IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NO. 14-0780

RICKY VON RAINES,

Petitioner Below, Petitioner,

vs.

DAVID BALLARD, WARDEN,
MOUNT OLIVE CORRECTIONAL COMPLEX,

Respondent Below, Respondent.

RESPONDENT'S RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF

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COMES NOW, Respondent, David Ballard, Warden, Mount Olive Correctional Complex, by counsel, David A. Stackpole, Assistant Attorney General and responds to Appellant's Reply to Respondent's Brief, which this Court ordered, on July 23, 2015, to be treated as a Supplemental Brief. This Court should affirm the *Habeas* Court's denial of Petitioner's claims.

I.

ARGUMENT

Petitioner's Supplemental Brief raises three (3) issues: [1] ineffective assistance of counsel based upon erroneous advice regarding the first plea agreement; [2] ineffective assistance of counsel based upon erroneous advice regarding the second plea agreement; and [3] involuntary plea. None of Petitioner's claims have merit.

A. Petitioner Continues To Conflate The Advice That His Trial Counsel Gave Him At The Time Of The First Plea Offer With The Advice That His Trial Counsel Gave Him At The Time Of The Second Plea Offer.

Petitioner continues to confuse the two (2) separate plea offers in order to make his argument. The first plea offer occurred prior to trial. (App. at 3-8.) Petitioner declined the first plea offer. *Id.* Petitioner concedes that his trial counsel urged him to accept the first plea offer. Pet'r's Br. at 3. However, Petitioner rejected the plea because his strategy was to try for a not guilty verdict by use of an alibi witness and his own testimony denying any involvement. (App. 113-15, 213, 216.)

Petitioner's strategy failed. Now, Petitioner seeks to claim that his trial counsel advised him that because his past felonies were non-violent, no recidivist action could be brought against him and that his trial counsel told him that no recidivist enhancement could occur for the burglary charge because he served time in jail rather than in a prison. Pet'r's Br. at 2-3. Petitioner's claims that he was unaware that he could face a recidivist enhancement are not credible because the transcript demonstrates that prior to trial, while the plea deal that was offered was put on the record, Petitioner's trial counsel and Petitioner both acknowledged that the original plea would have removed any recidivist implications and that Petitioner's felony past might have facts sufficient to be characterized as violent:

> MR. HOBBS: I'll be the first to tell you, Judge, I discussed the possibility of recidivist with my client, but either I overlooked or didn't listen, but I was thinking all his felonies were non-violent, and I know burglary at least for the purposes of parole is characterized as a violent crime. So I know that if there is a second violent crime conviction, that would present a possible factual basis for the recidivist to the life sentence rather than doubling the minimum.
>
> THE COURT: You now understand the offer was that if your client accepted the proposal, that the State would forego filing any recidivist action.
>
> MR. HOBBS: Yes.

THE COURT: And you understand that, Mr. Raines?

THE DEFENDANT: Yes, Your Honor.

(App. at 7-8.)

Petitioner claims that he declined the plea based on his trial counsel's advice that the "worst" sentence he would get if convicted would allow for parole eligibility in fifteen (15) years "even if the State were able to find some way to bring a recidivist action." Pet'r's Br. at 3. However, Petitioner's trial counsel did not give Petitioner advice regarding how Petitioner might be sentenced if there were multiple convictions in the jury trial prior to the First Plea Offer. (App. at 212.) To the extent that Petitioner's trial counsel advised Petitioner regarding the application of the recidivist statute prior to the First Plea Offer, the advice centered around an attempt to determine which prior felonies were violent and informing Petitioner that "a conviction of a second violent crime could serve as the basis for a life sentence as a recidivist offender." *Id.* It was not until the Second Plea Offer that the issue of sentences based upon multiple convictions was raised. (App. at 49-53.)

Petitioner also asserts that his trial counsel told him that he would be able to appeal the matter. Pet'r's Br. at 3. Petitioner's trial counsel did file an appeal for Petitioner and this Court denied the appeal in a Memorandum Decision. (App. at 219-24.)

The *Habeas* Court correctly recognized that under Petitioner's argument, he rejected the first plea offer because he believed the most time he could have received at trial was life in prison, which would make him parole eligible in fifteen (15) years. (App. at 215.) The *Habeas* Court concluded that Petitioner's current sentence makes him eligible for parole in ten and one half (10½) years, which is still less than what Petitioner would have gotten under his alleged understanding at the time that he passed up the first plea offer. *Id.*

Therefore, because Petitioner was aware of potential recidivist enhancements at the time that he turned down the first plea offer; because Petitioner refused the first plea offer in order to seek a not-guilty verdict; because it was not until the second plea offer that the issue of multiple sentences was raised; because Petitioner was not denied the right to appeal as he did appeal; and because Petitioner's current sentence makes him parole eligible in less time than Petitioner would have gotten at the time that he passed up the first plea offer, this Court should affirm the *Habeas* Court's denial of Petitioner's *Habeas* claims.

B. While Petitioner Initially Declined The Second Plea Offer, Petitioner Ultimately Accepted The Second Plea Offer.

Petitioner asserts that after his trial and conviction, he was given a second plea offer and that he declined the plea offer based upon his counsel's advice. Pet'r's Br. at 3. Petitioner's Supplemental Brief makes it appear as if he declined the second plea altogether. *See id.* That is simply not true. While it is true that Petitioner initially declined the second plea offer, Petitioner ultimately accepted the second plea offer. (App. at 54.)

Petitioner claims that his counsel's advice "set[] up his mind set to proceeded (sic) to a jury trial concerning the recidivist actions." Pet'r's Br. at 4. It is true that Petitioner's trial counsel gave Petitioner "erroneous advices" regarding the second plea offer and that advice was put on the record before the Trial Court. (App. at 50-3.) However, the Trial Court corrected Petitioner's trial counsel regarding sentencing implications as to the multiple convictions and the Prosecutor reoffered the second plea deal in an effort to avoid a *Habeas*. *Id.* With his understanding corrected by the Trial Court, Petitioner accepted the second plea offer and no matter what Petitioner's initial mindset was about proceeding to a jury trial for recidivist actions, Petitioner's acceptance of the second plea offer made any recidivist jury trial unnecessary. (App. at 54.)

C. Petitioner's Claim That His Plea Was Involuntary Is Without Merit.

Petitioner's plea was voluntary. "The court shall not accept a plea of guilty or *nolo contendere* without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." W. Va. R. Crim. P. 11.

Petitioner now asserts that his plea was involuntary because "the Judge and state prosecutor utilize[ed] the threat of multiple sentences derived from numerous lumped charges, and holding such over [Petitioner's] head should he reject the plea offered, proceed to trial, and be convicted." Pet'r's Br. at 4. Petitioner also claims that his trial counsel told him, "I order you to accept this plea because Judge O'Brian has stripped you of any voluntariness by using and holding a life sentence over your head, and a (sic) eight (80) year sentence for robbery, plus a lot more if you don't accept it." Pet'r's Br. at 5.

Petitioner's claim that his plea was involuntary fails for four (4) reasons: [1] Petitioner testified at the Omnibus Hearing and never raised the issue of involuntary plea; [2] Petitioner cannot point to anything in the record showing that the plea was involuntary; [3] Petitioner's *Losh* list failed to raise involuntary guilty plea; and [4] the plea colloquy demonstrates that the plea was voluntary.

First, none of Petitioner's assertions about his plea being involuntary were raised below. In fact, at the Omnibus Hearing, Petitioner testified and never said one (1) word about the plea being involuntary and not one (1) word about his trial counsel ordering him to accept the plea. (App. at 97-137.) Instead, Petitioner testified at the Omnibus Hearing that he raised the concern to his trial counsel that he might spend the rest of his life in prison if he went ahead with the

recidivist trial and that his trial counsel recommended him to take the plea and so he did take the plea deal. (App. at 109-10.)

Second, there is nothing in the record to suggest that the plea was involuntary. There were no threats directed at Petitioner. Petitioner has not pointed to anything in the record to suggest that his plea was involuntary or that there were any threats or coercion. To the extent that Petitioner claims that the Trial Court's discussion of the potential sentencing consequences that he was facing if he did not take a plea was a threat, Petitioner is wrong. Pet'r's Br. at 4. The Court's process of ensuring that the Petitioner was informed of the possible sentencing consequences if he proceeded forward without a plea was aimed at making sure that Petitioner could make an informed decision regarding the plea in compliance with Rule 11(c) of the West Virginia Rules of Criminal Procedure. Informing Petitioner about the possible sentence that he was facing is not coercion.

Third, Petitioner executed a *Habeas Corpus* Notification Form (hereinafter "*Losh* list"), which listed fifty-three (53) potential grounds for *Habeas* Relief. (App. at 76-80.) Only two (2) grounds were initialed: [1] ineffective assistance of counsel and [2] inconsistent elements of conviction. *Id.* Both issues were specifically initialed by Petitioner as indicated by the handwritten "RVR" and the document was signed both by Petitioner and his counsel. *Id.* Number six (6) on the list, which was "involuntary guilty plea," was not initialed. (App. at 77.) Because Petitioner did not raise the issue of involuntary guilty plea in the *Losh* list, Petitioner has waived the issue.

Fourth, the Trial Court had a lengthy plea colloquy that included asking Petitioner directly: "[n]ow do you feel like anybody is forcing you into this deal here today?" (Supp. App. at 17.) Petitioner's answer was "[n]o." (Supp. App. at 18.) The Trial Court went on to find that

"[t]here is no evidence of any promises, threats or coercive tactics used by the State to secure the Agreement, and the Agreement, under all the circumstances, is not patently unfair." (Supp. App. at 23.)

Therefore, because Petitioner did not offer any testimony that his plea was involuntary at the Omnibus Hearing; because there is no evidence in the record that the plea was anything other than voluntary; because Petitioner did not raise involuntary guilty plea as part of the *Losh* list; and because the testimony from the plea colloquy demonstrates that the plea was voluntary, this Court should affirm the Habeas Court's denial of the Petition.

IV.

CONCLUSION

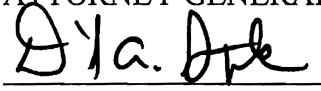
For the foregoing reasons and others apparent to this Court, this Court should affirm the *Habeas* Court's Order Denying Petitioner's Petition for *Habeas Corpus*.

Respectfully submitted,

DAVID BALLARD, WARDEN,
MOUNT OLIVE CORRECTIONAL COMPLEX,
Respondent Below, Respondent,

By Counsel,

PATRICK MORRISEY
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, David A. Stackpole, Assistant Attorney General and counsel for Respondent, do hereby verify that I have served a true copy of *RESPONDENT'S RESPONSE TO PETITIONER'S SUPPLEMENTAL BRIEF* upon counsel for Petitioner and upon Petitioner by depositing said copy in the United States mail, with first-class postage prepaid, on this 4th day of August, 2015, addressed as follows:

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