

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

**Barry Lee Ayers,
Petitioner Below, Petitioner**

vs.) No. 11-1097 (Cabell County 10-C-353)

**West Virginia Department of Corrections,
Respondent Below, Respondent**

FILED

November 19, 2012
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioner Barry Lee Ayers, by counsel Carl J. Dascoli Jr., appeals the June 22, 2011, order of the Circuit Court of Cabell County denying his petition for writ of habeas corpus. The respondent, by counsel Jake Morgenstern, filed a summary response.

The Court has considered the parties' briefs and the record on appeal. The facts and legal arguments are adequately presented, 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 of Appellate Procedure.

On February 13, 2009, petitioner entered a *Kennedy* plea of guilty to one count of first degree arson pursuant to a plea agreement with the State. He was thereafter sentenced to a determinate term of eight years of incarceration. Following his sentencing, the circuit court denied petitioner's motion for reconsideration and his pro se motion for reduction of sentence, though no direct criminal appeal was ever undertaken. On May 4, 2010, petitioner filed a pro se petition for writ of habeas corpus and was thereafter appointed counsel. On November 30, 2010, petitioner, by counsel, filed an amended petition for writ of habeas corpus alleging ineffective assistance of trial counsel. On May 19, 2011, the circuit court held an omnibus evidentiary hearing during which both petitioner and his prior counsel testified. Following the hearing, the circuit court denied petitioner habeas relief.

On appeal, petitioner alleges that it was an abuse of discretion for the circuit court to deny his petition for writ of habeas corpus and also alleges that his trial counsel was ineffective. In support of his assignments of error, petitioner argues that the plea negotiations in his criminal proceedings overwhelmingly favored the prosecution's agenda of a lengthy prison sentence. He argues that he received no benefit of his trial counsel's experience as an attorney, and asserts that he could have received the same eight-year sentence by representing himself below. According to petitioner, he would have benefitted from a preliminary hearing because information obtained could have served as a basis for a motion to exclude his confession.

In response, the State argues that the circuit court was correct to deny the petition for habeas relief because petitioner's trial counsel performed effectively throughout the criminal proceedings, including investigating the scene of the crime, interviewing fire officials, and keeping in constant contact with petitioner. According to the State, after petitioner's application for alternative sentencing was denied, his counsel bargained for a plea agreement that was twelve years below the statutory maximum term of incarceration for the crime. The State argues that these facts establish that petitioner failed to satisfy either prong of the test for ineffective assistance of counsel as set forth in syl. Pt. 1, *State ex rel. Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995).

This Court has previously held that

[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 a *de novo* review.

Syl. Pt. 1, *Mathena v. Haines*, 219 W.Va. 417, 633 S.E.2d 771 (2006). After careful consideration of the parties' arguments, this Court concludes that the circuit court did not abuse its discretion in denying the petition for writ of habeas corpus. Having reviewed the circuit court's "Order" entered on June 22, 2011, we hereby adopt and incorporate the circuit court's well-reasoned findings and conclusions as to the assignments of error raised in this appeal. The Clerk is directed to attach a copy of the circuit court's order to this memorandum decision.

For the foregoing reasons, we find no error in the decision of the circuit court and its June 22, 2011, order denying the petition for writ of habeas corpus is affirmed.

Affirmed.

ISSUED: November 19, 2012

CONCURRED IN BY:

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

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IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

FILED

BARRY LEE AYERS,

2011 JUN 22 P 5:30

PETITIONER,

ADELL CHANDLER
CIRCUIT CLERK
CABELL CO., WV

CIVIL ACTION NO. 10-C-353
INDICTMENT NO.: 08-F-332
JUDGE PAUL T. FARRELL

v.

WEST VIRGINIA DEPARTMENT
OF CORRECTIONS,

RESPONDENT.

ORDER

On May 4, 2010, the Petitioner filed his *pro se* Petition under W.Va. Code § 53-4A-1 for Writ of Habeas Corpus and eligibility for assignment of legal counsel. Upon reviewing the Petition, on May 21, 2010, this Court appointed Carl J. Dascoli, Jr., Esquire, to represent the Petitioner in this matter. On May 19, 2011, the Court conducted an Omnibus hearing in this matter.

Upon review of the Amended Petition, the testimony at the hearing, and all pertinent legal authorities, the Court makes the following findings of fact and conclusions of law:

1. On September 9, 2008, the Petitioner was arrested for First Degree Arson. It was alleged that the Petitioner set a fire, in a closet, in an apartment that was rented by his girlfriend. It was further alleged that after he set the fire, he waited for the fire department to arrive.
2. After the Petitioner was arrested, his bond was set at \$50,000.00.
3. The Petitioner's preliminary hearing was set for September 19, 2008, but the Petitioner waived his right to a hearing in exchange for the State's approval for the Petitioner to apply for home confinement, in lieu of bond.

4. On October 6, 2008, the Petitioner's application for alternative sentencing, in lieu of bond, was denied because the Petitioner's only contact person stated that Petitioner could not live with her.
5. On October 7, 2008, the Petitioner was indicted for First Degree Arson in Indictment No. 08-F-332.
6. On October 10, 2008, Paul Jordan was appointed as original counsel for the Petitioner.
7. On February 13, 2009, the Petitioner entered a Kennedy plea of guilty to First Degree Arson. The Petitioner was sentenced to a determinate sentence of eight (8) years in prison.
8. On April 8, 2009, the Petitioner, by counsel, filed a timely Motion for Reconsideration. On April 24, 2009, the Court conducted a hearing on the Motion and denied it.
9. On May 18, 2009, the Petitioner filed a Motion for Reduction of Sentence. On May 28, 2009, the Court denied the Motion.
10. No appeal was filed in this matter.
11. On May 4, 2010, Petitioner filed a *pro se* habeas petition.
12. On May 21, 2010, the Court appointed Carl J. Dascoli, Jr., to represent Petitioner. On November 30, 2010, Petitioner, by counsel filed an *Amended Petition for Writ of Habeas Corpus Ad Subjiciendum*.
13. On May 19, 2011, the Court conducted an Omnibus hearing in this matter.
14. Petitioner asserts that he was provided with ineffective assistance of counsel.
15. Petitioner asserts the following issues:
 - (a) The Petitioner was denied effective assistance of counsel due to original counsel's numerous acts of inadequate representation;

- (b) Counsel for the Petitioner failed to take an appeal;
- (c) No preliminary hearing was conducted on behalf of Petitioner;
- (d) No evidentiary rulings occurred in the Petitioner's case;
- (e) Mistaken advice of counsel as to parole or probation eligibility;
- (f) Excessive Sentence;
- (g) Severer sentence than expected;
- (h) Involuntary guilty plea;
- (i) Statute under which the Petitioner was convicted is unconstitutional;
- (j) The Petitioner was incompetent at the time of the offense;
- (k) Question of actual guilt upon an acceptable guilty plea;
- (l) Sufficiency of evidence;
- (m) Amount of time served on sentence, credit for time served;
- (n) The Petitioner's confession was coerced;
- (o) There were no challenges to the composition of the grand jury or its procedures;
- (p) Nondisclosure of Grand Jury minutes; and
- (q) Pre-sentence report contained erroneous information.

16. During the omnibus hearing, the Petitioner waived any attorney-client privilege regarding his communications with his original attorney, Paul Jordan

17. This Court finds that the threshold question in analyzing ineffective assistance of counsel claims is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In *Strickland*, the United States

Supreme Court of Appeals, held that the proper standard for attorney performance is that of reasonably effective assistance. *Id.*

18. In order for the Petitioner to prevail on an ineffective assistance of counsel claim, he must prove: "... 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 ex rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007).
19. Pursuant to West Virginia law, "... 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).
20. Petitioner asserts that the plea negotiations, which led to his plea agreement, were defective because they were one-sided and favored the prosecutions' agenda of a lengthy prison sentence. Petitioner asserts that he could have received an eight (8) year prison sentence if he had represented himself *pro se*. Petitioner asserts that if his counsel would have been more aggressive in his representation of him, he would have had a more favorable outcome.
21. Petitioner further asserts that his attorney did not file a timely appeal in this matter.
22. Petitioner further asserts that he would have had a better outcome with his case, if he had a preliminary hearing.

23. Petitioner further asserts that no evidentiary hearings were conducted in this matter and as a result, plea negotiations were one-sided and he received an eight (8) year determinate prison sentence.
24. Petitioner further asserts that his original counsel advised him that he could receive home confinement, in lieu of bond, on a pre-trial basis, if he waived his preliminary hearing. However, petitioner was not eligible for home confinement.
25. Petitioner further asserts that his prison sentence was excessive. Petitioner argues that at the time he committed the offense he was under the influence of alcohol and was an severe alcoholic who needed treatment for alcohol abuse, not prison time.
26. Petitioner further asserts that he received an eight (8) year determinate prison sentence, after his original counsel advised him that he was a candidate for home confinement or alternative sentencing.
27. Petitioner further asserts that he did not want to plead guilty to First Degree Arson and that he requested his counsel to have the state reduce his charge to a misdemeanor charge of destruction of property to avoid a felony conviction.
28. Petitioner further asserts that from the advice of counsel, he believed his only option was to go to prison. Petitioner argues that because he was a severe alcoholic he was intimidated by the entire process, so he entered a Kennedy plea because he could not bring himself to give a factual basis for his plea at his plea hearing.
29. Petitioner further asserts that West Virginia Code 61-3-1 is unconstitutional. Petitioner argues that the statute fails to provide that setting clothes on fire is a violation of West Virginia law. Petitioner argues that his intent in setting the clothes on fire was to obtain his girlfriend's attention, not to burn his girlfriend's residence.

30. Petitioner further asserts that he was incompetent at the time the offense was committed, because he was severely impaired by his alcohol abuse. Petitioner argues that he lacked the capacity to appreciate the wrongfulness of his actions and to conform to the requirements of law. Petitioner argues that his counsel should have had him evaluated to determine his criminal responsibility at the time he committed the offense.
31. Petitioner further asserts that he is guilty of misdemeanor destruction of property, not First Degree Arson and as such, he pled guilty to an offense that he did not commit.
32. Petitioner further asserts that there was insufficient evidence to support a conviction of First Degree Arson. Petitioner asserts that the only evidence in his case was the confession that he gave to fire investigators when he was under the influence of alcohol. Petitioner argues that no one witnessed him set the clothes on fire and no accelerants were used to start the fire.
33. Petitioner further asserts that there may have been a miscalculation by the Department of Corrections on the amount of time served on his sentence and credit for time served.
34. Petitioner further asserts that his confession was coerced because it was given under the influence of alcohol. Petitioner argues that since he was under the influence of alcohol at the time he made his confession, his original counsel should have filed a motion to suppress his confession because it was coerced and as such, his confession would not have been admitted against him and he would not have been convicted of First Degree Arson.
35. Petitioner further asserts that his original counsel did not make any challenges to the grand jury composition or its procedures.

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35. Petitioner further asserts that his original counsel did not make any challenges to the grand jury composition or its procedures.

36. Petitioner further asserts that his original counsel did not make any attempt to obtain grand jury minutes.
37. During the omnibus hearing, original counsel and the petitioner testified.
38. Petitioner admitted that he set fire to clothes in his girlfriend's closet in her apartment.
39. Original counsel testified that he performed an investigation of the scene of the crime, that he interviewed fire officials, that he met with his client on several occasions and that he discussed plea options with the State. Original counsel testified that after the petitioner's request for alternative sentencing and/or home confinement was denied, his options in obtaining a plea bargain for the petitioner were limited.
40. Original counsel further testified that the best plea bargain the State would offer him was a determinate sentence of eight (8) years in prison. Original counsel further testified that he explained to the Petitioner that he had a right to take this plea offer or that he could stand trial and if a jury found him guilty, he could be sentenced to two (2) to twenty (20) years in prison.
41. Original counsel testified that he advised the Petitioner that he had to choose whether he wished to take the plea bargain offer or go to trial. Original counsel testified that he did not make this decision for the Petitioner, although he recommended that with the plea bargain offer, he would only be sentenced to a determinate sentence of eight (8) years in prison and if the Petitioner went to trial and a jury found him guilty, he may be sentenced to two (2) to twenty (20) years in prison.
42. This Court finds that the testimony of original counsel demonstrates that the petitioner had reasonably effective assistance of counsel, pursuant to *Strickland v. Washington*, 466

U.S. 668, 686 (1984), *State ex rel. Hatcher v. McBride*, 221 W.Va. 760, 656 S.E.2d 789 (2007) and *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

43. As such, this Court finds that Petitioner is not entitled to the requested relief and Petitioner's *Amended Petition for Writ of Habeas Corpus Ad Subjiciendum* is DENIED.

WHEREFORE, this Court ORDERS that Petitioner is not entitled to the requested relief and Petitioner's *Amended Petition for Writ of Habeas Corpus Ad Subjiciendum* is DENIED

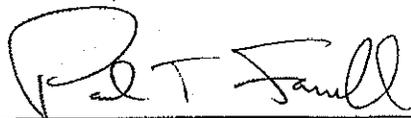
The Circuit Clerk of Cabell County is directed to distribute a copy of this Order to the following:

Doug Reynolds
Office of the Cabell County Prosecuting Attorney
Cabell County Courthouse
750 5th Avenue
Huntington, WV 25701

Carl J. Dascoli, Jr.
Dascoli Law Office
418 Eleventh Street, Suite 206
Huntington, WV 25701

Barry Lee Ayers
Western Regional Jail
1 O'Hanlon Place
Barboursville, WV 25504

Enter this Order this ^{21st PK} day of June 2011.



Paul T. Farrell, Judge

ENTERED Circuit Court Civil Order Book
No. _____ Page _____ this

STATE OF WEST VIRGINIA
COUNTY OF CABELL
I, ADELL CHANDLER, CLERK OF THE CIRCUIT
COURT FOR THE COUNTY AND STATE AFORESAID
DO HEREBY CERTIFY THAT THE FOREGOING IS
A TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON _____
GIVEN UNDER MY HAND AND SEAL OF SAID COURT
THIS _____ 2011
Adell Chandler CLERK
CIRCUIT COURT OF CABELL COUNTY WEST VIRGINIA