

**STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS**

**State ex rel Charles L. Mitter,
Petitioner Below, Petitioner**

vs) No. 101510 (Preston County 10-C-10)

**David Ballard, Warden,
Respondent Below, Respondent**

FILED
November 10, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Charles L. Mitter appeals from an order entered by the Circuit Court of Preston County dismissing his third petition for writ of habeas corpus on grounds that he did not establish by a preponderance of the evidence that he was denied effective assistance of counsel, that he was not notified of his right to appeal the denial of his second habeas petition, and that he was denied his right to appeal the denial of his second habeas petition. As set forth below, we find that the circuit court did not abuse its discretion in finding that the petitioner failed to establish his claims within the necessary parameters. Accordingly, we affirm the circuit court's order.

This matter has been treated and considered under the Revised Rules of Appellate Procedure. Pursuant to Rule 1(d) of the Revised Rules, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. This Court has examined the parties' briefs, the record on appeal, and parties' oral arguments. Upon consideration of the standard of review, the briefs, the record presented, and the oral arguments, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

In 1992, the petitioner, Charles L. Mitter, was convicted of three counts of first degree sexual assault and one count of sexual abuse by a custodian. He was sentenced to forty-five to seventy-five years in prison. The petitioner's direct criminal appeal of this conviction was denied by this Court. The petitioner then filed a *pro se* petition for writ of habeas corpus alleging, *inter alia*, the ineffective assistance of his trial counsel. Attorney Tim Sigwart was appointed to represent the petitioner in the habeas proceeding. Over the next six years, petitioner's counsel changed three times; Tim Sigwart was replaced by Joe Moses in February of 1995, Joe Moses was replaced by Ed Rollo in October of 1995, and Ed Rollo was replaced by James Flanigan in June of 2000.

Mr. Flanigan filed an amended petition for writ of habeas corpus in November of 2000. An omnibus hearing was held in May of 2001, and the petition was later denied in October of 2002. In December of 2002, Mr. Flanigan was replaced as counsel for the petitioner by James Brooks. Mr. Brooks missed the deadline to appeal the denial of the habeas petition. However, the circuit court re-filed its order, which allowed Mr. Brooks to file a petition for appeal within the new appeal deadline. The appeal was denied by this Court in September 2004.

In March of 2005, the petitioner, *pro se*, filed a second habeas petition alleging, *inter alia*, ineffective assistance of first habeas counsel, Mr. Flanigan. The circuit court appointed Tim Houston to represent the petitioner in the second habeas proceeding. An omnibus hearing was held to address the claims of this second habeas petition. In regard to the ineffective assistance of counsel claim, the petitioner argued that Mr. Flanigan was ineffective because he did not call trial counsel to testify at the omnibus hearing. In April of 2007, the second habeas petition was denied.

Current counsel, Melissa Giggenbach, was appointed in September of 2008 to assist the petitioner in all post-conviction matters. A third habeas petition was filed in January of 2010 alleging ineffective assistance of second habeas counsel, Mr. Houston. An omnibus hearing was held the following April. The petitioner claimed that Mr. Houston was ineffective because he had failed to call Mr. Flanigan as a witness during the second omnibus hearing and because Mr. Houston had failed to notify the petitioner of the denial of the second habeas petition or of his right to appeal the denial of his second habeas petition. Ultimately, the third habeas petition was denied. The petitioner then filed a motion under Rules 59 and 60 of the West Virginia Rules of Civil Procedure seeking an alteration or relief from judgment. This motion was denied in August of 2010, and the petitioner now appeals the denial of both the third habeas petition and the denial of the Rule 59 and Rule 60 motion to this Court.

This Court reviews a final habeas order using an abuse of discretion standard, underlying factual findings using a clearly erroneous standard, and questions of law *de novo*.

[I]n reviewing challenges to the findings and conclusions of the circuit court in a habeas corpus action, we apply a three-prong standard of review. We review the final order and the ultimate disposition under an abuse of discretion standard; the underlying factual findings under a clearly erroneous standard; and questions of law are subject to *de novo* review.

State ex rel. Kitchen v. Painter, 226 W. Va. 278, 284, 700 S.E.2d 489, 495 (2010) (quoting

Syllabus point 1, *Mathena v. Haines*, 219 W. Va. 41, 633 S.E.2d 771 (2006)).

Ineffective assistance of counsel claims must be evaluated under the two-prong standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). This test requires the petitioner to show that “(1) Counsel’s performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” Syllabus point 1, *Kitchen*, 226 W. Va. 278, 700 S.E.2d 489 (2010) (quoting Syllabus point 5, *State v. Miller*, 194 W. Va. 3, 459 S.E.2d 114 (1995)).

In its opinion letter, the circuit court conducted an analysis of the facts presented during the third omnibus hearing using the *Strickland* standard. In its Order Regarding Petitioner’s Motion for Relief from Judgment, it found that the petitioner was not prejudiced by any error committed by Mr. Houston. The circuit court noted that “there is no evidence presented showing a reasonable probability that but for Attorney Flanigan’s alleged errors the result of the proceeding would have been different.” The circuit court applied the *Strickland* standard to the facts of this case and found that the petitioner had failed to satisfy the second prong.

This Court finds that the circuit court conducted an adequate analysis under *Strickland* in concluding that Mr. Houston provided effective assistance of counsel. The circuit court did not abuse its discretion in denying the petitioner’s habeas petition on this issue.

This Court also finds that the circuit court correctly found that the petitioner was not denied his right to appeal the denial of his second habeas petition. West Virginia Code § 53-4A-7(c) (1967) (Repl. Vol. 2008), requires that the circuit court “make specific findings of fact and conclusions of law relating to each contention or contentions and grounds (in fact or law) advanced, [and] clearly state the grounds upon which the matter was determined.” This Court concludes that the court below presented adequate findings of fact to support its conclusion that the petitioner received notice from Mr. Houston of the denial of his second habeas petition and that the petitioner was notified by Mr. Houston of his right to appeal the denial of the second habeas petition. Thus, the petitioner was not denied his right to appeal his second habeas petition.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 10, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Brent D. Benjamin
Justice Thomas E. McHugh

DISSENTING:

Justice Menis E. Ketchum