

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

**Kenneth Wayne Martin,
Petitioner Below, Petitioner**

vs) **No. 11-0991** (Webster County 07-P-35)

**Thomas McBride, Warden,
Respondent Below, Respondent**

FILED
November 28, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Kenneth Wayne Martin appeals the circuit court's order denying his petition for habeas corpus following an omnibus hearing. He argues that his trial counsel was ineffective. Respondent Thomas McBride has filed a response.

This Court has considered the parties' briefs and the record on appeal. This matter has been treated and considered under the Revised Rules of Appellate Procedure pursuant to this Court's Order entered in this appeal on August 15, 2011. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, 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.

Petitioner was convicted by jury of incest, sexual abuse by a parent, and second degree sexual assault. Sixteen days before his trial,¹ petitioner moved to substitute counsel as he had retained the services of a new trial counsel. At a hearing held on the motion, the circuit court counseled petitioner regarding the possible consequences of such substitution so close to trial. Petitioner indicated that he understood the risks but still wanted the change of counsel.

Following his convictions, petitioner filed a petition for writ of habeas corpus. An omnibus hearing was conducted. The circuit court entered an order denying habeas corpus

¹ The petitioner was tried previously; his first trial ended in a hung jury. A second trial ended in the dismissal of the entire jury panel due to comments made by a juror who was related to the investigating officer.

relief finding that petitioner's trial counsel was not ineffective in his representation of petitioner.

“Findings of fact made by a trial court in a post-conviction habeas corpus proceeding will not be set aside or reversed on appeal by this Court unless such findings are clearly wrong.’ Syllabus Point 1, *State ex rel. Postelwaite v. Bechtold*, 158 W.Va. 479, 212 S.E.2d 69 (1975).” Syl. Pt.1, *State ex. rel. Waldron v. Scott*, 222 W.Va. 122, 663 S.E. 2d 576 (2008) (per curiam). “In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984): (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.’ Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).” Syl. Pt. 1, *State v. Frye*, 221 W.Va. 154, 650 S.E.2d 574 (2006). “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 accused.’ Syl. Pt. 21, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).” Syl. Pt. 3, *Frye*.

On appeal, petitioner argues that trial counsel was ineffective because he accepted his case only sixteen days before trial, did not properly review the case file, and did not properly investigate the case by interviewing potential defense witnesses, including petitioner's daughters, S.M and C.M.T, until the day that trial began and by not presenting their testimony at trial. The Court notes that petitioner, although warned and counseled by the circuit court of the risks of switching counsel so close to trial, elected to proceed with new counsel. In denying the habeas petition, the circuit court found that petitioner made a strategic choice to substitute counsel. The Court finds no error in the denial of habeas corpus relief on this ground.

In response to petitioner's allegation that trial counsel did not properly review the case file, the circuit court noted that trial counsel testified at the omnibus hearing that he reviewed the entire file. The circuit court found that “[p]etitioner's contention that [trial counsel] failed to review the file is without merit.” The Court finds no error in the denial of habeas corpus relief on this ground.

As to the allegations of improper investigation, the circuit court found that trial counsel's action in interviewing potential defense witnesses in front of the courthouse on the morning of trial was a common practice and does not constitute ineffective assistance of counsel. Further, the circuit court noted that trial counsel was substituted, with petitioner's consent, sixteen days prior to the beginning of trial. As such, the circuit court found no

ineffective assistance of counsel on this basis. The Court concludes that there was no ineffective assistance in regard to these allegations.

Petitioner next argues that trial counsel was ineffective because he failed to call J.S.², the man to whom the victim first confessed the allegations of abuse, to impeach the victim's credibility based upon the differing dates she gave as to when the abuse first occurred. Respondent notes that evidence of this inconsistency came in at trial, although not through testimony by J.S. The State had subpoenaed J.S. for trial but the subpoena was returned with the indication that he was not found. The circuit court concluded that there was nothing in the record to suggest that petitioner's trial counsel "would have been any more successful in his attempts." The circuit court also noted that trial counsel attempted to have the prior testimony of J.S. admitted into the record but the trial court denied the request. As a result, the circuit court concluded that trial counsel "acted as a reasonably skilled criminal defense attorney . . ." and was not deficient under the standard set forth in *Strickland*. The circuit court also recognized strategic reasons not to present J.S. as a witness at trial as his testimony, despite the inconsistency in the date of the first abuse, was consistent with the fact that sexual misconduct did occur, which would have been damaging to the defense. Considering the facts present in the case-at-bar, the Court concludes that the circuit court did not err in its decision that the failure to present J.S. as a witness was not ineffective assistance of counsel.

Finally, petitioner argues that trial counsel's closing argument was disorganized, was too brief, and failed to properly emphasize the State's heavy burden of proof and the presumption of innocence. Petitioner alleges that these failures were the result of trial counsel's exposure to paint fumes when his office was painted the day before closing arguments were presented. The circuit court found that although trial counsel did inform the circuit court that he was not feeling well, he "gave the [c]ourt no reason to think trial counsel could not continue with the case." As to the allegation of brevity, the circuit court found that the record reflected that the closing argument was "clearly more than five to six minutes of speaking time as alleged by petitioner." The circuit court concluded that "a review of the trial transcript indicates trial counsel's closing argument adequately covered the evidence of the case." The Court finds no error in the circuit court's conclusion that the events surrounding the closing argument do not rise to the level of ineffective assistance of counsel.

²As in cases involving sensitive matters and matters involving children, the Court refers to this potential witness by his initials.

For the foregoing reasons, we affirm.

Affirmed.

ISSUED: November 28, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman

Justice Robin Jean Davis

Justice Brent D. Benjamin

Justice Menis E. Ketchum

Justice Thomas E. McHugh