criminal trial. *Linkous* at page 624. This Court stated in *Linkous* that "ordinarily it is not reversible error or grounds for a mistrial to proceed to try a criminal defendant with a jury panel that may have seen him in handcuffs for a brief period of time prior to trial." *Id* at Syl. Pt. 2. There can be no question that the facts of the instant case are much more closely related than tied to the facts in the *Linkous* case. As such, it is not reversible error for any of the jury members to have seen the Respondent in handcuffs for such a brief period of time during a recess at the underlying trial of this matter.

III. Erroneous Findings of Fact and Abuse of Discretion

At least some of the findings of fact made by the Court in this matter were erroneous. In finding of fact number 3, the Court noted that the Trial Court apparently determined during the complaining witnesses testimony that the Respondent should be taken into custody for violating the

terms and conditions of his bond. The Trial Court noted that the Respondent's bond was revoked because he had made contact with the victim. See *Trial Transcript* at page 119. The Court was seemingly aware that the Respondent's bond had been revoked days prior to the trial, however the Respondent had not yet been taken into custody as a result of said bond violation. It appears the Court ordered the Respondent be taken into custody at the lunch recess as a result of the order revoking his bond and not as a result of the testimony of the victim.

In paragraph 4 of the Findings of Fact issued by the Lower Court, the Court noted that the Trial Court ordered the Respondent be taken into custody "during the noon - while from now own." This would seem to indicate the Respondent remained in custody *i.e.* in handcuffs during the remainder of the trial. In fact, it was noted in Respondent's original Petition for Appeal, the Respondent returned for the afternoon trial session free of restraints and remained so for the remainder of the trial. See *Petition for Appeal which is attached hereto and incorporated herein as Exhibit G, at page 8.*

Regarding the Trial Court's Conclusions of Law, the Trial Court cited multiple cases dealing with a criminal defendant having the right not to be forced to trial in physical restraints or in prison attire. Among these cases were *State ex rel McManus v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979) and in *Estelle v. Williams*, 425 U.S. 501, 96 S.Ct. 1691 (1976). The Court also cited *State v. Preacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981) and *State v. Brewster*, 164 W.Va. 173, 261 S.E.2d 77 (1979). These cases dealt with a defendant who was in physical restraints and/or prison attire during the course of a trial. That was not the case with Respondent's trial. The Respondent was placed in handcuffs after the jury was excused, but prior to entering the jury room, and only for a very brief period of time. Again, Respondent returned for the afternoon session free of restraints

as he remained throughout the balance of the trial. Additionally, paragraph 15 of the Court's Conclusions of Law indicates the Respondent was immediately detained following the testimony of the complaining witness. While it is correct the Respondent was taken into custody shortly after the victim testified, it was not done immediately after the victim testified. The victim completed her testimony and was excused by the Court. Subsequent to the victim being excused and presumably leaving the courtroom, the Court inquired of the State if it had a "fifteen minute witness" and the State responded it might be better to come back. The Court then addressed the jury relative to a luncheon break and admonished the jury not to discuss the case among themselves nor permit anybody to discuss it with them and that they were to return at one o'clock. At that point, the Court stated the Defendant may be taken into custody. *Please see Trial Transcript pages 122 through 125.* Consequently, it should not have appeared to the jury that the Respondent was taken into custody as a result of the victim's testimony.

Finally, in paragraph 17, the Court stated that the Trial Court had deprived the Respondent of his due process rights when it ordered him shackled during the course of the trial in the presence of the jury. While the Respondent appeared to be briefly handcuffed as the jury was exiting the jury box, this was done after the Court broke for the lunch break.

In basing its decision on erroneous findings of fact and conclusions of law, it abused its discretion under *State v. Vance* 270 W.Va. 640, 535 S.E. 2nd 484 (2000), in granting Respondent's Petition for Writ of Habeas Corpus.

POINTS AND AUTHORITIES CITED

West Virginia Cases

1. *State v. Brewster*, 164 W.Va. 173, 261 S.E.2d 77 (1979)
2. *State v. Linkous*, 177 W.Va. 621 (1987)
3. *State v. Vance* 270 W.Va. 640, 535 S.E. 2nd 484 (2000)
4. *State v. Miller*, 194, W.Va. 3, 459 S.E.2d 114 (1995)

CONCLUSION

Your Petitioner contends that the issues and relief sought by the Respondent in the instant Writ of *Habeas Corpus* have been previously, fully and finally adjudicated on multiple occasions in that this Petition for Writ of *Habeas Corpus* be dismissed with prejudice. Additionally, pursuant to the rulings handed down in *State v. Brewster and State v. Linkous, supra*, Respondent's Petition for Writ of Habeas Corpus should be dismissed with prejudice.

PRAYER FOR RELIEF

WHEREFORE, your Petitioner respectfully requests this Honorable Court hear this appeal and reverse the Trial Court's Order granting Petitioner's Writ of Habeas Corpus for the reasons set forth herein.

CERTIFICATE BY ATTORNEY

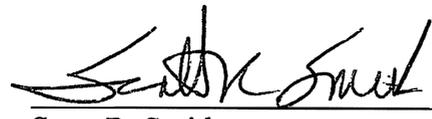
I hereby certify, pursuant to Rule 4(A)(c) of the West Virginia Rules of Appellate Procedure, that the facts alleged herein are faithfully represented and that they are accurately presented to the best of my ability.



Scott R. Smith
Ohio County Prosecuting Attorney

CERTIFICATE OF SERVICE

Service of the foregoing Petition for Appeal was had upon the Respondent, Patrick J. Meckling, by first class mail of a true copy thereof to his counsel, Brent A. Clyburn, at his last known address, 3521 Fairmont Pike Road, Suite B, Wheeling, West Virginia 26003 this 11th day of March, 2014.



Scott R. Smith
Of Counsel for Petitioner