

IN THE CIRCUIT COURT OF MONROE COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
JAMES R.L. MEADOWS,
Petitioner,

v.

Civil Action No.: 13-C-69

DAVID BALLARD, in his Official Capacity as
Warden, Mt. Olive Correctional Complex,
Respondent.

ORDER DENYING PETITIONER'S PETITION FOR WRIT OF HABEAS CORPUS

This matter is before the Court on a Petitioner for Habeas Corpus originally filed by Petitioner, James R.L Meadows, pro se, on October 17, 2013. On May 1, 2014, the Petitioner, by and through counsel Paul R. Cassell, Esq., filed Petitioner's Amended Petition for Habeas Corpus. The Respondent filed his Answer to the Petitioner's Amended Petition for Writ of Habeas Corpus on May 18, 2015. This Court conducted an omnibus habeas corpus evidentiary hearing on January 7, 2016. After the hearing, Petitioner then filed a supplemental brief in support of his Amended Petition for Writ of Habeas Corpus.

The Court has carefully reviewed the relevant portions of the record, filings in this matter, the parties' arguments, and the pertinent legal authorities. This Court has also considered the parties' evidence and arguments presented at the omnibus habeas corpus evidentiary hearing. Based upon the following findings of fact and conclusions of law, the Petition for Writ of Habeas Corpus is hereby **DENIED**.

I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner was indicted in November 2015 for one count of first degree murder, one count of death of a child by a guardian or custodian, and one count of child abuse resulting in injury. Petitioner's case was tried before a Monroe County Petit Jury, and Petitioner was ultimately convicted by that jury of one count of second degree murder, one count of death of a child by a guardian or custodian, and one count of child abuse resulting in injury. Petitioner was sentenced to concurrent definite terms of imprisonment for forty (40) years in prison on the first two counts and an indeterminate sentence of one to five (1-5) years on the third count. Petitioner appealed this conviction to the West Virginia Supreme Court of Appeals, and that Court affirmed the trial court's conviction. Petitioner then filed a *pro se* habeas corpus petition on October 17, 2013. On May 1, 2014, Petitioner filed an Amended Petition for Writ of Habeas Corpus through appointed counsel, Paul R. Cassell, Esq.

II. DISCUSSION OF LAW

The right to petition the Court for post-conviction habeas corpus is guaranteed by the West Virginia Constitution, Article III, Section Four. Post-conviction habeas corpus proceedings are governed by the *Rules Governing Post Conviction Habeas Corpus Proceedings in West Virginia* (hereinafter "Rule" or "Rules"), and West Virginia Code § 53-4A-1, *et seq.* Pursuant thereto, this Court **FINDS** that it has jurisdiction over the subject matter of this proceeding.

Any person convicted of a crime and incarcerated, who contends that such denial infringes his rights so as to render the conviction or sentence void under the Constitution, may file a petition for the writ of habeas corpus seeking for release from such illegal confinement, or correction of sentence. W. Va. Code § 53-4A-1 *et seq.* A writ of habeas corpus is available if, and only if, the contention has not been previously and finally adjudicated or waived in the

proceedings which resulted in the conviction and sentence, or in any other proceeding which the petitioner has instituted to secure relief from such conviction or sentence. *Id.* Where a petitioner alleges but fails to prove he is being illegally held, relief should be denied. Syl. pt. 1, *Echard v. Holland*, 177 W. Va. 138, 351 S.E.2d 51 (1996). In general, the post-conviction habeas corpus statute contemplates that every person convicted of a crime shall have a fair trial in the circuit court, an opportunity to apply for an appeal, and one omnibus post-conviction habeas corpus hearing at which he may raise any collateral issues which have not previously been fully and fairly litigated. *Losh v. McKenzie*, 166 W. Va. 762, 764, 277 S.E.2d 606, 609 (1981).

The Petitioner is currently incarcerated in Mount Olive Correctional Center on sentences imposed by this Court as a result of a Monroe County Petit Jury convicting him of murder in the second degree, death of a child by a guardian or custodian, and child abuse resulting in injury. The Court **FINDS** that the contentions asserted in Petitioner's Amended Petition, and the relief sought thereby, are appropriately before this court for consideration.

III. ANALYSIS OF GROUNDS ASSERTED BY PETITIONER

The Petitioner asserts two (2) grounds for relief in his Amended Petition for Writ of Habeas Corpus: 1) ineffective assistance of counsel and 2) violation of Petitioner's constitutional rights based on the cumulative effect of errors made by trial counsel.

A. Petitioner's representation at trial did not constitute ineffective assistance of counsel.

Petitioner, through his Amended Petition, first asserts that his counsel at trial failed to provide him with competent and effective assistance of counsel as contemplated by both the West Virginia Constitution and the United States Constitution. Petitioner asserts that his trial counsel was ineffective for eight reasons: 1) trial counsel conducted an inadequate investigation; 2) trial counsel was ineffective with regard to evidence of actual innocence; 3) trial counsel was

ineffective with regard to eliciting evidence of polygraph testing and having such evidence stricken from the record; 4) trial counsel was ineffective in allowing the continuous display of the victim's photograph; 5) trial counsel was ineffective in ascertaining petitioner's wishes concerning a change of venue and ensuring proper record was made of the decision to change venue; 6) trial counsel was ineffective with regard to violations of double jeopardy; 7) trial counsel was ineffective in addressing play therapy evidence; and 8) trial counsel was ineffective in seeking opinion evidence from a lay witness.

According to the West Virginia Supreme Court of Appeals, "[West Virginia] law is clear in recognizing that the Sixth Amendment of the federal constitution and Article III, § 14 of the state constitution, guarantee not only the assistance of counsel in a criminal proceeding, but that a defendant has the right to effective assistance of counsel. *Ballard v. Ferguson*, 232 W.Va. 196, 751 S.E.2d 716 (2013).

West Virginia applies the two-prong test for ineffective assistance of counsel established by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). Syl. pt. 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). First, counsel's performance must be deficient under an objective standard of reasonableness; and second, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland* at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* The Supreme Court of West Virginia has further held that

In reviewing counsel's performance, 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 circumstances, as defense counsel acted in the case at issue.

Syl. pt. 6, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995). Concerning this objective standard applied in ineffective assistance of counsel claims, the *Miller* court further explained,

[i]n other words, we always should presume strongly that counsel's performance was reasonable and adequate. A defendant seeking to rebut this strong presumption of effectiveness bears a difficult burden because constitutionally acceptable performance is not defined narrowly and encompasses a 'wide range.' The test of ineffectiveness has little or nothing to do with what the *best* lawyers would have done. Nor is the test even what most *good* lawyers would have done. We only ask whether a *reasonable* lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at the time, in fact, worked adequately.

Id. at 16, 459 S.E.2d at 127 (emphasis added).

The *Strickland/Miller* standard is demanding and not easily satisfied. *Id.* (“[T]he cases in which a defendant may prevail on the ground of ineffective assistance of counsel are few and far between.”); *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 319, 465 S.E. 2d 416, 421 (1995) (ineffective assistance claims are “rarely” granted and only when a claim has “substantial merit”). Review of defense counsel's performance is “highly deferential” and begins with the strong presumption that “counsel's performance was reasonable and adequate.” *Miller*, 194 W.Va. at 16, 459 S.E.2d at 127.

A petitioner claiming ineffective assistance must identify the specific “acts or omissions” of his counsel believed to be “outside the broad range of professionally competent assistance.” *Id.* at 17, 459 S.E.2d at 128; *see also State ex rel. Myers v. Painter*, 213 W.Va. 32, 35, 576 S.E.2d 277, 280 (2002) (“The first prong of [the *Strickland*] test requires that a petitioner identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgement”) (internal quotation marks omitted). The reviewing court is tasked with determining, “in light of all the circumstance” but without “engaging in hindsight,” if that

conduct was so objectively unreasonable as to be constitutionally inadequate. *Miller*, 194 W.Va. at 17, 459 S.E.2d at 128. Strategic choices and tactical decisions, with very limited exception, fall outside the scope of this inquiry and cannot form the basis of an ineffective assistance claim. *Legursky*, 195 W.Va. at 328, 465 S.E.2d at 430.

Moreover, identifying a mere mistake by defense counsel is not enough. Rather, “with [the] luxury of time and opportunity to focus resources on specific facts of a made record, [habeas counsel] inevitably will identify shortcomings in the performance of prior counsel;” however, a mere identification of mistake does not establish ineffectiveness because “perfection is not the standard for ineffective assistance of counsel.” *Miller*, 194 W.Va. at 17, 459 S.E.2d at 128.

Even if defense counsel’s conduct is deemed to have been objectively unreasonable, thereby satisfying the first prong of the *Strickland/Miller* test, such conduct does not constitute ineffective assistance unless it can also be demonstrated that the conduct was so impactful that there is a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *Id.* at Syl. Pt. 5, 459 S.E.2d at 117. Further, “[f]ailure to meet the burden of proof imposed by either part of the *Strickland/Miller* test is fatal to a habeas petitioner’s claim.” *State ex rel. Vernatter v. Warden, W. Va. Penitentiary*, 207 W.Va. 11, 528 S.E.2d 207 (1999).

1. Petitioner’s trial counsel properly conducted an independent and adequate investigation.

Petitioner asserts that his trial counsel failed to properly conduct an independent and adequate investigation of his case. Petitioner specifically asserts that trial counsel failed to facilitate direct contact between himself and the Petitioner, did not visit Petitioner in jail, and did not prepare witnesses in advance of trial.

The Court finds this claim to be without merit. First, it is clear from the record that Petitioner and his trial counsel had contact on numerous occasions prior to trial. *See generally* Omnibus Habeas Hearing Transcript (hereinafter "Hab. Tr.") In review of the record, the Court notes that the contact between Petitioner and his trial counsel was sufficient in that it afforded Petitioner's trial counsel an adequate opportunity to familiarize himself with the evidence and the witnesses, and provided him with the necessary prerequisite knowledge to prepare for trial as a reasonable attorney would under the circumstances. In fact, Petitioner's trial counsel even employed his own private investigator to gather evidence and speak with Petitioner prior to trial. In light of these findings, the Court dismisses Petitioner's contention that because trial counsel failed to conduct face-to-face visits with the Petitioner during his incarceration, communication between the two was necessarily insufficient. Further, it is clear from the record that trial counsel conducted adequate preparation in relation to trial witnesses, as he elicited testimony in support of Petitioner's character and conducted both direct and cross-examinations in a reasonable fashion. Additionally, Petitioner's trial counsel presented several witnesses in an attempt to challenge state witness credibility. Based on the foregoing, the Court concludes that Petitioner's contention that his trial counsel failed to conduct an adequate investigation does not meet the required legal standard for ineffective assistance of counsel outlined in *Strickland/Miller*.

2. Petitioner's trial counsel was effective with regard to evidence of actual innocence.

Next, Petitioner asserts that his trial counsel was constitutionally deficient for failing to elicit evidence of actual innocence in the form of testimony from one Stephanie Witham. In support of this contention, Petitioner cites to an instance in trial where his trial counsel attempted to introduce Witham's statement to the effect that the victim's mother, Cristen Hurley, was responsible for the underlying crimes. However, due to an inadequate foundation to impeach her

with the statement, and the prior dismissal of Witham as a witness, the evidence was not admitted. However, Petitioner's claims in this regard are flawed for several reasons.

First, the Court finds that Petitioner has overstated the potential exculpatory value of the statements made by Witham. Rather than providing first-hand evidence of the guilt of Hurley, a review of the transcript of Investigator Wheeler's interview with Witham clearly show that no statement was made by Hurley indicating that she had murdered the victim; rather, Witham's conclusion of Hurley's guilt in the matter was merely speculative, and failing to elicit the testimony was not unreasonable. Even assuming *arguendo*, that the failure to introduce the evidentiary testimony was a constitutionally deficient on the part of Petitioner's trial counsel, Petitioner fails to demonstrate that the admission of the speculative statement would have a reasonable probability of changing the outcome of the trial. Thus, Petitioner's second claim under a theory of ineffective assistance of counsel cannot fulfill the second prong of the *Strickland/Miller* test.

3. Petitioner's trial counsel was not ineffective with regard to eliciting evidence of polygraph testing.

Next, Petitioner asserts that his trial counsel was constitutionally deficient for failing to offer a curative jury instruction to Hurley's references to her polygraph examination during testimony. The Court finds this contention to be without merit. The Supreme Court of Appeals of West Virginia has not established "a hard and fast rule that a curative instruction is always required regardless if objection is raised." *See State v. Meadows*, 321 W.Va. 10, 743 S.E.2d 318 (2013). Assuming *arguendo* that a curative jury instruction was required at trial, Petitioner fails to assert any evidence that such an instruction would have had a reasonable probability to change the outcome of the proceedings as required by the second prong of the *Strickland/Miller* test.

4. Petitioner's trial counsel was not ineffective in allowing the continuous display of the victim's photograph.

Next, Petitioner objects to the fact that photos showing the injuries to the victim were displayed throughout the course of his cross-examination. Specifically, Petitioner contends that the display of the photos interfered with his ability to provide meaningful testimony, and that the photos distracted the jurors from the substance of his account. Petitioner argues that a failure to object to the display of the photos was constitutionally deficient and unreasonable omission on the part of his trial counsel.

After reviewing the trial transcript, the Court finds that the photos did not have a detrimental effect on Petitioner's ability to provide meaningful testimony. The State introduced the photos as relevant evidence to rebut the testimony of the Petitioner as to who inflicted the injuries on the child's body, and there is no evidence in the record suggesting that the photos were used for another purpose. Further, Petitioner provided lengthy testimony while on the stand during cross-examination. Additionally, there is no evidence in the record to suggest that the jury was distracted by the introduction of the photos during the course of Petitioner's testimony. Because of the relevancy of the photos, and the limited scope of their use, in an attempt to rebut testimony, the contention that the failure to object to the introduction of the photos on the part of Petitioner's trial counsel constitutes ineffective assistance of counsel, is rejected.

5. Petitioner's trial counsel was not ineffective in ascertaining Petitioner's wishes concerning a change of venue and ensuring that a proper record was made of the decision to change venue.

Next, Petitioner asserts that his trial counsel was deficient under an objective standard of reasonableness for failing to consult with him concerning a change of venue from Summers County to Monroe County. Specifically, Petitioner contends that his right to be present at all critical stages in his criminal proceedings was violated, because of his trial counsel's failure to

ensure his presence at the proceeding where the Motion for Change of Venue was granted. However, the Court finds this assertion to be without merit. After consulting the record, the Court notes that Petitioner's trial counsel initially made a motion for a change of venue early on in the court proceedings, at a hearing where Petitioner was in fact present. At that time, the Court specifically articulated that the change of venue request would be held in abeyance pending further consideration. The Court based this consideration on the investigations and preparations of Petitioner's trial counsel concerning the publicity of the case due the underlying allegations and the potential for a tainted jury pool. Further, at the time the request was taken under consideration, Petitioner was present for the hearing and made no objection to the request.

Even assuming *arguendo* that Petitioner's trial counsel acted ineffectively regarding providing notice of the Motion for Change of Venue, the contention fails because it is unreasonable to assume, absent specific evidence, that the outcome of Petitioner's trial would have been different had the matter been tried in Summers County.

6. Petitioner's trial counsel was not ineffective with regard to violations of double jeopardy.

Next, Petitioner argues that his trial counsel was constitutionally deficient under an objective standard of reasonableness for his inactions relating to claims of double jeopardy. Despite waiving the ground of "consecutive sentences for same transaction" in his *Losh* list, the Court will address Petitioner's claim that the charges of murder and child abuse resulting in death arise give rise to the aforementioned claim of a violation of double jeopardy. In examining Petitioner's assertion, the Court finds that it is without merit because the crime of child abuse resulting in death requires an additional element of proof that a custodial relationship existed between the perpetrator and the victim. Because of this additional element, the punishments in this case did not stem from the same incident and offense, and they are not prohibited by double

jeopardy. As a result, Petitioner's trial counsel was not ineffective for failing to make challenges concerning double jeopardy prohibitions.

7. Petitioner's trial counsel was not ineffective in addressing play therapy evidence.

Next, Petitioner asserts that his trial counsel was constitutionally deficient for failing to challenge the testimony elicited from psychologist Steve Ferris concerning interactions which occurred during play therapy sessions with the victim's brother. These sessions were conducted in an attempt to allow the child an opportunity to cope with the death of the victim. Specifically, Petitioner alleges that the testimony in question was not given in the form of a statement made for the purpose of medical diagnosis or treatment pursuant to W.Va. R. Evid. 803(4). Rather, the Petitioner contends that the testimony given by Ferris was broad and non-scientific in nature, and as a result, it fell outside the scope of admissibility and was highly prejudicial. In consideration of the testimony, the Court finds this claim to be without merit for the following reasons.

First, Petitioner's trial counsel made several objections to the introduction of the testimony in question. *See generally* Petitioner's Exhibit 4. Although the objections were overruled and the testimony was ultimately admitted, this pattern clearly demonstrates that Petitioner's counsel acted as a reasonable attorney would under similar circumstances, in that he made several efforts to prevent its admission. Additionally, the Court declines to accept Petitioner's categorization of the testimony in question. Rather than adopting Petitioner's contention that the testimony was broad and non-scientific, the Court finds that the testimony, when examined as a whole, demonstrates that Ferris's contested statements were given to provide a context as to the entirety of the therapy session and to frame his interactions with the child during his observations. Given the nature of the testimony coupled with Petitioner's trial

counsel's multiple objections, Petitioner's counsel was not constitutionally deficient under the specific ground asserted above.

8. Petitioner's trial counsel was not ineffective in asking opinion evidence from a lay witness.

Next, Petitioner argues that his trial counsel was constitutionally deficient when he elicited testimony in the form of an opinion by one Trooper Smith. The Court finds this contention to be without merit. In a review of the record, it appears as though Petitioner's trial counsel's motive in eliciting the contested opinion evidence, was a strategic decision to mitigate the inconsistencies in Petitioner's statements, by attributing them to intoxication. Attempting to elicit testimony which could bolster a voluntary intoxication defense to inconsistent statements made by Petitioner is entirely reasonable, and as a result, the Court declines to evaluate the trial strategy of Petitioner's trial counsel or make a finding of ineffective assistance of counsel under *Strickland/Miller*.

B. Petitioner's constitutional rights were not violated due to the cumulative errors of Petitioner's trial counsel.

As discussed above, Petitioner's eight assignments of error are each meritless. There can be no cumulative error without multiple errors. *State v. Knuckles*, 196 W.Va. 416, 425, 473 S.E.2d 131, 140 (1996). As a result, the Court finds this claim to be without merit.

WHEREUPON, it appearing proper to do so, it is hereby **ORDERED and ADJUDGED** as follows:

1. Petitioner's Amended Petition for Writ of Habeas Corpus is **DENIED**;
2. This Order is final and the matter shall be **STRICKEN** from the docket;
3. The Clerk shall provide attested copies of this Order to all parties and counsel of record.

Dated April 5, 2018.

/s/ Robert A. Irons

ROBERT A. IRONS, CIRCUIT JUDGE